



cleanup news

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Supreme Court To Decide Contribution Rights for Voluntary Cleanups

On January 9, 2004, the Supreme Court agreed to hear to hear the case of *Cooper Industries v. Aviall Services* (also known as *Aviall*). In *Aviall*, the Supreme Court will decide whether a potentially responsible party (PRP) under CERCLA Section 107(a) who has neither been sued under Section 106 or 107(a) of CERCLA nor resolved its CERCLA liability through an administrative or judicially approved settlement may conduct a voluntary CERCLA cleanup and then seek contribu-

tion from other PRPs under CERCLA Section 113(f).

On February 23, 2004, the United States filed an Amicus brief with the Supreme Court asserting that under CERCLA Section 113(f)(1) a prerequisite for PRPs seeking contribution under CERCLA Section 113(f)(1) is being sued under CERCLA Section 106 or 107(a). On March 3, 2003, the Supreme Court's calendar of cases scheduled for oral arguments in the April 2004 session was made public, and it does not include the *Aviall* case. It is anticipated the Court will hold this

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Leavitt Cuts Ribbon for New Emergency Operations Center

By Bryan Byrd, Office of Emergency Prevention, Preparedness, and Response

On January 14, 2004, EPA Administrator Mike Leavitt and Assistant Administrators Morris Winn, Kim Nelson, and Marianne Horinko cut the ceremonial ribbon celebrating the opening of EPA's new Emergency Operations Center (EOC). The opening concluded a collaborative effort by the Office of Solid Waste and Emergency Re-

sponse, Office of Environmental Information, and Office of Administration and Resource Management to transform EPA's EOC into one of the most technologically-advanced centers in the nation.

The EOC's improved technology and capability resulted from "lessons learned" from large national events, including the terrorist attacks of September 11th and the

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CleanupNews is a quarterly newsletter highlighting hazardous waste cleanup cases, policies, settlements and technologies.

anthrax response. Experience in these events showed the need for EPA to strengthen internal communication and interaction with other federal agencies. The new EOC was designed to be used by numerous offices within the EPA.

EPA is involved in a wide range of emergencies from almost-daily routine spills of hazardous substances to nationally-significant incidents, such as the response to the Columbia Shuttle recovery mission last year. The EOC receives about 30,000 incident notifications a year. Of these, EPA responds to 250 hazmat incidents and 300 oil spill responses. In addition, EPA's role in homeland security, critical infrastructure protection, and preparedness has increased.

Design and Construction of the Center

"Lessons learned" from recent events drove the design of the new EOC. One lesson was that during a large complex event, additional space is needed for multiple organizational elements to work with breakout capa-

bility. To address this need for space, the new EOC was designed with an operations center accommodating 12 workstations, a watch officer post, and a data management station. Three separate breakout rooms each holding up to 10 additional people and a separate 30 person executive conference room are connected to the operations center. The addition of the breakout rooms and executive conference room provide the EOC with fully functional, partitioned capacity allowing independent meeting space.



Workstations in the new Emergency Operations Center

Capabilities/Utilization

The EOC will be used for all aspects of emergencies including preparedness and critical infrastructure protection. During daily operations, the EOC handles incident notifications, gathers intelligence, analyzes the information, and rapidly shares the information with appropriate Agency personnel.

EOC staff is in constant contact with Regional Response Centers, On-Scene Coordinators, and the Environmental Response Teams as well as other federal agency EOCs, including the Department of Homeland Security Operations Center. Classified information is handled through the EOC's Secure Access Facility and Sensitive Compartmented Information Facility.

As part of EPA's National Approach to response, during a Nationally Significant Incident, members of the Agency's developing Response Support Corps will assemble and work together

in the operations center. The Response Support Corps is made up of volunteers from the Offices of Water, Air and Radiation, and Public Affairs and others who have made it a priority to help in time of an emergency. RSC staff will have access to workstations fully equipped with the latest technology. They will have the ability to communicate with each other, the field, and other agencies. With video-conferencing ability, 8 x 20 video wall, 9 screens, and potential to hold responders from offices across the Agency as well as inter-agency staff, the EPA's new EOC is fit to handle any crisis.

During a nationally significant event or in the course of daily operations, the EOC is a resource that will improve and support decision-making for the entire Agency. Having the latest technology enhances Agency efforts to analyze data, communicate with the field, and to be prepared for the unexpected.

For additional information, contact Bryan Byrd, Office of Emergency Prevention, Preparedness and Response, (202) 564-9499.

