Rohm & Hass Was Right: Recovery of Government Oversight Costs in Private Party Response Actions

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ROHM & HAAS WAS RIGHT: RECOVERY OF GOVERNMENT OVERSIGHT COSTS IN PRIVATE PARTY RESPONSE ACTIONS

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In 1993, the United States Third Circuit Court of Appeals issued a seminal decision in which it refused to allow the United States government to recover its costs for overseeing a cleanup conducted under the Comprehensive Environmental Response, Compensation, and Liability Act1 ("CERCLA" or "Superfund") by a private party. This decision, United States v. Rohm and Haas Co.,2 has been criticized3 by many as inconsistent with one driving principle of Superfund—that the government recover all its costs of cleaning up sites contaminated with hazardous substances.4

In Rohm & Haas, the Third Circuit applied a principle of constitutional law to recognize certain limits on when an agency may recover its administrative oversight costs from members of the regulated community.5 In so doing, it trampled upon "conventional wisdom" about the construction of the Superfund

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5. See Rohm & Haas, 2 F.3d 1265.
statute, and focused attention on a more comprehensive jurisprudential approach to the statute. This article examines the decision itself, considers subsequent applications of the *Rohm & Haas* decision, and concludes that the Third Circuit was on the correct path toward a more appropriate construction of the statute.

I. LIABILITY UNDER CERCLA

A. Statutory Background

Congress enacted CERCLA in 1980. The original statute created the Hazardous Substance Response Trust Fund to be used for the cleanup of hazardous substances released into the environment. CERCLA was amended

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7. The statute defines “hazardous substance” in relation to a variety of other environmental statutes. This definition is broader than “hazardous waste.”

The term “hazardous substance” means (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).


8. The statute defines “release” as:

[A]ny spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under
by the Superfund Amendment and Reauthorization Act ("SARA") in 1986, which eliminated the original trust fund and replaced it with the Hazardous Substance Superfund. The Superfund funds government cleanups of releases of hazardous substances into the environment. Cleanup action, whether by the government or private parties, is generally called "response action."

In addition to establishing the Superfund itself, the statute establishes a variety of mechanisms for governments and private parties to clean up contaminated sites and seek compensation from responsible parties for the costs of cleanup. The statute empowers the federal government to clean up sites itself and then sue for compensation, or to order responsible parties to undertake a cleanup action. This article focuses on cost recovery actions conducted by governments, rather than those undertaken by private parties.

One of the more common methods for the government to effect site cleanup is for it to undertake emergency cleanup action and the initial site investigation and study plan itself. After identifying potentially responsible parties ("PRPs") and issuing its administrative remedy selection, Environmental Protection Agency ("EPA") then seeks to have the responsible parties undertake cleanups. EPA may spend Superfund monies on sites listed on the National Priorities List ("NPL"). EPA uses a hazard ranking system to determine which sites will be added to the NPL. After a facility is added to the NPL, EPA may exercise its remedial authority. Generally, EPA will then investigate the site to determine the nature and scope of contamination in a remedial investigation/feasibility study ("RI/FS") step. EPA must select a cleanup remedy that is cost-effective and assures protection of human health and the environment and publish this decision in its record of decision ("ROD").

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section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

Id. § 9601(22).


12. The Environmental Protection Agency ("EPA") may spend Superfund monies on sites listed on the National Priorities List ("NPL"). EPA uses a hazard ranking system to determine which sites will be added to the NPL. After a facility is added to the NPL, EPA may exercise its remedial authority. Generally, EPA will then investigate the site to determine the nature and scope of contamination in a remedial investigation/feasibility study ("RI/FS") step. Id. § 9604. After the RI/FS is completed, EPA must select a cleanup remedy that is cost-effective and assures protection of human health and the environment and publish this decision in its record of decision ("ROD"). Id. § 9621(a).

13. "Respond" and "response" are defined as "remove, removal, remedy, and remedial action, [sic] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto." Id. § 9601(25).


15. 42 U.S.C. §§ 9604, 9607.

16. Id. § 9606.
the more permanent site cleanup through an administrative order or consent decree.\textsuperscript{17}

Persons who are liable\textsuperscript{18} under the statute become responsible for four categories of costs: (1) all costs of the government's removal and remedial actions "not inconsistent" with the National Contingency Plan ("NCP"); (2) any other necessary response costs incurred by any other person "consistent" with the NCP; (3) natural resource damages; and (4) health assessment costs.\textsuperscript{19}

\textsuperscript{17} The administrative process for cleanup is fairly complex. EPA cannot spend monies for site remedial action unless the site is listed on the NPL, and only the worst sites, after a risk-based ranking, are placed on the NPL. \textit{Id.} § 9605(a)(8)(A)-(B); 40 C.F.R. pt. 300, app. A (Hazard Ranking System). In general, one or more removal actions take place first, followed by a RI/FS. 40 C.F.R. § 300.430 (1994). The permanent remedy is selected and published in a ROD. \textit{Id.} § 300.430(f)(4)-(5). Finally, the plan for implementing the remedy is planned and executed in the remedial design/remedial action ("RD/RA") step. \textit{Id.} § 300.435. This process is explained in detail in \textsc{alFRED R. LIGHT, CERCLA LAW AND PROCEDURE} § 3 (1991 & Supp. 1993).

\textsuperscript{18} 42 U.S.C. § 9607(a)(1)-(4) provides for liability for the following parties:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . 

\textit{Id.} § 9607(a)(1)-(4).

For liable parties, the statute enumerates several very limited defenses:

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned . . . , and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

\textit{Id.} § 9607(b)(1)-(4).

\textsuperscript{19} \textsc{CERCLA} § 9607(a)(4)(A)-(D) sets out the costs for which a liable party is responsible:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
Courts have consistently observed that because the statute is remedial in nature, it must be liberally construed to assist EPA in the expedient and efficient cleanup of hazardous substances and to hold parties responsible for contamination liable for cleanup costs. As one court stated, Congress intended that the statute would provide for “EPA’s costs [to be] recouped, the Superfund preserved, and the taxpayers not required to shoulder the financial burden of nationwide cleanup.”

B. Removal and Remedial Costs

Under CERCLA, parties who meet the section 107 liability trigger are responsible for “all costs of removal or remedial action” to the federal government, or state government, as appropriate. Liable parties are also responsible for “any other necessary costs of response” incurred by any other person. Section 107(a)(4)(A) of CERCLA thus provides the starting point for

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(f) of this title.

Id. § 9607(a)(4)(A)-(D).

20. See, e.g., In re Bell Petroleum Servs., Inc., 3 F.3d 889, 894 (5th Cir. 1993); see also H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 22, reprinted in 1980 U.S.C.C.A.N. 6119, 6125 (enactment of statute was to establish a response and funding mechanism to address abandoned and inactive hazardous waste disposal sites).

21. See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (CERCLA’s two “central purposes” are to give the government the tools necessary to make a prompt and effective response to hazardous waste sites and to make the parties responsible for the problem bear the cost); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (determining that, because the statute is remedial, it must be construed liberally to effect its twin goals of prompt cleanup and financial accountability by the parties responsible); United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (“CERCLA is a remedial statute which should be construed liberally to effectuate its goals.”); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1503-04 (6th Cir. 1989) (interpreting recoverable costs liberally is in accordance with the broad remedial purpose of CERCLA); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992) (construing CERCLA liberally to achieve the goals of effective control of spread of hazardous materials and placement of cleanup costs with responsible parties); United States v. Parsons, 936 F.2d 526, 528-29 (11th Cir. 1991) (interpreting the statute not in a manner that would frustrate statutory goals unless a specific congressional intention otherwise dictates).


24. Id. § 9607(a)(4)(B).
consideration of response costs to which the government (state or federal) may be entitled under the statute. The question becomes how to define “all costs of removal or remedial action,” and what constitutes these costs.

Response action is the universe of actions for which compensation may be sought. The terms “respond” or “response” are defined as “remove, removal, remedy, and remedial action, all such terms (including the terms “removal” and “remedial action”) including enforcement activities related thereto.” Removal actions and remedial actions are generally thought of as subsets of response actions.

