UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 12 2007

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable John D. Dingell
Chairman, Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of October 23, 2006, requesting information regarding the Supreme Court decision in *Cooper Industries, Inc. v. Aviall Services, Inc.* Please find enclosed responses to questions posed in your letter. I hope this information will be useful to you.

If you have any further questions or concerns, please contact me, or your staff may contact Carolyn Levine in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-1859.

Sincerely,

Stephanie N. Daigle
Associate Administrator

Enclosure

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EPA Responses to Questions from Chairman John D. Dingell – October 23, 2006

Question 1: Please provide the most recent status of the case law in judicial circuits other than the 2nd, 3rd, and 8th, with respect to the availability of a CERCLA § 107(a) contribution claim to potentially responsible parties (PRPs) who have voluntarily incurred cleanup costs. Do any of the Circuit Courts of Appeals actually have cases pending before them? If so, please identify each such circuit and the pending case, and indicate whether oral argument has been scheduled or occurred.

Response: The status of case law is described in the United States brief, the Petition for a Writ of Certiorari in United States of America, Petitioner, v. Atlantic Research Corporation, No.06-562 (S. Ct.)("ARC Cert. Petition"), which was filed on October 24, 2006. That brief, which is included as Attachment 1, provides the relevant case law in all circuits at the time the brief was written and identifies all significant cases dealing with whether a PRP has a contribution claim under CERCLA § 107(a). See also the Briefs for the United States in E. I. DuPont de Nemours & Co. v. United States, No. 06-726 (S. Ct.), and UGI Utilities, Inc. v. Consolidated Edison Co. of N.Y., Inc, No. 05-1323 (S. Ct.), and the Brief for the United States as Amicus Curiae Supporting Petitioner in Cooper Industries, Inc, Petitioner, v. Aviall Services, Inc. No. 02-1192 (Sup. Ct.)("Aviall Amicus Brief"), Attachments 2, 3, and 4.

Question 2: Has the Environmental Protection Agency (EPA) filed a brief, expressed its views in any manner or taken a position on whether a CERCLA § 107(a) contribution claim is available to PRPs who have voluntarily incurred cleanup costs? If so, please identify each circumstance or case where EPA has taken a position on this issue and state the basis for your position.

Response: The views of the United States are represented in the Aviall Amicus Brief and the ARC Cert. Petition on whether a CERCLA § 107(a) contribution claim is available to PRPs who have voluntarily incurred cleanup costs. These briefs also describe the history surrounding positions expressed by the United States on this matter and the position of the United States in all significant cases.

Question 3: What impact has the decision in *Cooper Industries v. Aviall* had on the cleanup program? Has the EPA observed that there are significantly fewer voluntary cleanups taking place? If so, has the EPA attempted to quantify this impact?

Response: EPA has heard from stakeholders that the *Aviall* decision may be having an impact on voluntary cleanups. However, we do not have specific data at this time to quantify the impact of the decision. EPA continues to monitor developments to assess the impact on state voluntary cleanup and brownfields projects.

Question 4: What effect, if any, has the *Cooper Industries v. Aviall* decision had on Brownfields cleanups and the Congressional goal of promoting rapid voluntary cleanups.

Response: EPA does not have any data at this time that allows us to determine the effect of the decision on cleanups. However, EPA is strongly committed to encouraging voluntary cleanups by private parties and is using its full range of authorities to encourage and support the cleanup and reuse of contaminated properties including:

- Providing funding for State and Tribal Response programs;
- Completing 22 Memoranda of Agreement (MOAs) with states to clarify federal liability issues and help provide certainty to state cleanup decisions; and
- Providing program technical assistance through EPA Regional offices.

Question 5: After the decision in *Cooper Industries v. Aviall*, has EPA received a significant number of requests from private parties to bring a CERCLA enforcement action against them under Section 106 or 107(a) so they could then pursue contribution action from other liable parties under Section 113(f)? Please quantify the number of such requests and the additional EPA enforcement actions that resulted therefrom.

Response: Discussions with our Regional offices reveal that EPA has addressed a number of requests from private parties in which the *Aviall* decision was a factor. For instance, EPA Region 1 has received a request from a private party to reach a settlement under CERCLA to address contribution uncertainties and Region 5 has taken action several times to address private party contribution concerns. However, EPA does not formally track this information, and consequently we are unable to provide a specific number of such requests.