OSRE Releases Guidance on "Contiguous Property Owners"

By Cate Tierney, Office of Site Remediation Enforcement

On January 13, 2004, EPA issued an interim guidance entitled *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* ("Contiguous Property Owner guidance"). This guidance addresses CERCLA § 107(q), the "contiguous property owner" liability protection added to CERCLA by the 2002 Brownfields Amendments.

"Contiguous property owners" are those who Congress identified as victims of their neighbor's pollution. These landowners own property that is not the original source of the hazardous substance contamination, but whose property is or may be contaminated due solely to the actions of a different property owner. EPA's guidance focuses on the most common questions and big picture issues EPA has heard about contiguous property owners.

First, the Contiguous Property Owner guidance discusses some of the statutory criteria a landowner must

meet in order to be a contiguous property owner and evidences EPA's intent to implement the new landowner liability provisions in a manner that provides real and meaningful liability protection to landowners. For example, the guidance provides that, in exercising its enforcement discretion, EPA may treat a landowner as a protected Section 107(q) party even if he owns property that is not immediately adjacent to the source of the contamination.

Second, the guidance discusses the application of Section 107(q) to current and former owners of property and provides that EPA may treat former owners of property as contiguous property owners as long as they met the statutory criteria of Section 107(q) while they owned the property.

Third, the guidance discusses the relationship between new Section 107(q) and EPA's Residential Homeowner and Contaminated Aquifers Policies. The guidance notes that Section 107(q) protects from CERCLA liability many land-

owners that EPA did not generally pursue, through the exercise of its enforcement discretion, prior to the passage of the Brownfields Amendments. The guidance points out that these previously-existing policies are still in effect and, to the extent that they are broader (i.e., apply to more landowners) than Section 107(q), EPA may still apply these policies through the exercise of its enforcement discretion.

Finally, the guidance discusses the mechanisms EPA may provide, in its discretion, to resolve the remaining liability concerns of contiguous property owners. These mechanisms include no action assurance letters and settlements under Section 107(q).

The guidance and a reference sheet are available at: <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

For additional information, contact Cate Tierney, OSRE, (202) 564-4254.

Bush Administration Proposes \$45 Million for Great Lakes Cleanup

On January 29, 2004, EPA Administrator Mike Leavitt announced that President Bush's 2005 budget proposal includes \$45 million for cleaning up contaminated sediments in the Great Lakes. Leavitt made the announcement while visiting Belle Isle, one of 31 "Areas of Concern" within the Great Lake system. The "Areas of Concern" are areas where the sediments are heavily contaminated with PCBs, heavy metals, and polycyclic aromatic hydrocarbons (PAHs).

The Great Lakes Legacy Act, signed in November 2002, authorizes up to \$270 million between 2004-2008 to clean up the contaminated sediments. The proposed amount represents a \$35 million increase over the 2004 Great Lakes Legacy Act funding. Leavitt said that the increase "demonstrates the President's commitment to preserving and protecting these Great Lakes" and that "accelerating the cleanup of these contaminated areas will help keep the pollution from moving out into the lakes where cleanup becomes dramatically more difficult."

The proposed 2005 funding will address between four and six of the Areas of Concern. EPA will partner with the states, tribes, and stakeholders to determine which cleanup projects to fund with the funding.

Additional information about the Great Lakes Legacy Act and the Great Lakes Program are available at: <http://www.epa.gov/glla>.

Poudre River Investigation and Cleanup Begin

In September 2002, a contractor for the City of Fort Collins assisting with a Brownfields pilot study noted an oily sheen on the Cache la Poudre River, a river that runs through Fort Collins, Colorado.

Since that discovery, EPA's Office of Brownfields Cleanup and Redevelopment has studied the 1/8-mile section of the river where the substance—coal tar—was identified and 19 acres of adjacent commercial and residential property. Investigation results have not pointed to a definitive source for the contamination, but analysis of the river sediments has revealed that the tar is similar in composition to waste at the nearby former Poudre Valley Gas Plant. The coal gasification plant, which operated from 1904 to 1926, converted coal into fuel for heat and electricity. The Public Service Company

of Colorado (doing business as Xcel Energy) owns a portion of the gas plant site and has agreed to fund the estimated \$1.5 million cleanup project.

In January 2004, EPA and Xcel Energy signed an administrative order on consent to implement the investigation and cleanup of the Poudre River. Through the collaborative efforts of EPA, Xcel, and the City of Fort Collins, the work began the week of January 26, 2004. The investigation and cleanup involves diverting a portion of the river through pipes to avoid contact with contaminated sediments and replacing removed sediments. To help determine the source of the contamination, new monitoring wells will be installed, and a trench will be dug to the bedrock.

