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## A Clear Statement of Recovery: Applying the NCTA Doctrine in the Determination of Whether Oversight Costs are Recoverable Under CERCLA. *U.S. v. Dico*

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## CASENOTE

**A CLEAR STATEMENT OF RECOVERY: APPLYING THE NCTA DOCTRINE IN THE DETERMINATION OF WHETHER OVERSIGHT COSTS ARE RECOVERABLE UNDER CERCLA**

*U.S. v. Dico*<sup>1</sup>

## I. INTRODUCTION

The saga of Dico Inc. (“Dico”) and its battle against the EPA over the recoverability of oversight costs under the Comprehensive Environmental Response Compensation Liability Act<sup>2</sup> (“CERCLA”) is long and complex. The story entails three appearances before the United States Court of Appeals for the Eighth Circuit, and is not without its interesting moments. It snakes through the annals of environmental and administrative law touching on issues like disposal of trichloroethylene (“TCE”),<sup>3</sup> the Superfund, *Chevron* deference, and the clear statement doctrine or *National Cable Television* (“NCTA”) doctrine; however this casenote focuses on the deployment of the clear statement doctrine in determining whether oversight costs incurred by the Environmental Protection Agency (“EPA”), in overseeing a private party cleanup of hazardous substances, should be recoverable. Because of the complexity of the case history, the author has attempted to create a succinct summation that will give the reader an idea of the range of issues touched upon by the parties, but will at the same time not draw the reader away from the principal issue.

## II. FACTS AND HOLDING

A. *The Saga Begins*

In the mid-1970s, the EPA conducted tests of the drinking water supplied to the citizens of the city of Des Moines, Iowa.<sup>4</sup> The tests revealed that the water contained TCE, leading the EPA to designate a 200-acre parcel to the southwest of Des Moines as the site of the contamination.<sup>5</sup> Dico’s industrial operation<sup>6</sup> was located on this 200-acre site.<sup>7</sup> The EPA was able to identify two possible sources or “plumes” of pollution on the 200-acre parcel, one on Dico’s property and another north of Dico’s property (the “north plume”).<sup>8</sup> In July 1986 the EPA issued an administrative order under Section 106(a)<sup>9</sup> of CERCLA that directed Dico to clean up the site.<sup>10</sup>

<sup>1</sup> 266 F.3d 864 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 2291 (2002).

<sup>2</sup> 42 U.S.C. §§ 9601-9675 (2002).

<sup>3</sup> “TCE is a chlorinated commercial solvent commonly used to degrease machinery and remove paint.” *Crofton Ventures Ltd. Partn. v. G & H Partn.*, 116 F. Supp. 2d 633, 637, n. 10 (D. Md. 2000), *aff’d in part, rev’d in part*, 258 F.3d 292 (4th Cir. 2001). TCE is suspected to cause cancer in humans and has been linked to neurological damage and even death at high exposure. *Dico, Inc. v. Diamond*, 35 F.3d 348, 350, n. 2 (8th Cir. 1994).

<sup>4</sup> *U.S. v. Dico, Inc.*, 979 F. Supp. 1255, 1257 (S.D. Iowa 1997), *vacated*, 136 F.3d 572 (8th Cir. 1998).

<sup>5</sup> *Id.* at 1257.

<sup>6</sup> Dico used TCE to degrease its industrial machinery. See *U.S. v. Dico, Inc.*, 136 F.3d 572, 575 (8th Cir. 1998).

<sup>7</sup> *Dico*, 979 F. Supp. at 1257.

<sup>8</sup> *Dico*, 35 F.3d at 349.

<sup>9</sup> Section 106(a) provides that: “In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat

On September 8, 1986, Dico submitted to the EPA "a listing of those portions of the order which it [believed were] not appropriate or could hinder the implementation" of the response actions ordered.<sup>11</sup> The EPA agreed to some of the changes proposed by Dico,<sup>12</sup> and in May 1987 Dico began construction on waste removal systems, which went into operation in December.<sup>13</sup>

### B. The Opening Shots

In July 1988 Dico petitioned the EPA for reimbursement of costs it incurred in its cleanup efforts of the north plume,<sup>14</sup> pursuant to the Superfund Amendment and Reauthorization Act of 1986 ("SARA").<sup>15</sup> In May 1992 the EPA responded with a denial, arguing that because the clean up order was effective in July 1986 and SARA did not become effective until October 1986, it did not apply to Dico.<sup>16</sup> The United States District Court for the Southern District of Iowa agreed.<sup>17</sup> However, the Eighth Circuit reversed, holding that Dico could recover under SARA.<sup>18</sup>

### C. The Administrator Strikes Back

In the next round of the battle between Dico and the EPA, the EPA got in the first shot.. In April 1995 the EPA filed an action in the United States District Court for the Southern District of Iowa seeking recovery from Dico for the response costs it incurred as a result of the TCE contamination.<sup>19</sup> This action was based on CERCLA Section 107(a), which provides strict liability for a defendant when the plaintiff can show:

- (1) that the defendant is within one of the four classes of covered persons set forth in Section 107(a);<sup>20</sup>
- (2) a release or threatened release from a facility occurred;
- (3) the plaintiff incurred response costs as a result; and
- (4) those response costs were necessary and consistent with the national contingency plan.<sup>21</sup>

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occurs shall have jurisdiction to grant such relief as . . . the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a).

<sup>10</sup> Dico was directed create a system to capture and treat contaminated groundwater, install extraction wells to collect contaminated groundwater on both sides of the Raccoon River, and to treat any water extracted such that 96 percent of the TCE was removed and then release the water. In addition, Dico was to install monitoring systems to gauge the success of these measures and assure compliance. *Dico*, 35 F.3d at 350.

<sup>11</sup> *Dico, Inc. v. Diamond*, 821 F. Supp. 562, 566 (S.D. Iowa 1993), *rev'd* 35 F.3d 348 (8th Cir. 1994).

<sup>12</sup> *Id.*

<sup>13</sup> *Dico*, 35 F.3d at 350.

<sup>14</sup> *Id.*

<sup>15</sup> SARA allows parties who have received and complied with cleanup orders to petition the President for reimbursement. 42 U.S.C. § 9606(b)(2)(A).

<sup>16</sup> *Dico*, 35 F.3d at 350.

<sup>17</sup> *See Dico*, 821 F. Supp. at 567-68.

<sup>18</sup> *Dico*, 35 F.3d at 353.

<sup>19</sup> In response Dico filed a counterclaim for reimbursement of its costs; however this came to no avail. In September of 1996 the court granted the EPA's motion to dismiss the counterclaim for failure to exhaust administrative remedies, as Dico's administrative claim for reimbursement was still pending before the Environmental Appeals Board. *Dico*, 136 F.3d at 575.

<sup>20</sup> "(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 . . . arranged for disposal . . . of hazardous substances at any facility . . . 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 . . . ." 42 U.S.C. § 9607(a).

<sup>21</sup> *Dico*, 979 F. Supp. at 1258.

