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The Government Always Wins: The Government can now Recover Certain Oversight Costs under CERCLA Sec. 107. *United States v. E.I. DuPont de Nemours and Company, Inc.*

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NOTES

**THE GOVERNMENT ALWAYS WINS: THE GOVERNMENT
CAN NOW RECOVER CERTAIN OVERSIGHT COSTS UNDER
CERCLA § 107**

*United States v. E.I. DuPont De Nemours and Company, Inc.*¹

I. INTRODUCTION

Hazardous waste sites pose numerous problems to humans and the environment if they are not decontaminated. One example is the *Exxon Valdez* oil spill in Prince William Sound, Alaska in 1989.² That oil spill, and others like it, put in danger “ten million migratory shore birds and waterfowl, hundreds of sea otters, dozens of other species, such as harbor porpoises and sea lions, and several varieties of whales.”³ Another infamous example of a hazardous waste site⁴ is Love Canal, “where hazardous chemicals were poured into a ditch that was covered and over which was built a school and a number of homes.”⁵ As a result of disasters such as these, Congress has enacted many statutes over the years to enable the government, primarily through the Environmental Protection Agency (“EPA”), to perform hazardous waste cleanup or provide assistance to private parties in hazardous waste cleanup.⁶ In return for its assistance, the government has generally been allowed to recover some of

¹ 432 F.3d 161 (3d Cir. 2005) (“*DuPont II*”).

² U.S. ENVIRONMENTAL PROTECTION AGENCY, EXXON VALDEZ, <http://www.epa.gov/oilspill/exxon.htm> (last visited Apr. 19, 2006). The *Exxon Valdez* oil spill was the largest in U.S. history and resulted in more than eleven million gallons of crude oil in Prince William Sound, Alaska. *Id.*

³ *Id.*

⁴ “[O]ne by-product of American industrial development is an unfortunate legacy of environmental contamination, involving hundreds of hazardous chemical substances disposed of at thousands of sites across the United States. Susan M. Cooke, *The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation*, § 12.01[1] (1993). Experience suggests that it will take decades of effort and billions of dollars to clean up the nation’s hazardous waste sites to levels that are deemed acceptable by governmental regulators and the public.” *Id.*

⁵ *Id.* at § 12.02[2]. As a result of the toxic wastes buried under the school and homes, resident suffered from “liver abnormalities, skin sores, rectal bleeding, birth defects, miscarriages, and epilepsy.” *Id.*

⁶ See *infra* note 25 for examples of such statutes.

its costs incurred during the cleanup process under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). However, until *DuPont II* was decided, the government had not been allowed to recover oversight costs relating to a removal action. As the saying goes, the government always wins. Thus, in the Third Circuit at least, the government may now recover its oversight costs relating to a removal action.

II. FACTS AND HOLDING

Appellees E.I. DuPont de Nemours and Company (“DuPont”)⁷ and Ciba Specialty Chemicals Corporation have owned and operated the DuPont NewPort Superfund Site⁸ at various times over the years.⁹ In the 1980’s the site was identified as a “potential threat to human health.”¹⁰ As a result, in February 1990, the site was placed on CERCLA’s National Priorities List (“NPL”).¹¹ In an attempt to remedy the situation, the EPA “developed a remedial action plan . . . and issued a unilateral administrative order directing DuPont to remediate the site in the manner set forth in the remedial action plan.”¹² Following the EPA order, DuPont developed a “private party cleanup action.”¹³ This action consisted of two stages: first, the “removal action,” developing project specifications and

⁷ The two appellees will be referred to together as DuPont.

⁸ The DuPont NewPort Superfund Site is an industrial site in Delaware. *DuPont II*, 432 F.3d at 163. It is approximately 120 acres in size. *United States v. E.I. DuPont De Nemours and Co.*, 2004 WL 1812704 at *1 (D. Del. Aug. 5, 2004) (“*DuPont I*”). The site includes “a paint pigment plant, a former chromium dioxide plant, . . . two unlined, industrial landfills, . . . wetlands adjacent to each landfill, a baseball field . . . , and a portion of the Christina River.” *Id.*

⁹ *DuPont II*, 432 F.3d at 163.

