



Owners of CERCLA Property Have Options in Remedy Hunt

By Fred Blum

For almost two decades, federal cost recovery litigation was in stasis. One party, most likely a landowner, would bring suit in federal court under the Comprehensive Environmental Response Compensation and Liability Act, or CERCLA, 42 U.S.C. Sections 9600, et seq. The suit would be brought against all parties who either touched the property or the contaminants.

Because a CERCLA action was based on strict liability, with little if any real

longer, available to parties who had voluntarily undertaken the burden of remediating their property.

There are few cases that discuss the effect of *Cooper Industries*. But one thing is clear: The business-as-usual approach to cost recovery litigation is over. Cost recovery actions are now prohibited during a voluntary cleanup. Property owners who want to remediate their sites will be left with fewer attractive remedies.

One option is for property owners to submit to the Environmental Protection

Agency's action, and then sue everyone else. The second option is for the owner to agree with the EPA to remediate the site, and then sue everyone else. The third option is to initially forgo assumption of liability and turn to other, less-certain remedies. None of the scenarios is appealing, and one can easily predict that one impact of *Cooper Industries* will be to dramatically reduce the number of voluntary remediations.

make their gamble of admitting liability worthwhile. After *Cooper Industries*, the third option, pursuing other remedies, is more appealing. Those who prefer federal court will look to the Resource Conservation and Recovery Act. Section 7002(a)(1)(B) allows a private action against anyone who has contributed to the storage, transportation, handling or disposal of solid waste that may present an imminent and substantial endangerment to health or the environment.

Unlike CERCLA, however, the resource conservation act does not allow for the recovery of response costs, but only for an order requiring remediation of solid waste.

In state court, two remedies should be considered. First, an owner should consider a nuisance action. A nuisance is anything that substantially affects one's property rights, including being forced to comply with environmental regulatory requirements. *Capogeannis v. Superior Court*, 12 Cal.App.4th 668 (1993). Nuisance actions have no statute of limitation as long as the contamination has not been remediated. Liability is not strict, but nuisance does allow for abatement orders, back damages and punitive damages.

Second, an owner should consider a waste action. Anyone who causes damage to property is guilty of waste: *Smith v. Cap Concrete*, 133 Cal.App.3d 769 (1982). If the waste was willful, treble damages are available.

The chief result of *Cooper Industries*, therefore, may be a hunt for new remedies. While other remedies will not replace CERCLA, they can provide the landowner with appropriate remedies for dealing with contaminated property.

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This system made it unnecessary to wait for any governmental action before bringing the suit. More importantly, because the outcome was relatively clear — global liability — there was an overwhelming impetus to settle.

But all that may have changed. In December, the U.S. Supreme Court, in decision written by Justice Clarence Thomas, sent CERCLA litigation back to the Wild West days of frontier-style litigation with uncertain results. In *Cooper Industries Inc. v. Aviall Services Inc.*, 125 S. Ct. 577 (2004), the court held that CERCLA cost recovery actions were no

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The first two options are the least appealing. They require the landowner to fall on his or her sword, admit responsibility and hope the EPA cares enough about the site to focus precious staff time on the specific contamination. Owners must still hope that their latter CERCLA actions find enough deep pockets to

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