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United States v. Hyundai Merchant Marine Co.: Big Brother Is Watching - But Who Should Pay for His Monitoring Costs

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I. INTRODUCTION

Times of crisis often spur people to act. This truism is certainly valid in the context of an environmental crisis that prompts remedial congressional and executive legislative action. It is no coincidence that less than one year after the eleven million gallon Exxon Valdez oil spill, Congress hastily formulated and enacted the Oil Pollution Act of 1990 (OPA). Unfortunately, Congress failed to resolve many questions and concerns in OPA’s text in its desire to quickly enact OPA. One issue that remains open for debate is whether OPA allows the government to recover monitoring costs from a private party.

The Ninth Circuit, through its decision in United States v. Hyundai Merchant Marine Co., is presently the only circuit court in the country that has decided whether the government can recover monitoring costs under OPA. The Ninth Circuit ruled against Hy-
undai, a private party responsible for an oil spill, by deciding that monitoring costs were fully recoverable by the Coast Guard, the government agency overseeing Hyundai's ecological clean-up operation. Hyundai argued that OPA did not grant the federal government the right to recover the Coast Guard's costs incurred while monitoring the clean-up of a minor oil spill and challenged the government's attempt to recover these costs on multiple grounds. This Note will focus on Hyundai's contention that the United States Supreme Court's decision in National Cable Television Ass'n v. United States demands that monitoring costs be treated as a tax.

Specifically, this Note addresses whether the Coast Guard has statutory authority under OPA to bill a responsible party for costs the Coast Guard incurs in monitoring that party's clean-up response after an oil spill into navigable waters. Part II sets forth the facts, procedural history and holding of Hyundai. Part III presents the background of the monitoring cost reimbursement issue, how it has been addressed under previous statutes and OPA, and the prior judicial treatment of this debate and analogous controversies. Part IV reviews the Ninth Circuit's analysis in Hyundai. Part V critiques the Ninth Circuit's conclusion that a government agency can recover monitoring costs from a private party under OPA. Finally, Part VI discusses the Hyundai decision's

7. See Hyundai, 172 F.3d at 1190 (explaining that monitoring costs are costs incurred as result of oil spill that does not involve actual, physical removal of oil, but rather oversight of removal process). These costs may include "personnel, equipment, and investigatory costs, as well as the billing of the responsible party for government helicopter overflights." Alarcon & Jennings, supra note 3, at 421 (noting it is difficult to say what is not included in monitoring costs).

8. For the arguments set before the Hyundai court, see infra note 28 and accompanying text.


10. See id. at 342-43. "There the Court reminded Congress that it may not delegate away its taxing power to an executive agency." Hyundai, 172 F.3d at 1190 (explaining that although Hyundai used National Cable as basis for its challenge, it was not applicable here).

11. See Hyundai, 172 F.3d at 1189 (discussing whether "removal costs" under OPA includes "monitoring costs").

12. For a full discussion of the facts, procedural history and holding of Hyundai, see infra notes 17-29 and accompanying text.

13. For a complete examination of the statutory and legislative support of the Ninth Circuit's opinion in Hyundai, as well as the relevant case law surrounding this issue, see infra notes 30-114 and accompanying text. Specifically, for a full review of this issue under analogous statutes to OPA, see infra notes 72-107.

14. For a thorough discussion of the Ninth Circuit's analysis in Hyundai, see infra notes 115-29 and accompanying text.

15. For a critical analysis of the Ninth Circuit's decision, see infra notes 130-57 and accompanying text.
significance and its potential impact on future oil spill salvage operations.  

II. FACTS

In October 1991, the M/V Hyundai No. 12 grounded in the Shumagin Islands of Alaska. Each of the vessel’s tanks, collectively carrying 200,000 gallons of oil, was fractured and spilled 10,000 gallons of oil into the sea.

The United States government immediately responded to the initial threat by dispatching a Coast Guard team and equipment to monitor Hyundai’s attempts to contain the spill and free the vessel. Though the Coast Guard stood ready for eleven days following the grounding, its labor and technical services were neither needed nor used. Hyundai was able to contain the spill, clean up the oil, and free the ship without any outside assistance.

The United States brought suit in the United States District Court for the District of Alaska under OPA to recover its costs for the Coast Guard’s response to the Hyundai emergency. Initially,
the district court found that Congress did not intend to consider the monitoring expenses that the Coast Guard sought as a "removal cost" under the terms of the statute. The district court stated that it did not agree with the government's view that OPA's definitions of "removal" and "removal costs" included the cost of monitoring private response to oil spills.

The United States sought reconsideration of the initial Hyundai decision. After reviewing its original decision, the district court in Hyundai reversed its holding and held that monitoring costs were, in fact, included in the removal costs recoverable by the government under OPA from the responsible party. The Hyundai district court ultimately awarded 1.7 million dollars in removal costs to the United States. Hyundai then appealed the district court's

23. See United States v. Hyundai Merchant Marine Co., 1995 A.M.C. 2168, 2172 (D. Alaska 1995) (examining pertinent OPA provisions and related statutes as well as sparse legislative history of OPA, district court concluded that "Congress clearly distinguished removal and monitoring activities and costs . . . [and] limited the recovery to removal costs. Other activities do not generate recoverable costs . . . ").

24. See id. at 2171-72 (noting there must be nexus between oil spill and cost claimed). In arriving at its decision, the district court in Hyundai noted, but rejected, dicta found in the United States District Court of Louisiana's decision in Conoco Inc. v. United States. See id. (discussing Conoco in dicta and stating it's unconvinced that by including definitional provision in OPA Congress intended to protect parties from arbitrary assessments).

The court in Conoco interpreted OPA and analogous statutes and stated that it would "expand the definition of both 'removal' and 'removal costs' found [in OPA]" such that removal costs would include monitoring costs. Conoco Inc. v. United States, 39 ERC 1541, 1544 (E.D. La. Jan. 14, 1994) (holding review of propriety of government's demand for reimbursement for action taken by Coast Guard pursuant to OPA was not possible under the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1994)). The district court in Conoco said Congress' mere inclusion of "definitional provisions" for "removal" and "removal costs" is not enough to conclude that Congress had the intent of protecting the party responsible for the spill. See Conoco, 39 ERC at 1544 (commenting that relevant definitions were not sufficiently broad to support government's interpretation). For a further discussion of the decision in Conoco, see infra notes 102-07 and accompanying text.


26. See id. at 746 (reversing its first holding in Hyundai case).

27. See id. (rehearing the case and determining that sections of OPA, albeit obscured in statute, demanded deference to agency interpretation). The district court stated:

The ambiguity which has been observed by the court as between the statutory definition of "remove" and "removal costs" . . . calls into play both the involved agency's own interpretation of the statute as well as legislative history. . . . [T]he agency view is that monitoring costs are recoverable . . . [T]he legislative history of OPA . . . fails to support the court's initial view that monitoring costs were not included in recoverable removal costs.
award on several grounds. The Ninth Circuit Court of Appeals affirmed the district court’s decision and held that monitoring costs are recoverable removal costs under OPA.

Id.; see also United States v. Hyundai Merchant Marine Co., 172 F.3d 1187, 1188 (9th Cir. 1999) (stating damages awarded by district court in Hyundai case).

28. See Hyundai, 172 F.3d at 1189 (analyzing Hyundai’s assertion that United States could not recover monitoring costs and that only “necessary” costs were recoverable). Hyundai also asserted that some penalties were incorrectly assessed under the Debt Collection Act, 31 U.S.C. § 3717. See id. In addition, Hyundai contended the government should not have been awarded attorneys’ fees and, finally, that the wrong rate schedule was used when estimating the Coast Guard’s costs. See id. (affirming district court’s holding on all issues except penalty assessment under Debt Collection Act).

On appeal, before the Ninth Circuit Court of Appeals, Hyundai argued that OPA did not provide for the government’s cost recovery of the Coast Guard’s monitoring activities over Hyundai’s clean-up operation, “as opposed to the cost of actual removal of oil.” Id. (appreciating that Hyundai recognized its responsibility to reimburse government for some costs incurred by Coast Guard’s clean-up, but disputed majority of costs). The claim was before the court as a matter of first impression. See id. at 1188 (noting that no circuit had yet considered the issue). In addition, Hyundai argued that the definition of removal costs excluded monitoring costs. See id. at 1190 (commenting that every defendant that has challenged monitoring costs reimbursement, in various courts, have raised this argument, but to no avail). Hyundai stated that its argument was supported by a congressional conference report. See id. at 1190 n.2 (rejecting Hyundai’s argument that denial of monitoring cost recovery is supported by H.R. Conf. Rep. No. 101-655, 101st Cong., 2d Sess. 145 (1990)). The Congressional report states:

With respect to removal of any discharge or mitigation or prevention of any substantial threat of a discharge, the President may assume responsibility and costs of these actions subject to reimbursement from the responsible party; (i.e., “federalize the effort”); direct or monitor all Federal, State and private actions; and remove and, if necessary, destroy a vessel discharging or threatening to discharge.

Id. The Hyundai court interpreted the report so that “subject to reimbursement” only applies to the first clause. See id. Finally, Hyundai argued that the separate reference to “monitoring costs” and “removal” in a section of OPA supported its position that the two terms were not ordinarily grouped together. See id. at 1190 nn.2-3 (disagreeing with Hyundai’s position and holding “it is more reasonable to apply the clause to the entire sentence”).

Finally, Hyundai contested the charge of monitoring costs on the basis of the Supreme Court’s decision in National Cable Television Ass’n v. United States that only Congress has the power of taxation and that agencies may only impose fees. See id. at 1190-91 (citing National Cable Television Ass’n v. United States, 415 U.S. 336 (1974)). The imposition of a fee must be based on a number of factors that define the difference between a fee and a tax. See National Cable, 415 U.S. at 341-43 (stating agencies may exact fees from private parties for services rendered based on direct and indirect costs, value of service to recipient and public policy or interest served). Hyundai argued that the reimbursement of monitoring costs effectively functions as a tax. See Hyundai, 172 F.3d at 1190 (contending that if monitoring cost is considered tax then it is not recoverable because National Cable determined Congress has not made clear statement authorizing it). Further, Hyundai asserted that when monitoring private party oil spill salvage operations, the Coast Guard, as authorized by EPA, actually functions as an agency. See id.