Removal actions are considered to be “emergency” or interim activities to control an immediate threat to human health and the environment. The statute defines “remove” or “removal” as:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

On its face, the definition of removal thus covers actual removal of hazardous substances and disposal of removed material. This portion of the definition clearly does not extend to oversight costs. The rest of the definition, however, does extend to actions necessary to monitor the release of hazardous substances and to the catchall category of actions necessary to address damage to public health or the environment.

Remedial actions are generally longer term, more permanent actions. The terms “remedy” or “remedial action” are likewise defined broadly:

Those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so

25.  Id. § 9601(25).
26. Some commentators have pointed out that the removal/remedial distinction does not make sense in application and should be eliminated. See, e.g., Jerry L. Anderson, Removal or Remedial? The Myth of CERCLA’s Two-Response System, 18 COLUM. J. ENVTL. L. 103 (1993).
27. 42 U.S.C. § 9601(23).
that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.28

Again, portions of this definition clearly do not extend to oversight activities. The general description of remedial action, “actions consistent with a permanent remedy . . . to prevent or minimize the release of hazardous substances” does not extend to oversight activities. The last portion of the definition contains, however, a catchall provision covering any monitoring reasonably necessary to assure that the remedial action taken protects human health and the environment.

The issue of government recovery of oversight costs of private party response actions and the inquiry into the point at which an oversight action is divorced enough from an actual removal or remedial action as to lie outside the definition of removal or remedial arises within this context. As discussed in the following section, courts have had no difficulty determining that government oversight of private party response action is itself a reimbursable response action.

II. RECOVERY OF GOVERNMENT OVERSIGHT COSTS BEFORE ROHM & HAAS

Historically, courts have allowed EPA to recover a broad spectrum of costs in CERCLA cost recovery actions.29 The general approach has been to

28. Id. § 9601(24).
29. The United States may recover the costs of the following:
   (a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment.
   (b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances.
   (c) Planning and implementation of a response action.
   (d) Recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA, including the costs incurred for the staffs of the EPA
construe the provisions of the statute applying to response costs liberally.\textsuperscript{30} Courts have historically treated indirect costs, including EPA oversight costs, as recoverable response costs. The lead case in this area is \textit{New York v. Shore Realty Corp.}\textsuperscript{31} The case arose in 1984 when the State of New York brought suit against Shore Realty Corp. ("Shore Realty") and a corporate officer to clean up a hazardous waste disposal site that Shore Realty had purchased for development.\textsuperscript{32} The New York Department of Environmental Conservation had assessed site conditions, but the removal of leaking drums at the site was actually undertaken by Shore Realty.\textsuperscript{33}

The district court held that Shore Realty was liable under CERCLA for New York's response costs, and the Second Circuit affirmed. In affirming the lower court's award of the State's response costs, the court held that "[t]he State's costs in assessing the conditions of the site and supervising the removal of the drums of hazardous waste squarely fall within CERCLA's definition of response costs, even though the State is not undertaking to do the removal."\textsuperscript{34} The court's conclusion—that EPA supervision of drum removal conducted by a private party was a recoverable response cost—was reached with no further analysis.

The court's decision in \textit{Shore Realty} is easy to understand. It is almost intuitively obvious that EPA has the authority, and indeed must exercise this authority, to supervise or review response actions undertaken by a private party. At a minimum, EPA can be expected to conduct a final compliance review of site cleanups; in practice, EPA is extensively involved in monitoring all phases of cleanup activities by private parties. The problem lies in equating EPA's authority to conduct oversight activities to its ability to demand reimbursement for exercising oversight. The court in \textit{Shore Realty} made this leap without examining the statute, and later courts continued to follow \textit{Shore Realty} without further analysis.

In 1988, defendants in another Superfund action again argued that they should not be required to pay for government oversight costs of a private party action.\textsuperscript{35} In \textit{United States v. Ottati & Goss}, the court conducted a bifurcated trial,
considering first liability and then damages. Between 1981 and 1982, EPA had removed drums from the site and several years later a private party, International Minerals & Chemical Corp. ("IMC"), began additional cleanup activity under a court order. Under the terms of the court order, New Hampshire and EPA had the right to monitor the cleanup work undertaken by IMC. While IMC conducted site cleanup, New Hampshire and EPA had environmental coordinators at the site with the authority to make suggestions to IMC contractors, conduct sampling, and otherwise monitor cleanup activity. IMC also had an on-site coordinator present during the cleanup. During the damages portion of the trial, the court examined each category of costs for which the United States demanded reimbursement. It awarded EPA its oversight costs and awarded the State its oversight costs for monitoring the soil and drum removal operations.

Ottati & Goss, unfortunately, sheds little additional light on the recovery of government oversight costs of private party actions. Clearly, the court considered the primary issue to be the allocation of EPA’s requested costs among the defendants and the geographic portions of the site, awarding any costs “directly attributable” to the site. The court declined to award EPA $336,922 in “indirect costs” which included overhead expenses such as rent, utilities, supplies, and clerical staff, reasoning that “[t]hese indirect costs necessary to operate the Superfund program cannot be attributed directly to the [sites], and are therefore disallowed.” The court did, however, award the State its indirect costs, and EPA its payroll and travel costs. Like the decision in Shore Realty, Ottati & Goss ultimately failed to discuss, in any revealing way, whether indirect or oversight costs are qualitatively different from other costs under CERCLA and

36. Id. at 977, 980.  
37. Id. at 981.  
38. Id.  
39. Id.  
40. Id.  
41. Id. at 987-91.  
42. Costs awarded to EPA included: contractor costs for the operation of mobile laboratories during the 1981-1982 drum removal, payroll expenses for EPA personnel who worked at the site during drum removal operations, contractor costs to produce documents for the use of the defendants in the trial, contractor costs to testify during phase I (liability) of the trial, contractor costs to oversee work and excavation performed by the defendant’s environmental contractor at the site in 1984, contractor costs of preparation of a cost recovery report for trial, contractor costs for on-site organization of case files and preparation of evidence profile samples, contractor costs to develop computer data bases for use by government trial attorneys and experts, and retention of experts by EPA to assist in preparation for trial and to testify at trial. Id.  
43. Id. at 1002.  
44. The court denied EPA’s request for costs incurred by an analytical laboratory because there was insufficient data to “conclusively attribute it” to the site. Id. at 992.  
45. Id. at 995.  
46. Id. at 1003.
whether there is any qualitative difference between government oversight of its own response action versus government oversight of private party response action. Arguments challenging EPA’s method of allocating the indirect costs of operating the Superfund program to particular cost recovery actions, as described in Ottati & Goss, have not met with much success. Subsequent to Ottati & Goss, the government developed a better explanation of how it attributes indirect program costs to individual Superfund sites.

The Sixth Circuit added its view to the issue of the government’s recovery of its oversight costs in United States v. R.W. Meyer, Inc. Although it does not address government recovery of private party response costs, R.W. Meyer is significant because the court took a sweeping view of what constitutes recoverable response costs. In R.W. Meyer, the United States had been awarded its costs of response, including direct and indirect costs and prejudgment interest, on a motion for summary judgment against several defendants in a CERCLA cost recovery suit. On appeal before the Sixth Circuit, defendant Meyer challenged the award of EPA’s expenses which included “indirect costs,” costs paid to EPA contractors, EPA direct payroll and travel expenses, and enforcement costs of the Department of Justice (“DOJ”). Meyer argued that the government was entitled to recover only those administrative costs that were related to a specific removal action rather than those costs necessary to operate the Superfund program.

