



## Supreme Court: PRPs Can Sue for Cost Recovery

by Christopher Roe, Esq.

The United States Supreme Court, on June 11, 2007, made clear that a potentially responsible party can voluntarily perform a clean-up and sue other responsible parties for cost recovery under the federal Superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). What is most remarkable about this decision is that it was necessary at all. In the Court’s unanimous decision, all nine justices joined in reasoning that CERCLA, Section 107(a)(4)(B), makes a liable party responsible for response costs incurred by “any other person.” Despite the “plain terms,” in the case before the court, *United States v. Atlantic Research Corporation*, the United States itself had argued that Section 107(a)(4)(B) permits suit only by those “persons” (or parties) who themselves have no liability under the Superfund law. Key courts, including the Third Circuit Court of Appeals (which hears all appeals from the federal courts in Pennsylvania, New Jersey, and Delaware), also had previously taken this restrictive view. *E. I. Dupont de Nemours & Company v. United States*, 460 F.3d 515 (3d Cir. 2006).

Before the Supreme Court’s June 11 decision, the restrictive readings of Section 107(a)(4)(B) had left private parties that voluntarily incurred clean-up costs with very limited prospects for obtaining relief from others under CERCLA. This was especially true after 2004, when the Supreme Court decided *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). In *Aviall Services*, the Court held that a responsible party could only bring a contribution claim under Section 113(f) of CERCLA after having been sued (or having settled with the government) under Section 106 or 107(a) of CERCLA.

Now (more than 25 years after the enactment of CERCLA), some basics are clear:

1. A responsible party that actually incurs clean-up costs (consistent with the National Contingency Plan) may, under Section 107(a), assert a claim for cost recovery against other responsible parties (*Atlantic Research*); and
2. A private party can only assert a claim for contribution under Section 113(f), seeking equitable allocation of costs imposed on it with other responsible parties, after it has been sued or settled with the government under Section 106 or 107 (*Aviall Services*).

The Court’s most recent ruling removes one factor that potentially discouraged the voluntary clean-up of contaminated sites by private parties. However, as always under CERCLA, additional questions are raised by the decision or remain unanswered (for example, it is not clear whether the contribution protection provision of CERCLA, enacted to encourage parties to settle their liability with the government, will be undermined by the Supreme Court’s decision).

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The fact is that most clean-up of contaminated sites is performed by private parties. Even with the Supreme Court's recent ruling, private parties may have more effective claims to recover costs than CERCLA provides.

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