

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Army Environmental Law Bulletin*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The August 2003, *Army Environmental Law Bulletin*, is reproduced in part, below.

Fifth Circuit Reverses *Aviall*—Broadens Superfund Contribution Right

Industrial groups and the Environmental Protection Agency (EPA) officials recently breathed a collective sigh of relief when the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, in *Aviall Services, Inc., v. Cooper Industries, Inc. (Aviall II)*, affirmed the ability of potentially responsible parties (PRPs) to seek contribution from other PRPs under section 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), “at whatever time in the cleanup process the party, seeking contribution, decides to pursue it.”¹ The decision reverses a controversial opinion issued by a divided panel of the same court (*Aviall I*) that held that a PRP could “only” seek contribution from other PRPs if there was a prior or pending administrative abatement order under section 106 or a cost recovery action by a non-responsible party under section 107.² Critics argued that the earlier decision threatened to undermine a decade of CERCLA precedent, the EPA’s long-term enforcement policy, and CERCLA’s goal of encouraging PRPs to clean up contaminated sites voluntarily.³

In 1981, Aviall purchased an aircraft engine maintenance business and associated facilities from Cooper Industries. Aviall discovered that the facilities were contaminated from Cooper’s past activities and from its own operation at the site. Aviall notified the state environmental regulators which responded with letters informing Aviall that it was violating the state environmental laws. Neither the state regulators nor the EPA, however, took any action to force Aviall to remediate the site. Aviall cleaned-up the site and eventually sued Cooper to recover its response costs under section 113(f)(1) of CERCLA and state law. The district court granted summary judgment in favor of Cooper, ruling that Aviall could not seek response costs from Cooper under section 113(f)(1) “unless Aviall had incurred or at least faced liability under a CERCLA administrative abatement or cost recovery action.”⁴ *Aviall I* affirmed that decision.

At issue during the en banc hearing was the plain meaning of the first sentence of section 113(f)(1) (“Any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)] during or following any civil action under” sections 106 or 107(a)) and its relationship with the so-called savings clause.⁵ *Aviall I* concluded that “may,” when used in an enabling clause, meant “shall” or “must” and “establishe[d] an exclusive cause of action.”⁶ The *Aviall I* court harmonized that interpretation with the savings clause in 113(f)(1)⁷ by concluding that Congress intended the savings clause to preserve a “party’s ability to bring contribution actions based on state law.”⁸

The Court’s en banc opinion flatly rejected the “exclusivity” interpretation adopted in *Aviall I* and supported by the Department of Justice as amicus curiae in favor of an admittedly “expansive reading of section 113(f)(1)” —that allows a contribution claim whenever a PRP decides to pursue it.⁹ The court held that this result is more consistent with the text, legislative history and cases interpreting CERCLA. *Aviall II* dismisses

1. *Aviall Servs., Inc., v. Cooper Indus., Inc.*, 312 F.3d 677, 686 (5th Cir. 2002) (*Aviall II*).

2. *Aviall Servs., Inc., v. Cooper Indus., Inc.*, 263 F.3d 134, 137 (5th Cir. 2001) (*Aviall I*).

3. 42 U.S.C. § 9606, 9607(a) (2000) (containing CERCLA).

4. *Aviall I*, 263 F.3d at 135.

5. *Id.* at 138-39.

6. *Id.* at 139.

7. “Nothing in this section shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [sections 106 or 107].” See 42 U.S.C. § 9613(f).

8. *Aviall II*, 312 F.3d 677, 686 (5th Cir. 2002).

9. *Id.* at 686.

the notion that the court should read restrictive language into CERCLA where none exists, especially when Congress has demonstrated an ability to do so elsewhere in the statute, but chose a permissive term instead. In the court's view, section 113(f)(1) simply identifies a "non-exclusive list of circumstances in which actions for contribution may be brought."¹⁰ That reading, the court explained, comports with case law preceding the adoption of section 113(f) in 1986 that recognized an implicit right of contribution under section 107.¹¹ Further proof is found in the legislative history that indicated that section 113(f) was enacted to "confirm" those earlier court decisions and bring some uniformity to that area of the law.¹² Finally, the *Aviall II* court interpreted the savings clause in section 113(f)(1) as preserving a PRP's implicit right to seek what the Supreme Court has called, a "somewhat overlapping" remedy in section 107, rather than the somewhat anemic state law remedy suggested by *Aviall I*.¹³ Read together, the enabling and savings clauses of section 113(f)(1) "combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups."¹⁴

The Fifth Circuit's en banc decision will not be the last word on this issue. In February 2003, Cooper Industries petitioned the Supreme Court to overturn the *Aviall II* decision.¹⁵ The Court has agreed to hear the case and, as occurred in the lower

courts, the United States has been invited to file briefs expressing its views on this issue.¹⁶ Lieutenant Colonel David Harney.

To Exclude or Not to Exclude? The Ninth Circuit Demands Clarification Regarding NEPA Categorical Exclusions

In *California v. Department of Interior*,¹ the U.S. of Court of Appeals for the Ninth Circuit (Ninth Circuit) reminds us of the importance of providing contemporaneous documentation of agency National Environmental Policy Act (NEPA)-related decisions, even if the decision is to invoke the use of a categorical exclusion.