¹⁰ *Id.* The site was “heavily contaminated with various hazardous substances, including heavy metals such as arsenic, barium, cadmium, lead and zinc, as well as volatile organic compounds including tetrachloroethene and trichloroethene.” *DuPont I*, 2004 WL 1812704 at *2.

¹¹ *DuPont II*, 432 F.3d at 163. The NPL was first announced in 1983 and is “updated regularly based on the evaluation of both new sites and the progress of cleanup at sites already on the NPL.” University of Washington, *The History of Superfund*, <http://depts.washington.edu/sfund/history.html> (last visited Apr. 19, 2006).

¹² *DuPont II*, 432 F.3d at 163. The EPA issued the unilateral administrative order because the government and DuPont could not come to agreement on the implementation. *Id.* The EPA also had the authority for oversight and approval. *Id.* The plan included “excavating and dredging contaminated soil, monitoring contaminated groundwater, and constructing treatment facilities.” *Id.*

¹³ *Id.*

schedules; and second, the “remedial action,” which was the cleanup itself.¹⁴ DuPont finished the cleanup project both under budget and ahead of schedule, and the EPA approved the action.¹⁵ The EPA supervised the two stages of cleanup,¹⁶ incurring \$1,394,796.94 in oversight costs during the cleanup process.¹⁷

The United States brought suit under CERCLA to recover the oversight costs from DuPont.¹⁸ The Court of Appeals for the Third Circuit held that CERCLA provides for recovery of “costs incurred in the course of supervising a hazardous waste cleanup conducted by responsible private parties.”¹⁹ This decision overruled *United States v. Rohm & Haas Co.* (“*Rohm & Haas*”),²⁰ which barred “recovery of oversight costs of a removal action.”²¹

III. LEGAL BACKGROUND

A. CERCLA

Congress enacted CERCLA²² on December 11, 1980²³ and President Jimmy Carter signed it into law.²⁴ For two decades prior to the enactment

¹⁴ *Id.* The cleanup work included “soil excavation, remedial ‘cap’ construction, groundwater barrier installation, groundwater monitoring and treatment, and wetland restoration.” *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Oversight in the removal stage included “reviewing and approving project specifications, treatment technologies, testing and sampling methods, and construction schedules.” *Id.* Oversight in the remedial stage included “monitoring, reviewing, and approving design plan implementation, construction schedules, health and safety issues, field work, and field change requests.” *Id.*

¹⁷ *Id.* The oversight costs for the removal stage were \$746,279.77, and the oversight costs for the remedial stage were \$648,517.17. *Id.* DuPont spent more than \$35,000,000 during the cleanup. *Id.* at 177. The EPA also incurred past costs, such as travel and payroll, of \$499,803.81. *DuPont I*, 2004 WL 1812704 at *4. The parties settled this amount. *Id.*

¹⁸ *DuPont II*, 432 F.3d at 162.

¹⁹ *Id.*

²⁰ 2 F.3d 1265 (3rd Cir., 1993).

²¹ *DuPont II*, 432 F.3d at 163.

²² CERCLA is codified at 42 U.S.C. §§ 9601-9675. Congress enacted CERCLA “[i]n response to widespread public concern about the health and environmental threats posed by uncontrolled, abandoned hazardous waste sites, and the perceived inadequacy of prior environmental laws.” Cooke, *supra* note 4, at § 12.02[1].

²³ U.S. ENVIRONMENTAL PROTECTION AGENCY, CERCLA OVERVIEW, <http://www.epa.gov/superfund/action/law/cercla.htm> (last visited Apr. 19, 2006).