The EPA filed motions for summary judgment as to both liability and response costs in December 1996.<sup>22</sup> Dico did not dispute that the EPA could show that the first two elements were satisfied; it agreed that it fell into one of the Section 107(a) classes and that it was responsible for at least part of the TCE contamination and thus, that a release had occurred.<sup>23</sup> The court also found that the third element of a CERCLA claim was met.<sup>24</sup> Dico challenged liability on two grounds, arguing that under tort principles it should be apportioned between potentially responsible parties,<sup>25</sup> and that it should not be liable for any response costs associated with the north plume.<sup>26</sup> The court found neither of these contentions convincing<sup>27</sup> and granted the government's motion as to liability.<sup>28</sup> but that was not the end.

#### D. Dico Relies on Rohm & Haas

The most interesting aspect of the Dico Saga, and the crux of this casenote, was Dico's challenge to the recovery of response costs, particularly its contention that *oversight costs*<sup>29</sup> were not recoverable under Section 107, as a matter of law.<sup>30</sup> Dico's assertion was based on a case out of the Third Circuit in which the recovery of oversight costs was contested.<sup>31</sup> In *U.S. v. Rohm & Haas Co.*,<sup>32</sup> the court held that Section 107(a) did not provide for the EPA to recover costs incurred in overseeing a private party removal of hazardous substances.<sup>33</sup>

The EPA pointed out that *Rohm & Haas* has been "somewhat of an aberrant decision."<sup>34</sup> The *Dico* Court agreed, noting that the Third Circuit departed from prior case law in its construction of the recovery provisions of CERCLA, and that many courts had not followed *Rohm & Haas*.<sup>35</sup> The

<sup>22</sup> *Id.* at 1257.

<sup>23</sup> *Id.* at 1259.

<sup>24</sup> The third element turns on establishing a causal nexus between the release and the response costs incurred, and as Dico did not dispute the incurrence of some response costs by the Government, the court concluded that the element was satisfied. *Id.*

<sup>25</sup> A "Remedial Investigation Report" prepared for the EPA in December of 1985 identified other potential sources of TCE contamination: a school, another business, a landfill, railroad tank car spills, sewage from area sewer pipes, and leachate from water treatment plant sludge disposal pits. *Id.* at 1257-58. However, no other parties were named as defendants in the CERCLA action. *Id.* at 1258.

<sup>26</sup> *Id.* at 1261.

<sup>27</sup> As to apportionment, the court first cited a Fifth Circuit case *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993), in which that court reversed a finding of liability in a Section 107(a) action holding that "pollution of a stream by two or more factories may be treated as divisible in terms of degree, and apportioned among the defendants on the basis of evidence of the respective quantities of pollution." *Id.* at 903. The court then distinguished *Dico* pointing to the absence of evidence in the record, of the respective quantities of pollution discharged by other parties, and "evidence to confirm that releases did in fact occur from other facilities." *Dico*, 979 F. Supp. at 1261. The court also drew the distinction that *Dico*, unlike *Bell Petroleum*, was not a multi-defendant case. *Id.* These distinctions led the court to conclude that Dico had failed to establish a reasonable basis for apportionment of liability. *Id.* As to Dico's contention that it should not be liable for costs incurred in response to the north plume, the court found that the statement of one of Dico's experts to the effect that only a small fraction of the TCE in the north plume came from groundwater beneath Dico's production facility, created no genuine issue of material fact regarding Dico's liability for response costs incurred as a result of the north plume of contamination. *Id.* at 1262.

<sup>28</sup> *Id.* at 1264.

<sup>29</sup> Oversight costs include "costs incurred by the EPA in overseeing activities conducted by private parties other than EPA contractors." *Dico*, 266 F.3d at 876, n. 10 (quoting *U.S. v. Dico Inc.*, No. 4-95-10289, at 2 (S.D. Iowa Mar. 28, 2000) (order granting summary judgment on response costs)).

<sup>30</sup> *Dico*, 979 F. Supp. at 1262.

<sup>31</sup> *Id.*

<sup>32</sup> 2 F.3d 1265 (3d Cir. 1993).

<sup>33</sup> *Id.* at 1278.

<sup>34</sup> *Dico*, 979 F. Supp. at 1263.

<sup>35</sup> *Id.*

court cited *Atlantic Richfield Co. v. American Airlines, Inc.*,<sup>36</sup> a Tenth Circuit decision refusing to follow *Rohm & Haas* and stating that the Third Circuit had construed Section 107(a) too broadly.<sup>37</sup> Also damning to Dico's reliance on *Rohm & Haas* was the distinction that the court was able to draw between *Rohm & Haas* and the instant case, particularly that *Rohm & Haas* involved removal action whereas *Dico* involved remedial action.<sup>38</sup> The court again looked to *Atlantic Richfield*, which had involved remedial action, and which had chided the Third Circuit for not considering the broader definition remedial action. The court stated that regardless of whether the statutory definition of "removal" included oversight costs associated with private party removal actions, government oversight "reasonably required to assure that private party remedial actions protect the public health and welfare and the environment is remedial action as defined in Section 101(24) and therefore recoverable as a response cost."<sup>39</sup>

The court also rejected Dico's contention that it was not liable for attorney's fees,<sup>40</sup> and that the EPA's method in calculating and allocating costs was arbitrary and capricious.<sup>41</sup> The EPA's motion for summary judgment on response costs was then granted.<sup>42</sup>

#### D. Back to the Eighth Circuit

Dico again appealed to the Eighth Circuit, which disposed of the District Court's decision to grant the EPA's motion for summary judgment as to liability.<sup>43</sup> The Eighth Circuit stated that the district court had "made short work" of Dico's argument that a genuine issue of material fact existed as to whether the United States could establish a causal nexus between the release of hazardous substances and incurrence of response costs.<sup>44</sup> The Eighth Circuit pointed out that although Dico had admitted that its operations could have caused contamination, the record was devoid of an admission that any such contamination led to EPA activities, and thus the incurrence of response costs.<sup>45</sup> Because, according to the Eighth Circuit, the district court took its analysis no further than Dico's admission, it had not truly reached a determination of whether there existed a genuine issue of material fact as to causation.<sup>46</sup> The Eighth Circuit, looking at the record,<sup>47</sup> determined that Dico had indeed raised a genuine issue of material fact.<sup>48</sup>

The Eighth Circuit vacated the judgment for liability entered for the EPA, and set aside the monetary judgment.<sup>49</sup> The court then stated that the determination of whether recoverable costs

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<sup>36</sup> 98 F.3d 564 (10th Cir. 1996).

<sup>37</sup> *Dico*, 979 F. Supp. at 1263.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *Atlantic Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996)).

<sup>40</sup> Dico cited *Key Tronic Corp. v. U.S.*, 511 U.S. 809 (1994) for the premise that it should be able to escape liability for the United States' attorney's fees. *Dico*, 979 F. Supp. at 1263. However, the district court pointed out that *Key Tronic* dealt with attorneys fees in a suit brought against the United States and that the Supreme Court was silent on the matter of "the Government's recovery of attorney's fees through [Section 107]...." *Id.* (quoting *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 528 n. 6 (2d Cir. 1996)).