The Sixth Circuit began its analysis by noting that CERCLA’s broad remedial purpose “supports a liberal interpretation of recoverable costs.” The court stated that it agreed with this approach and found “that the challenged indirect costs are part and parcel of all costs of the removal action, which are recoverable under CERCLA.” The court explained that the indirect costs challenged by Meyer were in fact attributable to the site at issue because they represented the portion of EPA’s overhead expenses that supported the government’s cleanup activity at the site. By making this statement, the court essentially categorized all indirect costs as direct costs, to the extent that a system can always be devised to attribute program costs to participants. The Sixth

47. See, e.g., United States v. Lecarreaux, No. 90-1672, 1992 WL 108816 (D.N.J. Feb. 19, 1992) (reviewing how the Department of Justice calculates and allocates its direct and indirect CERCLA enforcement costs and holding that the approach is equitable and not inconsistent with NCP).
48. See infra note 58.
49. 889 F.2d 1497 (6th Cir. 1989).
50. Id.
51. Id. at 1499.
52. Id. at 1502.
53. Id. at 1503 (citation omitted).
54. Id.
55. Id.
56. This distinction is functionally meaningless—there can always be a method devised to tax administrative program costs to participants. The central questions are: does the statute authorize that such costs be taxed to participants, and is such taxation procedurally and substantively fair.
Circuit announced without compunction that “the government’s total response costs necessarily include both direct and indirect costs inherent in the cleanup operation.” The court was satisfied with EPA’s demonstration that it apportioned its indirect costs in each administrative region, such as office space for EPA employees, among all of the response actions undertaken in that region. The court further stated that this allocation of indirect costs to particular sites “effectively renders those costs direct costs attributable to a particular site.”

The *R.W. Meyer* decision chose to focus on the direct/indirect cost distinction. With this issue exhausted to the benefit of the government in *R.W. Meyer*, defendants seeking to challenge government requests for oversight costs needed to develop a different strategy. This strategy was developed and argued in *Rohm & Haas*.

### III. THE ROHM & HAAS DECISION

The *Rohm & Haas* case provides, to date, the most thorough analysis of whether the government may recover its costs of overseeing a cleanup performed by a private party. The case arose in connection with the cleanup of a landfill

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57. 889 F.2d at 1503.
58. *Id.* EPA’s method of calculating and allocating the indirect costs of running the Superfund program to individual response actions is described as follows:

   Essentially, the EPA determines, for each fiscal year, the total amount of EPA overhead costs at EPA headquarters and the ten regional EPA offices that support CERCLA response actions. EPA allocates part of the headquarters’ overhead costs that support response actions to each of its ten regional offices. Those costs are added to each regional office’s own overhead costs that support such actions. EPA then calculates an indirect cost rate for each region each fiscal year by dividing the region’s total overhead costs attributable to Superfund activities, plus its share of headquarters’ overhead costs, by the total number of hours billed by regional Superfund personnel in a given fiscal year. To determine what portion of its indirect costs support a particular response action, EPA multiplies the number of hours billed by certain regional personnel to a particular response action by the indirect cost rate for that fiscal year. Finally, to determine the total indirect costs attributable to a particular response site, EPA adds the indirect costs attributed to that site for each year during which response action occurred at that site.

*Id.* at 1503-04.
59. *Id.* at 1504. See also *Kelley v. Thomas Solvent Co.*, 21 Chem. Waste Lit. Rep. 185, 195-96 (Sept. 24, 1990) (following *R.W. Meyer*, the court allowed government recovery of indirect administrative costs: “[i]n so far as the indirect costs are attributable to the overhead expenses needed to support the government’s cleanup of the Verona Well Field and surrounding areas, they are reimbursable under CERCLA”); *Amcast Indus. Corp. v. Detrex Corp.*, 822 F. Supp. 545, 554 (N.D. Ind. 1992) (following *R.W. Meyer* and allowing recovery of indirect costs of employee labor and overhead costs, including office supplies).
60. 2 F.3d 1265.
in Bristol Township, Pennsylvania. Rohm & Haas had owned the landfill site, in whole and in part, from 1917 to 1978. The site was also partially owned, at the time of suit, by the Bristol Township Authority and a land development company. From 1917 to 1975, Rohm & Haas used the site to dispose of solid wastes, chemical wastes, and off-specification products from chemical and plastics manufacture. EPA began monitoring the site in 1979, and determined that hazardous substances were present at the site in the air, soil, and groundwater. EPA proposed adding the site to the National Priorities List ("NPL") in 1985, but through negotiations, Rohm & Haas convinced EPA that the site should be managed under the Resource Conservation and Recovery Act ("RCRA") rather than CERCLA. In 1987, EPA agreed to do so and removed the site from the proposed NPL list.

Rohm & Haas and EPA entered into an administrative consent order under section 3008(h) of RCRA in 1989. The order provided that Rohm & Haas would conduct certain cleanup activities at the site. The order did not provide that Rohm & Haas would be required to compensate EPA for EPA's costs of implementing the order. Rohm & Haas performed the work required by the consent order, and EPA oversaw this activity as it was performed.

In 1990, EPA brought a cost recovery action under section 107 of CERCLA to recover its costs incurred since 1979 in connection with the site. EPA also sought a declaratory judgment for all future costs it would incur at the site. The court noted that most of the costs sought by EPA were incurred by EPA after it had notified Rohm & Haas in February 1987 that the site would be managed under RCRA rather than CERCLA. The district court agreed with EPA that Rohm & Haas was liable under CERCLA and awarded EPA its oversight costs. The defendants, including Rohm & Haas, appealed, arguing that oversight costs incurred by the government are not recoverable under section

61. Id. at 1268.
62. Id.
63. Id.
64. Id.
65. Id.
67. 2 F.3d at 1268.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id. at 1268-69.
75. Id. at 1269.
76. Id.
107 of CERCLA. The defendants argued that the government's oversight of a private party's removal and remedial activities does not constitute a removal action.

As other courts have noted, CERCLA does not expressly provide for government recovery of oversight costs, so the issue becomes one of statutory construction. In shaping this construction, the court in *Rohm & Haas* first addressed the issue of which standard should be used in examining the language of CERCLA. It is at this point that *Rohm & Haas* departs from traditional Superfund thinking. Rather than invoking the broad remedial purposes of the statute and jumping to the conclusion, as other courts had done, that "all response costs" must therefore be recoverable, the Third Circuit addressed whether administrative program costs are qualitatively different from other costs recoverable under the statute.

The defendants argued that oversight costs are administrative costs for which the standards of *National Cable Television Association v. United States* ("NCTA") should apply. The Third Circuit observed that the NCTA standard is that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as fees or taxes, on those parties." Applying the NCTA analysis, the Third Circuit reasoned that the oversight costs at issue were costs incurred by the government in monitoring private parties' compliance with their legal obligations and, further, that these oversight costs were incurred with the intent to protect the public interest rather than the interests of the private parties being overseen. The court concluded that the oversight costs were thus administrative costs within the meaning of NCTA, inuring to the benefit of the public at large rather than private parties. The court rejected arguments that the NCTA principles were meant to be narrowly applied to cases where a regulatory agency,

77. *Id.*
78. *Id.* at 1272. The defendants argued in the alternative that, even if CERCLA does allow government recovery of its costs of private party oversight, it does not allow recovery of oversight costs conducted under RCRA. *Id.*
79. See, e.g., *In re Hemingway Transp., Inc.*, 126 B.R. 656, 662 (D. Mass. 1991), aff'd, 954 F.2d 1 (1st Cir. 1992) ("Since CERCLA does not define "response costs," the issue is one of statutory interpretation.").
80. 2 F.3d at 1273.
82. 2 F.3d at 1278-79.
84. 2 F.3d at 1273.
85. *Id.* (quoting *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989)).
86. *Id.* at 1273-74.
87. *Id.*
authorized to charge and collect fees from a regulated entity, could base the fees on the agency's total costs.  

The Third Circuit accepted the argument of the defendants that for such oversight costs to be charged to the defendants, the language of the statute should reflect clear congressional intent to impose such oversight costs on a private party.  

The court was careful to note that the central principle of NCTA was important to agency actions in general and that failure to apply the NCTA doctrine in Rohm & Haas might invite other agencies to tax their costs on regulated entities:

We believe the guiding principle of NCTA to be a sound one, particularly as applied in this case. The budget and appropriation process gives executive agencies an incentive to operate efficiently and makes them accountable to the Congress. When an agency asserts the right to secure financing of its activities by assessing its costs against those whom it regulates, that incentive and accountability are lost. Moreover, in the present context, recognition of the authority EPA asserts could result in the funding for a substantial amount of EPA activity, undertaken under a variety of different statutes, being shifted away from general revenue to specific levies on certain private parties.