29. See Hyundai, 172 F.3d at 1193. For a full discussion and critique of the decision and impact of the Ninth Circuit’s holding, see infra notes 115-70 and accompanying text.
III. BACKGROUND

A. Origins of Monitoring Costs Recovery

Monitoring costs are defined as costs incurred by a government agency in overseeing a private party’s removal of ecological waste and the costs incurred from performing remedial action after an environmental hazard. Prior to the Hyundai decision, no circuit court, and only a handful of district courts, had addressed whether OPA’s statutory language authorized the recovery of monitoring costs. Recovery of monitoring costs, however, is often dealt with under both the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). RCRA and CERCLA are


31. See, e.g., United States v. J.R. Nelson Vessel, Ltd., 1 F. Supp. 2d 172, 176 n.2 (E.D.N.Y. 1998) aff’d, 173 F.3d 847 (2d Cir. 1999) (stating in dicta that monitoring costs are “clearly recoverable under OPA”); United States v. Murphy Exploration & Production Co., 939 F. Supp. 489, 491 (E.D. La. 1996) (holding that term “removal costs” under OPA includes monitoring costs); United States v. Conoco, Inc., 916 F. Supp. 581, 584 (E.D. La. 1996) (holding responsible party strictly liable to pay for removal and monitoring costs from discharge of oil under OPA); Conoco, Inc. v. United States, 39 ERC 1541, 1544 (E.D. La. 1994) (stating in dicta that definition of removal costs in OPA was sufficiently broad to include monitoring costs). Hyundai is the first case to reach a circuit court regarding this issue because the grounding occurred only 45 days after OPA was passed and became law. See Appellants’ Opening Brief at 6, Hyundai (Nos. 97-35538, 97-35820).


similar because they authorize governmental removal cost recovery from a private party. As a result, the courts that have examined monitoring cost reimbursement under these statutes have based their decisions on: (1) the interpretation of "removal costs;" and (2) whether "monitoring costs" are included within these relevant provisions of RCRA and CERCLA. In addition, the monitoring cost reimbursement issue is also subject to analysis under the Supreme Court's decision in National Cable Television Ass'n v. United States, commonly referred to as the NCTA doctrine. Therefore, a review of how monitoring costs are treated pursuant to the language of RCRA and CERCLA, coupled with an examination of the case law generated from these statutes, as well as the analysis of this subject under the NCTA doctrine is necessary to understand the monitoring costs reimbursement issue under OPA.

1. Watchful Eyes Under RCRA

Enacted in 1976, RCRA set forth a complex plan for the federal regulation of hazardous wastes. RCRA's primary purpose was to reduce the creation of hazardous waste and regulate its storage, transportation and disposal through a permit system. This company] to secure reimbursement” for EPA clean-up costs; second, SARA increases CERCLA's capacity "for allocating clean-up costs among responsible parties." Denise M. Schuh, Comment, The Cents of It: Dischargeability and Environmental Claims Under the Bankruptcy Code, 14 N. Ill. U.L. Rev. 191, 199 (1993) (citing CERCLA § 107, 42 U.S.C. § 9607 (1988)).

34. See 42 U.S.C. § 6928(h) and § 9607(a); see also United States v. Rohm & Haas Co., 2 F.3d 1265, 1275-78 (3d Cir. 1993) (finding that CERCLA provision authorizing federal government to recover all "removal" costs does not include costs incurred by government in overseeing hazardous waste clean-up performed pursuant to RCRA).

35. See Rohm & Haas, 2 F.3d at 1275 (stating that "the key issue [is]: should CERCLA's definition of 'removal' be read to encompass the government's activity in overseeing removal or remedial action paid for and conducted by private parties?"); United States v. Lowe, 118 F.3d 399, 402 (5th Cir. 1997) (stating that "[t]he question presented is whether the government's oversight costs in a responsible party clean-up are response costs under CERCLA").

36. 415 U.S. 336, 341 (1974) (holding that Congress must clearly indicate its intent to delegate away its authority in order for executive agency to recover administrative costs, whether fees or taxes).


plex plan was designed to act as a “cradle to grave” regulatory system for hazardous waste.\textsuperscript{40}

Pursuant to RCRA, the Environmental Protection Agency (EPA) may order owners and operators of hazardous waste sites to monitor, test and analyze toxins levels present in soil surrounding a facility.\textsuperscript{41} EPA, however, may perform these tasks if either the owner is unable to do the work or the agency is unsatisfied with the owner’s efforts.\textsuperscript{42} In addition, RCRA \textit{expressly} provides that EPA

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vided by the [RCRA], EPA will administer the federal hazardous waste provisions of this legislation. They require the Administrator to develop criteria for determining what is a hazardous waste, and then to list those wastes determined to be hazardous. From point of generation, through transportation, storage, treatment and disposal, those wastes listed as hazardous are federally regulated.”; \textit{see also} Page, \textit{supra} note 38, at 532 (remarking that Congress’ intention was to eliminate unregulated land disposal of discarded materials and hazardous waste); Ian G. John, \textit{Note, Too Much Waste: A Proposal for Change in the Government’s Effort to Clean Up the Nation,} 70 \textit{Ind. L.J.} 951, 953 (1995) (discussing background of RCRA). Just prior to RCRA’s enactment, solid waste was being produced in greater amounts than ever before and the country’s environmental stability was dissipating at a rapid pace. \textit{See id.} at 954 (observing that “millions of tons” of recyclable material were being wasted every year).
\end{quote}

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40. \textit{See} Page, \textit{supra} note 38, at 532 (outlining regulatory system set forth in RCRA); \textit{see also} John, \textit{supra} note 39, at 954 (explaining that Congress concentrated on regulating generators, transporters, and hazardous waste treatment, storage, and disposal facilities). RCRA was intended to create a unified effort to stop the flow of improperly disposed waste among federal, state and local governments. \textit{See id.} (asserting that, unfortunately, potential effect of effort of that magnitude has yet to be fully realized).
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41. \textit{See} 42 U.S.C. § 6934(a)(1), (2). The relevant portion of RCRA states: If the Administrator determines, upon receipt of any information, that-

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\item[(1)] the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or
\item[(2)] the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, he may issue an order requiring the owner or operator of such facility or site to conduct such monitoring, testing, analysis, and reporting with respect to such facility or site as the Administrator deems reasonable to ascertain the nature and extent of such hazard.
\end{itemize}

\textit{Id.; see also} Wyckoff Co. v. EPA, 796 F.2d 1197, 1200 (9th Cir. 1986) (finding EPA correctly interpreted RCRA to permit it to order owner or operator of hazardous waste facility to conduct monitoring, testing and analysis).
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42. \textit{See} 42 U.S.C. § 6934(d)(1), stating in relevant part:

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\item[(1)] If the Administrator determines that no owner or operator referred to in subsection (a) or (b) of this section is able to conduct monitoring, testing, analysis, or reporting satisfactory to the Administrator, if the administrator deems any such action carried out by an owner or operator to be unsatisfactory, or if the Administrator cannot initially determine that there is an owner or operator referred to in subsection 9(a) or (b) of this section who is able to conduct such monitoring, testing, analysis, or reporting, he may -
\item[(A)] conduct monitoring, testing, or analysis (or any combination thereof) which he deems reasonable to ascertain the nature and extent of the hazard associated with the site concerned,
\end{itemize}

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may be reimbursed for the monitoring costs it expends in testing and analyzing potential hazardous waste sites. Furthermore, RCRA authorizes EPA to bring suit against anyone who harbors hazardous waste and contributes to the "imminent and substantial endangerment [of] health or the environment." Additionally, through RCRA, EPA may force environmental polluters to undertake appropriate corrective action through a program aptly named the corrective action program. The corrective

43. See id. (stating in subsection (b) that Administrator may order private party owner "to reimburse the Administrator or other authority or person for the costs of such activity"). In contrast, if an owner carries out work ordered by EPA pursuant to sections 6934(a) and (b), and EPA nonetheless performs its own testing, monitoring and analysis of the site, EPA may not recover the costs it expended if EPA's results are the same as those obtained by the owner. See id. § 6934(d)(2).

44. 42 U.S.C. § 6973(a) (detailing Administrator's authority).

45. See id. Section 6973(a) provides in relevant part:

Id. Section 6973(a) also allows EPA to issue "orders as may be necessary to protect public health and the environment." Id.; see also Cooke, supra note 32 (concluding that EPA may seek relief from hazardous waste site dangers, either through litiga-
action program aims to identify and redress environmental pollution at facilities that have RCRA hazardous waste permits.\(^{46}\) Therefore, every facility with a RCRA permit is required to implement a corrective action program.\(^{47}\) Consequently, the corrective action program reaches thousands of facilities throughout the United States.\(^{48}\) The Court of Appeals for the Third Circuit said that "[g]iven the scope of the RCRA corrective action program and the thousands of facilities involved, it is not surprising that EPA oversight of private [parties'] corrective action activities involves substantial expense."\(^{49}\) In sum, EPA's costs incurred in monitoring hazardous waste sites and in monitoring the corrective action program are fully reimbursable.\(^{50}\)

2. *Under the Glass in CERCLA*

After RCRA's promulgation, it was clear that it contained gaps and omissions.\(^{51}\) To pinpoint and remedy the pollution problems caused by hazardous materials not addressed in RCRA, Congress enacted CERCLA in 1980.\(^{52}\) Through CERCLA, Congress created
an extensive and "uniform system of notification, emergency governmental response, enforcement, and liability." Primarily a remedial statute, CERCLA commissions EPA to clean-up hazardous waste sites and identify and analyze the release of any unsafe materials into the environment.

