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Leigh Adele Aberbach

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RECOVERABILITY OF GOVERNMENT OVERSIGHT COSTS UNDER CERCLA SECTION 107: UNITED STATES v. ROHM AND HAAS CO.

I. INTRODUCTION

Eliminating the dangers posed by facilities that release hazardous substances is one of the most pressing environmental issues in the United States today. Both the Resource Conservation and Recovery Act ("RCRA")\(^1\) and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")\(^2\) address this vital concern. Because many cleanups are overwhelmed by protracted studies and litigation, the United States Environmental Protection Agency ("EPA") is placing increasing emphasis on RCRA's corrective action program.\(^3\) Under this program, the responsible party generally performs the corrective action, whereas under CERCLA, EPA or a responsible party may conduct cleanup.\(^4\) When EPA exercises its authority to undertake cleanup itself, the agency performs each stage of the work or hires contractors. Even when RCRA corrective action is undertaken by private parties, the agency's role in the cleanup is significant.\(^5\) In United States v. Rohm and Haas Co.,\(^6\) the United States Court of Appeals for the Third


4. United States v. Rohm and Haas Co., 2 F.3d 1265, 1271-72 (3d Cir. 1993). CERCLA § 104(a) authorizes the government to take removal or remedial action in response to a release or threatened release of a hazardous substance. CERCLA § 104(a), 42 U.S.C. § 9604(a). For a further discussion of what constitutes a hazardous release, see infra note 10 and accompanying text. CERCLA authorizes EPA to compel private parties to clean up hazardous waste sites at their own expense. CERCLA § 106, 42 U.S.C. § 9606. For a further discussion of compelled private party cleanups, see infra note 43 and accompanying text. Generally, under RCRA, EPA may bring suit to force any private party who contributed, or is contributing to a hazardous waste release which poses an imminent and substantial danger to health or the environment to take corrective action. RCRA § 7003, 42 U.S.C. § 6973. For a further discussion of RCRA corrective action authorities, see infra notes 14-34 and accompanying text.

5. Rohm and Haas, 2 F.3d at 1272. In order to determine whether government resources are necessary, EPA conducts most, if not all of the original assessment. Id.

6. 2 F.3d 1265 (3d Cir. 1993).
Circuit considered an issue of first impression regarding the extent of a private responsible party's liability under CERCLA section 107 for government costs incurred while overseeing private party RCRA corrective activity. The oversight costs at issue in *Rohm and Haas* primarily consisted of costs related to review work done by Rohm and Haas Company ("Rohm & Haas") pursuant to a RCRA section 3008(h) consent order.

This Note begins with a discussion of the statutory guidelines for the cleanup of hazardous substance releases set forth in RCRA and CERCLA. It also addresses EPA's policy of utilizing RCRA to handle sites which are subject to both statutes. This Note then examines standards of statutory construction and the levels of deference courts give to agency interpretations of statutes they are charged with implementing. Finally, this Note analyzes the Third Circuit's interpretation of RCRA and CERCLA, and its holding that government costs incurred while overseeing private party corrective action conducted under RCRA are not recoverable under CERCLA section 107.

II. BACKGROUND: STATUTORY AND REGULATORY CONTEXT

RCRA and CERCLA provide the appropriate legal standards for the cleanup of environmentally hazardous sites. Facilities that manage "hazardous wastes" are addressed by RCRA, which focuses on regulating ongoing hazardous waste activity. Facilities that release "hazardous substances" are addressed by CERCLA, which focuses on regulating ongoing hazardous waste activity. Facilities that release "hazardous substances" are addressed by CERCLA, which fo-

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8. Amici Curiae Brief for the Appellant at 12-13, *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993) (No. 92-1517) [hereinafter Amici Curiae Brief]. For a further discussion of the costs at issue, see *infra* note 107 and accompanying text. For a further discussion of RCRA § 3008(h), see *infra* note 33 and accompanying text.


a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

*Id.* § 1004(5), 42 U.S.C. § 6903(5).
cases on cleaning hazardous substance releases and recovering government cleanup costs from responsible parties. Since "hazardous substance" was the first significant congressional attempt to regulate hazardous waste. Setterlee & Anderson, supra note 3, at 183. RCRA was intended to accomplish four goals: (1) establish an Office of Solid Waste within EPA; (2) create a "cradle-to-grave" system for regulating hazardous waste, administered by the federal government unless a state accepts the federal plan as its own; (3) encourage states to establish solid waste control plans including provisions for closing open dumps; and (4) expand the federal role in encouraging recycling to continue the emphasis on research and development found in earlier legislation. Lawrence S. Coven, Comment, Liability Under CERCLA: After a Decade of Delegation, the Time is Ripe for Legislative Reform, 17 OHIO N.U. L. REV. 165, 173-74 (1990).

