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Comments: Recovery of EPA Oversight Costs from a Broad Reading of CERCLA

Aaron Kelly
University of Baltimore School of Law

RECOVERY OF EPA OVERSIGHT COSTS FROM A BROAD READING OF CERCLA

I. INTRODUCTION

Located near the state border in the Ramapo Mountains is the Borough of Ringwood, New Jersey.[1] This beautiful region of New Jersey—which has numerous lakes, parks, and nature trails—is the ancestral home of the Ramapough Indians.[2] Unfortunately for the Ramapough tribe members, it is also home to a site that was recently relisted under the Comprehensive Environmental Response, Compensation, and Liability Act[3] (CERCLA or Superfund) for priority cleanup because of the presence of hazardous substances which were being released into the environment, and which may be linked to increased occurrences of neurological disorders, heart disease, diabetes, and other health problems.[4] The Ford Motor Company used the Ringwood Mines/Landfill Site to dispose of paint sludge from a nearby plant that assembled Ford Mavericks, Falcons, and other vehicles from 1967 until 1974.[5] Ford deposited this sludge into mine shafts as well as open pits in a 500-acre area that is part of the Superfund site.[6] Nearby residents claim that Ford used countless dump trucks to deposit this lava-like sludge into holes on the site, and that there was even an instance of a bulldozer falling into one of the holes (that Ford never recovered).[7] Among the contaminants in this sludge were benzene and other known carcinogens, placing residents, as well as visitors who came to enjoy the beauty of the area, in peril.[8]

Because of the risk presented by the hazardous substances at the site, the Environmental Protection Agency (EPA) placed the site on

1. Tina Kelley, *Toxic Waste Taints a Jewel of New Jersey's Parks System*, N.Y. TIMES, Jan. 1, 2005, at B5; Ron Stodghill, *Can Ford Clean Up After Itself?*, N.Y. TIMES, July 29, 2007, at B1.
2. Steve Strunsky, *Superfund Site is Relisted, and Inquiry Begins*, N.Y. TIMES, Oct. 15, 2006, at O6.
3. 42 U.S.C. §§ 9601–9675 (2006).
4. Jan Barry et al., *Report Hits EPA Probe of Ford Site*, THE RECORD (Bergen County, N.J.), Sept. 28, 2007, at A1.
5. Barry, *supra* note 4; Strunsky, *supra* note 2.
6. Strunsky, *supra* note 2.
7. Barbara Williams, *Ford Sludge is Found in Ringwood Mine Pit*, THE RECORD (Bergen County, N.J.), Aug. 10, 2006, at A1.
8. Strunsky, *supra* note 2.

the CERCLA National Priorities List in 1983, and Ford began a cleanup of the site in 1987.[9] By the end of the cleanup in 1988, Ford had removed 11,340 tons of paint sludge and contaminated soil from the site.[10] In addition, Ford removed another six hundred cubic yards of contaminated soil and fifty-four drums from the site in the years following this initial cleanup.[11] Following what the EPA determined to be a successful cleanup of the site, the EPA removed the Ringwood Mines/Landfill Site from the CERCLA National Priorities List in 1994.[12]

In 2003, residents of Ringwood began calling attention to the discovery of more paint sludge in areas near the site.[13] Beginning in 2004, Ford resumed a cleanup effort of the site and ultimately removed more than 24,000 additional tons of paint sludge and contaminated soil.[14] The rediscovered paint sludge, as well as public outcry, forced the EPA to place the site back on the CERCLA National Priorities List in 2006.[15]

Because of the mishandling of the site, three members of Congress requested an investigation to determine why the EPA delisted the site despite considerable amounts of leftover waste still present at the site after Ford's initial cleanup efforts.[16] Taking into consideration that over two decades had passed since the EPA placed the site on the CERCLA National Priorities List, Congressman Frank Pallone Jr. (D-NJ) stated: "Since Ford is footing the bill, it's inconceivable to me why EPA does not expedite the cleanup."[17] The Office of Inspector General, an oversight agency within the EPA, eventually conducted a $544,000 investigation of the cleanup activities at the site and issued a report detailing many actions that the EPA could have taken to better manage the cleanup of the site.[18] Reflecting on the report, United States Senator Frank Lautenberg (D-NJ) chastised the EPA for failing to protect persons residing near the site and asserted that "[i]f [the] EPA had done its job, this site would've been cleaned up

9. Barry, *supra* note 4.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See id.*
16. *Id.*
17. Press Release, Congressman Frank Pallone Jr., Pallone Demands EPA & Ford Motor Co. Finish Cleanup of Ringwood Superfund Site (Sept. 27, 2005), *available at* http://www.house.gov/list/press/nj06_pallone/pr_sep27_ringwood.html.
18. Barry, *supra* note 4.

long ago."[19] The report noted that the EPA required very little documentation from Ford of its cleanup activities at the site and poorly gathered information regarding the scope of the contamination of the site.[20]

While this situation might be a mere embarrassment to the EPA, it is a tragedy for the residents of Ringwood, many of whom are minority Native Americans.[21] This fumbling by the EPA has caused these residents to distrust the EPA and to question its ability to properly oversee a private party performing a CERCLA cleanup action.[22] The end result of over two decades of EPA oversight of Ford's cleanup activities at the site has been very little reduction in the perceived risks from the site for the residents of Ringwood, despite enormous EPA and Ford expenditures.

But when the EPA decides to oversee a private-party cleanup under CERCLA, who is responsible for paying for the costs of the EPA's oversight activities? The nearby residents? The EPA? The polluter? That is the question this comment addresses. Specifically, this comment analyzes situations where the EPA, acting pursuant to CERCLA, oversees a private-party action to clean up a particular facility or site that is contaminated with hazardous substances and analyzes whether CERCLA authorizes the federal government to recover the EPA's oversight expenses from the private party.

This comment concludes, after a thorough analysis of CERCLA, that the EPA is not permitted to recover those costs from the private party performing a CERCLA cleanup of a contaminated site. Not only does the language of CERCLA demand that conclusion,[23] but this conclusion is also supported by public policy considerations underlying CERCLA.[24] The best way to ensure that the EPA acts not only efficiently, but also effectively, is to require the federal government to pay the costs of the EPA's own expenses incurred in supervising a private-party cleanup under CERCLA. Of course all of these costs incurred by the EPA will be paid by federal taxpayers, but those taxpayers are in the best position to hold the EPA accountable for inefficient oversight of private-party cleanup activities under CERCLA. The tax-paying citizens of the United States, through their elected representatives and senators in the United States Congress,

19. *Id.*
20. *Id.*
21. Strunsky, *supra* note 2.
22. Williams, *supra* note 7.
23. *See infra* Part V.
24. *See* Barry, *supra* note 4.

have the power to reward satisfactory performance by the EPA or to penalize the EPA for a misstep such as Ringwood.[25] This method is the best way to ensure that the EPA supervises private-party CERCLA cleanups diligently and promotes a quick and successful cleanup response to help those persons suffering as a result of hazardous substance releases at a contaminated site.

This comment will address whether the EPA, under CERCLA, can recover expenses incurred when overseeing a private-party cleanup action pursuant to an administrative order or consent agreement under CERCLA, not only by examining public policy concerns, but also by reading the language of the Act. Despite the heavy focus on public policy in the preceding paragraph, this comment will primarily address the issue through an analysis of CERCLA's many provisions. In Part II, this comment provides an overview of CERCLA's overall framework as well as CERCLA's provisions governing private-party cleanups of contaminated facilities and sites.[26] Part III provides the interpretations by various federal appellate courts of these relevant provisions of CERCLA,[27] while Part IV discusses those judicial interpretations of CERCLA and concludes that the courts have improperly interpreted the language of the CERCLA statute and reached conclusions that are not supported by the statute's plain language.[28]

II. OVERVIEW OF CERCLA

In response to sites such as Love Canal and numerous other contaminated sites,[29] the 96th Congress enacted CERCLA on December 11, 1980.[30] The final version of the Act was a last-minute compromise, constructed in order to enable the Act to be enacted.[31] As a result, there is very little legislative history available that might be used to determine Congress's original intent as to the interpretation of the language in the enacted statute's various

25. *See* 42 U.S.C. § 9662 (2006) (stating that Congress directly controls the government liability under CERCLA, limiting government liability "only to such extent or in such amounts as are provided in appropriation Acts."); *see also* 2 U.S.C. § 621 (2006).
26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part IV.
29. Rudy Abramson, *The Superfund Cleanup: Mired in Its Own Mess*, L.A. TIMES, May 10, 1993, at A1.
30. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).
31. United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984).

provisions.[32] Despite the lack of legislative history, the courts have found that it is clear that Congress enacted CERCLA to achieve two goals: (1) to provide the federal government with the tools necessary to effectuate a prompt response to releases or threatened releases of hazardous substances at a particular facility or site and (2) to ensure that those persons responsible for the contamination of the facility or site (referred to as potentially responsible parties or PRPs) bear the cost of the cleanup.[33] Achievement of these two goals presents numerous problems as the cleanup of a particular contaminated facility or site can take years to complete, costing millions of dollars, and the potential list of responsible parties can number over one thousand for some contaminated facilities or sites.[34]

As originally enacted in 1980, CERCLA contained many defects and omissions that impaired the ability of the federal government to implement a prompt and effective cleanup response at a particular contaminated facility or site.[35] As a result of these inadequacies, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA).[36] SARA included provisions requiring the EPA to complete the cleanup action at a number of specified sites within a specified time schedule and also limited a private party's ability to delay the cleanup process.[37] In addition to these changes, there were additional amendments that concerned the definition of terms that are relevant to this comment and will be discussed later.[38]

Before delving into interpretation of the actual language of the CERCLA statute, it is helpful to present an overview of the typical manner in which a CERCLA cleanup action will proceed. Initially, there has to be some sort of environmental contamination at the facility or site in question, which results in the EPA placing the

32. *See id.*

33. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

34. *See* Martin A. McCrory, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection*, 37 AM. BUS. L.J. 3, 4, 6 (1999).