<sup>41</sup> According to the court, under Section 107(a)(4)(A) the Government's averred costs are "conclusively presumed" to be consistent with the national contingency plan unless a showing can be made that they are not; and the district court concluded that such a showing had not been made. *Id.* at 1264.

<sup>42</sup> *Id.*

<sup>43</sup> *Dico*, 136 F.3d at 578.

<sup>44</sup> The third element of proving liability under Section 107(a). *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Dico presented evidence that despite the EPA's finding of high concentrations of TCE in groundwater below Dico's facilities, none of the EPA's "soil borings" could establish a "continuous line of contamination" from the soil to the groundwater. *Id.* at 579. Dico also challenged the method used in carrying out these borings. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

include oversight costs “is reserved for another day, and quite possibly another case.”<sup>50</sup> The court was wrong about “another case,” because Dico was not giving up.

### *E. The Third Trip to the Eighth Circuit*

On remand, in front of Judge Ronald E. Langstaff, Dico was found liable for response costs.<sup>51</sup> Judge Langstaff also granted the United States’ motion for summary judgment on the issue of the amount of costs it was entitled to recover.<sup>52</sup>

The Eighth Circuit affirmed, and as to the issue of response costs, disagreed with the Third Circuit’s analysis, holding that indirect and oversight costs are recoverable in remedial actions under Section 107(a).<sup>53</sup>

## III. LEGAL BACKGROUND

### *A. The NCTA or Clear Statement Doctrine*

The *NCTA* doctrine, or clear statement doctrine, grew out of the United States Supreme Court’s holding in *National Cable Television Ass’n, Inc. v. United States*.<sup>54</sup> The *NCTA* doctrine speaks to the issue of Congressional delegation to administrative agencies of the authority to “recover administrative costs not inuring directly to the benefit of regulated parties.”<sup>55</sup>

In *NCTA* fees assessed by the Federal Communications Commission (“FCC”) under the Independent Offices Appropriation Act (“IOAA”)<sup>56</sup> were challenged by cable television systems.<sup>57</sup> The IOAA, at the time the disputed fees were promulgated, provided in pertinent part:

It is the sense of the Congress that any work, service...benefit... license,...or similar thing of value or utility preformed, furnished, provided, granted...by any Federal agency...to or for any person (including...corporations...)...shall be self-sustaining to the full extent possible, and the head of each Federal Agency is authorized by regulation ...to prescribe therefor...such fee, charge, or price, if any, as he shall determine...to be fair and equitable taking into consideration direct and indirect costs to the Government, *value to the recipient*, public policy or interest served and other pertinent facts.<sup>58</sup>

The impetus for the IOAA, which was summed up in a House committee report, was a concern that the government was not receiving “full return” from the services that it rendered to “special beneficiaries.”<sup>59</sup> In 1964 the FCC, pursuant to the IOAA, established nominal filing fees for authorizations for radio stations, operators’ licenses, and communication common carriers.<sup>60</sup> Four

<sup>50</sup> *Id.* at 580.

<sup>51</sup> *Dico*, 266 F.3d at 868.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 878.

<sup>54</sup> 415 U.S. 336 (1974).

<sup>55</sup> *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 213 (1989).

<sup>56</sup> Originally Independent Offices Appropriation Act, Pub. L. No. 82-137, 65 Stat. 290 (1952), later recodified at 31 U.S.C. § 9701 (1983).

<sup>57</sup> See *NCTA*, 415 U.S. at 340.

<sup>58</sup> *NCTA*, 415 U.S. at 337 (quoting 65 Stat. 290) (emphasis added).

<sup>59</sup> *Id.* at 337 n. 1.

<sup>60</sup> Amendment of Subpart G of Part 1 of the Commission’s Rules Relating to the Schedule of Fees, Notice of Proposed Rulemaking, 21 F.C.C.2d 502.5 (1970).

years later the Supreme Court, in *United States v. Southwestern Cable Co.*,<sup>61</sup> held that the FCC had the power to regulate community antenna television (“CATV”)<sup>62</sup> systems.<sup>63</sup> Two years after that the FCC, following notice and comment, amended its fee schedule to impose fees upon CATVs.<sup>64</sup> Under the new fee schedule, filing fees were retained and an annual fee was set for each CATV at the rate of 30 cents for each subscriber.<sup>65</sup> The FCC reached the 30 cent figure by finding that subscription rates to CATVs had a mean of around \$5.00 per month and that a fee of 30 cents would equal about one-half of 1% of any one CATV system’s gross revenue from subscription.<sup>66</sup> According to the FCC the 30-cent fee would approximate “the value to the recipient.” as used in the IOAA.<sup>67</sup>

A trade association of CATV systems, arguing that the “fixing of such assessments” constituted the levying of taxes by an administrative agency, challenged these new fees.<sup>68</sup> The United States Court of Appeals for the Fifth Circuit approved the FCC’s new fee schedule, but the Supreme Court granted certiorari.<sup>69</sup> The Supreme Court began its analysis by addressing the dichotomy between taxes and fees.<sup>70</sup> The former, according to the Court, was a legislative function and that thus the legislature could “act arbitrarily,” disregarding benefits bestowed by the government on the taxpayer and instead focusing solely on the taxpayer’s ability to pay, e.g. income or property.<sup>71</sup> The latter were incident to voluntary actions like requests for licenses to practice law or medicine, or operate a broadcast station.<sup>72</sup> The key difference was that when a public agency charges fees, the fees are collected in return for a grant that “presumably, bestows a benefit on the applicant, not shared by other members of society.”<sup>73</sup>

The Court read the language of the IOAA narrowly, as authorizing a fee rather than a tax, to avoid the issue of Congressional delegation of taxation power to an agency. The term fees, according to the Court, connoted the granting of a benefit and the language “value to the recipient.” in the IOAA, bared this connotation.<sup>74</sup> Troubling to the Court was the language, “public policy or interest served, and other pertinent facts,” which when read literally would have carried “an agency far from its customary orbit” and put it into a revenue seeking function like a U.S. House of Representatives’ Appropriations Committee.<sup>75</sup> However, the Court sidestepped this potential landmine by finding that “value to the recipient” was the “measure of the authorized fee.” and that “public policy or interest served, and other pertinent facts” did not seem relevant in the instant case. The regulatory scheme Congress and the courts had crafted for CATVs was not built to “make entrepreneurs rich,” but rather to serve the public by making available rapid, efficient, and national, as well as worldwide, wire and radio communications service.<sup>76</sup>

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<sup>61</sup> 392 U.S. 157 (1968).

<sup>62</sup> Systems that transmit television programs via cable. *NCTA*, 415 U.S. at 338.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 340.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (quoting 23 F.C.C.2d 880; 28 F.C.C.2d 139).

<sup>68</sup> See *NCTA*, 415 U.S. at 338, 341-42.