CERCLA's statutory scheme provides for two methods of cleaning up a waste site. Section 106 of CERCLA authorizes EPA either to: (1) bring suit against a responsible private party for reimbursement of clean-up costs; or (2) order the responsible party to clean-up toxic waste sites at its own expense. As a result, RCRA and

53. United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989) (commenting that reporting requirements were to ensure that government would take swift action to monitor hazardous release). Congress' purpose in enacting CERCLA was "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. REP. No. 96-1016, 22 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6125. The Fifth Circuit stated that "CERCLA substantially changed the legal machinery used to enforce environmental clean-up efforts and was enacted to fill gaps left in an earlier statute, the Resource Conservation and Recovery Act of 1976 (RCRA)." Amoco Oil, 889 F.2d at 667 (commenting that under RCRA, government was not authorized to order responsible parties to clean-up waste sites unless they posed imminent threat to public health or welfare).

Through developing a method of regulation and financing of both governmental as well as private response actions at waste disposal sites, CERCLA remedied RCRA's problems. See Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (confirming that CERCLA establishes "a means of controlling and financing both governmental and private responses to hazardous releases"); United States v. Reilly Tar & Chem. Co., 546 F. Supp. 1100, 1111 (D. Minn. 1982) (finding congressional purpose of CERCLA is "to provide for liability, compensation, clean-up, and emergency response to hazardous substances released into the environment").

54. See CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1); see also Page, supra note 38, at 548. EPA also must prioritize releases and threatened releases of toxic materials by developing a National Priority List (NPL). See United States v. Rohm & Haas Co., 2 F.3d 1265, 1270 (3d Cir. 1993) (asserting that CERCLA's primary goal is to clean up and prevent hazardous waste sites).


During debate over CERCLA, three separate bills were under consideration. See Amoco Oil, 889 F.2d at 667 (discussing development of CERCLA); United States v. Mottolo, 605 F. Supp. 898, 905 (D.N.H. 1985) (setting forth background of CERCLA). The final version of CERCLA was a "last-minute compromise" between all three bills. See Amoco Oil, 889 F.2d at 667 (quoting Mottolo stating that consequently, CERCLA has become known, and deservedly so, for vague provisions and ambiguous and conflicting legislative history).

56. See CERCLA § 106(a), 42 U.S.C. § 9606 (a). Section 9606(a) states: In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and sub-
CERCLA are similar in that both statutes impliedly state that a government agency can recover removal costs when performing a clean-up for a private party. According to section 104 of CERCLA, the government may respond to an actual or threatened release of toxic materials by undertaking a removal or remedial action \textit{sua sponte}. In addition to sections 104 and 106, section 107 mandates that the costs the government incurs through the performance of any remedial action are recoverable from the party responsible for the substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA § 106(a), 42 U.S.C. § 9606(a).

57. See Cooke, supra note 32, § 14.02[3][c], at 14 (comparing CERCLA section 106 and RCRA section 6928 and noting similarities). To compare RCRA's treatment of the reimbursement issue, see supra notes 43 and 50 and accompanying text.

58. See CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1). Section 9604(a)(1) states in relevant part:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) 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, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1). Section 101(23) of CERCLA defines "remove" or "removal" as:

[T]he clean-up 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 the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121 et seq.]

CERCLA § 101(23), 42 U.S.C. § 9601(23).
sponsible for the release of the toxic waste.\textsuperscript{59} The courts disagree as to whether monitoring costs are included in the removal or remedial actions proscribed by CERCLA.\textsuperscript{60}

3. \textit{The NCTA Doctrine}

Before interpreting the language of RCRA and CERCLA, in light of monitoring cost recovery, it is essential to first examine the doctrine that resulted from the Supreme Court's decision in \textit{National Cable Television Ass'n v. United States}, popularly known as the "NCTA doctrine."\textsuperscript{61} The NCTA doctrine, explained in \textit{Skinner v.}

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\item \textsuperscript{59} See CERCLA § 107(a), 42 U.S.C. § 9607(a). This section states: 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, . . . 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; . . . CERCLA § 107(a), 42 U.S.C. § 9607(a). Additionally, Congress stated that CERCLA would "enable the Administrator to pursue rapid recovery of the costs incurred for the costs of such [removal or remedial] actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. REP. No. 96-1016, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120 (noting strengths of CERCLA in aiding enforcement of environmental laws).

\item \textsuperscript{60} Compare United States v. Rohm & Haas Co., 2 F.3d 1265, 1278 (3d Cir. 1993) (finding that monitoring costs are not included in recoverable costs of removal or remedial actions), with United States v. Lowe, 118 F.3d 399, 401 (5th Cir. 1997) (finding that EPA's response costs are recoverable from private parties as restitution).

\item \textsuperscript{61} See National Cable Television Ass'n, v. United States, 415 U.S. 336, 337 (1974) (explaining that case centered around Independent Offices Appropriation Act of 1952 which authorized federal agencies to impose regulation fee in return for agency's services). The fee was to be determined by considering "the direct and indirect costs to the Government, value to the recipient [and] public policy." \textit{Id.} at 337. The Federal Communications Commission (FCC) imposed a fee on community antenna television (CATV) systems and then added an annual fee for each CATV system at 30 cents per subscriber to the system. See \textit{id.} at 340 (observing that 30 cent fee was justified on ground that this was approximate "value to the recipient"). The CATVs challenged the 30 cent fee, claiming it included a fee for the "public policy or interest served." \textit{Id.} The United States Court of Appeals for the Fifth Circuit had affirmed the FCC's decision holding that the "value to the recipient" was the criterion to use in determining the standard and not the "public policy or interest served" language which would then make the fee similar to a tax. See \textit{id.} at 342-44. According to the Fifth Circuit, if the latter standard was used, the CATVs would be paying for the services they receive in addition to the benefits the public receives by the FCC's services, and this is in direct contrast to the purposes of the statute. See \textit{id.} The FCC appealed to the Supreme Court, which held that the "value to the recipient" was the proper measure of the fee authorized to be imposed and remanded the case for the fee to be determined under the proper standard. See \textit{id.} at 344.
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Mid-America Pipeline Co.,\textsuperscript{62} states 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."\textsuperscript{63} In recent case law, a trend has developed regarding the arguments each party makes in a dispute surrounding the issue of monitoring costs recovery based on the NCTA doctrine.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{62} 490 U.S. 212 (1989).
\item \textsuperscript{63} \textit{Id.} at 224. The Court held that Congress' delegation of its taxing power to the Secretary of Transportation in order to establish a system of user fees to cover costs of administering certain federal pipeline safety programs was not unconstitutional because it placed many restrictions on the Secretary's discretion to assess a pipeline user. \textit{See id.; see also} American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management Dist., 166 F.3d 895, 898-99 (6th Cir. 1999) (using \textit{National Cable} as guidance, pointing out that primary difference is that tax money is used for public purposes, and fees relate to individual benefits); United States v. Lowe, 118 F.3d 399, 400-01 (5th Cir. 1997) (commenting that as per \textit{National Cable}, Congress must make clear statement of intent to impose fees on regulated industries in order to collect those fees under its taxing authority); Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 567 (10th Cir. 1996) (quoting \textit{Skinner} court's analysis of holding in \textit{National Cable} with regard to need for clear congressional statement in order to tax); Seafarers Int'l Union v. United States Coast Guard, 81 F.3d 179, 182 (D.C. Cir. 1996) (quoting \textit{National Cable} and noting that Supreme Court distinguished between allowable user fees and unconstitutional taxes); \textit{Rohm & Haas}, 2 F.3d at 1273 (reiterating \textit{Skinner} court's interpretation of \textit{National Cable} and holding that oversight costs are akin to administrative costs in \textit{National Cable}).

\item \textsuperscript{64} \textit{See} Lowe, 118 F.3d at 400-01 (explaining that private parties argue that under NCTA doctrine there must be a clear legislative statement prescribing such recovery for government agencies to recover monitoring costs and, in turn, government agencies argue that NCTA doctrine is narrow and inapplicable in monitoring costs recovery cases); \textit{see also} Atlantic Richfield Co., 98 F.3d at 567-69 (stating that appellants based appeal on decision in \textit{Rohm & Haas}, contending that NCTA doctrine was applicable); \textit{Rohm & Haas}, 2 F.3d at 1273-74 (outlining defendant's contention that NCTA doctrine must be applicable for oversight cost recovery; plaintiffs asserted that NCTA doctrine is only applicable to narrow set of circumstances); Maine v. Department of Navy, 973 F.2d 1007, 1014 (1st Cir. 1992) (using NCTA doctrine, Navy argued that fees imposed on it by state of Maine were taxes and therefore impermissibly imposed, whereas Maine asserted that NCTA doctrine was inapplicable because compliance with state regulations benefited Navy); Town of New Windsor v. Tesa Tuck, Inc., 935 F. Supp. 317, 326-28 (S.D.N.Y. 1996) (setting forth that "[i]n arguing that the State is not entitled to cost incurred in overseeing the remedial activities of the Town, defendants rely upon \textit{United States v. Rohm & Haas, Co. . . . In opposition, the State relies on . . . several recent district court cases declining to follow \textit{Rohm & Haas}.}"); California Dep't of Toxic Substances Control v. Celtor Chem. Corp., 901 F. Supp. 1481, 1489-90 (N.D. Cal. 1995) (asserting that, despite defendants argument that NCTA doctrine was applicable and allowed for recovery of oversight costs, district court found argument unpersuasive and rejected that \textit{National Cable} announced universal definitions of fees and taxes).
Monitoring costs are intended to safeguard the public interest, as well as aid the interests of those being overseen.\textsuperscript{65} Though different in nature, monitoring costs are often considered administrative costs, analogous to the costs at issue in \textit{National Cable}.\textsuperscript{66} As a result, most defendants argue, pursuant to the NCTA doctrine, that a clear declaration of congressional intent is needed before the government may be reimbursed for its monitoring costs.\textsuperscript{67}

The government, on the other hand, traditionally argues that the NCTA doctrine does not apply to most cases dealing with monitoring cost reimbursement because \textit{National Cable} involved a limited and separate issue: whether a regulatory agency, authorized to collect fees from the entities it supervises, could calculate those fees based on the agency's total costs incurred due to the supervision.\textsuperscript{68} In contrast, according to the private parties, the issue in the majority of monitoring costs cases is simply whether the applicable statutory language provides for monitoring cost reimbursement.\textsuperscript{69}

\textsuperscript{65} See \textit{John}, supra note 39, at 980 & n.192 (pointing out positive aspects of \textit{Rohm & Haas} decision because private parties can seek out EPA's advice leading to efficient and effective clean-ups); see also \textit{Rohm & Haas}, 2 F.3d at 1273 (examining issue of oversight costs under NCTA doctrine). These "administrative costs" not only "inure[ ] directly to the benefit of regulated parties," but also to the benefit of the public at large. \textit{Skinner}, 490 U.S. at 224 (elucidating NCTA doctrine and distinguishing between costs that are fees and those that are taxes).

