

*Construction News**Special Alert:***U.S. Supreme Court Changes Superfund Cost Recovery Options**

Shortly after this edition of *Construction News* went to press, the U.S. Supreme Court issued its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004), the case discussed in our article “U.S. Supreme Court to Consider Major Issue for CERCLA Cost Recovery Scheme.” On December 13, 2004, the Supreme Court held that the contribution provisions of the Superfund Law do not authorize a private party to sue a potentially responsible party (“PRP”) unless an enforcement action is filed against it first.

In a seven-to-two decision, the Supreme Court reversed the U.S. Court of Appeals for the Fifth Circuit, which had ruled that parties who initiate private cleanups may bring contribution suits even without a prior enforcement action. *Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677 (5th Cir. 2002) (*en banc*). The Second, Third, Fourth, Sixth,

Seventh, Eighth, Ninth, and Tenth Circuits had agreed with the Fifth Circuit that contribution suits could be brought prior to enforcement actions.

After *Aviall*, industry groups and others who filed amicus briefs in support of Aviall’s position are expected to ask Congress to amend CERCLA and expressly allow parties who initiate private cleanups to bring contribution suits even without a prior enforcement action. PRPs who are not defendants in Section 106 or 107 actions, or state civil enforcement proceedings, will also need to reevaluate their statutory and common law options in seeking recovery for the costs of cleaning up hazardous waste sites. The *Aviall* decision will also put pressure on both U.S. EPA and the States (under CERCLA Section 113(g)(3)) to initiate many more enforcement actions, expecting that the Supreme Court’s ruling will significantly decrease parties’ incentives to engage in “voluntary” cleanups of contaminated sites.