We will not presume Congress to have intended a statute to create the dramatic and unusual effect of requiring regulated parties to pay a large share of the administrative costs incurred by the overseeing agency unless the statutory language clearly and explicitly requires that result.

In examining the statutory language, the court found that such explicit congressional intent was lacking. The court observed that the definition of "removal" does not contain an explicit reference to private party oversight activities; the court also failed to find that the statute contained a statement that Congress intended administrative and regulatory oversight costs of private party activity to be removal costs. The court determined that one of the categories of removal actions—"such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances"—should be read

88. Id. at 1273.
89. Id.
90. Id. at 1274.
91. Id. at 1275.
92. Id.
as referring to the actual monitoring of a release or threatened release rather than oversight of monitoring and assessment conducted by private parties.93

Noting that Congress omitted mention of oversight costs in the definition of removal, the court then turned to the portion of section 104(a) of CERCLA addressing remedial investigation/feasibility studies ("RI/FSs") conducted by private parties.94 Section 104(a) of CERCLA provides that private parties may conduct the RI/FS at a site "only if [EPA] contracts with or arranges for a qualified person to assist [EPA] in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by [EPA] under, or in connection with, the oversight contract or arrangement."95 The court reasoned that if Congress had considered government oversight of a private removal action to itself constitute a removal action, section 104(a) of CERCLA would have been unnecessary.96 The court further reasoned

93. Id. at 1275-76. In a footnote, the court stated:
   EPA’s argument would be stronger in our view if it were predicated on the fifth, catchall category of the removal definition—"the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." Arguably, this language is broad enough to include EPA's oversight of [the private parties'] activities.

Id. at 1276 n.17 (emphasis added) (citation omitted). The court went on to suggest, however, that this fifth category could also be read as applying only to "other actions to deal with the risk created by the release or threat of release and not actions to oversee the performance of those who have undertaken to deal with that risk." Id.

94. Id. at 1277.
96. 2 F.3d at 1277. An interesting twist to this argument may be that CERCLA § 111(c)(8) allows the Superfund to be used for contract costs arising under CERCLA § 104(a)(1). These include:
   The costs of contracts or arrangements entered into under [CERCLA § 104(a)(1)] to oversee and review the conduct of remedial investigations and feasibility studies undertaken by persons other than the President and the costs of appropriate Federal and State oversight of remedial activities at National Priorities List sites resulting from consent orders or settlement agreements.
42 U.S.C. § 9611(c)(8) (emphasis added). Consent orders and settlement agreements necessarily assume private action. This section, therefore, may be read to allow Superfund monies to be used for RI/FS and RD/RA oversight activities conducted by private parties. However, it does not allow the Superfund to be used for government oversight of RD/RAs conducted by private parties pursuant to a unilateral order issued by EPA for RD/RA activities. Id. This distinction makes little logical sense. The Rohm & Haas analysis could then be read as saying that Congress had set up a Superfund that reimburses the government its oversight costs for private party RI/FSs, and RD/RAs conducted by private parties under a consent order or settlement agreement, but that the government could not sue to recoup its costs of the RD/RA.

Interestingly, CERCLA § 111(c)(8) does not allow the government to receive Superfund monies if it must issue a party a unilateral CERCLA § 106 order to conduct a cleanup; rather, the government must have the private party conduct the cleanup under an agreed order or settlement agreement. Id. The effect of this provision, whether intended or not, is to provide a "carrot and stick" approach to effecting RD/RAs: the government is encouraged to have the RD/RA executed through
that if Congress had intended the government’s oversight costs of private party response actions other than RI/FSs to be recoverable, it would have so stated.97

As additional indicia of Congress’ intent, the court turned to CERCLA section 111 which sets out six categories of costs for which Superfund makes payment.98 The first category is for payment of governmental response costs incurred under CERCLA section 104;99 the fourth is for payment of certain specified costs, including the costs of contracts entered into under section 104(a)(1) of CERCLA to oversee RI/FSs undertaken by parties other than EPA.100 The court reasoned that Congress had chosen to treat and define oversight costs differently than response costs and that oversight costs are not necessarily a subset of response costs.101

After concluding that the costs of the government’s oversight of private party response action are not recoverable, the court set out those areas in which it understood the government to be able to recover certain costs.102 The court observed that “[w]here the government takes direct action to investigate, evaluate, or monitor a release, threat of release, or a danger posed by such a problem, the activity is a “removal” and its costs are recoverable.”103 The court explained that such costs would include costs of responding to a release regardless of the stage in the Superfund process at which such activity occurred; it would also include the government’s costs, such as RI/FS costs, incurred to develop an appropriate response at the site.104 The court also concluded that an independent basis for recovery of RI/FS costs existed because Congress had expressed such intent in the language of section 104(a) of CERCLA.105 The court reasoned that the costs of directing government removal and remedial action, at any stage, would be recoverable because section 104(b) of CERCLA authorizes the government to undertake investigation and studies “necessary or appropriate to plan and direct response actions.”106

In Rohm & Haas, the Third Circuit declined to apply a liberal interpretation of the goals of CERCLA as an alternative to examining other constructions of the statute that might be more compelling or appropriate. It recognized the tension between a broadly worded remedial statute necessitating agreement rather than unilateral order.

97. 2 F.3d at 1277.
99. Id.
100. Id. § 9611(c)(8). The section also lists as chargeable to the Superfund “the costs of appropriate Federal and State oversight of remedial activities at NPL sites resulting from consent orders or settlement agreements.” Id.
101. 2 F.3d at 1277.
102. Id. at 1278.
103. Id.
104. Id.
105. Id.
106. 2 F.3d at 1279.
broad agency powers and the principle of statutory construction that agency power is limited by statutory delegation. The court was reluctant to read the statute in a way that would once again give EPA a “blank check” for recouping its costs unless Congress explicitly gave EPA the check. That this approach of considering the scope of agency action rather than simply giving EPA another blank check was considered creative in light of the body of Superfund case law is disturbing.

To the surprise of many, DOJ did not petition the United States Supreme Court for appeal of the *Rohm & Haas* decision. The *Rohm & Haas* decision remains the law in the Third Circuit. The issue has not yet reappeared at the circuit court level.

IV. THE WAKE OF *ROHM & HAAS*

A. Third Circuit Decisions

After *Rohm & Haas*, parties have attempted to argue that they should not be required to pay EPA its oversight costs for response actions conducted by private parties pursuant to consent decrees, consent orders, and unilateral orders. District courts sitting in the Third Circuit have followed *Rohm & Haas*, although to varying degrees.

In *United States v. Atlas Minerals & Chemicals*, the district court for the Eastern District of Pennsylvania considered the applicability of the *Rohm & Haas* decision to a consent decree that had been lodged, but not entered, with the court at the time the Third Circuit handed down its decision. In the consent decree, the defendants agreed to pay the federal government certain costs, including future oversight costs, that EPA might incur in overseeing the defendants’ privately funded site remediation. As soon as *Rohm & Haas* was decided, the defendants sought to have the consent decree set aside or modified as to the oversight costs.

The government made two arguments attacking the application of *Rohm & Haas* in *Atlas Minerals*. The government first argued broadly that *Rohm & Haas* was wrongly decided. The district court declined to address this argument directly, noting that the Third Circuit’s opinion was mandatory authority in its

109. Id. at 647. EPA had conducted a Superfund financed emergency removal action at the site, completed the RI/FS, and issued two RODs for the site, after which it issued unilateral administrative orders pursuant to CERCLA § 106 requiring the defendants to implement the remedies set out in the RODs. EPA then filed suit against the defendants seeking recovery of its costs expended and a declaratory judgment covering future costs. The parties negotiated a consent decree to settle the cost recovery suit. Id. at 646-47.
110. Id. at 647.
district. The government then argued that because the court in *Rohm & Haas* did not analyze whether oversight costs are recoverable under the CERCLA definitions of "remedy" or "remedial action," the decision should be read narrowly to apply only to removal costs rather than remedial costs. This approach would allow the government to recover its oversight costs in the instant case because the consent decree covered future oversight costs of remedial action at the site rather than "removal" action as was considered in *Rohm & Haas*.