²⁴ University of Washington, The History of Superfund,

of CERCLA, Congress had passed “strong environmental legislation in recognition of the danger to human health and the environment posed by a host of environmental pollutants.”²⁵ However, these laws were inadequate to handle the “massive” problems.²⁶ Therefore, Congress enacted CERCLA as “an Act to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”²⁷ Congress believed “those responsible for problems caused by the disposal of chemical poisons must bear the costs and responsibility for remedying the harmful conditions they created.”²⁸ CERCLA gives the federal government authority to address “releases or threatened releases of hazardous substances that may endanger public health or the environment.”²⁹

Courts have had trouble interpreting CERCLA because of its “poor quality of . . . draftsmanship and its unhelpful legislative history.”³⁰ One court stated, “the ‘final version of the Act was conceived by an ad hoc committee of Senators who finished a last minute compromise which enabled the Act to pass . . . [therefore,] the statute was hastily and inadequately drafted.’”³¹ As a result, courts tend to interpret CERCLA “broadly and liberally in order to effectuate its remedial purpose with respect to hazardous waste cleanup and liability.”³² Courts have also noted that “Congress intended to address the problem of hazardous waste contamination in general rather than merely specific categories of

<http://depts.washington.edu/sfund/history.html> (last visited Apr. 19, 2006).

²⁵ H.R. REP. NO. 96-1016(I), at 17 (1980). One of these statutes was the Resource Conservation and Recovery Act, which provides for “the regulation and control of the generation, treatment and disposal of hazardous wastes.” H.R. REP. NO. 96-1016(II), at 3. Other statutes include the Clean Water Act, the Safe Drinking Water Act, the Toxic Substances Control Act, and the Hazardous Materials Transportation Act. Cooke *supra* note 4, at § 12.01[1].

²⁶ H.R. REP. NO. 96-1016(I), at 18. In 1979 the EPA estimated that between 30,000 and 50,000 “inactive and uncontrolled hazardous waste sites” existed and between 1,200 – 2,000 of those posed “a serious risk to public health.” *Id.*

²⁷ Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

²⁸ *DuPont II*, 432 F.3d at 164 (quoting *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 206 (3d Cir. 2003)).

²⁹ U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 23.

³⁰ Cooke, *supra* note 4, at § 12.03.

³¹ *Id.* (quoting *United States v. A. & F. Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984)).

³² *Id.*

pollutants, environmental media, and disposal sites.”³³

CERCLA has three main functions: to establish requirements for closed or abandoned hazardous waste sites, provide liability for those responsible for releasing hazardous waste, and establish a trust fund (“the Fund” or “Superfund”)³⁴ to pay for cleanup of the hazardous waste sites.³⁵ The Act provides for both short-term removal actions and long-term remedial actions.³⁶ *DuPont* is concerned with CERCLA § 107, which states in part that owners and operators of a facility are liable for costs incurred by the United States in removal and remedial actions and other necessary costs incurred by any other person.³⁷

³³ *Id.*

³⁴ This trust fund is funded by an excise tax on feedstock chemicals and petroleum. Environment, Health and Safety Online, <http://www.ehso.com/superfund.php> (last visited Apr. 20, 2006).

³⁵ U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 23.

³⁶ *Id.*

³⁷ 42 U.S.C. § 9607(a). This section provides the following:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

- (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--
 - (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;
 - (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(i) of this title.

Id.

B. Summary of Relevant Cases

In the instant decision the court overruled *United States v. Rohm & Haas Co.* (“*Rohm & Haas*”), holding that governmental oversight costs are recoverable.³⁸ In *Rohm & Haas*, the U.S. Court of Appeals for the Third Circuit held that Congress had given no clear indication that governmental costs were recoverable and the United States was not entitled to recovery.³⁹ *Rohm & Haas* centered on the hazardous waste cleanup in Bristol Township, Pennsylvania.⁴⁰ The defendant used the site for the “disposal of general refuse, [to] process wastes, and offgrade products from [Rohm and Haas] plastics and chemical manufacturing plants.”⁴¹ The EPA allowed the defendant to clean the site under the Resource and Conservation Recovery Act (“RCRA”) and then sought to recover oversight costs under CERCLA § 107.⁴² The court determined that CERCLA § 107 permitted recovery of costs incurred under other statutes (such as RCRA).⁴³ However, the court further stated that under the *National Cable Television Ass’n, Inc. v. United States* (“*NCTA*”)⁴⁴ standard, “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.”⁴⁵ After considering the various sections of CERCLA, the court found “there is no clear indication in § 107, § 104, the definition of removal, or § 106 that government oversight actions conducted . . . were intended to be recoverable removal costs.”⁴⁶ As a result, the United States was not entitled to recover its oversight costs for removal actions.⁴⁷

NCTA arose after the Federal Communications Commission (“FCC”) began to impose fees upon community antenna television (“CATV”) systems.⁴⁸ The petitioner in the case was a trade association

³⁸ *DuPont II*, 432 F.3d at 162.