35. *See* Scott C. Whitney, *Superfund Reform: Clarification of Cleanup Standards to Rationalize the Remedy Selection Process*, 20 COLUM. J. ENVTL. L. 183, 188 (1995).

36. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

37. Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1052 (1994). To limit the ability of a responsible party to delay the cleanup process, SARA restricted the availability of pre-enforcement judicial review and imposed a time schedule on settlement negotiations. *Id.*

38. *See* discussion *infra* Part IV.B.3.

particular site on the National Priorities List.[39] Following this action, the EPA and those parties found to be responsible for the contamination of the facility or site will either enter into an agreement or the EPA will issue an order directing certain responsible parties to perform a specified cleanup action.[40] To supplement the efforts of the private parties performing the cleanup action, the EPA will also expend considerable resources in order to oversee the private-party cleanup.[41]

A. Responsible Parties

To begin an analysis of CERCLA, it is necessary to detail which parties CERCLA identifies as being potentially responsible parties (PRPs) and subject to liability for governmental and private-party costs of cleaning up a particular contaminated facility or site. CERCLA section 107 identifies four categories of PRPs: (1) the owner or operator of the facility; (2) the owner or operator of the facility at the time of disposal of any hazardous substance at the facility; (3) any person who arranged for the disposal or treatment, by another person or entity, of any hazardous substance owned or possessed by that person, at the facility (if the facility is owned or operated by another party or entity); and (4) any person who accepts any hazardous substance for transport to the facility (if the transporter selected that facility).[42] The breadth of these four categories of PRPs indicates Congress's intent to make responsible, and liable, those parties who had any significant involvement in facilitating the disposal of a hazardous substance at a contaminated facility or site.

Once a person is identified as a CERCLA PRP, there are very few affirmative defenses available to that person. These defenses, also included in CERCLA section 107, are limited, and rarely applicable.[43] These defenses apply only in situations where the release or threatened release of a hazardous substance at the

39. *See, e.g.*, United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 163 (3d Cir. 2005); Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 566 (10th Cir. 1996). Alternatively, the EPA can propose to add the site to the National Priorities List to secure compliance with its mandated cleanup plan. *See, e.g.*, United States v. Rohm & Haas Co., 2 F.3d 1265, 1268 (3d Cir. 1993), *overruled by Dupont*, 432 F.3d 161. Congress authorized the creation of the National Priorities List under CERCLA section 105. CERCLA § 105, 42 U.S.C. § 9605(a)(8)(B) (2006).

40. *See, e.g.*, United States v. Lowe, 118 F.3d 399, 401, 403 (5th Cir. 1997).

41. *See, e.g.*, *Dupont*, 432 F.3d at 163 (holding certain private parties responsible for $1,394,796.94 of EPA oversight costs).

42. CERCLA § 107(a)(1)–(4), 42 U.S.C. § 9607(a)(1)–(4) (2006)

43. *See id.* § 107(b), § 9607(b).

contaminated site was caused solely by (1) an act of God; (2) an act of war; or (3) "an act or omission of a third party[,] other than an employee or agent of the defendant" or a person whose act or omission occurs in connection with a contractual relationship with the defendant, where the defendant shows that:

> (a) [the defendant] exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) [the defendant] took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[44]

These defenses are narrowly defined and must be the sole reason for the contamination.[45] The limited nature of these defenses expresses Congress's intent to ensure that those persons responsible for the contamination will be subject to CERCLA liability.

B. Authorization to Perform a Cleanup

Prior to undertaking a cleanup of a contaminated facility or site that is likely to result in cleanup expenses of millions of dollars, it is important to conduct a preliminary assessment of the facility or site, as authorized in CERCLA section 104.[46] A Remedial Investigation and Feasibility Study (RI/FS) is the first step in such a preliminary assessment.[47] An RI/FS is an evaluation of the site conducted to remove uncertainty about the scope and condition of the contamination at the facility or site.[48] The information gathered from the RI/FS will be used by the party performing the cleanup, either the EPA, a state, or a private party, to select the remedy best suited for the site.[49] The relevant part of CERCLA section 104 provides:

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44. *Id.*
45. *See id.* The defendant must prove by a preponderance of the evidence that the hazardous substance release or threatened release resulted "solely" from one of the three specified types of acts or omissions, or that the release or threatened release was caused solely by a combination of the three specified types of acts or omissions. *Id.*
46. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (2006).
47. ENVTL. PROT. AGENCY, EPA-540-G89004, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES UNDER CERCLA 1–6 (1988), *available at* http://www.epa.gov/superfund/policy/remedy/pdfs/540g-89004-s.pdf.
48. *Id.* at 1–3.
49. *Id.*

> When the President determines that such action will be done properly and promptly by [any PRP], the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with [section 122]. No remedial investigation or feasibility study (RI/FS) 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.[50]

Important portions of this section dictate that an RI/FS may be conducted by a PRP only after the EPA has determined that the PRP will properly carry out the RI/FS.[51] Additionally, the EPA may only permit a private party to perform an RI/FS if the private party arranges for oversight of the RI/FS by a qualified person and agrees to pay for the costs of that oversight.[52]

Addressing an issue that is not directly the subject of this comment but that is important to a discussion of CERCLA, CERCLA section 104 also authorizes the federal government to initiate a cleanup action at a contaminated facility or site and then seek restitution of its cleanup costs from the responsible parties.[53] Pursuant to CERCLA section 104, the EPA may perform a cleanup action at a contaminated facility or site when

> any hazardous substance is released or there is a substantial threat of such a release into the environment, or . . . there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare . . . .[54]

In carrying out a cleanup action in such a situation under CERCLA section 104, the measures undertaken must be consistent with the

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50. 42 U.S.C. § 9604(a)(1). The President has delegated his authority under this provision to the EPA. Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987).
51. *See* 42 U.S.C. § 9604(a)(1).
52. *Id.*
53. *Id.*
54. *Id.*

National Contingency Plan (NCP).[55] The NCP, authorized by CERCLA section 105, details the "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants."[56]

The alternative to a government-led cleanup action under CERCLA section 104 is a private-party cleanup action. For this type of cleanup to occur under CERCLA, the EPA will either issue an administrative order pursuant to CERCLA section 106, mandating such action, or enter into a consent agreement, pursuant to section 122, that requires such action.[57] In order for the EPA to permit a private-party cleanup under CERCLA, the EPA must first determine that the private party will properly perform the cleanup.[58] To facilitate the execution of the private-party cleanup action, the EPA will develop a cleanup plan for the private party.[59] Congress authorized the EPA to enter into such consent agreements in order to expedite the cleanup process, as well as to avoid unnecessary litigation.[60]

C. *Right of the Government and CERCLA PRPs to Recover Their Cleanup Costs or Contribution from other PRPs*

The cost recovery provisions of CERCLA are sections 107 and 113(f). After dictating which groups are PRPs, CERCLA section 107 outlines four categories of costs that are recoverable:

> (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

55. *Id.*
56. CERCLA § 105, 42 U.S.C. § 9605 (2006).
57. CERCLA §§ 106(a), 122, 42 U.S.C. §§ 9606(a), 9622 (2006); *see also* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 165 (3d Cir. 2005).
58. 42 U.S.C. § 9622(a).
59. *Id.* §§ 9604(c)(4), 9621(a); *see also Dupont*, 432 F.3d at 165.
60. 42 U.S.C. § 9622(a) ("[T]he President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.").

> (D) the costs of any health assessment or health effects study carried out under [section 104(i)].[61]

As indicated by CERCLA section 107, the first category of costs includes the federal government's costs of "removal" and "remediation" actions.[62] As this comment will demonstrate, these two terms are vital to a discussion of whether the EPA can recover its oversight costs because courts place heavy emphasis on the definitions of CERCLA's terms.[63] To recover this first category of costs, the federal government is only required to show that these costs are "not inconsistent" with the NCP, a less demanding test than for the second category.[64] The second category permits recovery by a private person of removal or remediation costs, but these costs must be consistent with the NCP.[65] The third and fourth categories, while important, do not implicate the issue this comment addresses; therefore, this comment will not discuss them further.

