

RALPH M. HALL, TEXAS  
MICHAEL BILIRAKIS, FLORIDA  
VICE CHAIRMAN  
FRED UPTON, MICHIGAN  
CLIFF STEARNS, FLORIDA  
PAUL E. GILLMOR, OHIO  
NATHAN DEAL, GEORGIA  
ED WHITFIELD, KENTUCKY  
CHARLIE NORWOOD, GEORGIA  
BARBARA CUBIN, WYOMING  
JOHN SHIMKUS, ILLINOIS  
HEATHER WILSON, NEW MEXICO  
JOHN B. SHADEGG, ARIZONA  
CHARLES W. "CHIP" PICKERING, MISSISSIPPI  
VICE CHAIRMAN  
VITO FOSSSELLA, NEW YORK  
ROY BLUNT, MISSOURI  
STEVE BUYER, INDIANA  
GEORGE RADANOVICH, CALIFORNIA  
CHARLES F. BASS, NEW HAMPSHIRE  
JOSEPH R. PITTS, PENNSYLVANIA  
MARY BONO, CALIFORNIA  
GREG WALDEN, OREGON  
LEE TERRY, NEBRASKA  
MIKE FERGUSON, NEW JERSEY  
MIKE ROGERS, MICHIGAN  
C.L. "BUTCH" OTTER, IDAHO  
SUE MYRICK, NORTH CAROLINA  
JOHN SULLIVAN, OKLAHOMA  
TIM MURPHY, PENNSYLVANIA  
MICHAEL C. BURGESS, TEXAS  
MARSHA BLACKBURN, TENNESSEE

ONE HUNDRED NINTH CONGRESS

U.S. House of Representatives  
Committee on Energy and Commerce  
Washington, DC 20515-6115

JOE BARTON, TEXAS  
CHAIRMAN

October 23, 2006

JOHN D. DINGELL, MICHIGAN  
RANKING MEMBER  
HENRY A. WAXMAN, CALIFORNIA  
EDWARD J. MARKEY, MASSACHUSETTS  
RICK BOUCHER, VIRGINIA  
EDOLPHUS TOWNS, NEW YORK  
FRANK PALLONE, JR., NEW JERSEY  
SHERROD BROWN, OHIO  
BART GORDON, TENNESSEE  
BOBBY L. RUSH, ILLINOIS  
ANNA G. ESHOO, CALIFORNIA  
BART STUPAK, MICHIGAN  
ELIOT L. ENGEL, NEW YORK  
ALBERT R. WYNN, MARYLAND  
GENE GREEN, TEXAS  
TED STRICKLAND, OHIO  
DIANA DEGETTE, COLORADO  
LOIS CAPPS, CALIFORNIA  
MIKE DOYLE, PENNSYLVANIA  
TOM ALLEN, MAINE  
JIM DAVIS, FLORIDA  
JAN SCHAKOWSKY, ILLINOIS  
HILDA L. SOLIS, CALIFORNIA  
CHARLES A. GONZALEZ, TEXAS  
JAY INSLEE, WASHINGTON  
TAMMY BALDWIN, WISCONSIN  
MIKE ROSS, ARKANSAS

BUD ALBRIGHT, STAFF DIRECTOR

The Honorable Stephen L. Johnson  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Dear Administrator Johnson:

On December 13, 2004, the Supreme Court decided in *Cooper Industries, Inc. v. Aviall Services, Inc.* 125 S. Ct. 577 (2004) that a private party may not obtain contribution from other liable parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Section 113(f)(1)) unless the private party has been sued under Section 106 or Section 107(a) of CERCLA. The ruling reversed a decision by the U.S. Court of Appeals for the Fifth Circuit that held parties who initiate private cleanups may bring contribution suits irrespective of prior enforcement action. The Supreme Court reserved judgment on the question whether liable parties who are not subject to an action under Section 106 or Section 107 may instead seek relief under Section 107(a)(4)(B).

Since the Supreme Court decision in *Cooper Industries v. Aviall* there have been several United States Circuit Court of Appeals decisions and numerous district courts that have directly addressed the availability of a CERCLA §107(a) contribution claim to potentially responsible parties who have voluntarily incurred cleanup costs. I am aware of two Circuit Court of Appeals decisions, *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir., 2005) and *Atlantic Research Corp. v. United States of America* (8th Cir., August 11, 2006), that held a liable party may, under appropriate procedural circumstances, bring a cost recovery action under Section 107. These two Circuit Courts concluded that it no longer made sense to view Section 113 as a liable party's exclusive remedy. Several weeks after the Eighth Circuit's decision in *Atlantic Research Corp.*, the United States Court of Appeals for the Third Circuit in *EI Dupont DeNemours and Company and Conoco, Inc., et al. v. United States of America* (August 29, 2006) refused to imply a cause of action for contribution under Section 107 or the common law available to potentially responsible parties engaged in *sua sponte* voluntary cleanups.

The Honorable Stephen L. Johnson

Page 2

I would like to obtain additional information relating to the case law in the other circuits with respect to the availability of Section 107 for contribution as well as the Environmental Protection Agency's (EPA) view on the impact of the decision in *Cooper Industries v. Aviall* on the overall cleanup program and the EPA's reaction to proposed legislative language to overturn the Supreme Court decision in *Cooper Industries v. Aviall*.

Please provide responses to the attached questions by no later than Thursday, November 9, 2006.

Sincerely,

A handwritten signature in black ink that reads "John D. Dingell". The signature is written in a cursive, flowing style.

JOHN D. DINGELL  
RANKING MEMBER

Attachment

cc: The Honorable Joe Barton, Chairman  
Committee on Energy and Commerce

The Honorable Paul E. Gillmor, Chairman  
Subcommittee on Environment and Hazardous Materials

The Honorable Hilda L. Solis, Ranking Member  
Subcommittee on Environment and Hazardous Materials

**Questions to the Honorable Stephen L. Johnson  
Administrator, Environmental Protection Agency  
Letter of October 23, 2006, from Rep. John D. Dingell**

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.
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.
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?
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?
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.
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?

7. Does EPA support any legislative changes to the contribution issue in light of the *Cooper Industries Inc. v. Aviall* case?
8. Is the 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.
9. Did the EPA support the Fifth Circuit Court of Appeals decision in *Cooper Industries, Inc. v. Aviall* and urge and/or request that 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.
10. What was the Department of Defense's position on the policy and legal issues presented by the Fifth Circuit decision in *Cooper Industries v. Aviall*?
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?

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?”
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 where they are PRPs with a Federal agency (such as DOD) and name the Federal agency that is also a PRP at the site.

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 liabilities? Is EPA aware of any sites or cases where this circumstance has actually occurred? If so, please identify each such circumstance or case.