

# EPA Revises Model Administrative Orders on Consent to Address Supreme Court Decision

August 30, 2005

On August 3, the U.S. Environmental Protection Agency (EPA) Office of Site Remediation Enforcement (OSRE) and the U.S. Department of Justice (DOJ) published a memorandum (Memorandum) detailing immediate interim revisions to three EPA model Administrative Orders on Consent (AOCs). The revisions to the AOCs are intended to clarify and reinforce EPA's position on a private party's right to contribution and settlement protection under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 113(f), if a party has agreed to perform remedial activities under an EPA AOC. EPA's position on this matter had been called into question by the U.S. Supreme Court's recent decision in *Cooper Industries Inc. v. Aviall Services Inc.*

## *Cooper Industries Inc. v. Aviall Services Inc.*

In December 2004, the Supreme Court ruled that a person may not seek contribution under § 113(f)(1) of CERCLA unless a civil action has been commenced against that person under either § 106 or § 107 of the Act. Because entry into an agreed administrative order with federal or state governments is not considered a "civil action" under § 106 or § 107, a potentially responsible party (PRP) who has voluntarily worked to clean up a site under an AOC would be unable to file an action for contribution from other responsible parties under § 113(f)(1) of CERCLA.

The Supreme Court noted that a PRP who has "resolved its liability" to the United States in a settlement agreement has the ability to seek contribution under § 113(f)(3)(B) of CERCLA, another section of the Act that also authorizes contribution actions. However, many PRPs had expressed concerns that EPA's model AOCs did not clearly state that a settling PRP had "resolved its liability" to the United States for purposes of § 113(f)(3)(B).

## **EPA Issues a Response to the Court's Ruling**

In response to the Supreme Court's ruling in *Aviall*, the EPA and DOJ issued the Memorandum to reiterate that "EPA and DOJ's intent and position has been, and continues to be, that EPA's AOCs resolve a settling PRP's liability within the meaning of CERCLA § 113(f)(3)(B)." The specific revisions identify the model AOCs as "administrative settlements," and thus clarify a party's right to contribution and settlement protection under CERCLA § 113(f). The following model orders will contain the interim revisions: (1) the Revised Model Administrative Order on Consent for Removal Actions; (2) the Revised Model Administrative Order on Consent for Remedial Investigation/Feasibility Study; and (3) the Model Administrative Order on Consent for Remedial Design. The model language used in the interim revised AOCs is considered a guidance for EPA's employees, and is not a rulemaking. The revisions to the AOCs are classified by EPA as "interim revisions" as the agency expects to continue to review the model agreements and developing law and issue further changes to the model AOCs as necessary.

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EPA intends that revised AOCs will constitute federal “settlement agreements” that satisfy the requirements of CERCLA § 113(f)(3)(B). Thus, a responsible party who agrees to perform remedial activities under a revised model AOC, as described in the Memorandum, will be entitled to contribution, as well as contribution protection, from PRPs that do not participate in the settlement.

### **Implications**

The EPA’s position on the resolution of a settling PRP’s liability within the meaning of CERCLA §113(f)(3)(B), as stated in the Memorandum and interim revisions to future AOCs, will benefit the regulated community by clarifying contribution rights that were put in question in the wake of the *Aviall* decision. It should be noted, however, that the Memorandum does not similarly affect state administrative agreed orders for environmental cleanups.

Although the interim revisions are prospective, Van Ness Feldman is working with clients who are currently conducting remedial actions under AOCs with the EPA, to obtain revisions to these existing AOCs in accordance with the Memorandum. Because the revisions are reasonably discrete and sanctioned by EPA OSRE and DOJ, EPA Regions may acquiesce to amend existing AOCs to include the revisions suggested for the model AOCs. This would allow signatory parties to existing AOCs the opportunity to clarify and confirm the intent of EPA regarding contribution rights and settlement protections rendered uncertain after *Aviall*.

### **For Additional Information**

Van Ness Feldman regularly counsels clients on issues related to hazardous waste regulations, investigations and cleanups, permitting, and compliance. Specifically, the firm has in-depth experience counseling clients on compliance with CERCLA, the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), the Clean Air Act, and the Clean Water Act. If you are interested in additional information regarding EPA and DOJ’s memorandum, or any other hazardous substance-related federal or state activity, please contact Marlys Palumbo or Ivy Anderson at (206) 623-9372 in our Seattle, Washington office, or Mitch Bernstein at (202) 298-1820 in our Washington, DC office.

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