In addition to CERCLA section 107, the other cost recovery provision in CERCLA is the contribution provision in section 113(f), which is limited to private parties.[66] A private-party PRP acquires this right to contribution only after the federal or state government or a private party has sought recovery from the private-party PRP under CERCLA section 107, or the private party has been subject to an EPA administrative order under section 106.[67] A private-party PRP may recover from any other PRP any costs that fit within one of the four categories of costs in CERCLA section 107.[68] In addition to providing a right to contribution for those PRPs that have performed a cleanup action, this section also shields parties from liability for contribution if the party has settled with the government.[69]

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61. *Id.* § 9607(a)(4).
62. *Id.* § 9607(a)(4)(A).
63. *See, e.g.*, Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 569 (10th Cir. 1996); United States v. Rohm & Haas Co., 2 F.3d 1265, 1275 (3d Cir. 1993), *overruled by* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161 (3d Cir. 2005).
64. 42 U.S.C. § 9607(a)(4)(A)–(B). A private-party PRP defendant, in order to avoid liability under this subsection of section 107 of CERCLA, is required to prove that the government's cleanup actions were inconsistent with the NCP when the government undertook a cleanup pursuant to CERCLA section 104. *See, e.g.*, *Atl. Richfield Co.*, 98 F.3d at 569.
65. 42 U.S.C. §§ 9601(25), 9607(a)(4)(B). CERCLA section 101 defines "response" costs to include costs for "removal" or "remediation." *Id.* § 9601(25).
66. *See* CERCLA § 113(f), 42 U.S.C. § 9613(f) (2006).
67. *See id.*
68. *Id.*
69. *Id.* § 9613(f)(2).

D. Removal, Remediation, and Response Costs

Having described the four main categories of costs a PRP may be responsible for paying under CERCLA, the next step is a further inquiry into exactly what costs are included within these categories. While it might seem counterintuitive, the starting point for a further interpretation of these categories will actually begin in the second category. The reason for this becomes apparent when examining the phrase "necessary costs of response," which can be recovered under section 107(a)(4)(B) of CERCLA by a private party (other than the federal government, a state, or an Indian tribe).[70] CERCLA defines response to mean "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."[71] As is apparent, any "necessary costs of response" include removal and remediation actions, and that leads the analysis back to the first phrase.

The first phrase, "all costs of removal or remediation action incurred by the United States Government or a State or an Indian tribe,"[72] requires defining the terms *removal* and *remediation*. A removal action is generally considered to be a short-term response, while a remediation action tends to be a long-term response or permanent solution.[73] A more exact definition of these two terms can be found in CERCLA section 101.[74] The first term, removal, is defined by CERCLA as follows:

> [T]he 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 substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to

70. *Id.* § 9607(a)(4)(B).

71. 42 U.S.C. § 9601(25) (2006). Unfortunately, CERCLA does not further define the term "enforcement activities," which is a term courts have examined in their analysis of this comment's issue. *See* discussion *infra* Part III.

72. 42 U.S.C. § 9607(a)(4)(A).

73. United States v. Lowe, 118 F.3d 399, 402 (5th Cir. 1997).

74. This comment uses the term "more exact" because, as will be shown later in the comment, almost every court struggles to determine exactly what Congress intended. *See* discussion *infra* Part III.

> the public health or welfare or to the environment, which may otherwise result from a release or threat of release.[75]

The second term, remediation, is defined as follows:

> [T]hose 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, . . . and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.[76]

This concludes this comment's discussion of the relevant provisions of CERCLA. Next, it is important to see how courts have analyzed these CERCLA sections and terms used in CERCLA and how the case law has developed within the Circuits.

III. RELEVANT CASES

In order to fully understand how the case law involving this comment's issue has evolved, it is necessary to begin with a court decision that almost every other court addressing the issue has considered. Following this discussion, this comment will analyze, chronologically, each of the relevant cases, irrespective of jurisdiction, as each court has been influenced by other jurisdictions' opinions even though they are not binding. This comment will show the development of case law among jurisdictions with respect to this comment's issue and the relevant provisions of CERCLA.

A. United States v. Rohm & Haas Co. (1993)

In *United States v. Rohm & Haas Co.*,[77] one of the first cases to address the issue of whether the EPA can recover costs incurred in

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75. CERCLA § 101(23), 42 U.S.C. § 9601(23) (2006).

76. *Id.* § 101(23), § 9601(24). The list within the definition of "remediation," shortened by an ellipsis, includes activities that one might reasonably assume would occur at a contaminated site, but it is quite exhaustive and detracts from the parts of the definition pertinent to the issue this comment seeks to address.

77. 2 F.3d 1265 (3d Cir. 1993), *overruled by* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161 (3d Cir. 2005).

oversight of a private-party cleanup action,[78] from 1917 until 1975 the defendants owned a 120-acre landfill located next to the Delaware River in Bristol Township, Pennsylvania.[79] During this time, the defendants Rohm & Haas (R&H), used this landfill to dispose of refuse and wastes from R&H's plastics and chemical manufacturing plants.[80] Following an administrative order by the EPA under section 106 of CERCLA, R&H began to conduct a removal action at the site in 1989.[81] Subsequently, R&H began performing the required work with the EPA overseeing the progress.[82] In November 1990, the United States brought a cost recovery action pursuant to CERCLA section 107, seeking reimbursement of all costs incurred by the federal government in connection with the site since 1979.[83] The district court, finding in favor of the government, awarded the United States $401,348.78 and all future costs properly incurred under CERCLA.[84] These costs included not only direct costs, but also indirect costs such as travel, payroll, and hiring contractors to review the work completed by R&H.[85]

The issue before the court in *Rohm & Haas*, like the issue this comment addresses, was whether the EPA can recover its expenses, under section 107 of CERCLA, for the oversight of a private-party removal action.[86] Unlike some of the cases that will be discussed later, *Rohm & Haas* only considered whether a removal action included oversight, and did not analyze terms such as remediation or response costs.[87] To analyze the relevant provisions of CERCLA, the

78. Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 568 (1996) (noting that the only relevant pre-*Rohm & Haas* decision is New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985)).

79. *Rohm & Haas Co.*, 2 F.3d at 1268.

80. *Id.*

81. *Id.* R&H entered into this administrative consent order under a similar environmental act, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k. *Id.* The court found that costs incurred under the RCRA could nonetheless be recoverable under CERCLA, provided that the costs met the definition of "removal." *Id.* at 1274–75.

82. *Id.* at 1268.

83. *Id.*

84. *Id.* at 1269.

85. *Id.* at 1269 n.4.

86. *Id.* at 1269.

87. *Id.* at 1271. The opinion states that the parties agreed that if the government's oversight costs could be recovered, it would only be recoverable under the definition of removal. *Id.* It does not state whether this is because the cleanup action involved was only a short-term response or whether the parties believed nothing in the

Third Circuit began by determining which standard of statutory interpretation to apply.[88] R&H argued for a standard whereby the court would have to find clear congressional intent within CERCLA for the EPA to recover the costs of its oversight.[89] In support of its position, R&H relied on *National Cable Television Ass'n v. United States*,[90] a case later interpreted by the Supreme Court in *Skinner v. Mid-America Pipeline Co.*,[91] as standing for the 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,' on those parties."[92] For reasons that will be discussed below, the Third Circuit agreed with R&H and concluded that the definition of *removal* must unambiguously provide for recovery of EPA oversight costs.[93]

Before continuing with a discussion of why the Third Circuit decided to apply the standard enunciated in *National Cable*, it is helpful to provide a summary of the issues in *National Cable. National Cable* involved the Independent Offices Appropriation Act of 1952.[94] At issue was whether the Federal Communications Commission (FCC) could base the fees it charged community antenna television (CATV) providers on the basis of direct and indirect costs to the government agency alone.[95] The Independent Offices Appropriation Act of 1952 provided that

> it is the sense of the Congress that any work, service . . . benefit, . . . license, . . . or similar thing of value or utility performed, 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 therefore . . . such fee, charge, or price, if any, as he shall determine . . . to be

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definitions of other terms such as remediation or response permitted the government to recover its oversight costs. *Id.*

88. *Id.* at 1273.
89. *Id.*
90. 415 U.S. 336 (1974).
91. 490 U.S. 212 (1989).
92. *Rohm & Haas*, 2 F.3d at 1273 (quoting *Skinner*, 490 U.S. at 224).
93. *Id.* at 1274.
94. Independent Offices Appropriation Act of 1952, ch. 376, 65 Stat. 268 (1951) (codified as amended at 31 U.S.C. § 9701 (2006)).
95. *Nat'l Cable*, 415 U.S. at 337–40.

> fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts.[96]

The FCC had determined its direct and indirect costs for CATV regulation to be $1,145,400 annually.[97] Based upon this calculation, the FCC added a thirty-cent-per-subscriber annual fee to each CATV system.[98] This fee would produce $1,145,000 annually, and the FCC concluded that it would approximate the "value to the recipient" as it is used within the Act.[99]

Looking at the language of the Act, the Supreme Court determined that the Act authorizes the FCC to impose a "fee," which connotes a "benefit" of value to the recipient.[100] A fee is incident to a voluntary act where the regulated entity receives a benefit not normally received by members of the public.[101] The Court concluded that "value to the recipient" was the true measure of the fee permitted, whereas the later language in the Act, "public policy or interest served," would permit the FCC to seek revenue that would amount to levying a tax.[102] This result would be contrary to the Act's objectives as it would obligate the regulated entities to pay for not only the benefits they received, but also for the protective services the FCC provides to the public.[103] The Court concluded that the Act did not permit the FCC to calculate its total direct and indirect costs for the regulation of CATV "and then to contrive a formula that reimburses the Commission for that amount."[104] Because some of the total direct and indirect costs for regulation "inured to the benefit of the public," the Court held that the FCC must recalculate the fees it charged.[105]

Turning back to *Rohm & Haas*, the Third Circuit found the rationale in *National Cable* and the later interpretation in *Skinner*

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96. *Id.* at 337 (quoting 31 U.S.C. § 483a (1970) (current version at 31 U.S.C. § 9701 (2006)). The current version of the statute no longer includes an explicit reference to an agency's indirect costs. 31 U.S.C. § 9701 (2006). It now just states that the fees must be based on "the costs to the [g]overnment," as opposed to direct and indirect costs to the government. *Id.*
97. *Nat'l Cable*, 415 U.S. at 340.
98. *Id.*
99. *Id.*
100. *Id.* at 340–41.
101. *Id.*
102. *Id.* at 341–43.
103. *Id.* at 341.
104. *Id.* at 343.
105. *Id.* at 343–44.

applicable to the case.[106] The court determined that the EPA oversight costs were the type of "administrative costs not inuring directly to the benefit of regulated parties" discussed in *National Cable.*[107] The Third Circuit noted that the oversight costs were intended for the benefit of the public rather than the interests of those the EPA supervised.[108] While the government contended that *National Cable* involved different circumstances, the court found that the rationale in *National Cable* and the statement in *Skinner* were not "confined to that narrow set of circumstances."[109] The Third Circuit concluded that "[it would] not presume Congress to have intended a statute to create the dramatic and unusual effect of requiring regulated parties to pay a large share of the administrative costs incurred by the overseeing agency unless the statutory language clearly and explicitly requires that result."[110]

Applying the clear statement doctrine, the Third Circuit then considered whether the definition of *removal* contained the authorization for the recovery of EPA oversight costs. The Third Circuit began by noting that nowhere in the definition of *removal* was there any mention of the type of oversight costs the EPA sought to recover.[111] Despite this, the government contended that the authorization for recovery could be found within the phrase "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" in the definition of *removal.*[112] The Third Circuit noted that this phrase, specifically the term "monitor," might be understood to encompass some oversight of a private-party action when viewed in a vacuum.[113] But the court held that the language must be examined in the context of a traditional CERCLA response, and therefore found that Congress more likely intended the term "monitor" to encompass actual monitoring of the release or threat of release, and not the oversight of a private party performing the removal action.[114] Accordingly, the Third Circuit found that CERCLA lacked the clear statement required by *National Cable* and held that the federal government could not

106. United States v. Rohm & Haas Co., 2 F.3d 1265, 1273–74 (3d Cir. 1993), *overruled by* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161 (3d Cir. 2005).
107. *Id.* at 1273 (quoting Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 224 (1989)).
108. *Id.*
109. *Id.* at 1273–74.
110. *Id.* at 1274.
111. *Id.* at 1275.
112. *Id.* (quoting 42 U.S.C. § 9601(23) (2006)).
113. *Id.*
114. *Id.* at 1275–76.

recover, under section 107 of CERCLA, the costs of EPA oversight.[115]

B. *The Other Circuits Respond to* Rohm & Haas*:* Atlantic Richfield Co. v. American Airlines *(1996) and* United States v. Lowe *(1997)*

The next circuit court decision to address the issue of EPA oversight under CERCLA was the Tenth Circuit's decision in *Atlantic Richfield Co. v. American Airlines, Inc.*[116] This case is different from the other cases discussed in this comment because Atlantic Richfield Company (ARCO) brought the cost-recovery action against other PRPs.[117] ARCO brought this action after it negotiated a consent decree with the EPA whereby ARCO would implement the entire remedy subject to the oversight of the EPA.[118] After ARCO cleaned the site to the satisfaction of the EPA in 1993, ARCO sought contribution from other PRPs under CERCLA section 113(f).[119] As discussed previously, the analysis is essentially the same for this type of action as it is for an action brought by the government because CERCLA section 113(f), the provision providing a right to contribution, allows the private party to recover all costs recoverable under section 107.[120]

Another difference between *Atlantic* and *Rohm & Haas* is the type of cleanup action involved. Whereas *Rohm & Haas* dealt with a removal action, the cleanup performed by ARCO in *Atlantic* was a remedial action.[121] Even though *Rohm & Haas* involved a different type of cleanup action, the Tenth Circuit still considered *Rohm & Haas's* reasoning, but nonetheless found it unpersuasive.[122] The court asserted that *Rohm & Haas* "departed significantly from prior case law," despite the existence of only one case decided prior to *Rohm & Haas* that addressed whether the EPA could recover oversight costs pursuant to CERCLA.[123] The Tenth Circuit questioned the use of a clear statement standard to analyze this issue and concluded that the circumstances in *National Cable* were

115. *Id.* at 1278.
116. Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564 (10th Cir. 1996).
117. *Id.* at 566.
118. *Id.*
119. *Id.* at 565–66.
120. 42 U.S.C. § 9613(f) (2006); *see also supra* notes 66–69 and accompanying text.
121. *Atl. Richfield Co.*, 98 F.3d at 568.
122. *Id.*
123. *Id.*

distinguishable from the issue in *Atlantic*.[124] Moreover, the court stated that *National Cable* involved members of a regulated industry, whereas *Atlantic* involves responsible parties paying for restitution.[125] Ultimately, the Tenth Circuit decided that it did not need to determine *National Cable's* applicability to *Atlantic* as it was used within *Rohm & Haas* because the cases involved two different types of response actions.[126]

Turning to the definition of *remediation*, the Tenth Circuit focused on the phrase within that definition referring to "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment."[127] The court correctly noted that "monitor" is not defined within CERCLA and chose to rely on a thesaurus to obtain a list of synonyms for the word, which included "audit, check, control, inspect, investigate, observe, *oversee,* regulate, review, scrutinize, study, survey, test and watch."[128] The Tenth Circuit then continued its examination of remediation, using the words monitoring and oversight interchangeably.[129] Interestingly, in an earlier part of the decision, the court had distinguished the circumstances in *National Cable* from this case on the grounds that *National Cable* involved "regulated" entities.[130] It seems questionable for the Tenth Circuit to rely on a group of synonyms so broad that it included the word "regulate," an action the court felt so distinguishable that it could disregard precedent established by the Supreme Court.[131] Notwithstanding the apparent inconsistency, the court ultimately concluded that EPA oversight costs were recoverable under section 107 of CERCLA under the definition of *remediation* because it was "reasonably required to assure that private party remedial actions protect the public health and welfare and the environment."[132]

The next court of appeals to examine the issue addressed in this comment was the Fifth Circuit in *United States v. Lowe*.[133] Unlike the two previous cases, the response action in this case included not

124. *Id.*
125. *Id.*
126. *Id.* The Tenth Circuit asserted that it could find the authorization for the recovery of EPA oversight within the definition of "removal" even under the clear statement standard, but did not detail its reasoning. *Id.* at 569.
127. *Id.* (quoting 42 U.S.C. § 9601(24) (2006)).
128. *Id.*
129. *Id.* at 569–70.
130. *Id.* at 568–69.
131. *See id.* at 569.
132. *Id.* at 570.
133. 118 F.3d 399 (5th Cir. 1997).

only a removal action, but also a remediation action.[134] The EPA ordered this private-party response action pursuant to CERCLA section 106 and the private parties performed the cleanup to the EPA's satisfaction by 1993.[135] In 1991, the government filed a cost-recovery action against the private parties under CERCLA section 107 to recover its expenses, including oversight costs.[136] The defendants urged the court to apply the clear statement standard of *National Cable*, and follow the Third Circuit in *Rohm & Haas*.[137] The federal government, on the other hand, asserted that *National Cable* was inappropriate for the court's consideration of the issue as it involved the imposition of fees on regulated entities, while CERCLA is a remedial statute.[138] The Fifth Circuit ultimately agreed with the government and distinguished the circumstances from those in *National Cable*.[139]

Turning next to the Fifth Circuit's analysis of whether the EPA can recover its oversight expenses of a private-party cleanup action, this comment will focus on the part of the opinion discussing response costs. While the Fifth Circuit did consider the definitions of both *removal* and *remediation*, the court devoted a considerable amount of its decision to the definition of *response costs*.[140] As discussed in Part II.D, *response costs* is not only an umbrella term for other terms such as *removal* and *remediation*; it also includes "enforcement activities" related to such costs.[141] The Fifth Circuit in *Lowe* found that EPA oversight easily fit within the definition of *enforcement activities*.[142] The court stated that EPA "monitoring or oversight is an inherent and necessary enforcement element of private party response action."[143] The Fifth Circuit concluded that enforcement activities