\textsuperscript{66} See \textit{John}, 490 U.S. at 224 (discussing issue in \textit{National Cable} that trade associations representing community antenna television systems (subscribers) which sought to set aside fee schedule of FCC which set annual fee each subscriber had to pay to get space to air its programs at 30 cents per subscriber).

\textsuperscript{67} See \textit{Florida Power & Light Co. v. United States}, 846 F.2d 765, 772-73 (D.C. Cir. 1988) (invoking NCTA doctrine, petitioner argued that delegation of power to tax to agency by Congress is prohibited without clear showing of intent); \textit{Town of New Windsor}, 935 F. Supp. at 326 (stating defendants relied on \textit{Rohm & Haas}' interpretation of NCTA doctrine); \textit{Cellior Chem. Corp.}, 901 F. Supp. at 1489-90 (pointing out that defendant relied on NCTA doctrine interpreted by \textit{Rohm & Haas} court which stated that, "the federal government could not collect its oversight costs because CERCLA provided no clear expression of Congress' intent to delegate such authority to the Executive").

\textsuperscript{68} See \textit{Town of New Windsor}, 935 F. Supp. at 326 (noting that State relied on line of cases declining to follow \textit{Rohm & Haas}' interpretation of NCTA doctrine); \textit{United States v. Ekotek, Inc.}, 41 ERC 1981, 1984 n.1 (D. Utah 1995) (discussing government's assertion and examining decisions by different courts rejecting \textit{Rohm & Haas}).

\textsuperscript{69} See, e.g., \textit{United States v. Lowe}, 118 F.3d 399, 400 (5th Cir. 1997) (stating issue as whether defendants can be held liable under section 107(a) of CERCLA for oversight costs); \textit{Atlantic Richfield Co. v. American Airlines, Inc.}, 98 F.3d 564, 567 (10th Cir. 1996) (asserting that case centered on outcome of question whether EPA oversight of private party clean-ups are costs for which appellants can be held liable under section 107(a) of CERCLA, and are therefore not recoverable by Atlantic Richfield); \textit{United States v. Rohm & Haas Co.}, 2 F.3d 1265, 1267 (3d Cir. 1993) (explaining issue as whether pursuant to CERCLA's liability provision, oversight costs incurred under RCRA are recoverable); \textit{United States v. Conoco, Inc.}, 916 F. Supp. 581, 582 (E.D. La. 1996) (explaining that government sought restitu-
Specifically, the government typically contends that a statute regulating a governmental agency’s actions also authorizes that agency to recover the costs it incurs while monitoring a private party’s clean-up or removal action. Consequently, the NCTA doctrine begs the question of what degree of congressional expression is necessary to impose liability.

B. Application of RCRA, CERCLA and the NCTA Doctrine to the Monitoring Cost Reimbursement Issue

1. Monitoring Costs as a Taxing Issue

Stemming from the Supreme Court’s decision in National Cable, lower courts began to hotly debate the monitoring costs restitution issue. The leading case rejecting the view that monitoring costs are recoverable under CERCLA and RCRA is the United...
States Court of Appeals for the Third Circuit’s decision in United States v. Rohm & Haas Co. 73

In Rohm & Haas, the government brought a declaratory judgment action under CERCLA to recover EPA’s monitoring costs that were incurred pursuant to an administrative consent order issued under RCRA. 74 The district court rejected R & H’s argument and

73. See United States v. Rohm & Haas, 2 F.3d 1265, 1265 (3d Cir. 1993) (finding that holding departs significantly from prior case law); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985) (addressing government oversight of private party clean-up and holding that government’s costs in assessing site conditions and supervising removal of waste, but not performing removal itself, are “response costs” under CERCLA). In addition, many courts have held that pursuant to CERCLA, EPA may recover the administrative and indirect costs incurred during a clean-up operation. See, e.g., United States v. Ottati & Goss, Inc., 900 F.2d 429, 444 (1st Cir. 1990) (discussing EPA’s contention that law requires courts to award it administrative costs and stating, “We agree with EPA that . . . courts should allow recovery of these indirect costs”); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1504 (6th Cir. 1989) (“Given section 9607(a)’s authorization for the government to recover all costs of its removal or remedial actions, we are not persuaded that the government’s indirect costs were unauthorized.”); Kelley v. Thomas Solvent Co., 790 F. Supp. 719, 729 (W.D. Mich. 1990) (finding that “indirect costs . . . are reimbursable under CERCLA”).

74. See Rohm & Haas, 2 F.3d at 1268. Rohm & Haas (R & H) entered into an Administrative Consent Order pursuant to section 6928(h) of RCRA. See id. According to the Order, R & H was to conduct clean-up on all the sites involved in the suit. See id. The order, however, did not provide for the government to be reimbursed for its costs in executing the order. See id. R & H performed the required work and continued to do so through the subsequent litigation. See id.

R & H owned a landfill containing hazardous wastes, which it was required to remediate. See id. at 1268. The case centered around a 120-acre landfill in Bristol Township, Pennsylvania. See id. From 1917 until 1963, R & H owned the whole site. See id. Fourteen and a half acres of the site were sold in 1963 to the Bristol Township Authority (BTA). See id. Between 1968 and 1971, almost eleven more acres were sold to Chemical Properties, Inc. (CP). See id. For 58 years, from 1917 to 1975, “R & H used the site for disposal of general refuse, process wastes, and off grade products from R & H’s plastics and chemical manufacturing plants.” See id. As of 1981, there were 309,000 tons of waste disposed at the site, 4,600 of which were categorized as hazardous substances under 42 U.S.C. § 9601(14). See id. The sites were investigated by both R & H and EPA and found to contain toxic materials in the air, soil and groundwater. See id. EPA planned on adding the site to the National Priorities List (NPL) under CERCLA, thereby ordering R & H to do certain work and to reimburse EPA for its portion of the work. See id. To conserve Superfund funds and promote private clean-ups, EPA enacted a policy that held that waste sites that could be regulated by both RCRA and CERCLA would be handled pursuant to RCRA and therefore, not placed on the NPL. See id. at 1268 n.1. R & H asserted, however, that because it was willing to do all the clean-up work itself, the site should be handled under RCRA, not CERCLA, and EPA agreed. See id. In contrast to the Draft Consent Order under CERCLA that EPA was originally going to issue, which provided for government reimbursement for response and monitoring costs, the clean-up agreement R & H actually signed under RCRA did not delineate any form of government monitoring cost recovery. See id. at 1268-69.

Accordingly, R & H’s work was still monitored by EPA, but was performed pursuant to RCRA’s remedial scheme. See id. at 1268 (explaining that over number of years, EPA conducted extensive monitoring of site and defendants’ activi-
held that because EPA agreed to manage the landfill under RCRA, it was not barred from seeking oversight costs under CERCLA. 75

On appeal, the Third Circuit reversed the district court's decision. 76 In comparing RCRA and CERCLA, the Third Circuit determined that the provisions for oversight and reimbursement in both statutes were extremely similar. 77 The circuit court then looked to CERCLA's definition of "removal" and questioned whether it should be read to cover EPA's activity in monitoring removal that had been conducted at the private party's expense. 78 Finally, the Third Circuit concluded that, pursuant to the NCTA doctrine, congressional intent for government recovery of monitoring costs must be explicit, and, therefore, any uncertainty as to Congress' intent must be resolved in favor of R & H. 79 In so concluding, the Third Circuit noted that reference to monitoring clean-up activities conducted and paid for by private parties did not fall under the definition of "removal" in RCRA and CERCLA. 80

The Rohm & Haas decision is significant because the Third Circuit is the only circuit court to decide that monitoring costs were not recoverable under RCRA and CERCLA. 81 Since that decision,

75. See United States v. Rohm & Haas Co., 790 F. Supp. 1255, 1265 (E.D. Pa. 1992) (holding that governmental monitoring costs were recoverable under CERCLA even though clean-up was performed under RCRA).

76. See Rohm & Haas, 2 F.3d at 1281. For a full discussion of the NCTA doctrine, see supra notes 61-71 and accompanying text.


78. See Rohm & Haas, 2 F.3d at 1271 (stating that its determination of whether CERCLA's definition of "removal" included monitoring costs controlled outcome of entire issue). For the text of CERCLA's definition of "removal," see supra note 58.

79. See id.

80. See id. The Third Circuit found that there was no clear statement by Congress regarding monitoring costs. See id.

81. See id. at 1275-78 (holding that CERCLA provision authorizing federal government to recover all "removal" costs does not include costs incurred by government in overseeing hazardous waste clean-up performed pursuant to RCRA); see also FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 841 (3d Cir.}

http://digitalcommons.law.villanova.edu/elj/vol11/iss2/6
the overwhelming majority of district and circuit courts addressing this issue have rejected the Third Circuit's reading of the germane statutory language.\textsuperscript{82}

2. Recoverable Monitoring Costs

The United States Court of Appeals for the Fifth Circuit rejected Rohm & Haas' holding when it decided that monitoring costs were recoverable by a government agency under CERCLA in United States v. Lowe.\textsuperscript{83}

1994) (stating that regulatory language should not be read broadly to allow for recovery of monitoring costs); United States v. Serafini, 898 F. Supp. 287, 290 (M.D. Pa. 1994) (stating government could not recover administrative costs absent clear congressional intent); United States v. Witco Corp., 853 F. Supp. 139, 142 (E.D. Pa. 1994) (relying on Rohm & Haas to hold that oversight and monitoring costs are not recoverable under statutes at issue).