RCRA authorizes EPA to identify and list hazardous waste sites; promulgate standards for generators and transporters of hazardous waste, and owners and operators of hazardous waste facilities; and issue permits for the operation of hazardous waste facilities. RCRA §§ 3001-05, 42 U.S.C. §§ 6921-25. RCRA also authorizes EPA to bring suit against any person who has contributed or is contributing to past or present "handling, storage, treatment, transportation or disposal" of hazardous waste which poses an imminent and substantial endangerment to health or the environment. Id. § 7003(a), 42 U.S.C. § 6973(a).

In its haste to pass CERCLA, Congress defined "hazardous substance" by reference to all substances EPA designated as hazardous pursuant to four other statutes, with additions. Steven Ferrey, The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste, 57 GEO. WASH. L. REV. 197, 257 (1988). A CERCLA "hazardous substance" is:

(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.

CERCLA § 101(14), 42 U.S.C. § 9601(14). CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." Id. § 101(22), 42 U.S.C. § 9601(22).

Robert M. Howard, Government Cost Recovery After the Cleanup: Do the Superfund Amendments Give the EPA a Licence to Squander?, 42 BAYLOR L. REV. 53, 63-64 (1990); Setterlee & Anderson, supra note 3, at 184. CERCLA was enacted to accomplish two main goals: (1) Congress intended that the federal government have the necessary tools to effectively respond to the problems resulting from hazardous waste disposal; and (2) Congress intended that those responsible for the problems bear the cost of remedying the conditions they created. Coven, supra note 9, at 167-68. CERCLA authorizes EPA to undertake cleanup of hazardous waste sites and creates a fund to pay for EPA's activities. CERCLA §§ 104-05, 42 U.S.C. §§ 9604-05. Yet, CERCLA places the ultimate responsibility for cleaning sites on responsible parties. CERCLA authorizes suit for the recovery of costs associated with cleanup against the following four classes of parties based on their relationship to the facility where the release occurred: (1) present owners or operators of a facility at which there is a release or threatened release of hazardous substances; (2) owners or operators of a facility at any time in the past when hazardous substances were disposed; (3) any person who arranged for the treatment,
ardous wastes” are a subset of “hazardous substances,” many facilities are subject to regulation under both RCRA and CERCLA. In addition, the creation of the RCRA corrective action program made the scope and effect of RCRA similar to CERCLA’s.

A. The Resource Conservation and Recovery Act

RCRA was passed in 1976 for the primary purpose of regulating treatment, storage and disposal facilities (“TSDs”) through a permit system. Under this system, owners and operators of TSDs who generate, treat, store and dispose of hazardous waste must manage their sites according to strict standards, and such activity is prohibited without a permit. RCRA also contemplates elimination or disposal of hazardous wastes at a facility; and (4) any person who transported hazardous substances to a facility. Id. § 107(a), 42 U.S.C. § 9607(a).

12. Stoll, supra note 9, at 1299. By comparing how a substance falls under CERCLA’s jurisdiction with how a substance falls under RCRA’s jurisdiction, it is apparent that CERCLA’s scope is broader than RCRA’s. Id. at 1301. First, under RCRA a substance must be a waste, whereas under CERCLA, whether a substance is a waste, a product or something else, is irrelevant. Id. Second, “hazardousness” encompasses more under CERCLA, since RCRA hazardous constituents are a subset of CERCLA hazardous substances. Id. (comparing 40 C.F.R. pt. 261, app. VIII (1990) with 40 C.F.R. pt. 302 (1990)). Also, a waste must be listed or meet one of the hazardous characteristics in order to be subject to RCRA jurisdiction. See 40 C.F.R. §§ 261.10-261.33 (1990). A substance will be subject to CERCLA jurisdiction, however, if it contains any amount of a hazardous substance. CERCLA § 101 (14), 42 U.S.C. § 9601(14).

13. See generally Stoll, supra note 9, at 1304-05 (noting amended RCRA expands its previous scope). For a discussion of RCRA’s development, see infra notes 14-34 and accompanying text.