<sup>69</sup> *Id.* at 340.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 341.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 342-43.

The Court then struck down the CATV fees<sup>77</sup> stating that while CATV operators may have received special benefits, it was not sure that the FCC's standard for imposing fees was correct.<sup>78</sup> It was not, according to the Court, sufficient for the FCC to figure the total cost to the FCC for "operating a CATV unit of supervision and then to contrive a formula that reimburses the [FCC] for that amount."<sup>79</sup> The Court believed that some of the costs of regulation had to have inured to the public and were thus not all being assessed based on "value to the recipient."<sup>80</sup>

In *Skinner v. Mid-America Pipeline Co.*, the Supreme Court clarified its *NCTA* holding.<sup>81</sup> *Skinner* involved a user fee schedule published by the Secretary of Transportation, for natural gas and hazardous liquid pipelines, pursuant to Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").<sup>82</sup> Mid-America Pipeline challenged the user fees authorized by COBRA contending that they constituted taxes levied by the Secretary of Transportation, and that such a delegation of taxing power should have to pass a greater level of scrutiny than the current non-delegation doctrine imposed.<sup>83</sup>

The Supreme Court, speaking through Justice O'Connor, first alluded to *Mistretta v. United States*,<sup>84</sup> which had recently reaffirmed the Court's "longstanding principle" that there would not be an improper delegation of legislative authority so long as Congress provided the agency standards such that a court could "ascertain whether the will of Congress has been obeyed."<sup>85</sup> Then the Court rejected Mid-America Pipeline's contention that a stricter standard should be used when scrutinizing delegation of taxing power.<sup>86</sup> Next, the Court stated that its *NCTA* holding was "not to the contrary" in not requiring a heightened standard for judicial review of delegation of authority to recover administrative costs.<sup>87</sup> In making this point, the Court stated that *NCTA* stood only for:

[T]he proposition 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 ....'<sup>88</sup>

The Court upheld the fees, finding that section 7005 explicitly reflected "Congress' intention that that total costs of administering [pipeline safety acts] be recovered through assessment of charges on those regulated" and that section 7005 provided an intelligible guideline for those assessments.<sup>89</sup>

<sup>77</sup> See *id.* at 344.

<sup>78</sup> *Id.* at 343.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 342-43.

<sup>81</sup> *Rohm & Haas*, 2 F.3d at 1273-74.

<sup>82</sup> Section 7005(a)(1) directed the Secretary to "establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." *Skinner*, 490 U.S. at 214.

<sup>83</sup> *Skinner*, 490 U.S. at 220.

<sup>84</sup> 488 U.S. 361 (1989).

<sup>85</sup> *Skinner*, 490 U.S. at 218, (quoting *Mistretta*, 488 U.S. at 379.)

<sup>86</sup> *Id.* at 222-23.

<sup>87</sup> *Id.* at 223.

<sup>88</sup> *Id.* at 224 (quoting *Fed. Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 10 (1976)).

<sup>89</sup> *Skinner*, 490 U.S. at 224.



## B. Rohm &amp; Haas

In *Rohm & Haas* the Third Circuit was asked to decide whether costs incurred by the government in oversight of a private party hazardous waste cleanup pursuant to the Resource Conservation and Recovery Act ("RCRA")<sup>90</sup> could be recovered under CERCLA Section 107(a), which provides for recovery of all costs of removal and remedial action incurred by the EPA.<sup>91</sup> This presented an issue of first impression for the Third Circuit.<sup>92</sup> In order to answer this question the court had to also address the more germane issue, for purposes of this casenote, of whether Section 107(a) contemplated the recovery of costs incurred overseeing removal action carried out by a private party.<sup>93</sup>

*Rohm & Haas* arose from the cleanup of hazardous substances from a 120-acre landfill in Bristol Township, Pennsylvania, adjacent to the Delaware River.<sup>94</sup> The Rohm and Haas Company ("R & H") owned the entire site from 1917 to 1963. In 1963, and again in 1968 and 1971, R & H sold portions of the site, finally transferring the remainder to a wholly owned subsidiary, Rohm and Haas, Delaware Valley, Inc. ("R & H- DVI").<sup>95</sup> R & H had used the site for disposal of general refuse, process wastes, and offgrade products from the company's plastics and chemical manufacturing.<sup>96</sup> In 1979, the EPA began to monitor the site.<sup>97</sup> Two years later R & H- DVI informed the EPA that 309,000 tons of waste was disposed of at the site, and that nearly 5,000 tons of the waste was hazardous as defined by CERCLA.<sup>98</sup> Investigations led to the discovery of hazardous substances at the site, as well as in the air and surrounding soil and groundwater.<sup>99</sup>

In April 1985 the EPA proposed adding the site to the National Priorities List, and in August of the next year sent R & H- DVI "a draft consent order" under Section 106 of CERCLA that required certain work to be done at the site, and provided for reimbursement of all of the EPA's response and oversight costs.<sup>100</sup> R & H- DVI responded by asking that the site be handled under RCRA rather than CERCLA; the EPA acquiesced<sup>101</sup> since the request comported with EPA's policy of handling cleanups under RCRA rather than CERCLA when both were applicable.<sup>102</sup> In February 1989, R & H- DVI and the EPA entered into an Administrative Consent Order under section 3008(h)<sup>103</sup> of RCRA.<sup>104</sup> The order provided that R & H- DVI would perform cleanup related activities on all the portions of the site, including portions it no longer owned.<sup>105</sup> However, the order

<sup>90</sup> 42 U.S.C. §§ 6901-87 (2002).

<sup>91</sup> *Rohm & Haas*, 2 F.3d at 1267.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1268.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> The purpose of the policy was to conserve Superfund funds and promote private cleanups by managing facilities under RCRA rather than CERCLA, and not to post sites on the National Priorities List, except in instances where the owner or operator was not able or not willing to take corrective action. *Id.* at n. 1, see EPA, RCRA/NPL Listing Policy, 51 Fed.Reg. 21054, 21057-59 (1986).

<sup>103</sup> 42 U.S.C. § 6928(h).

<sup>104</sup> *Rohm & Haas*, 2 F.3d at 1268.