During the project, temporary fencing will be in place, and air and water monitoring will be performed to ensure public health and safety. Also, a portion of the Poudre River Trail will be re-routed, and one of the parking lots for the Gustav Swanson Natural Area will be closed. The Aztlan Community Center, United Way facility, and skate park located near the worksite will not be affected. Fortunately, the drinking water intakes for the cities of Fort Collins and Greeley are located upstream from the contamination, and it does not appear that anyone is using the groundwater at or around the worksite.

The work, including re-vegetation, will be completed by May 2004.

For additional information, contact Jennifer Lane, EPA Region 8, lane.jennifer@epa.gov.

O'Brien Machinery Project: Enforcement Working to Redevelop Property

by Jocelyn Scott, Office of Site Remediation Enforcement

Main Street Village—an exciting new townhome community in Downingtown, Pennsylvania—is a far cry from the contaminated industrial site that was once owned by O'Brien Machinery Company. The 10.6-acre parcel is now the site of a recently developed 160-unit housing development with a beautiful creek and newly landscaped surroundings. EPA's Superfund enforcement program recognized the benefits of this project to human health and the environment, and made significant efforts that helped bring redevelopment of this site to fruition.

During the 1980s, the O'Brien Machinery Co. operated a manufacturing plant that built and repaired large electrical generators used in industrial processes. The site was abandoned after the owner of the property went bankrupt owing over \$1 million in unpaid back taxes. The site turned from a productive facility into an abandoned contaminated property riddled with drug dealers and dilapidated buildings. When EPA discovered the site in 1992, it found transformers leaking PCB-containing fluids onto the site and subsequently conducted removal activities. The



Agency attached a \$1.5 million CERCLA lien against the property for costs it incurred in performing these removal activities at the site. Although EPA's cleanup efforts were sufficient to prevent an endangerment posed by high levels of PCBs, further

EPA Details Resource Conservation Challenge Accomplishments

EPA recently published the first annual report on the Resource Conservation Challenge, a major cross-Agency initiative that identifies and uses innovative, flexible, and protective ways to conserve natural resources and energy. RCC works to (1) prevent pollution and promote recycling and reuse of material; (2) reduce the use of toxic chemicals; and (3) conserve energy and materials through partnerships and programs that protect human health and the environment; save energy and reduce greenhouse gases; create jobs; and grow the economy.

The report outlines major RCC achievements, including measurable environmental benefits and an increase in the number of new partnerships. Nearly all the RCC environmental benefits result from voluntary public-private partnerships. In 2003, existing RCC partnerships with federal and state governments, tribes, and industry grew, and new ones were formed. The Agency's long-standing partnership, WasteWise, grew to over

1,300 members, and new partnerships like the National Waste Minimization Partnership Program, the Coal Combustion Products Partnership, Plug-In to eCycling, and the

85 percent of newly generated scrap tires and to reduce the number of tires in existing stockpiles by 55 percent within four years.

•In 2002, WasteWise partners collectively reduced greenhouse gas emissions by 2.4 million tons.

"I'm thrilled at the energy and enthusiasm surrounding the RCC—and the real sense of ownership by EPA nationwide," said Marianne Horinko,

EPA Assistant Administrator for the Office of Solid Waste and Emergency Response. "It's a true collaboration among diverse stakeholders. We'll accomplish more in less time than years of regulatory development and litigation could ever do."

The RCC annual report is available at: <http://www.epa.gov/epaoswer/osw/conserves/resources/rcc-rpt1.pdf>. Complete information about the Resource Conservation Challenge is also on the Web at: <http://www.epa.gov/rcc>.

For additional information, contact Diane Bartosh, Office of Solid Waste, (703) 308-7895.

"This report shows us that the old ways of doing business are too slow and discouraging, and that the RCC is a successful, collaborative tool for achieving future progress on the environment."

—Marianne Horinko, EPA Assistant Administrator for the Office of Solid Waste and Emergency Response

GreenScapes Alliance grew from the ground up. RCC's partners identified environmentally beneficial solutions to specific problems and implemented them. For example:

- A Waste Minimization Partner in Texas is working to reduce polycyclic aromatic hydrocarbons (PAHs) in tank bottom wastes by 32,000 pounds and benzene by 70,000 pounds.

- Plug-In to eCycling partners safely recycled 26.4 million pounds of electronic equipment in 2003.

- The tire partnership is committed to reduce, recycle, or otherwise recover

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case over for oral argument until October 2004.