15. Rohm and Haas, 2 F.3d at 1269. Obtaining a RCRA permit can be difficult, time consuming and subject to public opposition. Stoll, supra note 9, at 1302. For a description of permit application requirements and procedures, see ENVIRONMENTAL LAW INSTITUTE, RCRA Deskbook 3, 18-19 (1991).

16. An owner or operator includes “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.” CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2). Every owner of the contaminated property between the initial disposer and current owner is responsible so long as a disposal is found to have occurred during the time of ownership. United States v. Conservation Chem. Co., 619 F. Supp. 162, 253-54 (W.D. Mo. 1985).

17. 40 C.F.R. pts. 262-68 (1990). Different RCRA performance requirements apply based on a party’s status as a generator or transporter, as opposed to a treater, storer or disposer of hazardous waste. See generally RCRA §§ 3002-04, 42 U.S.C. §§ 6922-24. Under RCRA § 3004(a), EPA is required to issue performance regulations with which all TSDs must comply. Id. § 3004(a), 42 U.S.C. § 6924(a). These regulations include: (1) obtaining EPA identification numbers; (2) developing waste analysis plans; (3) establishing security procedures; (4) ensuring regular facility inspections; (5) training personnel; (6) developing emergency procedures; (7) complying with reporting and recordkeeping requirements; (8)
ing hazardous waste problems through monitoring and corrective action performed and paid for by private parties.\textsuperscript{18}

When enacted, RCRA included the section 7003 "imminent hazard" provision, which prior to CERCLA's enactment in 1980\textsuperscript{19} provided EPA with its only authority to pursue legal action to require cleanup of a hazardous waste site.\textsuperscript{20} RCRA section 7003 underwent two major revisions after it was hastily drafted and passed by Congress.\textsuperscript{21} First, section 7003 was amended in 1980 to allow EPA to seek an injunction before any risk of harm was certain; previously such action required an actual imminent and substantial danger to public health or the environment.\textsuperscript{22} The 1980 amendment to section 7003 also gave EPA the power to issue administratively developing closure and post-closure plans; and (9) establishing financial assurances for closure and post-closure activity. 40 C.F.R. pt. 264 (1990). In short, TSDs must minimize risks of hazardous waste releases through security measures, inspections and proper personnel training in hazardous waste handling and emergency procedures. \textit{Environmental Law Institute}, supra note 15, at 11-12. TSD requirements are more onerous in scope, complexity and cost than the requirements for generators and transporters. J. Stanton Curry et al., \textit{The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities}, 23 Ariz. St. L.J. 359, 362-64; \textit{Environmental Law Institute}, supra note 15, at 11.

The RCRA permit requirement became effective November 19, 1980. 40 C.F.R. pt. 260. For TSDs existing prior to that date, Congress provided that they could continue operating without a permit if they qualified for interim status. RCRA § 3005(e), 42 U.S.C. § 6925(e). To obtain a TSD permit, an applicant must demonstrate that any actions taken will comply with these strict standards. \textit{Rohm and Haas}, 2 F.3d at 1269; Curry et al., supra at 363. In addition, one cannot escape cleanup responsibility by ceasing participation in the permit program because each TSD must go through closure procedures before the facility is released from its permit. 40 C.F.R. §§ 264.110-120 (1987); Edmund B. Frost, \textit{Strict Liability as an Incentive for Cleanup of Contaminated Property}, 25 Hous. L. Rev. 951, 956 (1988).

18. \textit{Rohm and Haas}, 2 F.3d at 1269. For a further discussion of RCRA's goals, see supra note 9 and accompanying text.


20. Bradford F. Whitman, \textit{Superfund Law and Practice} 6 (1991). As first enacted in 1976, RCRA § 7003 provided in relevant part "upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit... to immediately restrain any person contributing to such handling." RCRA § 7003(a), 42 U.S.C. § 6973(a). For a further discussion of the current version of § 7003, see infra note 28 and accompanying text.


22. Cooke, supra note 21, § 15.01(1)(b).
tive orders and to impose fines on those who failed to comply with such orders. Congress also expanded the statute by adding RCRA section 3013 which allows EPA to order owners and operators to monitor, test and analyze their facilities to determine the extent of an environmental hazard. If this is not done to EPA’s satisfaction, the agency can perform the work and demand reimbursement of its costs. If, however, EPA tests confirm results obtained by private party tests conducted pursuant to an administrative order, the owner is not required to reimburse EPA. Second, section 7003 was affected when Congress passed the Hazardous Solid Waste Amendments (“HSWA”) in 1984. The current version of section 7003 permits EPA to bring suit to force any person who contributed or is contributing to a hazardous waste problem that poses an imminent and substantial danger to public health or the environment to take corrective action.