The district court agreed with the government that the *Rohm & Haas* decision could be limited, if read narrowly, to oversight costs related to removal actions. The court noted further, however, that even though it characterized the response action in the consent decree as "remedial" action, costs of EPA's oversight of remedial activity undertaken pursuant to the consent decree might not be recoverable. The court reached this conclusion because the *Rohm & Haas* statutory analysis was "directly applicable" even if the results were not.

The defendants presented several arguments to the court that it should set aside or modify the consent decree subsequent to the *Rohm & Haas* decision. First, the defendants argued that the court should read the oversight cost provision in the decree narrowly to exclude oversight costs not recoverable under CERCLA. The court declined to do so, noting that the parties to the consent decree were bound to their agreement by principles of contract law. The defendants then argued that entry of the consent decree without modification would violate public policy because it would allow the government recovery of oversight costs that were otherwise not recoverable by law.

The court recognized that the *Rohm & Haas* decision had been driven by the NCTA principle of the non-delegation doctrine. It then sidestepped application of the *Rohm & Haas* analysis by stating that, "[i]f the oversight costs sought here are subject to the NCTA doctrine," the government would be able to recover its oversight costs as long as the statutory definition of "remedy" or "remedial" unambiguously covered such oversight costs. The court held that the defendants would have other opportunities to challenge the oversight costs; therefore, entry of the consent decree should not be precluded:

111. *Id.* at 649 n.1.
112. *Id.* at 649.
113. *Id.* at 649-50.
114. *Id.* at 650.
115. *Id.* at 651.
116. *Id.* See also Carol E. Dinkins, *Negotiation and Settlement Issues in Federal Enforcement Actions*, 921 A.L.I.-A.B.A. 1557, 1569 (1994) (noting the government's argument in *Atlas Minerals* that the consent decree was a "binding contract" and that the court's role is to determine whether the decree is fair to the public rather than to the parties entering into the agreement).
117. 851 F. Supp. at 651.
118. *Id.*
119. *Id.*
After careful consideration, and mindful of the strong policy in favor of settlement in CERCLA actions, the court concludes that the potential NCTA problems should not bar entry of the decree. In light of the decree's provision of procedures for resolving disputed assessments, which makes the federal courts the ultimate arbiters of disputes, the court finds it prudent to defer consideration of NCTA-type challenges until costs are properly assessed and disputed.120

The court invited Congress to resolve the statutory ambiguity and EPA to reconsider its approach toward cost recovery.121 After rejecting the defendants' arguments that the consent decree was otherwise unreasonable,122 unfair,123 and inconsistent with the goals of CERCLA,124 the court granted the government's motion for entry of the consent decree.125

The Eastern District of Pennsylvania followed the Rohm & Haas decision more closely in United States v. Witco Corp.126 In Witco, EPA had conducted the RI/FS and issued the record of decision ("ROD") for a chemical and pesticide manufacturing facility in New Jersey.127 After the ROD was issued, one of the defendants, Elf Atochem, entered into a consent decree with the United States.128 The consent decree provided that Elf Atochem would perform and finance the remedial design/remedial action ("RD/RA") at the site at an estimated cost of about $47 million.129 The decree also provided that Elf Atochem would reimburse EPA $2.7 million for past and future response costs incurred by EPA.130

120. Id. at 652.
121. Id. The court apologized for failing to address the issue directly, stating:

The court acknowledges that deferral of the NCTA determination may create future administrative burdens on both the parties and the court, and that resolution of the issues now would add a stronger sense of finality to the decree. However, subsequent developments may obviate the need to decide this question at all. Congress might react and legislatively resolve the problem. Or, more realistically, EPA may, in light of Rohm & Haas, re-assess the wisdom of asserting the authority to recover certain types of oversight costs. Given the possibility, however remote, that the government might never seek costs that trigger a NCTA-type problem, the court will wait until such costs are sought.

122. Id.
123. Id. at 652-55.
124. Id. at 655.
125. Id.
126. 853 F. Supp. 139.
127. Id. at 140.
128. Id.
129. Id.
130. Id.
After the settlement decree was lodged with the court, the government brought a cost recovery action against Witco to recover all other unreimbursed past and future response costs, and for a declaratory judgment that Witco was liable for all response costs not covered by the Elf Atochem consent decree. Witco made a motion to dismiss on the grounds that the government had full relief from Elf Atochem for all costs which it was entitled to recover and that, as a matter of law, the government could not recover future costs incurred in the oversight of Elf Atochem’s remediation activities.

The court in *Witco* defined the issue as whether government oversight costs for private party remedial activity constitute recoverable “response costs” under the statute. The court declined to award the federal government its oversight costs for site remediation, rejecting the government’s argument that *Rohm & Haas* was distinguishable because it dealt with a removal action rather than a remediation action. The court held that the statutory definition and language concerning remedial actions “is very similar to and evinces no clearer congressional intent than does that concerning removal actions” and declined to distinguish *Rohm & Haas*, applying the *Rohm & Haas* analysis to the remedial action before the court.

In a private cost recovery action brought by a corporation against the United States, the Third Circuit seized the opportunity to reinforce its holding in *Rohm & Haas* and indirectly validate the *Witco* decision. In *FMC Corp. v. United States Department of Commerce*, the government attempted to argue that the waiver of sovereign immunity contained in section 120(a)(1) of CERCLA did not apply to the federal government’s arrangement for the production of rayon during World War II. The court held that the government was liable under the plaintiff’s theories because its regulatory activities were so extensive as to qualify it as an “operator” and “arranger for disposal” under the statute.

The court made several comments in *FMC* relevant to its construction of oversight costs. First, it noted that its conclusion in *FMC* was consistent with its approach to statutory construction and in particular, with its construction of

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131. Id. at 141.
132. Id.
133. Id. at 142.
134. Id. at 143.
135. Id.
136. FMC Corp. v. United States Dep’t of Commerce, 29 F.3d 833 (3d Cir. 1994).
138. 29 F.3d at 835. FMC alleged that the government was responsible as an owner and operator of the rayon manufacturing facility and for having arranged for the disposal of hazardous wastes there. Id.
139. Id. at 840.
CERCLA: "plain language to mean what it says." Second, the court observed that its decision in FMC was consistent with its earlier ruling in Rohm & Haas:

We also point out that our approach is consistent with United States v. Rohm & Haas Co. . . . in which we refused to read the term "removal" in CERCLA section 101(23) to include governmental oversight of private remedial actions, in part because we found "it highly significant that Congress omitted any mention of oversight . . . in the definition of removal." Just as we would not read undesignated conduct into the definition of "removal," we will not read the broad regulatory exception advanced by the government into section 107(b) or section 120(a)(1).1

Several judges joined in a dissenting opinion, asserting that the United States had not waived sovereign immunity and, further, that the United States' extensive wartime regulatory activity did not rise to the level of "operator" or "arranger" liability under the statute. In the dissent, however, the judges again stood behind their holding in Rohm & Haas and made clear that the Rohm & Haas opinion extended to both removal and remedial activities:

In our recent opinion in United States v. Rohm & Haas Co., we held that the government could not recover from private parties the cost of government oversight of the removal and remedial activity performed and paid for by a private party. We recognized the incomparability between government and private action, and were unwilling to read CERCLA as treating government cleanups and private cleanups as equivalent actions for purposes of recovery of costs. We noted that it was "far more likely that Congress viewed EPA's overseeing of a private party's removal activities as qualitatively different from EPA's actually performing removal activities." With the Third Circuit on record that it intended to stick with its ruling in Rohm & Haas, the Middle District of Pennsylvania adhered to the Rohm & Haas decision in United States v. Serafini. In Serafini, several defendants had entered into a consent decree with the federal government to perform remedial activities.

140. Id.
141. Id. at 841 (citations omitted).
142. Id. at 846.
143. Id. at 850 (Chief Judge Sloviter dissenting) (emphasis in original) (citations omitted).
action at a landfill in Pennsylvania. The government later sought to recover its response costs, including its oversight costs for the performance of the remedial action, from defendants who had not entered into the consent decree. The court had awarded the government $2.3 million in response costs, issuing a preliminary award in June of 1992 and the final award in September of 1993.