<sup>105</sup> *Id.*

was silent as to reimbursing the EPA for costs it incurred in implementation.<sup>106</sup> R & H- DVI complied with the order and the EPA oversaw its work.<sup>107</sup>

In November 1990 the EPA brought an action, pursuant to CERCLA Section 107(a), to recover all costs it incurred in relation to the site since beginning to monitor it in 1979.<sup>108</sup> The EPA also sought declaratory judgment to declare all future costs incurred at the site recoverable.<sup>109</sup> The United States District Court for the Eastern District of Pennsylvania found that the elements for CERCLA liability<sup>110</sup> had been met, and that no defenses were applicable.<sup>111</sup> The court held R & H liable for over \$400,000 and for "any other appropriate and proper response costs shown to be due after the filing of the action and in the future."<sup>112</sup>

On appeal, respondent EPA contended that its overseeing of R & H- DVI's activities required by the order constituted a "removal" under CERCLA Section 101(23), thus making costs incurred pursuant to it recoverable under CERCLA Section 107(a).<sup>113</sup> R & H contended that the EPA could not be seeking recovery of "removal" costs because (1) overseeing a private party's removal and remedial actions did not qualify as a "removal" for the purposes of Section 107(a), and (2) assuming *arguendo* that CERCLA does provide for recovery of oversight costs, CERCLA does not provide for oversight costs associated with RCRA activities.<sup>114</sup>

The court made short work of R & H's second argument, stating that section 107(a) expressly addresses the situation in which two or more statutory schemes would be applicable.<sup>115</sup> The court stated that Section 107(a)'s opening clause, "notwithstanding any other provision or rule of law," decrees that when CERCLA and another statute are both applicable, CERCLA's liability provisions will prevail even if the language of the two statutes conflict.<sup>116</sup>

The court looked more favorably upon R & H's first argument, in which R & H contented that for the Court to find oversight costs recoverable under the *NCTA* doctrine, "there must be a clear congressional intent, reflected in the language of the statute, to impose upon a party oversight costs incurred by the EPA."<sup>117</sup> The court found that because the oversight that the EPA engaged in was meant to protect the public's interest, as opposed to the interest of the party being overseen, the costs associated with it were "of the kind discussed in *NCTA*," i.e. costs that did not inure directly to the benefit of regulated parties, but to the public.<sup>118</sup> Thus, the EPA would prevail only if "removal," as defined by CERCLA, unambiguously allowed for the EPA to recover oversight costs.<sup>119</sup>

The court first considered what was not included in the definition of "removal"<sup>120</sup> for the purposes of CERCLA.<sup>121</sup> The definition did not include any express language speaking to the issue

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1268-69.

<sup>110</sup> (1) that the defendant is within one of the four classes of covered persons set forth in section 107(a); (2) a release or threatened release from a facility occurred; (3) the plaintiff incurred response costs as a result; and (4) those response costs were necessary and consistent with the national contingency plan. *Dico*, 979 F. Supp. at 1258.

<sup>111</sup> *Rohm & Haas*, 2 F.3d at 1269.

<sup>112</sup> *U.S. v. Rohm & Haas*, 790 F. Supp. 1255, 1265 (E.D. Pa. 1992), *rev'd*, 2 F.3d 1265 (3d Cir. 1993).

<sup>113</sup> *Rohm & Haas*, 2 F.3d at 1272.

<sup>114</sup> *Id.*

<sup>115</sup> *Sec id.* at 1274.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1273.

<sup>118</sup> *Id.* (quoting *Skinner*, 490 U.S. at 224).

<sup>119</sup> *Rohm & Haas*, 2 F.3d at 1274.

<sup>120</sup> "Removal" is defined in CERCLA Section 101(23) as "... the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary 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

of oversight of action taken by and paid for by private parties.<sup>122</sup> The EPA had argued that “such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances”<sup>123</sup> could be read as a clear statement of the intent of Congress to allow recovery of oversight costs.<sup>124</sup> The court responded, stating that it was as plausible to read the language as addressing only the actual monitoring of a release or threat of release, as to read it as meaning the oversight of private party clean-up activities.<sup>125</sup> The former reading was consistent with an appreciation that the definition distinguished at all stages<sup>126</sup> between actions taken to determine the extent of the risk created by a release or threatened release, and actions taken to appraise the performance of others.<sup>127</sup> The court felt that the more linguistically plausible reading of the language would be the one that embraced this distinction, and that its, and not the EPA’s, embraced the distinction.<sup>128</sup>

The omission of language expressly speaking to recoverability loomed large in the eyes of the court.<sup>129</sup> The court noted that CERCLA provides two basic methods of clean up; a Section 104 cleanup conducted by the government, which could seek reimbursement, and a Section 106 cleanup in which the EPA could use administrative orders to force private parties to clean up hazardous substances at their own expense.<sup>130</sup> The latter method was similar to that already in place under Section 7003<sup>131</sup> of RCRA.<sup>132</sup> According to the Court, neither RCRA nor any environmental statute predating CERCLA, contained provisions providing for recovery of monitoring or oversight costs incurred by the EPA.<sup>133</sup> Moreover, there existed the “established prior practice” of financing oversight from appropriated funds.<sup>134</sup> Thus, if CERCLA really did authorize the EPA to recover costs incurred in overseeing private party cleanup activity under RCRA or CERCLA, it would represent a “major policy change.”<sup>135</sup> It followed that the EPA would not likely have announced such a major change solely by including “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances” in CERCLA’s definition of removal.<sup>136</sup>

The court then turned its focus from what Congress had omitted to what it had included.<sup>137</sup> The court focused on CERCLA Sections 104 and 111 in this part of its analysis.<sup>138</sup> The primary

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substances, the disposal of removed material, or 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. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A § 5121 *et seq.*].”

<sup>121</sup> *Rohm & Haas*, 2 F.3d at 1275.

<sup>122</sup> *Id.*

<sup>123</sup> *Supra* n. 122 (third category of “remove”).

<sup>124</sup> *Rohm & Haas*, 2 F.3d at 1275.

<sup>125</sup> *Id.* at 1275-76.

<sup>126</sup> According to the court the stages were: assessment, response formulation, and execution. *Id.* at 1276.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *Id.*

<sup>131</sup> 42 U.S.C. § 6973.

<sup>132</sup> *Rohm & Haas*, 2 F.3d at 1276.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1236-37.

<sup>136</sup> *Id.* at 1277 (quoting 42 U.S.C. § 9601(23)).

<sup>137</sup> *Rohm & Haas*, 2 F.3d at 1277.

<sup>138</sup> *Id.* at 1277-78.

purpose of Section 104(a), as stated above, is to provide for EPA removal and remedial action; however it also permits the EPA to allow responsible parties to carry out such action provided that the EPA finds that “such action will be done properly and promptly.”<sup>139</sup> Section 104(a) also provides that:

No remedial investigation or feasibility study (RI/FS) [by a responsible party] shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President 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 the President under, or in connection with, the oversight contract or arrangement.<sup>140</sup>

According to the Court an RI/FS was an “investigation” for the purposes of Section 104(b)<sup>141</sup> and “clearly a removal action.”<sup>142</sup> The court concluded that if oversight of a private party cleanup by the EPA was a removal action, then the above provision from Section 104(a) would be superfluous because Section 107(a) would authorize the recovery of EPA oversight costs.<sup>143</sup> Moreover, the Court noted that Section 104(a) authorizes a number of removal and remedial activities, and only discussed oversight and reimbursement for oversight in the context of RI/FS’s.<sup>144</sup> Thus, if Congress had intended to provide for reimbursement for oversight in general, it would have included a manifestation of this intent in Section 104(a).<sup>145</sup>

What the court called “equally strong evidence of Congress’s intent” regarding oversight costs appears in Section 111 of CERCLA.<sup>146</sup> Section 111 deals with payments from the Superfund, and sets out six categories of payments that can be made from the fund.<sup>147</sup> The first is “[p]ayment of governmental response costs incurred pursuant to [Section 104].”<sup>148</sup> “Response” costs include “removal” and “remedial” costs.<sup>149</sup> Section 111(a)(4) sets out the fourth category of authorized payments, which is “[p]ayment of costs specified under subsection (c) of this section.”<sup>150</sup> Subsection (c) of Section 111 lists items of costs that can be “funded from the Superfund.”<sup>151</sup> Subsection (c)(8) lists as appropriate Superfund expenses:

The costs of contracts ... entered into under [Section 104(a)(1)] of this title to oversee and review the conduct of [RI/FS’s] 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.<sup>152</sup>

<sup>139</sup> *Id.* at 1277 (quoting 42 U.S.C. § 9604(a)(1)(B)).