Background:

Cooper Industries (“Cooper”) operated an aircraft maintenance business that contaminated the property with hazardous substances. In 1981, Aviall Services (“Aviall”) purchased Cooper’s business and its operation. Aviall’s operation of the business also resulted in the deposition of hazardous materials. When Aviall found hazardous substance contamination, it notified Texas authorities, and cleaned up the property without an order from state or federal authorities. Aviall subsequently sought contribution from Cooper under section 113(f) of CERCLA, which allows parties to seek contribution from other parties responsible for the contamination of the site.

The district court rejected Aviall’s claim holding that Aviall voluntarily cleaned up the site and that CERCLA 113(f) only applies where a cleanup action occurs pursuant to a lawsuit or settlement involving the federal or state government. Aviall appealed the district court’s decision to the United States Court of Appeals for the Fifth Circuit. In November 2002, the Fifth Circuit reversed the lower court’s decision and found that Aviall could seek contribution from Cooper under CERCLA Section 113(f) even though Aviall cleaned up the site voluntarily. In December 2003, Cooper filed a petition for *certiorari* asking the Supreme Court to review the case. The Supreme Court invited the United States to file an Amicus brief on whether the Supreme Court should grant *certiorari* and hear the case. On December 12, 2003, the United States filed an Amicus brief recommending that the Court review the case. On January 9, 2004, the Supreme Court decided to

review this case. The United States filed an Amicus brief on the merits of the case on February 23, 2004.

For additional information, contact Clarence Featherston, OSRE, (202) 564-4234.

Bunker Hill Superfund Site Notice of Appeal Filed

In two court decisions issued on September 3, 2001 and November 18, 2003, the U.S. District Court for the District of Idaho awarded a \$7 million reduction in remaining financial responsibilities of a 1994 consent decree at the Bunker Hill Mining and Metallurgical Site to the defendants, Asarco, Inc. and Hecla Mining Company. The court determined the modification of the agreement was appropriate because factual circumstances had changed since the lodging of the 1994 decree.

From the late 1800s to the 1970s, mining activities upstream and a lead smelter in the Coeur d’Alene Basin contaminated the groundwater, soil, air, and Coeur d’Alene River with lead, arsenic, zinc, and cadmium. The affected area is divided into three cleanup projects. Operable unit 1 (OU1) and OU2 are within the “Box,” a 21-square-mile area within the Coeur d’Alene Basin comprised of historic smelter and mining areas as well as residential areas containing 5,000-6,000 residents. OU3 is the “Basin,” which runs along the Coeur d’Alene River through Lake Coeur d’Alene and into the Spokane River. Since 1994, over 2,200 residential and community areas have been cleaned up and blood lead levels in children have been re-

duced significantly through the efforts of EPA and Upstream Mining Group, a syndicate of mining companies including Asarco and Hecla.

The Box was the area of focus for remediation pursuant to the 1994 decree. The court found that EPA’s recent decision to use CERCLA remedial authorities to deal with environmental issues outside of the Box but inside the Coeur d’Alene Basin represented a departure from EPA’s previously announced plans and an increase in the total potential financial exposure of the movants. According to the court, EPA made it more difficult for the defendants to obtain credit backing to meet the financial requirements of the 1994 agreement by permitting cleanup efforts on the mining wastes outside of the Box. To comply with the court order, EPA and the State of Idaho will confer with the defendants about the most efficient way to accomplish a \$7 million cut in financial obligations.

Within the 1994 decree, EPA reserved their authorities for any contamination outside of the Box while allowing a covenant not to sue for OU2. EPA and the Department of Justice are considering an appeal. In the meantime, they have filed a notice of appeal, preserving the right to lodge an appeal in the future.

The U.S. District court ruled in favor of EPA in a similar suit for cleanup costs in OU3. In that ruling, Hecla and Asarco were held liable for 31% and 22% of the cost, respectively.

For additional information, please contact Ted Yackulic, Region 10, (206) 553-1218.

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remediation of remaining contamination was necessary to make the site viable for redevelopment and reuse.

Fortunately, Gary Silversmith, President of SERENA, Inc. was willing to tackle such an undesirable site and approached the Borough of Downingtown with a plan to acquire the O'Brien site and redevelop it into a townhouse neighborhood after remediation. The plan required that EPA coordinate closely with Pennsylvania's Department of Environmental Protection, Chester County, the Borough, and SERENA. Their willingness to work together and invest resources into this project allowed several activities to occur, including: (1) a \$1 million grant from Pennsylvania's Industrial Sites Reuse Fund; (2) a prospective purchaser agreement (PPA) between EPA and SERENA for the additional cleanup activities including the remediation of residual PCB contamination to residential levels and a controlled demolition of existing structures; and (3) proper remediation of the site that was protective of human health and the environment. In addition to negotiating the PPA, EPA's enforcement program worked hard to arrange a way to resolve its CERCLA lien against the O'Brien site to allow this project to move forward. Without these collaborative efforts, the site would have remained a contaminated unused piece of property.