134. *Id.* at 400.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 401.
139. *Id.*
140. *See id.* at 401–04. The Fifth Circuit's analysis of the terms "removal" and "remediation" were much the same as the Tenth Circuit's examination of "remediation" in *Atlantic*. *See id.* at 401–03. The Fifth Circuit also focused much of its attention on the term, "monitoring," and cited the synonyms used in *Atlantic* to come up with a list of possible meanings for monitoring. *Id.* at 403.
141. 42 U.S.C. § 9601(25) (2006); *see supra* note 71 and accompanying text.
142. *Lowe*, 118 F.3d at 403.
143. *Id.* The Fifth Circuit here, like the Tenth Circuit in *Atlantic*, was comfortable using one synonym from the assorted list of synonyms interchangeably with the actual language of CERCLA. *See supra* notes 129–132 and accompanying text.

include EPA oversight because certain sections of CERCLA, specifically CERCLA sections 111(c)(8), 122(f)(3), and 122(f)(5), contemplate EPA oversight.[144] As a result of the court's analysis of the definitions of removal, remediation, and response costs, the Fifth Circuit held that the plain meaning of CERCLA authorized the EPA to recover its costs of oversight of a private-party cleanup action.[145]

C. *The Third Circuit Overrules* Rohm & Haas*:* United States v. E.I. Dupont De Nemours & Co. *(2005)*

In 2005, the Third Circuit revisited its prior holding in *Rohm & Haas* when it decided the case of *United States v. E.I. Dupont De Nemours & Co.*[146] The *Dupont* case arose from an administrative order the EPA issued pursuant to CERCLA section 106 requiring the defendants to clean up the site, subject to EPA oversight.[147] The response plan consisted of two stages: a removal stage and a remediation stage.[148] In the first stage, the government incurred $746,279.77 in oversight costs, and in the second stage, the government incurred $648,517.17 in oversight costs; total oversight costs were $1,394,796.94.[149] The government then brought a cost-recovery action against the defendants pursuant to CERCLA section 107.[150]

Dupont is a notable case because it includes not only a majority opinion, but also a dissenting opinion.[151] The majority first reexamined whether the Third Circuit would continue to rely upon the rationale in *National Cable* as applicable to the issue before it

144. *Lowe*, 118 F.3d at 403. Section 111(c)(8) of CERCLA permits the use of the Superfund to pay for the costs of oversight of RI/FS as well as for the costs of oversight of remedial activities taken pursuant to consent orders or settlement agreements. CERCLA § 111(c)(8), 42 U.S.C. § 9611(c)(8) (2006). Sections 122(f)(3) and (5) of CERCLA base the validity of a covenant not to sue on satisfactory completion of a cleanup action. CERCLA § 122(f)(3), (5), 42 U.S.C. § 9622(f)(3), (5) (2006). As will be discussed later, the inclusion of these provisions actually raises questions as to why Congress did not include an explicit reference to EPA oversight costs as the type of costs that are recoverable under CERCLA by the federal government. *See* discussion *infra* Part IV.B.4.

145. *Lowe*, 118 F.3d at 404.

146. 432 F.3d 161 (3d Cir. 2005).

147. *Id.* at 163.

148. *Id.*

149. *Id.*

150. United States v. E.I. Dupont De Nemours & Co., 2004 U.S. Dist. LEXIS 16366, at *1–2 (D. Del. Aug. 5, 2004).

151. *Dupont*, 432 F.3d at 180 (Rendell, J., dissenting). The case also includes a concurring opinion which agrees with the result, but takes issue with the majority's interpretation of the term "monitoring." *Id.* (Roth, J., concurring in part).

under CERCLA.[152] The Third Circuit reiterated the reasoning asserted by the courts in *Atlantic* and *Lowe* in distinguishing the circumstances in *National Cable* from those presented by the case before it.[153] The court found that while *National Cable* involved the imposition of user fees on a regulated industry, the issue in *Dupont* concerned a remedial statute that sought restitution from liable parties.[154] Also vital to the Third Circuit's reasoning was its assertion that CERCLA liability is determined through the courts, not by an administrative decision as in *National Cable.*[155] Applying these considerations, the court decided to overrule the precedent of *Rohm & Haas* and concluded that the rationale in *National Cable* was no longer applicable to a discussion of recovery by the federal government of EPA oversight costs under CERCLA.[156]

Turning next to the Third Circuit's analysis of the language of CERCLA, the court analyzed the CERCLA terms *removal*, *remediation*, and *response costs*, in much the same way as did the courts in *Atlantic* and *Lowe.* Like these two previous decisions, the Third Circuit used the same broad list of synonyms to equate the term monitoring, used in the definitions of both *removal* and *remediation*, with EPA oversight.[157] The Third Circuit also examined response costs, which include costs of enforcement activities, and determined that Congress also intended it to include EPA oversight costs.[158] The court believed that enforcement activities include any action taken to ensure compliance with CERCLA.[159]

The Third Circuit also addressed a provision not previously analyzed in depth in this comment, CERCLA section 104, which authorizes a private party to conduct a remedial investigation and feasibility study. As discussed in Part II.B, this part of CERCLA section 104, amended by SARA, requires the private party to agree in advance to reimburse the government for the oversight expenses of supervising a private party RI/FS.[160] The defendants asserted that the inclusion of this provision in CERCLA by Congress would be unnecessary if CERCLA section 107, pursuant to the definitions of

152. *Id.* at 166–68.
153. *Id.* at 167–68.
154. *Id.*
155. *Id.* at 168.
156. *Id.* at 162–63, 169.
157. *Id.* at 171–72.
158. *Id.* at 173–74.
159. *Id.*
160. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (2006).

removal, *remediation*, and *response costs*, already permitted the recovery of EPA oversight costs.[161] The government, on the other hand, contended that this provision in CERCLA section 104 is not unnecessary because it adds an additional requirement for private parties, specifically that they agree in advance to pay for the federal government's oversight expenses.[162] The Third Circuit agreed with the government's argument and reasoned that Congress added this language to CERCLA section 104 in order to further the goal of encouraging settlements under CERCLA.[163] The court concluded that Congress included this provision in CERCLA section 104 in order to avoid forcing the EPA to bring an action under section 107 to seek reimbursement for these costs after the private party conducted the RI/FS.[164]

In contrast to the position taken by the majority, the dissent in *Dupont* concluded that if EPA oversight costs were otherwise recoverable by the federal government under CERCLA's definitions of *removal*, *remediation*, or *response costs*, there would be no need under CERCLA to permit recovery by the federal government of oversight costs for this specific type of action.[165] The dissent concluded that under the majority's interpretation, notwithstanding CERCLA section 104, a PRP would effectively agree in advance to pay for EPA oversight costs when entering into a settlement agreement because the government would be authorized to recover these expenses after the cleanup as a matter of law pursuant to section 107.[166] For the dissent, CERCLA section 104 is more naturally read as an exception to CERCLA's general rule that EPA oversight costs are not recoverable under section 107 by the federal government.[167]

IV. DISCUSSION

A. Applicable Standard

Courts that have addressed the issue of whether the EPA can recover its oversight expenses pursuant to CERCLA have begun by determining which standard of statutory interpretation to apply when

161. *Dupont*, 432 F.3d at 174–76.
162. *Id.* at 175.
163. *Id.* It is questionable whether a provision requiring extra work when a private party enters into a settlement actually encourages a private party to settle.
164. *Id.* at 176.
165. *Id.* at 186–87 (Rendell, J., dissenting).
166. *Id.* at 187 (Rendell, J., dissenting).
167. *Id.* (Rendell, J., dissenting).

analyzing the issue, which is where this discussion will begin.[168] The court in *Rohm & Haas* was the first circuit to apply the clear statement standard, enunciated in *National Cable*, to its analysis of governmental recovery of EPA oversight costs under CERCLA.[169] As this comment has demonstrated, numerous courts declined to follow the Third Circuit's reasoning in *Rohm & Haas* and have chosen instead to apply a plain meaning standard.[170] Additionally, the Third Circuit's decision in *Dupont* expressly overruled *Rohm & Haas*, and no other circuit has issued a binding opinion requiring the application of *National Cable* to the issue of governmental recovery of EPA oversight costs under CERCLA.[171]

Against this backdrop, it is difficult to conclude that *National Cable*'s clear statement doctrine applies to the analysis of the present issue. Where the issue in *National Cable* involved the imposition of administrative costs by an agency onto regulated entities, the issue of the recoverability of EPA oversight costs involves liable parties paying for the portion of the harm they caused.[172] Liability under CERCLA can hardly be described as either a fee or a tax and it is more appropriate to refer to it as restitution or compensation. The private parties performing a cleanup under CERCLA are responsible for a contamination, whereas the entities in *National Cable* were innocent parties paying a fee for the authorization to conduct a business.[173] Despite the difference in circumstances, the underlying principles of *National Cable* still offer guidance. The court in *National Cable* expressed concerns over governmental agencies recovering their administrative expenses from regulated private parties.[174] While there need not be a clear statement of congressional intent to shift the burden of government oversight expenses onto

168. *See, e.g.*, *id.* at 166; United States v. Lowe, 118 F.3d 399, 400–01 (5th Cir. 1997); Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 567 (10th Cir. 1996); United States v. Rohm & Haas Co., 2 F.3d 1265, 1273 (3d Cir. 1993), *overruled by Dupont*, 432 F.3d 161.