82. See, e.g., United States v. Lowe, 118 F.3d 399, 401 (5th Cir. 1997) (determining that government monitoring costs are not fees or taxes but restitution payments made by liable parties for clean-up costs and are therefore recoverable by the government); accord Atlantic Richfield Co. v. American Airlines, 98 F.3d 564, 568 (10th Cir. 1996) (holding costs of EPA monitoring or oversight of remedial action (as opposed to removal action) were recoverable); United States v. Monsanto Co., 858 F.2d 160, 174-75 (4th Cir. 1988) (stating that all costs of removal action, including monitoring costs, should be reimbursed by private owner); Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co., 936 F. Supp. 1250, 1262 (E.D. Va. 1996) (noting that plaintiffs could recover the costs of oversight by EPA); Town of New Windsor v. Tesa Tuck Inc., 935 F. Supp. 317, 326-27 (S.D.N.Y. 1996) (explaining that CERCLA response costs are payments by responsible parties, in restitution, for removal actions and further recognizing that "oversight costs fall squarely within statutory definitions of 'removal' and 'remedial' and are recoverable").

83. See Lowe, 118 F.3d at 404 (concluding that governmental monitoring of private party's remedial or removal action qualifies as response under section 101(25) of CERCLA, 42 U.S.C. § 9601(25), and therefore responsible parties are liable for costs of monitoring). Lowe centered around the clean-up of a Superfund site in Texas used by a number of chemical corporations. See id. at 400. EPA ordered the site to be cleaned-up pursuant to section 106 of CERCLA, 42 U.S.C. § 9606. See id. In accord with EPA's order, the appellants completed the clean-up themselves; however, the government monitored the clean-up operation. See id. The site was certified as clean by EPA in April, 1993, thereby concluding all further remedial action by the appellants. See id.

After the owners completed their own clean-up of the site, the government filed a cost recovery action under section 107(a) of CERCLA to recover its response costs, including monitoring costs. See id. The government sued to recover all costs it incurred relating to the removal and remedial action. See id. In addition, the government sought a declaratory judgment holding the appellants liable for all future response costs. See id. In defending its action, Lowe contended that monitoring cost recovery from a purely private party clean-up operation was not authorized under CERCLA. See id. Upon the government's motion, the district court granted summary judgment in favor of the government and Lowe appealed. See id. Monitoring costs were also awarded for the government's monitoring activities related to a Remedial Investigation/Feasibility Study (RI/FS). See id. at 400 n.1. This is a study that determines the type and extent of contamination at a site, as well as the degree of risk to the public. See id. Finally, the study seeks to identify
The Fifth Circuit agreed with the government and found that the application of the NCTA doctrine to the monitoring cost reimbursement issue was inappropriate. According to the court in *Lowe*, CERCLA response costs are payments by responsible parties that are comparable to restitution for clean-up charges incurred while remediating a potentially or already contaminated site, and not fees or taxes as characterized by the Third Circuit in *Rohm & Haas*.

The Fifth Circuit next examined the pertinent sections of CERCLA to determine whether they provide for monitoring costs recovery. The circuit court concluded that as long as the government's actions are in accord with the National Contingency Plan, the costs incurred are recoverable from the responsible party.

Techniques to use in the clean-up of the site, or at least ways to contain the contamination. See *id*. The governmental monitoring costs related to the RI/FS were not contested by the appellants. See *id*.

*Lowe* urged the Fifth Circuit to follow *Rohm & Haas* by applying the NCTA doctrine, and find that for monitoring costs to be recoverable, Congress must clearly state such intention in the statute. See *id*. at 400. Specifically, Lowe argued that "National Cable's 'clear statement' requirement should be applied to CERCLA because the administration of hazardous waste clean-up benefits the general public, and the assessment of fees on specific parties for the payment of benefits to the general public endows that fee with the character of a tax assessment." *Id*. at 401. In addition, Lowe argued that as a de facto tax payment, the recovery of monitoring costs by the government is not authorized under *National Cable* because there is no language in the statute indicating a clear intent by Congress to have EPA reimbursed for such costs. See *id*. For a full discussion of the NCTA doctrine, see *supra* note 61-71 and accompanying text. For a full discussion of the Third Circuit's application of the NCTA doctrine to the issue of monitoring cost reimbursement, see *supra* notes 72-82 and accompanying text.

84. See *id*. (stating that *National Cable* and subsequent cases pertain to "imposition of user fees on regulated entities seeking authorization to do business"); *cf*. Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 227 (5th Cir. 1979) (explaining that *National Cable*’s characterization of "fees" is akin to requesting public agencies to grant permits in order for businesses to carry on trades). The *Lowe* circuit court noted that CERCLA is a remedial statute and does not estimate user fees on regulated industries. See *Lowe*, 118 F.3d at 401 (citing United States v. R.W. Meyer, 889 F.2d 1497, 1504 (6th Cir. 1989) (holding that CERCLA is remedial in nature and fees cannot be imposed pursuant to it)).

85. See *Lowe*, 118 F.3d at 401 (stating, "CERCLA response costs are neither fees nor taxes, but rather payments by liable parties in the nature of restitution for the costs of cleaning-up a contamination"); *see also* Atlantic Richfield Co. v. American Airlines Inc., 98 F.3d 564, 568 (10th Cir. 1996) (finding that government monitoring costs are not fees or taxes, but restitution payments made by liable parties for clean-up costs); Maryland Cas. Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987) (finding CERCLA relief is form of remedial, equitable relief).

86. See *Lowe*, 118 F.3d at 401-04 (analyzing statutory language, particularly definitions, under CERCLA section 101).

87. See *id*. at 401-02 (noting that "the government may either conduct clean-ups itself or permit or require responsible parties to do so") (citing 42 U.S.C. §§ 9604(a) and 9606). Quoting the language of section 9607(a)(4), the circuit
The Fifth Circuit supported its holding by finding that the plain language in the statute, namely the definitions of "removal" and "remedial action" in CERCLA, are unambiguous. Additionally, according to the Lowe court, the plain meaning of a term cannot be determined in isolation, but rather the meaning should be drawn from the context in which the term is used. As a result, the Fifth Circuit held that although the term may be open to different interpretations, it is not ambiguous when the context eliminates all court stated that costs incurred by a private party or by the government in cleaning up a site are recoverable under CERCLA. See id. at 402.

Additionally, the Fifth Circuit examined and compared the definitions of "removal," "response" and "remedial action" under CERCLA. See id. For the full text of CERCLA's definition of "removal," see supra note 58. CERCLA's definition of "remedial action" includes:

[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, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, clean-up 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.

CERCLA § 101(24), 42 U.S.C. § 9601(24). Generally speaking, a "removal" is a "short-term response" and a "remedial action" is considered a "long-term response" or permanent resolution to the problem. See Lowe, 118 F.3d at 402; see also Daigle v. Shell Oil Co., 972 F.2d 1527, 1533-34 (10th Cir. 1992) (examining language of CERCLA and holding that any necessary costs consistent with national contingency plan are recoverable). 88. See Lowe, 118 F.3d at 402. The definitions of both "removal" and "remedial action" contain the term "monitoring;" "monitoring," however, is not defined within CERCLA. See Lowe, 118 F.3d at 402 (pointing out uncertainty surrounding meaning of "monitoring"). In accordance with traditional principles of statutory construction, the Lowe court stated that a term not defined in a statute must be given its ordinary and natural meaning. See id.; see also United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994) (affirming rules for interpreting statutory construction). Moreover, the undefined term must be construed in concert with the overall policies and objectives of the statute. See Lowe, 118 F.3d at 402; see also Brown v. Gardner, 513 U.S. 115, 117-19 (1994) (examining how to interpret undefined statutory terms); In re Locklin, 101 F.3d 435, 439 (5th Cir. 1996) (emphasizing that undefined statutory term must be interpreted in context of its use within writing).

89. See Lowe, 118 F.3d at 402; see also Reich v. Arcadian Corp., 110 F.3d 1192, 1195-96 (5th Cir. 1997) (evaluating statutory construction of term not in isolation, but in context in which it is used).
but one meaning. Thus, the Fifth Circuit determined that the word “monitor” was interchangeable with “watch” and “scrutinize.”

The Fifth Circuit next stated that under CERCLA, the term “removal” is aimed at containing and cleaning up hazardous substance releases, including those activities deemed necessary to prevent hazardous releases from adversely affecting public health. The Lowe court stated that “EPA oversight, or monitoring, is certainly part and parcel of preventing and minimizing the release of hazardous substances.” The Fifth Circuit concluded that governmental monitoring or oversight of a private party’s removal or remedial actions is a “response” under CERCLA, thus, responsible parties are liable for these costs.

C. Monitoring Costs and OPA

As explained earlier, OPA was enacted as a result of the Exxon Valdez oil spill. OPA amended, expanded and strengthened the requirements of prior statutes addressing oil spill liability and compensation. Preceding OPA, the Federal Water Pollution Control Act (FWPCA) authorized, but did not require, federal removal of
oil spills and approval of response plans. OPA's requirements changed those set forth in FWPCA to require such efforts and to expand governmental monitoring and clean-up responsibilities. OPA also increased the potential liabilities of responsible parties and significantly broadened financial responsibility requirements.

Prior to the district court decision in Hyundai, only two cases had decided the issue of monitoring cost recovery under OPA. In the first of these cases, United States v. Conoco, the United States District Court for the Eastern District of Louisiana held that monitoring costs were recoverable pursuant to OPA. In 1992, two of Conoco's vessels had spilled oil, and the government monitored

FWCPA consists of general oil spill clean-up provisions. See Michael P. Donaldson, The Oil Pollution Act of 1990: Reaction and Response, 3 VILL. ENVTL. L.J. 283, 286 (1992). If it was determined that an owner or operator could not remove oil from a spill themselves, FWCPA authorized the government to remove the oil. See id. The Senate commented that, "[t]he [FWCPA]... has historically provided only partial protection. The Act sets inappropriately low limits of liability for owners and operators of vessels with respect to Federal oil spill removal costs and natural damages, and provides no coverage or compensation for other damages." S. REP. No. 94, at 724. Consequently, where OPA applies, certain provisions of FWCPA that were once applicable are not now. See id. But see Gonynor, supra note 37, at 107 (stating FWCPA comprehensively addressed maritime oil pollution, "and continues to have vitality today"). When OPA was enacted, it amended FWCPA in numerous ways, but FWCPA is still an integral part of federal pollution law. See id.