Under the Outer Continental Shelf Lands Act,² leases for exploration and production of oil and gas are set for terms of five to ten years.³ Normally, such leases expire after their initial term, unless lessees are able to produce paying quantities of oil or gas, or drilling is underway. If production or drilling is not underway at the end of the initial term of the lease, it expires.⁴ The statute, however, provides that if production or drilling is not underway, the Department of Interior (DOI) may "suspend" the lease term. The suspension is, in effect, an exten-

10. *Id.*

11. *Id.*

12. *Id.* at 684.

13. *Id.* at 685.

14. *Id.* at 688.

15. *Cooper Indus., Inc. v. Aviall Servs. Inc.* No. 0201192, *pet. for cert. filed* (U.S. Feb. 12, 2003).

16. *Id.*; 123 S. Ct. 1832 (April 21, 2003).

1. 311 F.3d 1162 (9th Cir. 2002).

2. 43 U.S.C. §§ 1331-1356a (2000).

3. *Dep't of Interior*, 311 F.3d at 1168.

4. *Id.*

5. *Id.*

6. 16 U.S.C. §§ 1331-1356a (2000).

7. 42 U.S.C. §§ 4321-70d.

8. *Dep't of Interior*, 311 F.3d at 1169.

9. *Id.* at 1169-70. The circuit court upheld the District Court's decision that the suspension of the leases was a "federal agency activity" under 16 U.S.C. 1456(c)(1), which required a consistency determination under the CZMA. *Id.* at 1170-73. Further discussion of this portion of the case is beyond the scope of this article.

10. *Id.* at 1175; 40 C.F.R. subpt. 1508.4 requires an agency adopting a categorical exclusion to "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." Categorical Exclusion, 40 C.F.R. subpt. 1508.4 (2001).

11. *Dep't of Interior*, 311 F.3d at 1176 (citing *Bicycle Trails Council v. Babbitt*, 82 F.3d 1445, 1456 n.5 (9th Cir. 1996)).

sion of the term of the lease, and is granted to allow the lessee the opportunity to develop the lease.⁵

In this case, there were thirty-six off-shore oil and gas leases located between the Channel Islands National Marine Sanctuary and the Monterey Bay National Marine Sanctuary near the California coast. The DOI approved the suspension of these leases without making a consistency determination under the Coastal Zone Management Act (CZMA)⁶ or performing an environmental impact statement (EIS) or environmental assessment (EA) as required by NEPA.⁷ The State of California challenged the lease suspension decision in federal district court, alleging that the DOI failed to make the consistency determination called for by the CZMA and perform the EA or EIS required by NEPA.⁸ The District Court ruled in favor of the plaintiffs, which caused the DOI and the lessee oil companies to appeal to the circuit court as interveners.⁹

The DOI argued that the decision to suspend the leases fit within a properly adopted categorical exclusion, and therefore, that no further environmental review was required. As required by the Council on Environmental Quality (CEQ) regulations implementing NEPA, the DOI's categorical exclusion includes exceptions under which the exclusion would not apply.¹⁰ While the DOI acknowledged that the administrative record does not include any documentation demonstrating that it made a categorical exclusion determination *at the time the lease suspension decision* was made, it argues that the record is sufficient because it shows that a proper categorical exclusion applies.

The court found the DOI's argument unpersuasive and explained the requirement for proper application of a categorical exclusion: "An agency satisfie[s] NEPA if it applies its categorical exclusions and determines that neither an EA or EIS is required, so long as the application of the exclusions to the facts of a particular action is not arbitrary or capricious."¹¹ The court also noted that while the Ninth Circuit previously upheld the application of a categorical exclusion in *Bicycle Trails*

Council v. Babbitt,¹² the agency made specific findings of fact and applied them to its categorical exclusion in a Record of Decision published in the Federal Register.¹³ According to the court, if there is no such finding in the administrative record, it is unclear on review if the agency actually considered the environmental consequences of its action as part of the decision process.¹⁴

It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious if there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision. Post hoc invocation of a categorical exclusion does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made.¹⁵ The Ninth Circuit remanded the case to the District Court to determine what further NEPA documentation may be required, noting that in this case, if one or more of the "extraordinary circumstances" are present, the use of the categorical exclusion would be precluded.¹⁶

Army Regulation 200-2, Environmental Effects of Army Actions and *Federal Regulations* impose similar documentation requirements for the use of categorical exclusions (CX) within the Army.¹⁷ *Federal Regulations* address categorical exclusions, and a CX listing is included in Appendix B.¹⁸ It also discusses the appropriate use of Records of Environmental Consideration (RECs), which are most frequently used to document the use of a CX.¹⁹ A review of the CX listing in Appendix B indicates that all but the most routine types of categorical exclusions require an REC. Given the Ninth Circuit's emphasis on contemporaneous documentation of the application of categorical exclusions, environmental coordinators and the attorneys who advise them should pay careful attention to this requirement. Lieutenant Colonel Scott Romans.

12. *Babbitt*, 82 F.3d at 1445.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* See 40 C.F.R. subpt. 1508.4 (2001).

17. Environmental Analysis of Army Actions, 32 C.F.R. pt. 651 (2002); U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1998).

18. 32 C.F.R. § 651.29.

19. *Id.* at 651.19.