169. *See Atl. Richfield Co.*, 98 F.3d at 567–68. Prior to *Rohm & Haas*, the only decision addressing the issue of whether CERCLA provides for governmental recovery of government oversight costs was New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). *Id.* at 568.

170. *See, e.g.*, *Lowe*, 118 F.3d at 401; *Atl. Richfield Co.*, 98 F.3d at 568; Cal. Dep't of Toxic Substances Control v. SnyderGeneral Corp., 876 F. Supp. 222, 225 (E.D. Cal. 1994).

171. *Dupont*, 432 F.3d at 162–63, 166.

172. *Lowe*, 118 F.3d at 401.

173. *Id.*

174. *Dupont*, 432 F.3d at 181 (2005) (Rendell, J., dissenting).

private parties, the courts should not follow a tortured interpretation of CERCLA in order to reach a conclusion they support.[175] The inquiry should focus on what the provisions of the CERCLA statute actually provide and not what courts believe they should provide.[176]

B. Relevant Provisions

1. Removal Actions

A good starting point for an inquiry into the relevant provision of CERCLA that affects the recovery of EPA oversight costs is CERCLA's definition of the term *removal.* If there is any part of the definition of *removal* that authorizes recovery of EPA oversight costs, it is in the following words: "[S]uch actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances."[177] As this comment has previously discussed, the decisions that address the issue of governmental recovery of EPA oversight costs tend to focus on these words.[178] Of the courts that have addressed the issue, most focused specifically on the word "monitor," and many used a thesaurus to find synonyms for monitor.[179] Of the synonyms, the courts tend to emphasize one, "oversee."[180] While a synonym may be helpful in interpreting a term, relying too heavily on the synonym can lead to a construction of CERCLA section 107 that is more liberally in favor of the federal government than Congress intended.[181] As this comment has indicated, the first court to use these synonyms was the Fifth Circuit in *Atlantic.*[182] While the use of a thesaurus may be helpful, there are limitations. When a thesaurus produces synonyms such as *control* and *regulate*, that list of synonyms is unreliable because it includes terms that are outside the scope of CERCLA, and cannot possibly mean what Congress intended when it included the term *monitor* in CERCLA's definition of *removal.*[183] Applying these synonyms to the analysis of the applicable standard, it is highly unlikely that a court would find *National Cable* applicable because CERCLA permits the EPA to monitor or regulate the cleanup.

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175. *See id.* at 188 (Rendell, J., dissenting).
176. *Id.* at 182 (Rendell, J., dissenting).
177. 42 U.S.C. § 9601(23) (2006).
178. *See* discussion *supra* Part III.B.
179. *See, e.g.*, United States v. Lowe, 118 F.3d 399, 403 (5th Cir. 1997).
180. *See id.*; Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 569 (10th Cir. 1996).
181. *See Dupont*, 432 F.3d at 183 (Rendell, J., dissenting).
182. *See, e.g.*, *Lowe*, 118 F.3d at 403.
183. *See id.*

A more appropriate reading of the term *monitor* would be that it refers to actual testing and studying of the release or the threat of release of hazardous substances at a contaminated site, and not oversight of that activity. Numerous courts have interpreted the phrase "monitor, assess, and evaluate the release or threat of release of hazardous substances" to mean initial investigations into the scope of the release.[184] The language following the word *monitor* leads to the conclusion that the term is only meant to refer to the release and not to EPA oversight of a private-party cleanup.[185] Had Congress intended this language to authorize recovery by the federal government of EPA oversight costs, it would have used language that was not as specific to investigating the release. This language in the phrase does not aim to permit governmental recovery of EPA oversight costs, and to find authorization of such recovery involves making a leap from what CERCLA states to what courts believe CERCLA probably should have provided.

In addition to the phrase discussed above, another phrase within the definition of *removal* that is relevant to a discussion of governmental recovery of EPA oversight costs is "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."[186] This phrase is at times overlooked or under-discussed in opinions or parties' arguments addressing the issue that is the subject of this comment, presumably because the word *monitor* is synonymous with oversee, and most analyses end with *monitor*.[187]

While EPA oversight of a private-cleanup action is undoubtedly beneficial to public health, welfare, and the environment, it is hard to say that it is "necessary to prevent, minimize, or mitigate damage . . . which may otherwise result from a release."[188] The language here

184. *See, e.g.*, Cannon v. Gates, 538 F.3d 1328, 1334 (10th Cir. 2008) (finding that the government had begun to "monitor, assess, and evaluate" the site where it had conducted historic research, investigations, and site surveys to determine the exact nature of the contamination); Frey v. EPA, 403 F.3d 828, 835 (7th Cir. 2005) (noting that the phrase "monitor, assess, and evaluate" includes investigating water and sediment contamination).

185. *See Dupont*, 432 F.3d at 183–84 (Rendell, J., dissenting).

186. 42 U.S.C. § 9601(23) (2006).

187. *See, e.g.*, *Dupont*, 432 F.3d at 172–73 (giving a small amount of coverage compared to the term, "monitor"); United States v. Rohm & Haas Co., 2 F.3d 1265, 1276 n.17 (3d Cir. 1993) (noting that the EPA's argument would have been stronger if it had relied on this catch-all phrase), *overruled by Dupont*, 432 F.3d 161.

188. 42 U.S.C. § 9601(23).

clearly refers to the "release or threat of a release," and not actions taken to supervise the work of a private party.[189] Like the rest of the definition of *removal*, this phrase is meant to include work done to the site in order to address the contamination directly.[190] In fact, the only examples of what the term *removal* includes are actions taken as a result of a release, such as security fencing to limit access, temporary evacuation, and housing.[191] It is clear that *removal* is only concerned with action taken to address the release, and not the oversight of another's cleanup or containing the release.[192]

There is one last consideration to discuss when looking at CERCLA's definition of *removal*. As stated within the dissent in *Dupont*, there is an oddity created by asserting that the authorization for governmental recovery of EPA oversight costs exists within CERCLA's definition of *removal* while at the same time concluding that these costs are recoverable as costs of oversight of a removal action.[193] It is unquestioned that these cases involve the EPA's oversight of a private-party removal action, so it is peculiar to say that EPA oversight is a part of the private party's action that the EPA is overseeing.[194]

2. Remediation Actions

In CERCLA's definition section, the definition of *removal* is followed by the definition of *remediation*.[195] Naturally, this is usually the next provision courts examine when analyzing whether the EPA can recover its costs of oversight of a private-party cleanup.[196] Because removal and remediation actions are both types of cleanup efforts, they are defined quite similarly, and this similarity is shown in the use of common terms within the two definitions.[197] Not surprisingly, courts that find authorization for governmental recovery of EPA oversight costs, within the definition of *removal*, have a tendency to find that same authorization in the definition of *remediation*. As in the definition of *removal*, the main focus of the courts' analyses in the definition of *remediation* is the term

189. *Id.*
190. *See id.*
191. *Id.*
192. *Dupont*, 432 F.3d at 185 (Rendell, J., dissenting).
193. *Id.* at 182 (Rendell, J., dissenting).
194. *Id.* at 182–83 (Rendell, J., dissenting).
195. 42 U.S.C. § 9601(23)–(24) (2006).
196. *See, e.g.*, *Dupont*, 432 F.3d at 171–72.
197. *See* 42 U.S.C. § 9601(23)–(24).

monitoring.[198] This comment has already addressed the definition of *monitoring* resulting from a natural reading, and an additional in-depth discussion is unnecessary.[199] It only needs to be reiterated that the plain meaning of *monitoring* within a remediation action is the actual studying of the site, not oversight of a private party's cleanup actions.