98. See Gonynor, supra note 37 at 106-07 (discussing background of oil pollution legislation). OPA in its current state is very similar to the Oil Pollution Act of 1924. See id. (explaining that 1924 Act demonstrated concern for oil spills because they posed serious threat of harm to maritime and fishing industries, and decreased values of beaches and shore properties). There were two oil pollution control acts prior to the 1924 Act as well. See id. (commenting that 1888 New York Harbor Act and 1899 Rivers and Harbors Act were first known statutes to address water protection issue).

99. See id. (outlining changes that OPA injected into oil pollution legislation, which before was solely governed by FWPCA, and noting that FWPCA is still very viable and integral).

100. See id. at 109-10 (noting that although OPA broadened liability in many respects, the ability to limit liability also exists if responsible parties follow OPA guidelines).

101. See Conoco, 916 F. Supp. at 582 (considering whether monitoring costs are recoverable by government under OPA); see also United States v. Murphy Exploration & Prod. Co., 939 F. Supp 489, 491 (E.D. La. 1996) (deciding whether government agency can be reimbursed for monitoring costs).


103. See id. at 582 (explaining that case related to two different Conoco oil spills into Gulf of Mexico). The first spill took place in February 1992, and the second took place in April of the same year. See id. (noting that, with respect to both spills, Conoco took prompt action in cleaning-up discharged oil and repairing leaks).
both clean-up operations. To support its challenge to the government’s monitoring costs assessment, Conoco argued that Congress drew a distinction between monitoring activities and monitoring costs. The district court rejected this contention and instead embraced the government’s straightforward reading of OPA. In effect, the district court read monitoring costs into reimbursable “removal costs” under OPA.

In United States v. Murphy Exploration & Production Co., the same district court that decided Conoco again held that monitoring costs were recoverable by the government. Murphy had spilled five hundred gallons of oil from its production platform into the Gulf of Mexico. Immediately, Murphy began a clean-up and remedied the damage caused by the spill. Nevertheless, the

104. See id. During their oversight activities, the Coast Guard conducted helicopter overflights to determine where additional clean-up efforts were needed, monitored Conoco’s response action and investigated both incidents. See id. The Coast Guard’s costs for both spills totaled over $20,000. See id.

Both parties filed summary judgment motions regarding the issue of whether the Coast Guard could recover monitoring costs. See id. Both parties agreed that “removal costs” were recoverable under OPA. See id. For the definition of “removal costs” under OPA, see infra note 107.

105. See id. at 583. Additionally, Conoco asserted a double taxation argument. See id. at 583-84. According to Conoco, monitoring was an agency operational cost intended to be paid by the Oil Spill Liability Fund. See id. Conoco, however, already supported that fund by paying production and import taxes on petroleum. See id. at 584. Thus, under Conoco’s reasoning, the demand for monitoring costs constituted a double assessment. See id.

106. See id. The government advanced a clear, straightforward reading of the pertinent sections of OPA. See id. For the text of those provisions, see infra notes 119-22 and accompanying text. In Conoco, the government argued, and the court agreed, that is was necessary for the Coast Guard to oversee the clean-up efforts of private parties to ensure that the efforts were adequate to control the spills. See Conoco, 916 F. Supp. at 584. The court in Hyundai quoted Conoco and emphasized that OPA authorizes not just “removal” of hazards but also “such other actions as are necessary to minimize or mitigate damage to the public health or welfare.” Hyundai, 172 F.3d at 1190 (quoting Conoco, 916 F. Supp. at 583).

107. See Conoco, 916 F. Supp. at 583 (supporting its finding, district court noted that “[t]he very phrasing indicates that Congress understood the term removal costs to include the cost of monitoring activities”). OPA’s definition of “removal costs” states: “[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters . . . is liable for the removal costs and damages specified in subsection (b) that result from such incident.” 33 U.S.C. § 2702(a).


109. Id. at 491 (rejecting defendants contention that Conoco can be distinguished from issue in Murphy and instead following Conoco’s analysis and holding).

110. See Alarcon & Jennings, supra note 3, at 434 (noting that government sought almost $20,000 in monitoring costs, $17,000 of which was helicopter flights over clean-up site).

111. Murphy, 939 F. Supp. at 490 (outlining not only Murphy’s efforts to clean site but also expenditures government made over three day period, “including re-
United States sought to recover close to $20,000 in monitoring costs.\textsuperscript{112} The parties voiced identical arguments to those made in Conoco, and, not surprisingly, the district court arrived at the same conclusion, that monitoring costs are recoverable under OPA.\textsuperscript{113} Consequently, the case law regarding monitoring cost recovery under OPA has thus far been very favorable to the government’s interpretation of OPA’s statutory language.\textsuperscript{114}

IV. NARRATIVE ANALYSIS

The issue before the Ninth Circuit in Hyundai was whether the United States government may, pursuant to OPA, bill a private party for costs incurred by the Coast Guard while monitoring that party’s clean-up of a threatened or actual oil spill.\textsuperscript{115} The Ninth Circuit first considered Hyundai’s argument that monitoring costs did not constitute “removal costs” as contemplated in the statutory language of OPA.\textsuperscript{116}

In its consideration of Hyundai’s argument, the Ninth Circuit first reviewed OPA’s definition of “removal costs” by reading several provisions of OPA together with FWPCA provisions.\textsuperscript{117} First, the Hyundai court examined OPA section 2702(a), which stated that the “removal costs” set forth in section 2702(b) were recoverable by view and monitoring of Murphy’s clean-up plans and removal operations” and various other activities).

\textsuperscript{112.} See id. (commenting that government spent $17,000 on helicopter flights to monitor release of oil into water and sent defendants bills to recover costs but had to institute action in order to receive payment).

\textsuperscript{113.} See id. at 490-91; see also Alarcon & Jennings, supra note 3, at 435-36 (stating that Murphy court adopted the reasoning set forth by Conoco court as its own and that court in Murphy had “blind allegiance” to Conoco).

\textsuperscript{114.} See, e.g., United States v. J.R. Nelson Vessel, Ltd., 1 F. Supp.2d 172, 176 n.2 (E.D.N.Y. 1998) aff’d, 173 F.3d 847 (2d Cir. 1999) (stating in dicta that monitoring costs are “clearly” recoverable under OPA); Murphy, 939 F. Supp. at 491 (holding that term “removal costs” under OPA includes monitoring costs); Conoco, 916 F. Supp. at 584 (holding responsible party strictly liable to pay for removal and monitoring costs from discharge of oil under OPA); Alabama State Docks Dep’t v. Compania Antares de Navegacion and Water Quality Insurance Syndicate, 1999 A.M.C. 309, 313 (S.D. Ala. 1998) (explaining that “removal costs” under OPA include costs of monitoring a responsible party’s clean-up).

\textsuperscript{115.} Hyundai, 172 F.3d at 1188 (noting that OPA provides that responsible party is liable for “removal costs and damages” including but not limited to, removal costs incurred by government).

\textsuperscript{116.} See id. at 1189 (highlighting that essence of Hyundai’s argument was that responsible party who expends millions of dollars to clean up oil spill should not be required to pay United States for efforts that were duplicitous). For a full discussion of Hyundai’s arguments before the Ninth Circuit, see supra note 28.

\textsuperscript{117.} See id. (examining relevant provisions of OPA and cross-referencing FWPCA since FWPCA is specifically cited in OPA).
the government from a private party. Subsection (b)'s discussion of "removal costs" led the Hyundai circuit court to FWPCA for guidance on what constitutes those costs. Turning to FWPCA, in particular to section 1321(c), the Ninth Circuit found that the Act required the President to protect against the threat of an oil spill and secure the prompt removal of any discharge resulting from a spill. In so doing, the President may: (1) take steps to lessen or prevent the threat of a discharge of oil; (2) order the removal of discharge; and (3) "monitor all . . . private actions to remove a discharge . . . ". Finally, the Ninth Circuit stated that subsection (c) allowed the President to direct and monitor all actions to remove, mitigate, or prevent the threat of a discharge of oil when there is a substantial threat to the well-being of the United States or the fish and wildlife within it.

The Ninth Circuit read the above provisions concurrently and concluded that they entitle the government to recover the Coast Guard's costs of monitoring Hyundai's clean-up and removal. The Hyundai court found that by monitoring Hyundai's operation, the government was overseeing a private party's clean-up and was trying to lessen or prevent the threat of oil discharge.

118. See id. (analyzing issue through plain reading of statutory language). For OPA's definition of "removal costs," see supra note 107.

119. See id. at 1190 (finding that cross-referenced provisions of two statutes allowed Coast Guard to recover monitoring costs incurred while salvaging leaking ship carrying 200,000 gallons of fuel). Subsection (b) provides: "The removal costs referred to in subsection (a) of this section are (A) all removal costs incurred by the United States . . . under subsection (c), (d), (e) or (1) of section 1321 of this title . . . ." 33 U.S.C. § 2702(b).

120. See Hyundai, 172 F.3d at 1189 ("[The FWPCA] directs the President to ensure effective and immediate removal of discharge, and mitigation or prevention of a substantial threat of discharge, of oil into United States Waters."). (quoting 33 U.S.C. § 1321(c)(1)(A)).

121. Id. at 1189-90 (examining scope of executive's power to mitigate oil spills under FWPCA). Sections 1321(c)(1)(B)(i) and (ii) state that in carrying out those duties enumerated in section 1321 (c)(1)(A), the President may: "(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time; (ii) direct or monitor all Federal, State, and private actions to remove a discharge . . . ." 33 U.S.C. § 1321 (c)(1)(B)(i), (ii).

122. See Hyundai, 172 F.3d at 1190 (determining that Coast Guard's actions fall within these parameters because they were an attempt to lessen damage caused by spill). Specifically, FWPCA states: "The President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of a discharge." 33 U.S.C. § 1321(c)(2)(A).