Question 6: The following legislative change in light of the contribution issue raised by *Cooper Industries v. Aviall* has been proposed:

> **Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9613(f)(1) is amended:**
>
> **A. By striking "during or following any civil action under civil action under Section 106 or under Section 107(a)"; and**
>
> **B. By inserting at the end of the section: "The amendments made by this subtitle shall be applicable with respect to any action that has not been finally adjudicated as of the date of enactment of this Act."**

Does EPA support amending the CERCLA statute in the manner described above to address the *Cooper Industries v. Aviall* contribution issue? Does this language raise any unintended legal or policy issues in addition to fixing the Section 113(f) contribution issue?

Response: While we recognize that the proposed legislative language is intended to address that portion of the statute upon which the Supreme Court focused, making such a change in the statute may raise unintended legal or policy issues.

Question 7: Does EPA support any legislative changes to the contribution issue in light of the *Cooper Industries v. Aviall* case?

Response: EPA has not taken a position on legislative changes to address issues raised in the *Cooper Industries v. Aviall* case.

Question 8: Is EPA aware of other Federal agencies that would either support or oppose the amendment described in Question 6? If so, please identify them and their position.

Response: EPA is not aware of the positions of other Federal agencies with respect to the amendment described in Question 6.

Question 9: Did the EPA support the Fifth Circuit Court of Appeals decision in *Cooper Industries, Inc. v. Aviall* and urge and/or request the Department of Justice file a brief in the U.S. Supreme Court in support of the Fifth Circuit decision? If not, please explain exactly what the EPA position was on the legal and policy issues presented by the *Cooper Industries, Inc. v. Aviall* case, prior to the Department of Justice's filing of a brief with the U.S. Supreme Court in favor of overturning the Fifth Circuit's decision.

Response: The U.S. government's position on the issues presented by the *Aviall* case can be found in the attached Aviall Amicus Brief (Attachment 2).

Question 10: What was the Department of Defense's position on the policy and legal issues presented by the Fifth Circuit decision in *Cooper Industries, Inc. v. Aviall*?

Response: Please consult the Department of Defense for their official position regarding the Court's decision.

Question 11: The United States Court of Appeals for the 8th Circuit in *Atlantic Research Corporation* stated:

> **"If we adopted the Government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination."**

Does the EPA support insulating the Defense Department from responsibility for its own pollution where it is a PRP?

Response: Federal agencies, including the Department of Defense, are responsible for their pollution, under CERCLA, the Federal Facilities Compliance Act, and other laws. EPA does not agree with the legal analysis expressed by the 8th Circuit in the Atlantic Research Corporation

(ARC) case. A more detailed description of the position of EPA's position regarding the ARC case is provided in the ARC Cert. Petition (Attachment 1).

Question 12: If a private party who shares liability with the Department of Defense at a toxic waste site voluntarily initiates a private cleanup to protect the public health or the environment, how do they obtain proper contribution from DOD if they cannot use Section 113(f) and the Department of Justice argues as they did in the Seventh Circuit (*Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing and Coatings, Inc.*) that "a Section 107 cost recovery action may be brought only by governmental entities or non-liable parties who have undertaken cleanups, not by PRPs"?

Response: The position of the United States is that a liable party may not bring a cost recovery action under Section 107. However, a party that resolves its liability to the United States or a State in an administrative or judicially-approved settlement may seek contribution against any other liable party pursuant to Section 113(f)(3)(B) of CERCLA. Thus, in order to obtain contribution rights, a private party could enter into negotiations with EPA or a State for performance of the private cleanup under either an administrative agreement or a judicial consent decree, depending on the circumstances. When such negotiations are undertaken by EPA and the Department of Defense (DOD) is a potentially liable party, DOD is routinely invited to participate in the settlement.

Question 13: Are you aware of any private PRPs that were involved at sites where DOD or other Federal agencies were also PRPs who have been unable to pursue or obtain contribution after voluntarily initiating cleanup actions at the site? If so, please identify by name each of the private persons or companies who have been disadvantaged in pursuing or obtaining contribution at the site and where they are PRPs with a Federal Agency (such as DOD) and name the Federal agency that is also a PRP at the site.

Response: EPA does not track this information. EPA is aware, however, of the recent decision out of the Third Circuit in *DuPont v. United States* (460 F.3d 515) denying DuPont's contribution claim against the Department of Defense. DuPont has sought certiorari to the U.S. Supreme Court.

Question 14: Does EPA believe that permitting a private party to bring a contribution action in the absence of a pending or completed action resolving its own liability runs the risk of exposing contribution defendants to double or multiple liability? Is EPA aware of any sites or cases where this circumstance has actually occurred? If so, please identify each such circumstance or case.

Response: EPA has not done a legal analysis of whether permitting a private party to bring a contribution action in the absence of a pending or completed action creates a risk of exposing contribution defendants to double or multiple liability. We are not aware of any instance arising from a section 113 claim resulting in a private party being held responsible for double or multiple liabilities.