While the definitions of *removal* and *remediation* are similar, there are differences, and one difference is relevant to this discussion. As explained in Part II.D, the definition of *remediation* includes "such actions at the location of the release as storage, confinement . . . and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment."[200] The phrase "at the location of the release"[201] implies that the term *monitoring* is used only to refer to monitoring that is conducted geographically at the site. Since the monitoring must take place within certain geographical constraints, it follows that the monitoring is concerned with the site and the contamination, not the actions of some third party. The only monitoring that can be conducted exclusively at the site of the contamination is scientific monitoring to determine the scope of the release.[202] EPA oversight of a private party's cleanup action, on the other hand, is not an action that exclusively occurs "at the location of the release."[203] While certain oversight activities can occur at the site, there are numerous other oversight functions that will occur miles from the location of the release.[204] If Congress had intended the term *monitoring* to mean EPA oversight, did it only intend for the oversight costs to be recoverable as remediation costs when it occurred at the site of the release? Under this tortured construction, Congress would have created a complicated statutory framework where certain oversight costs would be recoverable under CERCLA based entirely on geographical considerations. There are complex implications of equating EPA oversight with monitoring as it is used within CERCLA's definition of *remediation*. This result is counter to the

198. *See, e.g.*, *Dupont*, 432 F.3d at 171–72.
199. *See* discussion *supra* Part IV.B.1.
200. 42 U.S.C. § 9601(24).
201. *Id.*
202. *See Dupont*, 432 F.3d at 172.
203. *See id.* at 163.
204. *See* 42 U.S.C. § 9601(24). "The term [remedial action] includes the costs of permanent relocation of residents[,] . . . offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances . . . ." *Id.*

common sense conclusion that CERCLA's use of the term *monitoring* simply refers to actual monitoring of the release, not to a third party overseeing another's efforts to remediate a site.[205]

3. Response Costs

The courts in *Atlantic*, *Lowe*, and *Dupont* read the phrase *enforcement activities*, contained within CERCLA's definition of response costs, to include EPA oversight of a private-party cleanup action. These courts concluded that enforcement activities include EPA oversight because "it does not stretch or distort the meaning of the phrase" to reach that conclusion.[206] For these courts, enforcement activities include not only actions taken to compel a private party to perform a cleanup when a private party fails to perform, but also the evaluation by the EPA of a private party's actions in performing the requested cleanup action.[207] In the face of the Supreme Court construing enforcement activities narrowly, the court in *Atlantic* acknowledged that their reading of the term was liberal, but nonetheless concluded that *enforcement activities* could be read broadly enough to support its holding.[208]

While the courts in *Atlantic*, *Lowe*, and *Dupont* interpreted the phrase *enforcement activities* to include EPA oversight of a private-party cleanup activity, many other courts conclude that this term primarily, if not entirely, refers to the EPA utilizing a process to compel compliance. The court in *United States v. Chapman*[209] found that costs of enforcement activities included reasonable attorney's fees where the defendant had failed to perform a cleanup after the EPA issued the defendant an order to do so.[210] A decision by the Eighth Circuit in *United States v. Gurley*[211] found that the attorney's fees associated with identifying the defendant as a potentially responsible party were recoverable as enforcement activities.[212] Lastly, Justice Scalia, dissenting in *Key Tronic Corp. v. United*

205. *See Dupont*, 432 F.3d at 184 (Rendell, J., dissenting).
206. Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 570 (10th Cir. 1996).
207. *See Dupont*, 432 F.3d at 173–74.
208. *Atl. Richfield Co.*, 98 F.3d at 570 (citing Key Tronic Corp. v. United States, 511 U.S. 809 (1994)).
209. 146 F.3d 1166 (9th Cir. 1998).
210. *Id.* at 1167–69.
211. 43 F.3d 1188 (8th Cir. 1994).
212. *Id.* at 1200.

States,[213] found that "the costs of 'enforcement activities' naturally (and indeed primarily) include attorney's fees."[214]

The view that the phrase *enforcement activities* refers to actions taken to compel a private party to comply is buttressed by the House Committee Report on SARA amending response costs to include enforcement activities. According to the Report, the modification "will confirm the EPA's authority to recover costs for enforcement actions taken *against* responsible parties."[215] The word *against* implies that enforcement activities include only those actions that are adverse to the interests of the private party performing the cleanup action. It necessarily follows that costs such as litigation expenses and attorney's fees related to forcing a private party to perform a cleanup are what Congress intended by amending SARA. EPA oversight of a private-party cleanup action, on the other hand, can hardly be described as an action taken against a responsible party. For the EPA oversight to be effective, the EPA must work with the private party in order to ensure that the cleanup protects the public welfare and the environment. If the EPA's role in a cleanup action degrades as a result of a private party's unsatisfactory cleanup to the point of being "enforcement actions taken against [a] responsible [party]," then that role can no longer be considered oversight.[216] The statutory language of CERCLA does not permit such an interpretation.[217] CERCLA section 122, permitting the government to enter into a consent agreement, prohibits the government from entering into one if the government determines the responsible party will not perform the cleanup properly.[218] Indeed, responsible parties generally prefer EPA oversight of their cleanup as opposed to a government-led removal or remediation action.[219] EPA oversight of a private-party cleanup action is certainly not an action that can be described as "against [a] responsible part[y]."[220]

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213. 511 U.S. 809 (1994).

214. *Id.* at 823 (Scalia, J., dissenting).

215. *Id.* at 818 n.10 (emphasis added) (citing H.R. REP. NO. 99-253, pt. 1, at 66–67 (1985)).

216. United States v. Chapman, 146 F.3d 1166, 1175–76 (9th Cir. 1998) (allowing recovery of reasonable attorney's fees as response costs because the defendant failed "to clean up his property without EPA involvement.").

217. *See* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 173–74 (3d Cir. 2005) (discussing the EPA's role of monitoring a clean-up as separate from compelling compliance under section 107 of CERCLA, 42 U.S.C. § 9607 (2006)).

218. CERCLA § 122(a), 42 U.S.C. § 9622(a) (2006).

219. *See Dupont*, 432 F.3d at 166.

220. Key Tronic Corp. v. United States, 511 U.S. 809, 818 n.10 (1994) (citing H.R. REP. NO. 99-253, pt. 1, at 66-67).

The notion that enforcement activities include EPA oversight of a private-party cleanup is a textual leap the courts make, not to interpret the language of the CERCLA statute as its plain meaning indicates, but to read what the courts believe CERCLA should state. There must be something more than just a bald conclusion that CERCLA's term *enforcement activities* includes EPA oversight of a private-party cleanup because "it does not stretch or distort the meaning of the phrase."[221] To conclude that CERCLA permits the recovery by the federal government of the costs of EPA oversight of a private-party cleanup action, the court must find that Congress intended that interpretation when it amended CERCLA in 1986.[222] A more natural reading of *enforcement activities* would solely include actions taken against a private party in order to compel compliance with CERCLA.[223]

4. Other Provisions of CERCLA

An additional area of CERCLA that affects whether the EPA can recover its oversight costs of a private-party cleanup action is the textual support CERCLA contains elsewhere—what other provisions of CERCLA include or omit. Courts addressing this issue recognize that a particular section of a complex statute cannot be examined in a vacuum, but must be read in context with a consideration of the statute as a whole.[224] A good starting point for such an interpretative approach is CERCLA section 104, which not only permits the EPA to recover its costs of oversight of a private-party cleanup, but requires that a private party agree to reimburse the EPA for them as a condition to entering into an agreement directing the private party to perform the RI/FS.[225] SARA amended this provision of CERCLA in order to permit the private party to perform the RI/FS itself.[226] As discussed in Part II.B, the RI/FS is a preliminary assessment of the contaminated site conducted to determine the best possible means of achieving a proper solution.[227] Congress amended this section of CERCLA to permit a limited set of circumstances where Congress intended the EPA to recover oversight expenses.[228]

221. *See Dupont*, 432 F.3d at 185 (Rendell, J., dissenting) (quoting Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 570 (10th Cir. 1996)).
222. *Id.*
223. *Id.*
224. *See, e.g., Atl. Richfield Co.*, 98 F.3d at 569.
225. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (2006).
226. *Dupont*, 432 F.3d at 186 (Rendell, J., dissenting).
227. *See* discussion *supra* Part II.B.
228. *Dupont*, 432 F.3d at 186 (Rendell, J., dissenting).

The RI/FS is a removal action because it is an action taken to "monitor, assess and evaluate the release or threat of release of hazardous substances."[229] Because the RI/FS is a removal action, there would be no need to amend the language of CERCLA to permit the recovery by the federal government of costs incurred by EPA in conducting oversight of the RI/FS if Congress already intended to authorize governmental recovery for costs of removal actions in general.[230] If Congress intended to include EPA oversight within the definition of *removal*, it surely would not have added additional authorization in CERCLA section 104 for governmental recovery of the costs of a more specific removal action.

Courts finding authorization for the recovery by the federal government of the costs of EPA oversight of private-party cleanup actions conclude that the additional provision in CERCLA section 104 referring to EPA oversight is nonetheless necessary because of the extra requirement in section 104 that the responsible party must agree in advance to reimburse the EPA for oversight costs.[231] While this is an additional requirement, it is not necessary in CERCLA section 104 if the definition of removal already includes EPA oversight of a private party cleanup action. If CERCLA's definition of *removal* already authorizes the EPA to recover oversight expenses, then a private party would merely be agreeing under CERCLA section 104 to pay in advance the costs for which it is already liable.[232] Under this interpretation, it seems odd for Congress to take the time to amend a statute in order to achieve the exact same result already provided in the statute.