123. See Hyundai, 172 F.3d at 1190 (rejecting Hyundai's assertion that Congress did not intend for monitoring costs to be recoverable by government).

124. See id. The Ninth Circuit stated: The Coast Guard's actions were an attempt to 'mitigate or prevent a substantial threat of a discharge,' section 1321(c)(1)(B), it was 'monitoring . . . private action to remove a discharge,' section 1321(c)(1)(B)(ii), and
For further support of its holding, the Ninth Circuit turned next to the definition of "removal costs" found in OPA, which includes costs to "prevent, minimize or mitigate" a potential oil spill.\textsuperscript{125} Rejecting Hyundai's argument that the definition excluded monitoring costs, the Ninth Circuit stated that the "Coast Guard's monitoring activities are part of its effort to prevent or minimize a threatened oil discharge."\textsuperscript{126} According to the Hyundai court, the Coast Guard's "emergency stand-by" activities were an act of prevention by the government and were "clearly recoverable under the terms of the definition as it applies to the liability imposed by section 2702."\textsuperscript{127}

\textit{Id.} Additionally, the court did not agree with Hyundai's argument that OPA's congressional history [H.R. CONF. REP. No. 101-653, 101st Cong., 2d Sess. 145 (1990)] sanctioned its assertion that remuneration is not available for monitoring costs. \textit{See Hyundai}, 172 F.3d at 1190 n.2. The congressional report at issue stated: "With respect to removal of any discharge, the President may assume responsibility and costs of these actions subject to reimbursement from the responsible party; . . . direct or monitor all Federal, State and private actions . . . ." \textit{Id.} (quoting H.R. CONF. REP. No. 101-653, 101st Cong., 2d Sess. 145 (1990)). Hyundai asserted that the phrase "subject to reimbursement" only applied to the language in the first clause, specifically "removal of any discharge or mitigation or prevention of any substantial threat . . . ." \textit{Hyundai}, 172 F.3d at 1190. The Ninth Circuit rejected this interpretation, concluding that the statement applies to the whole sentence. \textit{See id.} For instance, according to the Ninth Circuit, it is improbable that Congress did not intend for the government to be reimbursed for its efforts at removing or destroying a vessel. \textit{See id.}

125. \textit{See Hyundai}, 172 F.3d at 1190 (dismissing Hyundai's contention that definition of removal costs excludes monitoring). OPA defines "removal costs" as: "[T]he costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 U.S.C. § 2701 (31).

126. \textit{Hyundai}, 172 F.3d at 1190. Hyundai relied on the narrower definition of "remove" or "removal" to "no avail." \textit{See id.} This definition states that "remove" or "removal" means "containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." 33 U.S.C. § 2701 (30). The court, however, found that the definition was inapplicable because it did not include prevention. \textit{See Hyundai}, 172 F.3d at 1190. Under the court's reasoning, the broader definition of "removal costs" includes preventative costs. \textit{See id.}

127. \textit{Hyundai}, 172 F.3d at 1190. For the text of pertinent provisions of section 2702, see supra notes 119-22 and accompanying text. Hyundai also contended that Congress' deliberate, separate reference to "removal" and "monitoring costs" in section 2712(a)(1) demonstrates that "removal costs" do not normally include "monitoring costs." \textit{See id.} at 1190 n.3. Section 2712 of OPA deals with the authorized uses of the Oil Spill Liability Trust Fund. \textit{See} 33 U.S.C. § 2712. Subsection (a)(1) states that the fund will be used for: "the payment of removal costs, including the costs of monitoring removal actions . . . ." 33 U.S.C. § 2712(a)(1). Exam-
Finally, the Ninth Circuit briefly addressed Hyundai's argument that on the basis of the reasoning set forth in *National Cable*, the Coast Guard could not recover monitoring costs because, in effect, it would be imposing a tax on a private party, a function reserved solely for Congress. 128 Without analyzing this issue under the NCTA doctrine, the Ninth Circuit held that OPA authorized the reimbursement of costs, not of taxes, and, therefore joined the Fifth Circuit in holding that a clean-up cost is not a tax, and, thus, monitoring costs are reimbursable. 129

V. CRITICAL ANALYSIS

In issuing its opinion, the Ninth Circuit followed the few district court decisions which have held that the government can recover its monitoring costs incurred in overseeing a private party's environmental clean-up operation under OPA. 130 Circuit courts, however, differ in resolving this issue. 131 For example, the Third Circuit interpreted the statutes narrowly, coupling them with the NCTA doctrine, and held that both RCRA and CERCLA lack an

ining this provision, the Ninth Circuit said that the word "including" actually suggested the opposite of Hyundai's contention and, in fact, a "monitoring cost" is normally grouped in as a "removal cost." See *Hyundai*, 172 F.3d at 1190 n.3.


129. See *Hyundai*, 172 F.3d at 1190-91. The Ninth Circuit proceeded to affirm the district court's holding that: (1) the United States was not limited to recovering only those costs determined to be "necessary"; (2) the United States could recover its base costs, as opposed to incremental costs; (3) the United States could recover attorney's fees; and (4) the correct rate schedule was used in determining Hyundai's bill from the Coast Guard. See id. at 1191-93. The Ninth Circuit, however, reversed the district court with regard to the penalties assessed under the Debt Collection Act, 31 U.S.C. § 3717, finding that penalties could not be imposed on Hyundai pursuant to this Act. See id. at 1192.

For a full discussion of the Fifth Circuit's decision in *Lowe*, see *supra* notes 83-94 and accompanying text.


131. Compare United States v. Rohm & Haas Co., 2 F.3d 1265, 1275-78, (3d Cir. 1993) (finding that CERCLA provision authorizing federal government to recover all "removal" costs does not include costs incurred by government in overseeing hazardous waste clean-up performed pursuant to RCRA), with United States v. Lowe, 118 F.3d 399, 401 (5th Cir. 1997) (holding that government's monitoring costs of clean-up operation were recoverable pursuant to CERCLA).
explicit congressional expression that monitoring costs should be recoverable, and as a result, those costs are not reimbursable. Conversely, the Fifth Circuit interpreted the statutes broadly, dismissing the NCTA doctrine as inapplicable in this issue, and held that despite the absence of a clear congressional expression in the statutes, monitoring costs are recoverable by the government.

The Third and Fifth Circuits engaged in a dual analysis of the issue, first, examining it under the NCTA doctrine and, second, interpreting the statutory language of RCRA and CERCLA. The Third Circuit premised its decision in United Stated v. Rohm & Haas Co. on the interpretation of whether the recovery of monitoring costs are taxes or fees. The Rohm & Haas court based its decision on the NCTA doctrine and held that monitoring costs are administrative costs, which benefit the private or regulated party as well as the public at large. Consequently, the dual beneficent result of monitoring costs put them into the category of taxes. Moreover, the NCTA doctrine states that if Congress is going to delegate away its power to tax, it must do so with a clear and explicit expression in the statutory language. Neither RCRA nor CERCLA expressly state that pursuant to its regulations, EPA may tax a private party responsible for an environmental hazard. As a result, monitor-


133. See Lowe, 118 F.3d at 401; see also United States v. Monsanto Co., 858 F.2d 160, 174-75 (4th Cir. 1988) (finding that government monitoring costs are not fees or taxes but restitution payments made by liable parties for clean-up costs). For a discussion of the facts, rationale and holding in Lowe, see supra notes 83-94 and accompanying text.

134. Compare Hyundai court’s analysis, see supra notes 117-129 and accompanying text, with Rohm & Haas court’s analysis, see supra notes 76-80 and accompanying text and Lowe court’s analysis, see supra notes 84-94 and accompanying text.

135. Rohm & Haas, 2 F.3d at 1274 (invoking use of NCTA doctrine as sound principle under these facts).

136. See id. (asserting that budget process gives executive agencies incentives to operate efficiently, but when that agency can recover any costs expended, that incentive is lost and accountability disappears).

137. See id. (insisting that presuming Congress’ intent in writing CERCLA and RCRA is beyond scope of judiciary and therefore only unambiguous definition of removal will allow for recovery of costs by government).


139. See Rohm & Haas, 2 F.3d at 1278 ("[T]here is no clear indication in [section 9607, section 9604], the definition of removal, or [section 9606] that govern-
ing costs are not recoverable. The Third Circuit’s application of the NCTA doctrine in this context, however, is questionable.

In contrast, the Fifth Circuit’s decision in *Lowe* examined the statutory language of CERCLA and held that monitoring costs are included under the definition of “response” and, therefore, the recovery of such costs is authorized under a “remedial” or “removal action” pursuant to CERCLA. In contrast to the *Rohm & Haas* court’s interpretation, the *Lowe* court stated that CERCLA does not impose fees or charges on a regulated industry. Rather, CERCLA is a remedial statute and monitoring costs are restitution payments from the responsible party. Consequently, the NCTA doctrine is inapplicable in examining this issue. Finally, looking at the plain language of the statute and citing various provisions of CERCLA, the Fifth Circuit concluded that monitoring costs are recoverable by the government.

Relatively little case law addressed this issue under OPA prior to the decision in *Hyundai*. Nevertheless, the Ninth Circuit followed these few existing district court cases in holding that the government was entitled to full reimbursement for its monitoring costs from a private party. In so doing, however, the Ninth Circuit did not examine the monitoring costs reimbursement issue under the

140. See *Rohm & Haas*, 2 F.3d at 1278 (finding no clear congressional indication, as mandated by NCTA doctrine, that oversight costs are included in recoverable costs).

141. For a full discussion of the Fifth Circuit’s analysis and holding in *Lowe*, see supra notes 83-91.

142. See United States v. Lowe, 118 F.3d 399, 401 (5th Cir. 1997).

143. See id. (noting that government may either conduct clean-ups itself or require responsible parties to do it).

144. See id. (holding that liability for all costs government and private party incur in performing clean-up is imposed under CERCLA).

145. See id. at 403 (finding that “government monitoring or oversight is an inherent and necessary enforcement element of private party response action”).