<sup>140</sup> 42 U.S.C. § 9604(a)(1)(B) (1988).

<sup>141</sup> Section 104(b) addresses “investigations, monitoring, coordination” and other like activities by the President. 42 U.S.C. § 9604(b).

<sup>142</sup> *Rohm & Haas*, 2 F.3d at 1277.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (quoting 42 U.S.C. § 9611(a)(1)).

<sup>149</sup> See 42 U.S.C. § 9601(25).

<sup>150</sup> *Rohm & Haas*, 2 F.3d at 1277 (quoting 42 U.S.C. § 9611(a)(4)).

<sup>151</sup> *Id.*

<sup>152</sup> 42 U.S.C. § 9611(c)(8).

The court felt that if the cost of overseeing removal and remedial activities was in itself a removal cost it would be covered under Section 111(a)(1), authorizing the EPA to use Superfund resources for "payment of governmental response costs," making Section 111(c)(8), dealing specifically with RI/FS costs, superfluous.<sup>153</sup>

Finally, the court stated that the EPA's role in overseeing private party cleanup is much removed from "any sort of literal government removal."<sup>154</sup> Section 107's recovery provisions seemed to have been drafted with an eye toward Section 104(a) EPA cleanups, and there was "no clear indication" in Sections 104, 106, 107 or the definition of removal, that EPA oversight costs, pursuant to Section 106 or RCRA Section 7003 private party cleanups, were intended to be recoverable as removal costs.<sup>155</sup> Accordingly the court found that the "clear indication mandated by" *NCTA* was not present and held that the EPA was not entitled to recovery of the oversight costs sought.<sup>156</sup>

### C. *Rohm & Haas Not Followed*

Prior to *Rohm & Haas* the only case addressing the issue of recoverability of oversight costs incurred by the EPA pursuant to a private party cleanup was *New York v. Shore Realty Corp.*<sup>157</sup> The *Shore Realty* court had, in finding an owner liable for response costs under Section 107, stated that the EPA's cost in "assessing the conditions of the site and supervising the removal" of hazardous substances fell well within CERCLA's definition of response costs.<sup>158</sup>

Three years after *Rohm & Haas* the Tenth Circuit got its chance to weigh in on the issue of recoverability of oversight costs.<sup>159</sup> In *Atlantic Richfield Co. v. American Airlines, Inc.*, the Tenth Circuit addressed the recoverability issue in the realm of a contribution action brought under CERCLA Section 113(f)<sup>160</sup> by a company that had incurred response costs as part of a private party cleanup overseen by the EPA.<sup>161</sup> Atlantic Richfield Co. ("ARCO") had negotiated a consent decree with the EPA under which ARCO would undertake all remedial action in cleaning up a 6.2 acre site near Tulsa, known as the Glenn Wynn site.<sup>162</sup> The consent decree, which was filed in May 1989, also provided that ARCO would pay any EPA response costs associated with the cleanup of the site, and future oversight costs that the EPA incurred in monitoring ARCO's compliance with the consent decree.<sup>163</sup> The cleanup was completed by June 1993, after which ARCO brought an action for contribution against other parties whose waste oil had been deposited at the Glenn Wynn site.<sup>164</sup> The United States District Court for the Northern District of Oklahoma held that ARCO was entitled to contribution for the money it must disgorge to the EPA for oversight of the cleanup, and for attorney's fees incurred in negotiating the consent order.<sup>165</sup>

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<sup>153</sup> *Rohm & Haas*, 2 F.3d at 1278 (quoting 42 U.S.C. § 9611(a)(4)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> 759 F.2d 1032 (2d Cir. 1985).

<sup>158</sup> *Id.* at 1043.

<sup>159</sup> See *Atlantic Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 566 (10th Cir. 1996).

<sup>160</sup> 42 U.S.C. § 9613(f)(1) provides in part that "Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action [under section [106] of this title or under section [107(a)] of this title."

<sup>161</sup> *Atlantic Richfield Co.*, 98 F.3d at 566.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 565.

The Appellants relied on *Rohm & Haas* to argue that ARCO should not be entitled to oversight costs, because the costs of EPA oversight were not costs appellants could be held liable for under Section 107(a).<sup>166</sup> The Tenth Circuit was not persuaded.<sup>167</sup> The court pointed out that *Rohm & Haas* addressed *removal* action as defined in Section 101(23) not *remedial* action as defined in Section 101(24), and that the EPA was only seeking the costs of overseeing remedial action.<sup>168</sup> The Court forewent deciding whether the application of the *NCTA* doctrine to CERCLA was correct and stated the even assuming *arguendo* that it was, the definitions of “remedial action” in Section 101(24)<sup>169</sup> and “response” in Section 101(25)<sup>170</sup> comported with the doctrine.<sup>171</sup> The court believed the definitions satisfied the “clear and explicit indication of Congressional intent” required under the *NCTA* doctrine.<sup>172</sup>

First, the court honed in on the term “monitoring” in Section 101(24), and as it was not defined elsewhere in CERCLA, the court constructed it in accordance with its “ordinary and natural meaning.”<sup>173</sup> According to the court, which employed both dictionary and legal thesaurus,<sup>174</sup> the verb monitor was synonymous with “audit, check, control, inspect, investigate, observe, *oversee*, regulate, review, scrutinize, study, test and watch.”<sup>175</sup> Reading the statutory language in Section 101(24) in its statutory context, the court concluded that the “monitoring” in that section necessarily included government oversight of private party remedial action.<sup>176</sup> Thus, since Section 107(a)(4)(A) provides that responsible parties are liable for all *removal* or *remedial actions*, and oversight is monitoring, and monitoring is included in the definition of *remedial*, the EPA had to be able to recover oversight costs.<sup>177</sup>

Next, the court turned to Section 101(25), which states that “remedial action” includes “enforcement of activities related thereto.”<sup>178</sup> According to the court, the plain meaning of that phrase would not be distorted by concluding that monitoring or oversight is an enforcement activity.<sup>179</sup>

Finally, the court addressed the Appellant’s contention that the Section 104(a) provision that permits a responsible party to conduct an RI/FS only after agreeing to reimburse the Superfund for the costs of EPA oversight shows that other oversight costs cannot be recovered;<sup>180</sup> an issue considered by the Third Circuit in *Rohm & Haas*.<sup>181</sup> The court stated that the existence of such a provision was insufficient to show Congressional intent to preclude the recovery of oversight costs associated with private party cleanups.<sup>182</sup>

<sup>166</sup> *Id.* at 567.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.* at 568.