After the *Rohm & Haas* opinion was issued in August of 1993, the nonsettling defendants in *Serafini* moved the court for reconsideration of the consent decree. The government argued that the *Rohm & Haas* decision applied to removal actions, but did not apply expressly to remedial actions. The court disagreed, noting that the Third Circuit had later stated that its holding extended to both removal and remedial actions and that the court’s reasoning applied to both types of actions. Accordingly, the court vacated the entire $2.3 million award of response costs.

### B. Other Courts—Questioning the Reasoning of *Rohm & Haas*

Districts outside the Third Circuit have shown less inclination, not surprisingly, to adopt the *Rohm & Haas* analysis. Unfortunately, these courts have not expressed a willingness to dissect the *Rohm & Haas* opinion; rather, the trend is to reject *Rohm & Haas* out of hand.

At least two courts outside the Third Circuit have agreed with the *Rohm & Haas* approach. In *County of Santa Clara v. Meyers Industries*, the District Court for the Northern District of California considered an argument made by the California Department of Toxic Substances Control that *Rohm & Haas* had misapplied the *NCTA* doctrine to CERCLA cost recovery actions by treating cleanup costs like cable regulatory costs. The court agreed, however, with the *Rohm & Haas* analysis: to a regulated entity, oversight costs functioned like cable regulatory costs because they both served to protect the public rather than

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145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
benefit the regulated entity. Unfortunately, the court chose not to address the issue in any more detail.

The district court sitting in Maine has also considered and accepted the application of *Rohm & Haas* to government recovery of oversight costs of private party response actions. In *Central Maine Power Co. v. F.J. O'Connor Co.*, the current owner of a hazardous waste site brought a contribution action against the former site owners to recover response costs that the current owner had incurred to clean up the site. The current site owner, Central Maine Power ("CMP"), requested that it be entitled to reimbursement for costs it had paid to EPA for EPA's oversight of its cleanup activities. One of the former owners of the site argued that CMP was not entitled to contribution for the oversight costs it had paid EPA because, under *Rohm & Haas*, it was under no legal obligation to make payment to EPA in the first place. Citing *Rohm & Haas*, the court agreed and determined that, because CMP was not required to reimburse EPA for oversight costs, the costs were not "necessary response costs" to which CMP was entitled reimbursement. As had the court in *Santa Clara*, the court in *Central Maine Power* adopted the *Rohm & Haas* decision with little new analysis.

The District Court for the Eastern District of California has not agreed with its sister court in the Northern District and has declined to adopt the *Rohm & Haas* reasoning. In *California Department of Toxic Substances Control v. Syndergeneral Corp.*, the court found the holding in *Rohm & Haas* to be "neither binding nor persuasive" in cases where a state agency seeks to recover its oversight costs. Adopting the reasoning of an earlier decision in the Eastern District of California, the court distinguished *Rohm & Haas* by arguing that the Third Circuit had considered the recovery of oversight costs by an executive

153. *Id.* The court also rejected the plaintiff's argument that *Union Pac. R.R. Co. v. Public Util. Comm'n of Oregon*, 899 F.2d 854 (9th Cir. 1990), was applicable, noting that the Ninth Circuit determined that a voluntary licensing fee should not be viewed as a tax. *Id.* at *10-11. In the case before it, the court concluded that:

"The cost of environmental cleanup is not voluntary. The cleanup is imposed as a legal obligation . . . [and] is not a voluntary act that they can refuse. In the *Union Pacific* case, the parties could refuse to do business in Oregon. In the case at bar, the parties must perform their obligations. Recovery of oversight costs would be an additional fee imposed by the Department. The fee would be for the benefit of the public not the private parties. It would thus become a tax and should be held to the clear language standard [*established in NCTA and Rohm & Haas*]."

*Id.*

155. *Id.* at 643.
156. *Id.* at 648.
157. *Id.*
159. *Id.*
agency of the federal government.\footnote{Syndergeneral, 28 Chem. Waste Lit. Rep. at 370.} \textit{Rohm & Haas} was founded on a principle set out in \textit{NCTA}—an agency’s “overstep” of its power to charge fees under a federal statute which allowed an agency to impose “fees” in violation of the United States Constitution’s nondelegation clause.\footnote{Id.} The court concluded that where a state government rather than a federal agency seeks cost recovery, the constitutional concern for the separation of powers would not be implicated and the \textit{Rohm & Haas} result not required.\footnote{Id.}

The United States District Court for the District of Colorado has also allowed a state to recover its costs associated with oversight of private party cleanup activities.\footnote{Id.} In \textit{Colorado v. United States}, the court considered an action by the state for recovery of cleanup, litigation, and oversight costs in connection with the cleanup of the Rocky Mountain Arsenal.\footnote{Id.} Colorado requested reimbursement, \textit{inter alia}, for costs associated with cleanup and the state’s oversight of actions taken by the federal government under Colorado’s delegated \textit{RCRA} program.\footnote{Id.} The court allowed the recovery of these costs, taking the very broad position that response costs need only “be incurred” for a state to seek compensation and that the statute “does not require removal or remedial action pursuant to \textit{CERCLA}.”\footnote{Id.} The court reasoned that, because the terms “removal” and “remedial” actions include enforcement action under the definition of section 101(25) of \textit{CERCLA} and the “concept of enforcement necessarily encompasses oversight activities,” Colorado’s oversight activities could result in recoverable response costs.\footnote{Id. at 952.}

The \textit{Syndergeneral} and \textit{Colorado} decisions may indeed be properly distinguishable from \textit{Rohm & Haas}. States seeking oversight costs do not trigger the nondelegation concerns of \textit{Rohm & Haas}, as the court in \textit{Syndergeneral} noted.\footnote{Id.} Further, the ability of a state to monitor actions of the federal government where the federal government is the responsible party may raise a number of issues not considered in \textit{Rohm & Haas}. These issues, which may be quite novel, are not addressed here because another federal district court did tackle the \textit{Rohm & Haas} decision head on.

\footnote{Syndergeneral, 28 Chem. Waste Lit. Rep. at 370.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Colorado v. United States, 867 F. Supp. 948 (D. Colo. 1994).}
\footnote{Id.}
\footnote{Id. at 952.}
\footnote{Id.}
\footnote{42 U.S.C. § 9601(25).}
\footnote{867 F. Supp. at 952. The court pointed to the special circumstance when the state is the enforcing agency and the federal government is the responsible party in a \textit{CERCLA} cleanup, noting that oversight authority placed only in the hands of the federal government would create a conflict of interest. \textit{Id.} at 953.}
\footnote{See \textit{Syndergeneral}, 28 Chem. Waste Lit. Rep. at 367.}
The United States District Court for the Southern District of Texas recently rejected the *Rohm & Haas* analysis on its merits. In *United States v. Lowe*, the defendants were engaged in the cleanup of a Superfund site pursuant to an order issued under section 106 of CERCLA. The government then negotiated a consent decree which required payment of the government’s oversight costs for remedial action at the site, with the remedial action to be undertaken by the defendants. Before the consent decree was entered by the court, the Third Circuit issued its decision in *Rohm & Haas*, and certain defendants demanded that the oversight provisions in the decree be removed. The government moved for summary judgment on the issue of recoverability of its oversight costs of the defendants’ remedial action.

After setting out the relevant definitions from the statute, the court found the *Rohm & Haas* reasoning to be unpersuasive. First, the court stated that oversight costs are included within the terms of section 107(a) and the definition contained in section 101(23) of CERCLA:

Oversight necessarily encompasses the evaluation of all stages of the cleanup process, from the preliminary investigation through the final treatment, destruction, disposal or removal of hazardous substances on the site. Oversight is “necessary to prevent, minimize or mitigate” damages to the public welfare, and necessary to “monitor, assess, and evaluate” the release or threatened release of hazardous substances into the environment.