146. For a discussion of the case law which addressed this issue prior to *Hyundai*, see supra note 31.

147. See supra note 31 (citing district court cases that considered monitoring cost recovery issue pursuant to OPA and finding that government could recover monitoring costs).
dual analysis used by the circuit courts in the Rohm & Haas and Lowe cases.\textsuperscript{148}

Instead, although the conclusion in Hyundai was the same as in Lowe and other circuits, the reasoning was different because the Ninth Circuit used a pure statutory language analysis in concluding that monitoring costs are recoverable.\textsuperscript{149} Beginning and ending its analysis from the basis that “the definition of ‘removal’ costs under [OPA] includes monitoring costs,” the Ninth Circuit examined the statutory language of OPA in accordance with FWPCA.\textsuperscript{150} The Hyundai court emphasized that OPA’s definition of “costs of removal” includes the Coast Guard’s monitoring activities as a preventative action.\textsuperscript{151}

Nonetheless, the recovery of “monitoring costs” is not mentioned in any of the Ninth Circuit’s cited definitions.\textsuperscript{152} The Hyundai court reached its conclusion by cutting and pasting selected provisions of OPA and FWPCA together and reading words into both statutes.\textsuperscript{153} The Ninth Circuit decided Hyundai in a vacuum by not analyzing the issue under the NCTA doctrine.\textsuperscript{154} With very few exceptions, most courts deciding the issue of monitoring costs reimbursement have extensively examined the NCTA doctrine in order to evaluate the doctrine’s application in a particular case.\textsuperscript{155}

\textsuperscript{148} See supra notes 117-29 and accompanying text for a complete discussion of the Hyundai court’s analysis of the monitoring costs reimbursement issue.

\textsuperscript{149} See Hyundai, 172 F.3d at 1189-90. For a discussion of the Hyundai court’s plain language analysis, see supra notes 116-27 and accompanying text.

\textsuperscript{150} See id. at 1189.

\textsuperscript{151} See id.

\textsuperscript{152} For a full review of the OPA definitional provisions cited by the Ninth Circuit, see supra notes 118-24 & 126-27 and accompanying text.

\textsuperscript{153} See Hyundai, 172 F.3d at 1189-90.

\textsuperscript{154} See id. (declining to utilize NCTA doctrine in analysis of monitoring cost reimbursement issue).

\textsuperscript{155} See United States v. Lowe, 118 F.3d 399, 400 (5th Cir. 1997) (deciding issue of whether defendants can be held liable under section 107(a) of CERCLA for oversight costs by examining NCTA doctrine); Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 567 (10th Cir. 1996) (finding that decision in case depended on analysis under NCTA doctrine of question whether EPA oversight of private party clean-ups are costs fees or taxes); United States v. Rohm & Haas Co., 2 F.3d 1265, 1267 (3d Cir. 1993) (explaining outcome of issue as determined by NCTA doctrine); Florida Power & Light Co. v. United States, 846 F.2d 765, 772-73 (D.C. Cir. 1988) (invoking NCTA doctrine, petitioner argued that delegation of power to tax to agency by Congress is prohibited without clear showing of intent); Town of New Windsor v. Tesa Tuck, Inc., 935 F. Supp. 317, 326 (S.D.N.Y. 1996) (noting that reimbursement of oversight costs under CERCLA was subject to resolution of analysis under NCTA doctrine); California v. Celotex Chem. Corp., 901 F. Supp. 1481, 1489-90 (N.D. Cal. 1995) (pointing out that defendant relied on NCTA doctrine interpreted by Rohm & Haas court which stated that, “the federal
In sum, the Ninth Circuit should have explained its reasoning for dismissing the NCTA doctrine as inapplicable since it is the first case to decide the monitoring cost reimbursement issue under OPA. The Ninth Circuit should have followed other circuits’ examples when considering this issue and addressed the NCTA doctrine, as well as distinguished OPA from both CERCLA and RCRA. Instead, the Ninth Circuit conducted no analysis with regard to the NCTA doctrine and practitioners are left to wonder what particular aspects of Hyundai and OPA are analogous to CERCLA and the line of cases following Lowe.

VI. IMPACT

Through its decision in Hyundai, the Ninth Circuit jumped head first into the debate over monitoring cost reimbursement of environmental clean-up operations. By determining that the government may recover monitoring costs, the Ninth Circuit joined the Fifth Circuit and expressly disagreed with the Third Circuit’s decision in United States v. Rohm & Haas Co.

Typically, clean-ups performed by a private party cost far less than those conducted by the government. A private party has government could not collect its oversight costs because CERCLA provided no clear expression of Congress’s intent to delegate such authority to the Executive).

156. See Lowe, 118 F.3d at 401 (rejecting NCTA doctrine as binding on monitoring costs recovery issue); Atlantic Richfield Co., 98 F.3d at 567-69 (rejecting appellants’ arguments based on decision in Rohm & Haas contending that NCTA doctrine was applicable); Rohm & Haas, 2 F.3d at 1273-74 (explaining that NCTA doctrine is applicable for oversight cost recovery and plaintiffs assertion that NCTA doctrine is only applicable to narrow set of circumstances is incorrect); Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm’n, 601 F.2d 223, 227 (5th Cir. 1979) (discussing National Cable Television Ass’n v. United States’s characterization of “fees” in order to decide reimbursement issue).

157. See Hyundai, 172 F.3d at 1189-90 (glossing over NCTA doctrine with regard to this issue and dismissing it as inapplicable to case in question).

158. See supra note 71 (comparing holdings of two leading cases, Rohm & Haas and Lowe, disagreeing on the monitoring cost recovery issue).

159. Compare Rohm & Haas, 2 F.3d at 1275-78, (finding that CERCLA provision authorizing federal government to recover all “removal” costs does not include costs incurred by government in overseeing hazardous waste clean-up performed pursuant to RCRA), with Hyundai, 172 F.3d at 1190 (holding that government’s monitoring costs of oil spill clean-up performed pursuant to OPA were included in reimbursable “removal” costs). For a full discussion of the Third Circuit’s decision in Rohm & Haas, see supra notes 72-82 and accompanying text.

160. See John, supra note 39, at 952 (observing that because of their vested interest, private parties are more expedient and economical in their clean-up operations than government). In some cases, those performing the actual clean-up are private contractors hired by the government. See id. (noting that even privately-owned contractors employed by government are cheaper than government run clean-ups).
the incentive to keep its costs low to save money. 161 On the other hand, the government has no frugal incentive behind its actions, and instead follows its planned course of action, regardless of cost, safe in the knowledge that it will likely recover all incurred expenses. 162

The entire purpose of statutes such as RCRA, CERCLA and OPA is to ensure the efficient and safe clean-up of environmentally hazardous or potentially hazardous waste sites by the parties responsible for the pollution. 163 Nonetheless, private parties that perform their own clean-up and also must pay the government to monitor their work, most likely will lose any incentive to fully comply with the statutory regulations regarding clean-up. 164 The Third Circuit in Rohm & Haas, however, made compliance with RCRA and CERCLA less expensive for private, responsible parties and, therefore, more attractive for them to quickly and efficiently perform the clean-up needed to ensure a cleaner, safer environment. 165 As a result, the decision in Hyundai, which is in direct contrast to Rohm & Haas, may have the adverse effect of encouraging non-compliance and discouraging autonomous clean-ups. 166

Furthermore, the potential economic impact on oil transportation costs cannot be discounted. The decision in Hyundai will affect a large group of players in the transportation of oil, including pro-

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161. See id. (emphasizing reasons why it is greater benefit to public, government and private oil operators that private parties perform their own clean-ups).

162. See id. (observing that government is not most efficient clean-up operator because it lacks incentives to keep costs low); see also Alarcon & Jennings, supra note 3, at 421-22 (criticizing blank check courts have given Coast Guard in expending and recovering monitoring costs).

163. See John, supra note 39, at 954 (discussing purpose of RCRA); see also Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) (describing reason CERCLA was enacted was to create a means of overseeing and financing governmental and private responses to hazardous releases); Gonynor, supra note 37, at 114 (establishing purpose behind enactment of OPA).

164. See Alarcon & Jennings, supra note 3, at 440 (stating that “[if] responsible parties begin to weigh the cost of involving the Coast Guard against the cost of penalties for not reporting a spill, a definite step in the wrong direction will have precipitated”); see also Petition For Writ of Certiorari at 15, Hyundai, (Nos. 97-35538, 97-35820) (discussing loss of incentives for private parties to perform anything more than minimal response to clean-up its own spill if they know they will have to pay their own response costs as well as government’s costs).

165. See Gonynor, supra note 37, at 114 (noting that Third Circuit recognized dilemma between having statutes that encourage private party clean-ups but at same time also continue to encompass the government’s interest in the clean-up).

166. See id. at 117 (observing that “vague and general standards may have the requisite flexibility to deal with the wide variety of expenses that arise in connection with a pollution response operation, however, such ambiguity may not resolve the differing perspectives of industry and government”).
ducers, consumers, insurers and claimants.\textsuperscript{167} The oil producers' costs will undoubtedly rise as a result of the \textit{Hyundai} holding; but of even more concern is that the operational budget of the Coast Guard will foreseeably rise as well.\textsuperscript{168} Consequently, the increased costs of the Coast Guard's budget will be subsidized out of the taxpayer's pocket, both through taxes and higher oil prices, to finance the producers' increased insurance costs.\textsuperscript{169} In conclusion, the decision in \textit{Hyundai} almost certainly will have the effect of breeding complacency amongst responsible parties, and few taxpayers will appreciate the hit they may take in the pocketbook to pay for the overlap that occurs when the government monitors private parties' clean-up operations.\textsuperscript{170}

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\textsuperscript{167} See Alarcon & Jennings, \textit{supra} note 3, at 439-40 (criticizing the \textit{Hyundai} decision and noting its potential impacts).

\textsuperscript{168} See \textit{id.} at 440 (highlighting economic problems with \textit{Hyundai} decision).

\textsuperscript{169} See \textit{id.} (outlining economic and social issues that come with requiring private parties to pay for governmental monitoring of private clean-ups).

\textsuperscript{170} See Gonynor, \textit{supra} note 37, at 114 (observing redundancy of private sector performing clean-up of site and then being forced to pay government's costs of monitoring progress).