<sup>169</sup> 42 U.S.C. § 9601(24) defines “remedial action” in pertinent part as “those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release . . . any monitoring reasonably required to assure that such actions protect the public health . . . .”

<sup>170</sup> 42 U.S.C. § 9601(25) defines “response” to include “remove, removal, remedy, and remedial action; all such terms (including the terms “removal” and “remedial action”) include enforcement activities related thereto.”

<sup>171</sup> *Atlantic Richfield Co.*, 98 F.3d at 569.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* (citing Webster’s Third New International Dictionary 1460 (Phillip B. Gove, ed.1993); William C. Burton, Legal Thesaurus 337).

<sup>175</sup> *Atlantic Richfield Co.*, 98 F.3d at 569.

<sup>176</sup> *Id.*

<sup>177</sup> *See id.*

<sup>178</sup> *Id.* at 570.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See Rohm & Haas*, 2 F.3d at 1277.

<sup>182</sup> *Atlantic Richfield Co.*, 98 F.3d at 570.

The court affirmed the lower court's holding on the issue of recoverability of response costs.<sup>183</sup> Since monitoring or oversight of private party remedial action was remedial action under Section 101(24), responsible parties were liable for the costs of oversight under Section 107(a)(4)(A); entitling ARCO to contribution for payment of such oversight costs under Section 113(f).<sup>184</sup>

#### IV. INSTANT DECISION

The third time in front of the Eighth Circuit was not a charm for Dico. Dico contended that based on *Rohm & Haas*, the court should apply the *NCTA* doctrine in determining whether Section 107(a) authorized the recovery of oversight costs, and that the clear statement mandated by the doctrine was lacking.<sup>185</sup> The Eighth Circuit, like the district court, distinguished *Rohm & Haas* from the instant case on the basis that the latter concerned recovery of costs for removal, not remedial activities.<sup>186</sup> This distinction was paramount in the court's decision not to adopt the reasoning of *Rohm & Haas*.<sup>187</sup> The court pointed out that a dichotomy exists between the nature of the fees to be imposed in *NCTA* and the nature of CERCLA.<sup>188</sup> CERCLA, the court stressed, was remedial in nature and specifically designed to put the cost of clean-up on the parties that were responsible for introducing hazardous substances into the environment.<sup>189</sup> The statutes allowing the EPA to recover costs were not like user fees, but were designed to force responsible parties to pay.<sup>190</sup> To buttress its belief that applying the clear statement doctrine would be inappropriate, the court relied on *U.S. v. Lowe*,<sup>191</sup> in which the Fifth Circuit refused to apply the *NCTA* doctrine in the context of CERCLA.<sup>192</sup> The court then declined to adopt the "Third Circuit's narrow approach."<sup>193</sup>

The court then considered the issue of recovery of oversight costs under the *NCTA* doctrine.<sup>194</sup> The court adopted the reasoning of *Atlantic Richfield* wholesale, stating that remedial action was more broadly defined than removal.<sup>195</sup> Like the Tenth Circuit in *Atlantic Richfield*, the court cited the "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment" language from the definition of remedial.<sup>196</sup> The court agreed that this language provided the clear statement of Congressional intent required by the *NCTA* doctrine,<sup>197</sup> leading it to conclude that even under the *NCTA* doctrine, oversight costs were recoverable under Section 107(a).<sup>198</sup>

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<sup>183</sup> *Id.* at 572.

<sup>184</sup> *Id.* at 571.

<sup>185</sup> *Dico*, 266 F.3d at 877.

<sup>186</sup> *Id.*

<sup>187</sup> *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> 118 F.3d 399 (5th Cir. 1997). The *Lowe* Court found that an *NCTA* analysis was "inappropriate in the CERCLA context because CERCLA is a remedial statute; it does not impose user charges on a regulated industry, and therefore the clear statement doctrine does not apply to cost-restitution awards in CERCLA cases." *Dico*, 266 F.3d at 877. (citing *Lowe*, 118 F.3d at 400-403).

<sup>192</sup> *Dico*, 266 F.3d at 877.

<sup>193</sup> *Id.* at 878.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (quoting 42 U.S.C. § 9601(24)).

<sup>197</sup> *Dico*, 266 F.3d at 878.

<sup>198</sup> *Id.*

## V. COMMENT

A. *The Third Circuit's Decision to Apply the NCTA Doctrine*

The Tenth Circuit, in *Atlantic Richfield*, found that CERCLA response costs differed greatly from user fees or taxes, pointing out that they are not levied against the "innocent member of a regulated" industry to pay the EPA's administrative costs, but rather to pay for damage caused.<sup>199</sup> This seems a narrow reading of the Supreme Court's language in *Skinner*<sup>200</sup> regarding administrative costs. The hallmarks of such costs, according to the Supreme Court, are that the costs do not inure "directly to the benefit of regulated parties," and that the costs arise as an "additional financial burden."<sup>201</sup> These two hallmarks are apparent in the guise of EPA oversight costs. In addition there is a policy concern, touched on in *Rohm & Haas*, that cries out for the application of the *NCTA* doctrine.

While it is true that oversight of a removal and or remedial action will likely result in the benefit to the regulated party, a significant portion of the benefit from this activity inures to the benefit of others. The Supreme Court did not state in *Skinner* or *NCTA* that just because the regulated party or industry inures some benefit, that agencies are free to recover all of their oversight costs from the regulated parties. The Court said the opposite. In *NCTA* the Court said of the FCC that "[t]here is no doubt that the main function of the [FCC] is to safeguard the public interest in the broadcasting activities of members of the industry."<sup>202</sup> According to the Court, allowing the FCC to assess, against those in the industry, amounts sufficient to recoup FCC costs of oversight would mean that broadcasters would be paying not only for services benefiting them, but for "the protective services rendered to the public by the [FCC]."<sup>203</sup> So, even if part of the oversight goes to benefit the regulated party, the oversight costs must still comply with the *NCTA* doctrine as long as a portion of the benefits are not inuring directly to the benefit of the regulated party. Thus, the first hallmark of the administrative costs addressed in *NCTA* and *Skinner* is apparent in EPA oversight costs.