Rather than accepting the interpretation of the definition of the term *removal* in CERCLA by courts such as *Dupont*, it seems much more likely that Congress amended CERCLA in 1986 to ensure that the EPA would recover its expenses from oversight of a private party's RI/FS because it could not otherwise recover them under the definition of *removal*. It appears that Congress confined recovery to the narrow set of circumstances where the private party agreed in advance to pay for EPA oversight of a RI/FS, not of a removal action in general. If Congress had intended to authorize the EPA to recover all costs of oversight of a removal action, it could have easily done so. Instead, Congress chose to amend CERCLA so that a private

229. 42 U.S.C. § 9601(23) (2006); *see also* 42 U.S.C. § 9604(a)(1)–(2).

230. *Dupont*, 432 F.3d at 185–87 (Rendell, J., dissenting).

231. *See, e.g.*, *id.* at 175.

232. *Id.* at 186 (Rendell, J., dissenting).

party would have to agree in advance under CERCLA section 104 to pay for EPA's costs only of oversight of the RI/FS.[233]

In addition to CERCLA section 104, Congress also amended CERCLA in 1986, in the SARA amendments, to permit the use of the Superfund to pay for costs incurred by the federal government for oversight of a private party's cleanup action.[234] Prior to the SARA amendment in 1986, CERCLA section 111 simply provided that the EPA could use the Superfund to pay for costs that the EPA incurred when it conducted a removal or remediation action under section 104.[235] If, as the courts in *Atlantic*, *Lowe*, and *Dupont* hold, EPA oversight is considered a removal or remediation action, there would have been no need for Congress to later amend this provision to permit the use of the Superfund for oversight of a more specific removal action. The construction advanced by these courts implies that Congress amended CERCLA to authorize reimbursement from the Superfund for expenses that the EPA was already permitted to recover under CERCLA.[236]

When construing a statute, it is necessary "to give every word some operative effect."[237] When Congress amends a statute and adds a provision, the courts "cannot suppose that [the] change was without a distinct purpose on the part of Congress."[238] The Supreme Court recently addressed another section of CERCLA amended by SARA in *Cooper Industries, Inc. v. Aviall Services, Inc.*[239] The Court in *Cooper* addressed whether a private party PRP who had not been sued under CERCLA sections 106 or 107 may seek contribution from other PRPs under section 113(f).[240] Because the relevant provision of CERCLA section 113(f) provided that a private party may seek contribution "during or following any civil action" under sections 106 or 107, the Court held that the private party may not do so.[241] The Court noted that "[t]here 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."[242] Like the relevant language here, there is

233. *Id.* (Rendell, J., dissenting).
234. *Id.* at 187 (Rendell, J., dissenting).
235. *Id.* (Rendell, J., dissenting).
236. *Id.* (Rendell, J., dissenting).
237. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 167 (2004).
238. Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 475 (1911).
239. 543 U.S. 157 (2004).
240. *Id.* at 160–61.
241. *Id.*
242. *Id.* at 166.

no reason why Congress would specify that the Superfund could be used to reimburse the EPA for oversight expenses if those expenses were already within CERCLA's definition of *removal* or *remediation*. Just as in *Cooper*, where Congress in CERCLA has listed specific instances where a private party PRP can seek contribution from other PRPs,[243] the issue here is one where Congress included certain actions where the EPA could recover its oversight costs yet omitted others.

A final consideration is the lack of any explicit authorization by Congress permitting the EPA to recover expenses resulting from EPA oversight of a private-party cleanup in general. The only provisions where Congress addressed the recoverability of EPA oversight costs were in regards to a limited type of removal action and the use of the Superfund.[244] It is notable that Congress made clear references to EPA oversight costs in these provisions but not in others.[245] Because Congress included these two specific references to governmental recovery of EPA oversight costs, it is clear that Congress was aware that there would be EPA oversight expenses associated with a removal or remediation action. It is also clear that Congress intended that these two actions, EPA oversight of a private party cleanup and a private party removal or remediation cleanup action, would be two separate and distinct events.[246] With respect to the Superfund, Congress already permitted its use for removal and remediation actions and then added authorization for its use for payment of EPA oversight costs.[247] Congress would likewise have added authorization for governmental recovery of EPA oversight costs from private parties if it had intended to do so.[248] The lack of any reference to EPA oversight costs in the cost recovery provision evidences

243. *Id.* at 162–63.

244. 42 U.S.C. §§ 9604(a), 9611(c)(8) (2006).

245. *See id.*

246. *See id.*

247. *Id.* § 9611(c)(8).

248. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166 (2004). With respect to the requirement that a private party could only bring a contribution claim under CERCLA section 113(f), the Court stated, "[I]f [section] 113(f) were read to authorize contribution actions at any time, regardless of the existence of a [section] 106 or [section] 107(a) civil action, then Congress need not have included the explicit 'during or following' condition." *Id.* In *Cooper*, the Court analyzed what Congress explicitly included, which provides helpful guidance here when dealing with what Congress explicitly omitted. *See id.*

Congress's intent not to permit governmental recovery of EPA oversight costs.[249]

5. General Goals of CERCLA

The goals of CERCLA, to ensure the prompt cleanup of a contaminated site and to impose liability upon those persons responsible for the contamination, are considerations that must be taken into account in interpreting any of the provisions of CERCLA.[250] The first, and arguably most important of the two goals, is to give the government the tools it needs to execute an effective and prompt response action at a contaminated site.[251] Obviously, without a cleanup action there would be no need for recovery of removal or remediation expenses because there would be no cleanup expenses incurred. The primary thrust of CERCLA, as an environmental law, is to protect the public welfare and environment, with a secondary objective of forcing those persons responsible for a site's contamination to pay for the expense of that protection.[252] The second objective of CERCLA, then, is subservient to the first. It can hardly be expected that the EPA would ignore a contaminated site simply because it would be unable to later obtain restitution. For example, in the case where the EPA, for a particular contaminated site, cannot identify any PRPs that are solvent, it is without question that the EPA would remediate the site, notwithstanding being unable to subsequently recover its cleanup expenses. When a question arises as to which goal is the most important of the two, it naturally follows that the goal of protecting the public welfare and environment should always take precedence.

This conclusion brings the discussion back to the narrative that began this comment.[253] As the introduction detailed, EPA oversight of a private party's cleanup action is not always effective in ensuring that a private party performs a cleanup in a manner consistent with the first goal of CERCLA, even when the responsible party is footing

249. *See* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 187 (2005) (Rendell, J., dissenting).

250. *See* Aaron Gershonowitz, United States v. Atlantic Research Corp.: *Who Should Pay to Clean Up Inactive Hazardous Waste Sites?*, 19 DUKE ENVTL. L. & POL'Y F. 119, 121 (2008).

251. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 n.2 (D. Minn. 1982) ("Both the House and Senate Committee Reports express the need for prompt action . . . and detail the magnitude of the problems caused by hazardous waste disposal in this country.").

252. *See id.* at 1112.

253. *See* discussion *supra* Part I.

the bill for the EPA oversight. As the introduction alluded, there is little accountability for EPA oversight when the only parties to the transaction are the EPA and the private party. In most instances, when an entity employs a third-party to perform services, it is expected that the third-party will act in furtherance of that entity's best interests. If a private party is required to pay for EPA oversight of the private party's cleanup actions, would the EPA need to act in the private party's best interests? The obvious answer to that question is no, but it does create an interesting and unusual relationship.

The main problem with a private party paying for EPA oversight costs is accountability. When the EPA fails to provide adequate supervision of a private party's cleanup actions, will the private party object to those oversight costs on the grounds that it is not receiving the full value of its contribution? A PRP, under a set of circumstances similar to that of Ford's in Ringwood, New Jersey, likely would not object to the ineffective oversight of its cleanup by the EPA. Presumably, a PRP would be content paying a discounted rate for EPA oversight when compared to the amount it would have to pay to remediate the site completely. Certainly, it would be preferable if the two goals of CERCLA could be accomplished with respect to every circumstance. But when the accomplishment of the second goal places the first in peril, the need to protect the public welfare and environment greatly outweighs the price tag of an effective response.

V. CONCLUSION

When Congress passed CERCLA in 1980, it envisioned an environmental law that could be used to respond to the numerous hazardous waste sites in the nation and then recover from those persons responsible for the sites' contamination. As a part of this process, Congress also contemplated that the EPA would oversee a private party's cleanup action. But simply because a private party's response action will entail EPA oversight does not mean that the EPA oversight actions should be considered part of the response actions. The language of CERCLA makes this point clear. It is only through a reaching and overly broad construction of CERCLA's definitions of *removal*, *remediation*, and *response costs* that the courts are able to find support for their conclusions that the federal government can recover under CERCLA EPA's costs incurred in oversight of a

private party's response actions.[254] These courts fail to read the actual language of CERCLA's definitions to obtain plain meanings of those definitions, and instead interpret CERCLA in a manner that the courts prefers.[255] The language of CERCLA simply does not authorize the federal government to recover the costs the EPA incurs when the EPA oversees a private party cleanup under CERCLA.

Aaron Kelly†

254. *See supra* Part IV.B.1–3.

255. *See supra* Part IV.B.1–3.

† J.D. Candidate, May 2011, University of Baltimore School of Law. I would like to thank Professor Steven Davison for his valuable feedback and guidance. I would also like to thank my family for their encouragement and support.