The court went on, however, to point out that the statute does not distinguish between EPA’s direct monitoring of a release and its indirect monitoring of a private party’s cleanup. The court reasoned that adoption of the *Rohm & Haas* approach “would lead to the incongruous result that the EPA could recover the costs of overseeing its own contractors, but not the costs of overseeing those hired by the potentially responsible parties.” The court in *Lowe* adopted the Sixth Circuit’s analysis in *United States v. R.W. Meyer* that the responsible parties should bear all direct and indirect costs of site cleanup and

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172. *Id.* at 629.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 631.
177. *Id.* at 631, 632.
178. *Id.* at 632.
179. *Id.*
180. 889 F.2d 1497; see *supra* notes 49-59 and accompanying text.
that "the allocation of the indirect costs to specific cleanup sites effectively renders those costs direct costs attributable to a particular site."\textsuperscript{181} It chose, once again, to turn the issue into one of direct versus indirect costs.

V. \textit{Key Tronic} — What the Supreme Court Says About Response Costs

The United States Supreme Court recently issued its eagerly awaited decision in \textit{Key Tronic Corp. v. United States}.\textsuperscript{182} Although the decision addresses the issue of the recovery of attorney's fees by private parties in CERCLA actions, \textit{Key Tronic} sheds some light on the approach the Supreme Court might take in its construction of "response costs" under CERCLA.

In \textit{Key Tronic}, the petitioner and other parties allegedly disposed of certain chemicals contaminating a landfill.\textsuperscript{183} Key Tronic Corp. ("Key Tronic") settled with the state of Washington and EPA, agreeing to pay $4.2 million towards cleanup.\textsuperscript{184} Key Tronic then brought two CERCLA claims against another responsible party at the site, the United States Air Force ("Air Force").\textsuperscript{185} Key Tronic sued the Air Force in a contribution claim, seeking partial recovery of the $4.2 million Key Tronic had paid to EPA.\textsuperscript{186} Key Tronic also sued the Air Force on a cost recovery claim for an additional $1.2 million that Key Tronic had incurred prior to settlement with EPA.\textsuperscript{187} The $1.2 million included attorney's fees for: (1) identification of other PRPs at the site, including the Air Force, (2) preparation and negotiation of the settlement agreement between Key Tronic and EPA, and (3) prosecution of the cost recovery action for attorney's fees.\textsuperscript{188} The district court dismissed the contribution claim because the Air Force had obtained contribution protection in its settlement agreement with the United States. The district court considered the cost recovery claim and awarded Key Tronic attorney's fees. The appellate court reversed, holding that Congress had not explicitly authorized private litigants to recover legal expenses in a private cost recovery action.\textsuperscript{189}

In considering the issue, the Supreme Court observed that CERCLA is a "comprehensive statute" granting the executive "broad power to command government agencies and private parties to clean up hazardous waste sites."\textsuperscript{190}

\textsuperscript{181} 864 F. Supp. at 632.
\textsuperscript{182} 114 S. Ct. 1960 (1994).
\textsuperscript{183} Id. at 1963.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 1963-64.
\textsuperscript{190} Id. at 1964.
With this framework in place, the court then moved to an analysis of attorney’s fees as a separate conceptual creature apart from the construction of the parent statute.\(^{191}\) The Court noted that:

> Our cases establish that attorney’s fees generally are not a recoverable cost of litigation “absent explicit congressional authorization.” Recognition of the availability of attorney’s fees therefore requires a determination that “Congress intended to set aside this longstanding American rule of law.” Neither CERCLA § 107, the liabilities and defenses provision, nor § 113, which authorizes contribution claims, expressly mentions the recovery of attorney’s fees. The absence of specific reference to attorney’s fees is not dispositive if the statute otherwise evinces an intent to provide for such fees.\(^{192}\)

To determine whether Key Tronic would be entitled to its attorney’s fees as a recoverable response cost, the Court then turned to the language of the statute itself. The Court considered whether the definition of “response” in section 101(25) encompasses such fees.\(^{193}\) Focusing on whether the term “enforcement activities” contained in the definition of “response” could include attorney’s fees, the Court considered first the plain language of the statute and then the statute’s legislative history. Because the plain language did not include attorney’s fees, the majority turned quickly to the legislative history of the CERCLA and SARA enactments.

The Court noted that the 1986 SARA amendments introduced the “enforcement activities” language.\(^{194}\) Two sections of SARA expressly allow for an award of attorney’s fees: a new section authorizing citizens’ suits and an amendment to the Attorney General’s abatement action authority, permitting a person erroneously ordered to pay response costs to recover counsel fees in certain circumstances.\(^{195}\) The Court further noted that CERCLA expressly authorizes the recovery of attorney’s fees in certain employee discrimination actions.\(^{196}\)

The Court held that private parties could not recover attorney’s fees for three reasons. First, the Court reasoned that section 107’s cause of action for private parties is not explicitly set out in the statute, and because the statutory provision only impliedly authorizes a suit, attorney’s fees must be authorized with

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191. Id. at 1965.
192. Id. (quoting Runyon v. McCrary, 427 U.S. 160, 185 (1976)).
193. Id. at 1964-68.
194. Id. at 1965.
196. 114 S. Ct. at 1966; see 42 U.S.C. § 9610(c).
the clarity required by *Alyeska Pipeline Service Co. v. Wilderness Society*.\(^{197}\) The *Alyeska* decision is well-known for establishing the “American Rule” of attorney’s fees—that each party bears its own attorney’s fees unless the statute establishing a cause of action expressly provides otherwise.\(^{198}\) Application of the *Alyeska* rule thus meant that CERCLA need either specifically reference attorney’s fees or evince an intent to provide for such fees.

Second, the Court observed that Congress had included two express provisions for fee awards in the 1986 SARA amendments without including similar fee provisions in the private party contribution and cost recovery sections of the statute.\(^{199}\) “These omissions,” the Court stated, “strongly suggest a deliberate decision not to authorize such awards.”\(^{200}\) Finally, the Court reasoned that:

> [I]t would stretch the plain terms of the phrase “enforcement activities” too far to construe it as encompassing the kind of private cost recovery action at issue in this case. Though we offer no comment on the extent to which that phrase forms the basis for the Government’s recovery of attorney’s fees through § 107, the term “enforcement activity” is not sufficiently explicit to embody a private action under § 107 to recover cleanup costs.\(^{201}\)

The Court went on to conclude that certain fees paid to a lawyer might be recoverable, not as litigation-related fees barred under *Alyeska*, but as work “closely tied to the actual cleanup [that] may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B).”\(^{202}\) This would include, for example, work conducted to identify other PRPs at the site.\(^{203}\) The Court agreed with the district court that locating other PRPs served to increase the likelihood that a cleanup effort would be funded and completed and that such efforts significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. These kinds of activities are recoverable costs of response clearly distinguishable from litigation expenses.\(^{204}\)

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198. *Id.*
200. *Id.* at 1967.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
The *Key Tronic* decision sheds some light on how the Supreme Court might approach the issue of whether response costs include government oversight costs of private party action. For example, in considering whether the statute created an express or implied cause of action, the court found it significant that two of the sections of the statute enacted in 1980 did not call for the recovery of attorney's fees, while two sections contained in the 1986 SARA amendments did.\(^{205}\) The Court noted that attorney's fees issues had largely been decided by courts, with Congress placing its imprimatur on these judicial constructions by amending CERCLA in the SARA amendments to include "enforcement activities" within the definition of response.\(^{206}\) The Court concluded that Congress' failure to mention attorney's fees in the cost recovery provisions in the SARA amendments "strongly suggest[s] a deliberate decision not to authorize such awards."\(^{207}\) Based on the Court's approach in *Key Tronic*, it is reasonable to assume that the Court might find persuasive the reasoning in *Rohm & Haas* that Congress did not take the opportunity in the SARA amendments to extend the government's ability to recover oversight costs for private party-executed RI/FSs, which intent was spelled out in the 1980 statutory language, to other response actions.

More importantly, the Court expressed its unwillingness to analyze the CERCLA language allowing recovery of "all costs of response" in a vacuum. It recognized that there was a separate rule of law—the "American Rule"—governing the types of costs requested under the statute and it recognized that, where an established rule of law requires the presence of explicit statutory language to support an award of costs, this rule should be applied.\(^{208}\) This is precisely what the Third Circuit did in *Rohm & Haas*.\(^{209}\) In short, the Court did not make a simple observation, as so many lower courts have done, that the broad remedial purposes of CERCLA demand liberal construction of its provisions and then proceed to allow an award of costs. It did not make a policy judgment that allowing broad recovery of all costs by private parties, including attorney's fees, might best promote CERCLA's goal of encouraging expedient site cleanup.\(^{210}\)

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205. *Id.* at 1965-66. "As we have said, neither § 107 nor § 113 expressly calls for the recovery of attorney's fees by the prevailing party. In contrast, two SARA amendments contain explicit authority for the award of attorney's fees [42 U.S.C. §§ 9659(f), 9606(b)(2)(E)]." *Id.* at 1966.

