On the Cutting Edge: An Insider's Perspective

Second Circuit Ruling Contrary to Practices in New York

A recent federal appellate court ruling is not only bad law, it is bad policy and does not reflect the current practices in New York state, an attorney with significant experience with site cleanups in the state told BNA Oct. 3.

Referring to the U.S. Court of Appeals for the Second Circuit's decision in *Consolidated Edison Co. v. UGI Utilities Inc.,* 2d Cir., No. 04-2409-cv, 9/9/05 , Larry Schnapf said the ruling is harmful because the court held that the cleanup agreement that Consolidated Edison entered into with the state was not an administrative settlement within the meaning of Section 113(f)(2) of the federal superfund law even though it specifically referred to CERCLA. Schnapf is with the New York City law firm Schulte Roth & Zabel.

Although the court did find that Consolidated Edison could pursue cost recovery under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (*see related story*, p. 80), Schnapf believes the ruling sets bad precedent because in finding that the Voluntary Cleanup Agreement Consolidated Edison entered into with the state did not satisfy CERCLA Section 113(f)(2), the court, in essence, debunked the way the New York Department of Environmental Conservation approaches cleanups.

According to Schnapf, DEC uses CERCLA instead of the state superfund program to enter into settlements to cleanup contaminated sites. All such agreements, including those executed under the state voluntary cleanup program, brownfields cleanup program, and all administrative orders on consent, refer to CERCLA, not the state law in reference to resolving liability.

"These agreements in New York are intended to be administrative settlements under CERCLA Section 113(f)(2)," Schnapf said. "The court ignored the practical realities of how sites are remediated in New York state" and the ruling will "disrupt cleanups under the state superfund law as well as the VCP and BCP," he said. "The state of New York has gone on record in briefs submitted in various federal actions that it's administrative settlements are intended to resolve CERCLA liability. To ignore the express intent of the parties is nothing less than judicial activism!"

Schnapf explained that not only does the ruling provide a great disincentive to conducting voluntary cleanups in New York, but that the ruling potentially "eviscerates the contribution protection in settlement agreements," which DEC has tried to preserve by including specific language to memorialize this intent in relevant documents.

Schnapf went on to explain that DEC actually modified the language in the state cleanup and settlement agreements after the U.S. Supreme Court's ruling in *Cooper Industries Inc. v. Aviall Services Inc.* 125 S.Ct. 577, 59 ERC 1545 (2004), to preserve the right of contribution under Section 113. Because of the ruling in *Consolidated Edison*, DEC is drafting new language to preserve the right making it more specific that the intent of the agreement is to resolve liability under CERCLA to DEC and that it also absolves the parties for past costs and future work at the site, similar to a prospective purchaser agreement, Schnapf said.

Schnapf told BNA that he believes the state of New York is considering requesting an en banc rehearing of the case by the Second Circuit. In addition, he explained the Second Circuit in *Consolidated Edison* did not reject its ruling in *Bedford Affiliates v. Sills*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998) despite numerous requests by district courts suggesting that the Second Circuit reconsider Bedford in light of Cooper Industries. Bedford held that a PRP that cleaned up a contaminated site under a pair of consent orders was limited to recovering costs under CERCLA Section 113 contribution action against another PRP, which still leaves open the question of how parties in that circuit should pursue cleanup costs. "Because of the tectonic shift that has occurred since the ruling in *Cooper Industries*," the Second Circuit should take the various pleas and district courts to revisit the issue. " The assumption upon which Bedford was founded- namely that Congress intended that section 113(f) be the sole mechanism for bringing contribution actions is no longer good law- any flies in the face of the broad language of section 107 which states that 'any person' who incurs response costs may seek recovery under that section of CERCLA" Schnapf said. "The district courts in the Circuit have been recognizing that it is bad policy to prevent PRPs from bringing contribution

actions since this will discourage responsible parties from voluntarily cleaning up sites. Instead of listening to the pleas of the district courts to eliminate this perverse incentive, the Second Circuit has now exacerbated by the problem by potentially removing the benefit of contribution protection from volunteers. To ignore the damage that Bedford is now inflicting on cleanups in the state is the height of judicial arrogance."