³⁹ *Rohm & Haas*, 2 F.3d at 1278.

⁴⁰ *Id.* at 1268.

⁴¹ *Id.* By 1981, 309,000 tons of waste and 4,600 tons of hazardous substances had been disposed of at the site. *Id.*

⁴² *Id.*

⁴³ *Id.* at 1274.

⁴⁴ 415 U.S. 336 (1974).

⁴⁵ *Rohm & Haas*, 2 F.3d at 1273.

⁴⁶ *Id.* at 1278.

⁴⁷ *Id.*

⁴⁸ *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 338-39 (1974) (“*NCTA*”).

that represented CATV systems.⁴⁹ The trade association opposed the fee since it was based on the FCC's costs and did not reflect any benefit that inured to the public.⁵⁰ The Supreme Court held that the fee was calculated incorrectly and the correct measure of the fee was to be the "value to the recipient."⁵¹

Other cases have examined the *NCTA* standard as it relates to recovery of administrative costs. Those courts have generally determined that the Supreme Court's proposition in *NCTA* 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."⁵²

In *Cooper Industries, Inc. v. Aviall Services, Inc.* ("*Cooper Industries*"),⁵³ the Supreme Court determined that Aviall Services' interpretation of the word "may" in CERCLA § 113(f)(1) was broader than the natural meaning of the word.⁵⁴ Aviall Services brought suit against Cooper Industries to recover costs Aviall Services incurred in cleaning up four properties in Texas that had been contaminated with hazardous substances.⁵⁵ Cooper Industries owned the properties until 1981, at which time Aviall Services bought them.⁵⁶ Aviall Services sued under CERCLA § 113, which allows for contribution from previous owners.⁵⁷ The Court determined that proper statutory interpretation involves the natural meaning of the term.⁵⁸ In addition, if terms are interpreted outside their natural meaning, they can make other terms explicitly used superfluous, which the Court is "loath to do."⁵⁹ The Court

⁴⁹ *Id.* at 337-38.

⁵⁰ *See generally id.* at 336-40.

⁵¹ *Id.* at 342-43.

⁵² *Rohm & Haas*, 2 F.3d at 1273 (quoting *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989)).

⁵³ 543 U.S. 157 (2004).

⁵⁴ *Id.* at 165-66.

⁵⁵ *Id.* at 157.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 166.

⁵⁹ *Id.* "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim and at the same time allow contribution actions absent those conditions." *Id.*

also noted that, while both parties claimed the purpose of CERCLA was in their favor, “[i]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁶⁰

These and other cases suggest that the government is not entitled to recover for costs incurred unless Congress has clearly intended it to be able to do so. In addition, statutes are to be interpreted narrowly and terms are to be given their natural meaning. The *DuPont II* majority has therefore chosen to reject prior case law in its determination that the government is entitled to recover its oversight costs.

IV. INSTANT DECISION

A. *Majority Opinion*

The majority held that CERCLA provides for governmental recovery of oversight costs.⁶¹ In reaching this decision, the majority first discussed the history and purpose of CERCLA.⁶² One purpose of particular importance to the majority is that the parties who create hazardous waste should be expected to pay for the hazardous waste cleanup.⁶³ As part of the analysis to determine whether CERCLA provides for governmental recovery, the majority had to determine whether the statute contained a clear statement and an intelligible principle.⁶⁴

The *NCTA* clear statement doctrine states, “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

⁶⁰ *Id.* at 167-68 (quoting *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)).

⁶¹ *DuPont II*, 432 F.3d at 162. The concurring opinion agreed with the majority, except for the majority’s “reliance on the ‘monitoring’ provision.” *Id.* at 180. The concurrence agreed with the government that the “oversight aspect of removal and remedial activities falls within the description of the various activities as they are defined in . . . CERCLA § 101.” *Id.* As a result, the “monitoring” provision is unnecessary, and oversight costs for remedial and recovery activities are recoverable. *Id.*

⁶² *Id.* at 164-66.