206. *Id.* at 1966.

207. *Id.* at 1967. Justice Scalia, joined by Justices Blackmun and Thomas, noted in his dissent that this argument "would be persuasive" if the term "enforcement activities" were ambiguous; however, Justice Scalia stated that he believed the term "clearly includes the assertion of a valid private claim against another private litigant." *Id.* at 1969.

208. *Id.* at 1967.

209. 2 F.3d 1265.

Instead, the Court in *Key Tronic* analyzed the award of attorney’s fees to private party litigants in much the same way that the Third Circuit approached the award of oversight costs to EPA in *Rohm & Haas*. Both began by first considering the appropriate standard of review for the type of costs to be awarded. Both concluded that the type of costs to be awarded required explicit authorization by CERCLA, the governing statute. Both denied the costs requested because the statute did not expressly provide for them.

It is also telling to note what the Court did not do in *Key Tronic*. After looking to the language of the statute, it did not invoke the remedial purposes of CERCLA as the basis for its decision. It did not consider whether allowing private parties to recover attorney’s fees would enhance the goals of CERCLA. It did not view CERCLA as a unique statute requiring the suspension of the rules of statutory construction. Finally, it did not seek to arrive at a result that might be incongruous where the statute demanded another construction. There is, in short, nothing wrong with construing a statute, as did the court in *Rohm & Haas*, so that the government can recoup its oversight costs if it undertakes certain response action itself rather than oversee a third party conducting the same activity.

**VI. THE REAUTHORIZATION SOLUTION**

The issue of government recovery of its oversight costs of private party cleanup is ripe for legislative action or Supreme Court review. Based on DOJ’s unwillingness to pursue an appeal of *Rohm & Haas*, it is uncertain whether it will choose to appeal other adverse decisions. Congress certainly has the best opportunity to act during the reauthorization process in 1995.

Because Superfund Reauthorization failed in Congress in the 1994 session, Congress must act to reauthorize the statute in the 1995 session. A great deal of attention has focused on larger issues such as the proposed allocation process, but little has centered on issues such as whether oversight costs should be recoverable and, if so, how the statute may be redesigned to assist EPA in reducing administrative costs.

211. *See supra* notes 108-25 and accompanying discussion.
The Clinton Administration's Superfund reform bill, H.R. 228, was introduced in the House on January 4, 1995, the opening day of the 104th Congress. H.R. 228 seeks to disavow the Rohm & Haas decision and "remedy" the oversight cost issue by amending section 107(a)(4)(A) of CERCLA to make liable parties responsible for "all costs of removal or remedial action, including the costs of overseeing response actions conducted by potentially responsible parties," incurred by the United States government or a state or an Indian tribe not inconsistent with the national contingency plan. In addition, the bill would amend the definitions of "respond" and "response" in section 101(25) of CERCLA to read as follows:

The term "respond" or "response" means remove, removal, remedy, and remedial action, all such terms (including the terms "removal" and "remedial action") including enforcement activities (including attorneys' fees and expert witness fees) and oversight activities related thereto when such activities are undertaken by the President, a State or Indian Tribe.

If language like that in H.R. 228 is adopted, it will largely put to bed the oversight cost issue. The areas available to challenge would shift to procedural ones: for example, the method of the government's allocating of Superfund program costs to specific sites.

Of course, a statutory change entails a policy choice. The Clinton Administration's goal, not surprisingly, is to provide additional support to EPA in running the program. This choice may not be the best one, but it is likely to have some support. For example, one commentator has suggested that, if the government cannot recover its costs of overseeing private party cleanup activity, it will abandon its "enforcement first" policy and undertake more cleanup activities itself in order to recoup its oversight costs. This would tie up available Superfund monies. The government could be expected to make this argument in support of a statutory change providing it with clear authority to recoup all its oversight costs.

This argument, while valid, overlooks the obverse: if parties can save oversight costs by undertaking response action themselves, they have additional incentive to do so. The more private parties undertake response action, the more resources EPA has for application to other sites and activities, and the better resources are allocated. It is anecdotal that private parties can undertake site

216. Id.; see also Daily Env't Rep. (BNA) (Jan. 6, 1995).
218. Id. § 606(5).
219. Jacob, supra note 3 at 1259-60.
cleanup more efficiently than the government. For example, the General Accounting Office has concluded that EPA has historically failed to monitor or manage the costs of its contractors and that this has resulted in escalated costs at Superfund sites. Superfund literature is peppered with observations that EPA is inefficient when acting on its own, with no outside or PRP pressure to minimize costs. In practice, PRPs often agree to undertake site cleanup with the belief that they can complete site remediation themselves at a lower cost than by having EPA undertake the cleanup. It makes good sense to encourage private parties to undertake more response action. EPA might be easily persuaded to agree with this preference by statutory language directing EPA to prefer private party response action where appropriate.

There are other sound policy reasons for not imposing oversight costs on responsible parties in Superfund actions. One relates back to the central reasoning in Rohm & Haas: is it good policy to place the entire cost of a regulatory program on the backs of regulated entities? Let's face it, the Superfund program as it currently functions is inefficient, cumbersome, and expensive. Parties frequently complain that they spend significant sums on litigation, while administrative costs on EPA's part are also staggering. The Rohm & Haas decision was careful to note that administrative agencies may function more efficiently when they receive funding from general revenues rather than by taxing regulated entities with the costs of running the administrative program. In practice, EPA has no incentive to keep its operating costs down if it can recoup those costs from regulated parties.

Aside from the inefficiency built into a system where an agency is left to tax its own operational costs, the inequitable nature of the Superfund program should be taken into account. Oversight costs are not only billed to big chemical companies. They are also billed to landowners, municipalities, trucking companies and a host of other "innocent" parties who cannot escape the CERCLA liability yoke. Assuming that these parties participate in a cleanup effort by a
PRP group, the "innocent" players pay along with the rest. In this light, it hardly seems fair to tax program costs on parties who are simply unlucky.224

The court in *Rohm & Haas* probably made the best observation about oversight costs that Congress should consider: oversight costs of private party response action are the agency's review of a private party complying with a legal obligation. In no other environmental program are parties taxed the costs of administrative overhead. If Congress is going to impose sweeping liability and compliance requirements on private parties, there should be reasonable limits to the agency's recovery of those costs. Congress should seek to find and define these limits on agency action.

Clear statutory language excluding certain costs from recovery (or including them) also avoids protracted litigation. Traditionally, awards of fees and costs lead to additional litigation over the manner in which fees are calculated, apportionment between defendants, and other concerns. Even if this litigation takes place after the cleanup is completed, it depletes government funds to defend such arguments. If fees and costs are awarded, the statute should make appeals of the awards as streamlined as possible or provide for limited review. If costs are not awarded, litigation on the issue is averted altogether.

The oversight costs issue will remain a difficult one until resolved by legislative or judicial action. Until then, private parties will continue to invoke *Rohm & Haas* in an attempt to avoid or diminish the effect of EPA's bills for oversight costs of private party response action.225

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224. It is likely that some of these categories of PRPs will be given some relief in Superfund reform. See, e.g., H.R. 228, 104th Cong., 1st Sess. § 403 (1995) (listing limits on liability for certain PRPs, such as small businesses).

225. See Peter E. Hapke & Andrew N. Davis, *Negotiating EPA Consent Orders and Consent Decrees: Steering Your Client Through the Shoals*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,116 n.27 (Mar. 1994) (suggesting that parties negotiating consent decrees with EPA attempt to get EPA to compromise on the amount of oversight costs sought, to seek such costs from nonsettling PRPs, to review EPA's cost documentation for accuracy and consistency with the NCP, and to negotiate the documentation that EPA will provide the PRPs to support its oversight cost bills).