

## *CERCLA Section 107 PRP Cost Recovery Case To Be Argued Before the Supreme Court*

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Historically, parties engaged in cleaning up contaminated property typically could look to two provisions of the federal Superfund law as potential avenues for recovering at least a portion of their costs. The Superfund law's cost recovery provisions are found in Section 113(f) and Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Section 113(f) allows a potentially responsible party ("PRP") to bring a contribution action against another PRP to recover and apportion each party's fair share of the site costs. However, in 2004, the United States Supreme Court, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, held that a PRP could seek contribution from other PRPs under Section 113(f) only if the PRP bringing the contribution claim was already the subject of a government enforcement action.

After the Court's *Cooper* decision, PRPs who had

remediated properties without waiting for a government enforcement action (i.e., parties who remediated "voluntarily") sought to use CERCLA Section 107 to recover costs from other PRPs. Section 107 provides that PRPs are liable to "any other person" for costs of responding to contamination. Therefore, after *Cooper*, PRPs not qualified to invoke Section 113(f) tried to use Section 107 instead, arguing that they were "any other person" to whom another PRP was liable for paying the costs of response.

On April 23, 2007, the United States Supreme Court will hear oral arguments on the issue of whether PRPs who clean up properties voluntarily can use Section 107 to recover any of their costs. The government's position is that PRPs are not entitled to recover costs under Section 107 – their sole recovery mechanism is through Section 113(f), even with its limitations. State and local governments and private parties who have relied

on Superfund's cost recovery mechanisms are anxiously awaiting the Supreme Court's decision.

The case now before the Supreme Court is an appeal from the U.S. Court of Appeals for the Eighth Circuit's decision in *Atlantic Research Corporation v. United States*, 459 F.3d 827 (8th Cir. 2006). Atlantic argues that, under CERCLA Section 107, it is an "other person" who is entitled to recover costs from another PRP. Atlantic seeks to recover costs of remediating a former industrial park, where it retrofitted rocket motors under contract with the Department of Defense. The PRP from whom it wants to recover a portion of those costs is the United States, whom Atlantic alleges is liable as an owner/operator and an arranger at the site.

Atlantic seeks to rely on Section 107 to recover costs because, after the Supreme Court's decision in *Cooper*, it cannot use Section 113(f) to recover costs because it was

not already the subject of a government enforcement action under CERCLA. The Eighth Circuit held that Atlantic could pursue an action against the United States for cost recovery or an implied right of contribution under Section 107, despite Atlantic's status as a PRP. In so holding, the Eighth Circuit held that pre-*Cooper* precedent needed to be revisited and that CERCLA's language and policy encouraging prompt clean-ups supported allowing a PRP to recover costs under Section 107. In addition to examining the language and policy of CERCLA, the Court took into account the position of the United States as the party against whom recovery was sought. Because the United States could choose not to pursue an enforcement action that would allow the PRP to use Section 113(f) to recover costs, if a PRP was not allowed to use Section 107, the United States could insulate itself from liability.

As of April 5, 2007, both parties had filed their opening briefs before the Supreme Court. The parties' briefs focus on

CERCLA Section 107's statutory language and legislative history, and on Superfund policy, generally. The United States asserts that the language of Section 107 expressly limits the availability of a cost recovery action under that Section to persons other than PRPs. In addition, the United States argues that allowing for cost recovery or contribution under Section 107 would remove the incentive for PRPs to settle with the government, contrary to Congressional intent. Atlantic's argument is based on both the plain meaning of the statute and an evaluation of the history of CERCLA's cost recovery and contribution provisions. Atlantic also dismisses the United States' argument that allowing a PRP to bring a Section 107 action will discourage settlements and encourage unwanted voluntary clean-ups. On the contrary, according to Atlantic, the incentives to settle are still very much alive, and encouraging voluntary clean-ups serves CERCLA's fundamental purpose.

Numerous *amicus* briefs were filed in this case. Huron Valley Steel Corporation; Cooper Industries, MeadWestvaco Corporation and UGI Utilities, Inc.; and Reading Company filed briefs in support of the United States. Twelve *amici* briefs were filed on behalf of Atlantic, including briefs filed by The City of New York; nine former senior U.S. EPA officials including former U.S. EPA Administrator, Carole Browner, two former U.S. EPA General Counsels, and a former Assistant Administrator for Enforcement and Compliance Assurance for U.S. EPA; Natural Resources Defense Council and seven law professors; the United States Conference of Mayors; a group of attorneys general from 38 sites, the District of Columbia, and Puerto Rico; the Association of California Water Agencies; the Superfund Settlement Project; and numerous corporate and public entities that engage in clean-ups around the country. The filing of these *amicus* briefs further demonstrates that the Supreme Court's decision in this case will be very significant to all stakeholders in the Superfund process.

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