⁶³ *Id.* at 164.

⁶⁴ *Id.* at 166.

characterized as 'fees' or 'taxes,' on those parties."⁶⁵ In addition to a clear statement, Congress must also "set forth an intelligible principle to constrain the agency."⁶⁶ DuPont argued CERCLA contains neither a clear statement nor an intelligible principle.⁶⁷ The court distinguished the *DuPont II* and *NCTA* statutory frameworks and determined that *NCTA* does not govern CERCLA analysis.⁶⁸ In addition, the court determined that even if *NCTA* was applicable, CERCLA has its own clear statement and intelligible principle within its cost recovery provision.⁶⁹ As a result, government recovery of oversight costs is authorized, though subject to the limitations found in the terms "removal action"⁷⁰ and "remedial action"⁷¹ and the provisions of the National Contingency Plan ("NCP").⁷²

The court found "EPA oversight falls comfortably within the

⁶⁵ *Id.* (quoting *Skinner*, 490 U.S. at 224).

⁶⁶ *Id.*

⁶⁷ *Id.* at 167.

⁶⁸ *Id.* The court notes *NCTA* dealt with user fees and a regulated industry, while CERCLA deals with "restitutionary payments" and responsible parties. *Id.* at 167-68. Further, *NCTA* liability is "determined by administrative levy" and CERCLA liability is "judicially determined under a federal cause of action." *Id.* at 168.

⁶⁹ *Id.*

⁷⁰ "Removal actions" involve:

monitor[ing], assess[ing], and evaluat[ing] the release or threat of release of hazardous 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.

42 U.S.C. § 9601(23).

⁷¹ "Remedial actions" involve:

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 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.

42 U.S.C. § 9601(24).

⁷² *DuPont II*, 432 F.3d at 168. The NCP provides for "methods and criteria for determining the appropriate extent of removal, remedy, and other measures." *Id.*

definitions of ‘removal action’ and ‘remedial action.’”⁷³ In addition, EPA oversight is an “enforcement activity” which is included within the terms “removal action” and “remedial action.”⁷⁴ The majority also discussed CERCLA § 107,⁷⁵ which authorizes recovery of all “government costs of monitoring, enforcement activities, and any other action necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment.”⁷⁶ The court found that this section authorizes government recovery based on “the plain meaning of the relevant CERCLA provisions, the overall statutory framework, the functional benefits of agency oversight, and the overarching statutory objective of ensuring that those responsible for environmental harm are ‘tagged’ with ‘the cost of their actions.’”⁷⁷ Therefore, the government was authorized to recover its oversight costs from DuPont.⁷⁸

B. Dissenting Opinion

The dissent, conceding that *NCTA* should not be controlling in this case, concluded that the government still cannot recover its oversight costs.⁷⁹ The dissent asserts that CERCLA does not state “any intent on the part of Congress, clear or otherwise, to allow the EPA to recover the costs of overseeing removal or remedial actions.”⁸⁰ In addition, the dissent argues that the majority mistakenly equates “government oversight” with “monitoring,” as found in the definitions of “removal action” and “remedial action.”⁸¹ Further, even the EPA has distinguished between oversight and performance of removal and remedial actions, and the EPA is only allowed to recover for the actual performance of the actions, not the oversight of the actions.⁸²

⁷³ *Id.* at 170.

⁷⁴ *Id.* at 173-74.

⁷⁵ 42 U.S.C. § 9607(a).

⁷⁶ *DuPont II*, 432 F.3d at 174.

⁷⁷ *Id.* at 179.

⁷⁸ *Id.*

⁷⁹ *Id.* at 180.

⁸⁰ *Id.* at 182.

⁸¹ *Id.*

⁸² *Id.* at 182-83. “[T]he plain language of the definitions includes actions taken to contain and clean up releases of hazardous waste, but not actions taken to oversee another’s containment and cleaning up of those sites.” *Id.* at 185.