In 2001, SERENA completed the redevelopment of the O'Brien Machinery site into an attractive upscale townhome community. While there were several major hurdles along the way, the property was remediated and returned to productive reuse for the community. This project is evidence of the great work EPA's Superfund enforcement program has been performing to ensure the revitalization of

brownfield properties. It is also an excellent example of how a sound redevelopment plan and strong partnership between federal, state, local and private entities can transform a site from a brownfield to a redevelopment success.

For additional information, contact Jocelyn Scott, OSRE, (202) 564-4795.

House Bill Seeks Service Station Liability Limits

House Resolution 3543, introduced by Rep. Michael Capuano (D-MA) this past November, seeks to limit liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for service station dealers with respect to the release or threatened release of recycled oil. The bill would amend CERCLA Section 114(c) to add a new paragraph. The new paragraph would explain that response costs or damages may not be recovered from service station dealers that properly managed and disposed of recycled oil in the period between November 8, 1986 and the effective dates of regulations and standards promulgated under Section 3014 of the Solid Waste Disposal Act.

Currently, CERCLA Section 114(c) allows certain liability exemptions for service station dealers meeting specific requirements. The exemptions are intended to promote the collection of used motor oil from do-it-yourselfer recyclers (e.g., individuals changing oil in personal-use vehicles). To be eligible for an exemption, a service station dealer (SSD) must meet three criteria: the dealer meets the definition of a service station dealer as defined in CERCLA Section 101(37); the collected used oil has not been mixed with a CERCLA hazardous substance;

and the used oil has been "managed in compliance with the regulations and standards promulgated pursuant to Section 3014 and other applicable authorities."

The bill seeks to expand the third requirement for exemption by amending the exemption period to include management and disposal activities occurring on or after the effective start date of the Superfund Amendments and Reauthorization Act of 1986 (SARA). The used oil management standards included in SARA were not codified (as 40 CFR Part 279) until 1992. The effective date for these standards under RCRA is March 8, 1993. Thus, an SSD can still be liable under CERCLA for actions taken prior to 1993.

The bill, which has gained a number of co-sponsors, has been referred to the House Committee on Transportation and Infrastructure and the House Committee on Energy and Commerce.

For additional information, contact Susan Boushell, OSRE, boushell.susan@epa.gov.

OSRE Completes Second Printing of PRP Search Manual

The Office of Site Remediation Enforcement (OSRE) has done a second printing of the September 2003 PRP Search Manual. The purpose was to provide copies to State and Tribal staff who perform potentially responsible party (PRP) search activities and to give extra copies to Regional staff who requested them.

As previously announced, the manual is also available online at

<http://www.epa.gov/compliance/resources/publications/cleanup/superfund/prpmanual/index.html>.

If you have any questions, please contact Nancy Deck, OSRE, (202) 564-6039.

April 27, 2004

1:30-3:30pm National Notable Achievement Awards Ceremony
Sheraton, Crystal City, VA

Contact: Ann Eleanor, eleanor.ann@epa.gov

April 28-29, 2004

2004 ASTSWMO Mid-Year Meeting

Savannah, GA

Contact: Jocelyn Scott (202) 564-4795

<http://www.astswmo.org>

May 11-12, 2004

2004 National Corrective Action Conference

Orlando, FL

Contact: Lael Butler (404) 562-8453 or

Karen Tomimatsu (703) 605-0698

<http://www.nationalcaconf.com/default.html>

July 12-14, 2004

ASTSWMO 2004 State Hazardous Waste Managers Conference

Washington, DC

Contact: Jocelyn Scott (202) 564-4795

<http://www.astswmo.org>

September 20-22, 2004

Brownfields 2004: "Gateway to Revitalization"

St. Louis, MO

<http://www.brownfields2004.org>

Glossary

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act	PAHs	Polycyclic aromatic hydrocarbons
CFR	Code of Federal Regulations	PCBs	Polychlorinated biphenyls
EOC	Emergency Operations Center	PPA	Prospective purchaser agreement
EPA	Environmental Protection Agency	RCC	Resource Conservation Challenge
OSRE	Office of Site Remediation Enforcement	RCRA	Resource Conservation and Recovery Act
OSWER	Office of Solid Waste and Emergency Response	SARA	Superfund Amendments and Reauthorization Act
OU	Operable unit		

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<http://www.epa.gov/compliance/about/offices/osre.html>

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