The EPA, like the FCC, exists to safeguard the public interest. However, its scope is broader than that of the FCC. Where the FCC is, in the words of the Court, safeguarding "public interest in the broadcasting activities of members of the industry,"<sup>204</sup> the EPA is safeguarding public interest with regard to any industry or business that might fall under the auspices of environmental statutes like RCRA or CERCLA. This broader scope should make a court even more leery of allowing the EPA to recover oversight costs because the benefits of oversight will inure to so many that are not being regulated. For example, future purchasers of once polluted realty would benefit by being assured of taking title to property that is free of hazardous substances. Those who enjoy the outdoors would be able to do so with less risk of encountering improperly disposed of hazardous substances. Those living around sites that are polluted with hazardous substances would benefit by having cleaner water to drink or air to breathe. With so many, beyond just the party being overseen, receiving benefit from the clean-up, it would seem that the party being overseen is being forced to

<sup>199</sup> *Atlantic Richfield Co.*, 98 F.3d at 568.

<sup>200</sup> "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." *Skinner*, 490 U.S. at 224.

<sup>201</sup> *Id.*

<sup>202</sup> *NCTA*, 415 U.S. at 341.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*



disgorge what looks like an environmental tax. This disgorgement is the “additional financial burden”<sup>205</sup> that the Court spoke of in *Skinner*.

A strong policy justification for application of the *NCTA* doctrine exists in addition to the justification that the benefits of oversight costs inure to parties not being directly overseen. The Third Circuit pointed out that the budgeting and appropriations scheme for federal government agencies creates an incentive for those agencies to act efficiently.<sup>206</sup> Agencies must justify their methods and existence to Congress; the controller of the purse strings. However, when an agency is allowed to assess costs to regulated parties for doing its administrative duty, the Congressional check on its power, i.e. its “accountability,”<sup>207</sup> is lost. In a nation like the United States, which has a plethora of administrative agencies, it seems that the populace would be well served by maintaining this accountability. Agencies should not be given the power to fund their oversight activities with assessments from regulated parties without a clear statement of Congressional intent to allow them to do so.

The Third Circuit was correct in recognizing that the benefits of oversight costs inure not just to those being regulated, and in recognizing the danger inherent in not requiring a clear statement of Congressional intent before allowing the EPA to assess such costs.

### *B. The NCTA Doctrine's Appropriateness in a Remedial Action Setting*

The next issue to address is whether the rationale employed by the Third Circuit to justify its use of the *NCTA* doctrine in *Rohm & Haas* holds true when dealing with the oversight of remedial action, like in *Dico*. It does.

The policy justification is just as strong in the instance of oversight of a removal action as in the instance of oversight of remedial action. In either, the danger of lack of agency accountability is the same, since in either the agency has the same power to assess costs. Further, oversight of remedial action also seems to fall under the guise of costs for regulatory benefits not inuring directly to the benefit regulated parties. The definition of “remedial action” includes “diversion, destruction, segregation of reactive wastes,” as well as “any monitoring reasonably required to assure that such actions protect the public health . . . .”<sup>208</sup> It seems likely that Congress meant for “remedial action” to inure to the benefit of the public, and it follows that the oversight of such activity, i.e. making sure it is done properly, must also inure to the benefit of the public. Thus, it seems that in both the instance of oversight of removal action, and oversight of remedial action, benefits inure to those not being regulated, making the *NCTA* doctrine appropriate.

### *C. Reconciling The Rohm & Haas Approach with the Dico Approach*

The Tenth Circuit concluded that, even if it had applied the *NCTA* doctrine, a clear statement of Congressional intent could be found in the term “monitoring” that is used in the definition of “remedial action.”<sup>209</sup> This is not an untenable position. The Tenth Circuit, in interpreting the term “monitoring,” was compelled to interpret it in accordance with its ordinary and natural meaning, as it

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<sup>205</sup> *Skinner*, 490 U.S. at 224.

<sup>206</sup> See *Rohm & Haas*, 2 F.3d at 1274.

<sup>207</sup> *Id.*

<sup>208</sup> 42 U.S.C. § 9601(24).

<sup>209</sup> See *Atlantic Richfield Co.*, 98 F.3d at 569.

was not defined elsewhere in CERCLA.<sup>210</sup> The term “monitoring” appears in the second sentence of the definition, which reads:

The term [remedial action] 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.<sup>211</sup>

The Tenth Circuit concluded that “monitoring” was synonymous with the term “oversee.”<sup>212</sup> “Monitoring” clearly applies to the phrase “assure that such actions,” and “such actions” refers to phrase “cleanup of released hazardous substances.” The Tenth Circuit’s interpretation of the term “monitoring” was not unreasonable, given its relation to the “cleanup of released hazardous substances.”

Although the use of the term “monitoring” in the definition of remedial action played a large role in the Tenth and Eighth Circuits’ determination that a clear statement of Congressional intent was present, the term “monitor” also appears in the definition of “removal.” However, the Third Circuit found that the definition of “removal” did not contain a clear statement of Congressional intent regarding recovery of oversight costs.<sup>213</sup> The definition of “removal” is not as well drafted as that of “remedial action.” An examination of the phrase, in the definition of “removal,” that contains the term “monitor,” reveals the poor drafting. The phrase reads: “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 . . . .”<sup>214</sup> It is difficult to determine from this language whether “monitor” should be read as applying only to “the release or threat of release of hazardous substances,” to “the disposal of removed material,” or to both. In the face of this ambiguity it is difficult to say that the Third Circuit erred in finding that “monitor,” addressed only the actual monitoring of a release or threat of release. Moreover, construction against the drafter should make Congress act more carefully in drafting future statutory definitions.

The difference between the positions taken by the Third Circuit, and the Eighth and Tenth Circuits can also be attributed to the fact that a line of reasoning followed by the Third Circuit, in determining that clear congressional intent was lacking, is inapplicable to situations involving “remedial action.” The Third Circuit’s conclusion that because Section 104(a) permits a private party to conduct an RI/FS only upon the party’s agreeing to reimburse the Superfund for Government oversight costs of the RI/FS Congress did not intend that other oversight costs be recoverable, does not apply to situations involving “remedial action.” The reasoning is limited because an RI/FS is a “removal” action.<sup>215</sup> An interpreter looking for a clear statement of congressional intent, in the definition of “remedial action” is restricted to the plain language of the definition. The *Atlantic Richfield* and *Dico* courts interpreted “remedial action” in this fashion, and

<sup>210</sup> *Id*

<sup>211</sup> 42 U.S.C. § 9601(24).

<sup>212</sup> *Atlantic Richfield Co.*, 98 F.3d at 569.

<sup>213</sup> *Rohm & Haas*, 2 F.3d at 1277.

<sup>214</sup> 42 U.S.C. § 9601(23).

<sup>215</sup> *Rohm & Haas*, 2 F.3d at 1277

one can see how, based on the plain language of the definition, they arrived at the conclusions they did.

## VI. CONCLUSION

Regardless of whether the Third Circuit reached the correct result in holding that oversight costs of removal actions are not recoverable, its decision to use the *NCTA* doctrine was the right one. Conversely, the Tenth and Eighth's Circuit's decisions to not apply the doctrine in *Atlantic Richfield* and *Dico* were erroneous; however, both courts reached the correct result. Both were correct in finding that the definition of "remedial action" contained the clear statement of Congressional intent necessary to delegate to the EPA the authority to recover costs incurred in overseeing a remedial action.

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