The dissent also contends the term “enforcement activity” is an “action taken to compel a responsible party to perform a removal or remedial action,” not an action to seek recovery of costs.⁸³ Also, the word “oversight” is not contained within § 107 of CERCLA; therefore, Congress did not intend to include oversight within the activities for which recovery is allowed.⁸⁴

In addition to these arguments, the dissent contends the majority has read CERCLA too broadly, despite the fact the Supreme Court has urged against broad interpretations.⁸⁵ The dissent also disagrees with the majority’s decision to give the EPA *Skidmore* deference in this case.⁸⁶ *Skidmore* deference is given to an agency when “its policy ‘is made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.’”⁸⁷ The dissent concedes the EPA may have “specialized experience” in CERCLA enforcement, however it notes “no other court to consider the issue of the recoverability of oversight costs under CERCLA has deferred to the EPA’s view as a basis for its decision.”⁸⁸

Finally, the dissent worries the EPA can take advantage of the statute and recover enlarged amounts from the responsible parties.⁸⁹ CERCLA provides that if private parties choose to do so, they can implement remedial action plans themselves.⁹⁰ This allows private parties to “control the cost of the cleanup operation within the parameters of the plan.”⁹¹ If the EPA is allowed to then bill for oversight activities after the plan is completed, the parties are subject to unfairness and unpredictability.⁹² In addition, because the standard of review is “arbitrary and capricious,” it is too difficult for the responsible parties to prove the

⁸³ *Id.*

⁸⁴ *Id.* at 185-86.

⁸⁵ *Id.* at 189-90.

⁸⁶ *Id.* at 187.

⁸⁷ *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁸⁸ *Id.* at 187-88.

⁸⁹ *Id.* at 192.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* “Allowing the EPA to bill the responsible party for its ‘oversight’ activities after the fact destroys the fairness and predictability of the statutory arrangement.” *Id.*

amounts charged were too high.⁹³ According to the dissent's interpretation of the statute, there is a distinction between recoverable and non-recoverable costs that is missing from the majority's interpretation.⁹⁴ As such, the dissent finds "CERCLA does not authorize the EPA to recover the costs of overseeing removal and remedial actions conducted by private parties."⁹⁵

V. COMMENT

The *DuPont* majority determined the government was entitled to oversight costs. However, in so deciding, the court had to reject prior case law, including its own decision in *Rohm & Haas*. Part of the reason the majority reached this conclusion is because several other circuits have questioned the Third Circuit's holding in *Rohm & Haas*. The court declined to adopt the Third Circuit's decision in *Rohm & Haas* and interpreted CERCLA broadly even though the Supreme Court has urged against broad interpretations. As noted earlier, courts tend to interpret CERCLA broadly and liberally. However, the Supreme Court has "emphasized that CERCLA is subject to the same canons of statutory construction that govern all other federal statutes and cautioned lower courts against straying too far from the statute's text."⁹⁶ In utilizing their broad interpretations, the majority and the other circuits have "ignore[d] what the statute *says* in favor of a reading that comports with its view of what the statute *should do*."⁹⁷ If a court has guidance on an issue by way of a statute, it should be bound by the statute not by what it thinks is the best outcome in the situation. If it appears the statute is not providing for the optimal outcomes, Congress is always free to amend the statute.

The majority also erred in its interpretation of the words "oversight" and "enforcement activities." It equates "oversight" with "monitoring" and also assumes oversight qualifies as an enforcement activity, which is included in the definition of removal and remedial activities. As the Court of Appeals for the Tenth Circuit noted, "it does

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 193.

⁹⁶ *Id.* at 189.

⁹⁷ *Id.*

not stretch or distort the meaning of the phrase to conclude that monitoring or oversight of a private party remedial action to determine whether the action complies with a consent decree and the provisions of CERCLA is enforcement activity related to a remedial action."⁹⁸ The Court of Appeals for the Fifth Circuit has also stated, "government monitoring or oversight is an inherent and necessary enforcement element of private party response action."⁹⁹ As such, these circuits have seemingly employed a liberal interpretation of CERCLA. But according to the Supreme Court, liberal statutory interpretations are not appropriate.

A further problem with the majority opinion is that Congress does not refer to oversight in the definition of removal. As the court points out in *Rohm & Haas*:

Nowhere in the definition of removal is there an explicit reference to oversight of activities conducted and paid for by a private party. Nowhere is there an explicit statement that Congress considers administrative and regulatory costs incurred overseeing the removal and remedial actions of a private party to be removal costs in and of themselves.¹⁰⁰

Congress knew how to authorize recovery of oversight costs and chose not to do so.¹⁰¹ For example, as the dissent notes, when Congress enacted the Superfund Amendments and Reauthorization Act ("SARA" or "SARA Amendments") to CERCLA in 1986, it included recovery of oversight costs in limited circumstances.¹⁰² One such circumstance is § 104(a), which requires "reimbursement of costs incurred by the government overseeing the private [Remedial Investigation and Feasibility Study]."¹⁰³ If Congress intended for the government to be able to recover oversight costs in all circumstances, it would be unnecessary to provide for recovery

⁹⁸ *Id.* at 185 (quoting *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996)).

⁹⁹ *Id.* (quoting *United States v. Lowe*, 118 F.3d 399, 403 (5th Cir. 1997)).

¹⁰⁰ *Rohm & Haas*, 2 F.3d at 1275.

¹⁰¹ "Given the context in which CERCLA was enacted, we find it highly significant that Congress omitted any mention of oversight, or of government activities conducted under § 106, in the definition of removal." *Id.* at 1276

¹⁰² *DuPont II*, 432 F.3d at 185-86.

¹⁰³ *Rohm & Haas*, 2 F.3d at 1277.

of oversight costs in these specific circumstances. The SARA Amendments also now allow the government “to seek reimbursement from the Superfund for its oversight costs in particular situations.”¹⁰⁴ Again, if Congress intended for oversight costs to be readily recovered by the government, it would not have needed to enact an amendment providing for such recovery. As a result, the majority is not at liberty to reach beyond congressional intent and assert that Congress intended to authorize recovery of oversight costs.

Further, the majority has chosen to define “monitor” as monitoring another party. The correct definition of “monitor” is the monitoring of the release of hazardous substances. As § 104 states, “[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.”¹⁰⁵ In this section “monitor” clearly refers to monitoring a release, threat of release, or danger. Nowhere in the section does Congress refer to monitoring another party. For monitoring or oversight costs to be recoverable, the costs must be incurred by the party actually monitoring the release. The majority chose to construe “monitor” too broadly when it determined that monitoring applied to the monitoring of another party who monitored the release.¹⁰⁶

Finally, another problem with the majority’s analysis, as discussed in the dissenting opinion, is that the majority is construing a statutory provision “to allow a wholesale transfer of the expenses of operating government to private parties where no intent to do so appears on the face of the statute.”¹⁰⁷ By allowing the EPA to recover oversight costs not provided for in the statute, the EPA can effectively shift government expenses to private parties. The shifting of expenses can be especially burdensome to private parties not anticipating bearing the costs of the governmental oversight, particularly if they do not have the funds to pay the government. This is an example of a situation where the government always wins. If the EPA doesn’t want to pay for its own expenses, it can

¹⁰⁴ *DuPont II*, 432 F.3d at 187 (italics omitted).

¹⁰⁵ *Rohm & Haas*, 2 F.3d at 1278.

¹⁰⁶ “[I]f what the government is monitoring is not the release or hazard itself, by rather the performance of a private party, the costs involved are non-recoverable oversight costs.” *Id.* at 1279.

¹⁰⁷ *DuPont II*, 432 F.3d at 181.

simply assert CERCLA § 107 and force a private party to pay the expenses for it.

VI. CONCLUSION

Prior to *DuPont II*, the government had not been entitled to recover oversight costs under CERCLA § 107. The majority determined that the government should recover its costs using a broad interpretation of CERCLA. But as the dissent correctly points out, the Supreme Court has urged against taking such a broad interpretation. A narrow reading of the statute leads to the conclusion that such oversight costs are not in fact recoverable. Despite this, the majority still allows for governmental recovery, further proving the point that the government always wins.

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