23. Id. at n.6; see also Appellant’s Corrected Brief at 5, United States v. Rohm and Haas Co., 2 F.3d 1265 (3d Cir. 1993) (No. 92-1517) [hereinafter Rohm & Haas Brief]. Section 7003(a) provides that as well as being able to seek a court ordered remedy, EPA may, after giving notice to the affected state, “take other action... including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.” RCRA § 7003(a), 42 U.S.C. § 6973(a). This power gives EPA the ability to deal with hazardous waste problems in a timely fashion. 2 Cooke, supra note 21, § 15.01(8)(a).

24. Rohm and Haas, 2 F.3d at 1269; see also RCRA § 3013(a), 42 U.S.C. § 6934(a).


26. Rohm and Haas, 2 F.3d at 1269; see also RCRA § 3013(d)(2), 42 U.S.C. § 6934(d)(2).


28. Rohm and Haas, 2 F.3d at 1269. On its face, the 1976 version of § 7003 did not appear to authorize suits to compel cleanup of sites at which wastes had been disposed of in the past. Whitman, supra note 20, at 8 (emphasis added). EPA recognized this weakness to compel cleanup by past waste generators, so it successfully persuaded Congress to add a specific reference to past generators by including the past tense of the verb “contribute” and the words “past or present” as a modifier. Id. at 9. Section 7003 now reads:

[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit... against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

RCRA § 7003(a), 42 U.S.C. § 6973(a).
HSWA was designed to identify and remediate environmental contamination at all facilities that hold RCRA hazardous waste permits and to substantially expand RCRA corrective action.29 RCRA's scope was augmented by HSWA's addition of sections 3004(u), 3004(v) and 3008(h). Section 3004(u) requires TSD facilities seeking RCRA permits to take corrective action for all hazardous waste releases from any solid waste management unit ("SWMU"),30 regardless of when the waste was placed in the SWMU.31 Section 3004(v) requires those who hold permits to undertake corrective action beyond the facility boundaries.32 Under section 3008(h) EPA may order any interim status facility that releases hazardous wastes into the environment to undertake corrective action.33 Since the corrective action program is applicable to all facilities required to have a RCRA permit, it extends to most sizable industrial facilities in the United States.34

29. Rohm and Haas, 2 F.3d at 1269-70. For example, prior to 1984, corrective action under RCRA was limited to on-site releases of hazardous waste from permitted facilities occurring after January 26, 1983. Curry et al., supra note 17, at 364-65. EPA's pre-1984 corrective action regulations were promulgated on July 26, 1982, but were not effective until January 26, 1983. Id. at 365 n.36; see 47 Fed. Reg. 32,336 (1982). In 1984, Congress amended RCRA to make corrective action requirements applicable to TSD facilities which received hazardous wastes after July 26, 1982, rather than January 26, 1983. Id.; see RCRA § 3004(i), 42 U.S.C. § 6924(i) (1988).

30. The term "solid waste management unit" ("SWMU") is defined broadly to apply to any unit from which hazardous constituents might migrate whether or not the units were intended to manage solid or hazardous waste. See 50 Fed. Reg. 28,702, 28,712 (1985). EPA considers the term to include, inter alia, any container, tank, surface impoundment, waste pile, landfill or incinerator. Curry et al., supra note 17, at 365-66 n.38.

31. Curry et al., supra note 17, at 365; see RCRA § 3004(u), 42 U.S.C. § 9624(u). Thus, the owner or operator may be responsible for cleaning up waste of a prior owner. Therefore, § 3004(u) will have a significant effect on industrial facilities since cleanup requirements are imposed without regard to fault. Frost, supra note 17, at 955-56.

32. Setterlee & Anderson, supra note 3, at 185; see RCRA § 3004(v), 42 U.S.C. § 6924(v) (1988). This requirement is avoidable "only if the owner or operator can convince the EPA that permission for such action cannot be obtained." Setterlee & Anderson, supra note 3, at 185; see 52 Fed. Reg. 45,790 (1987). EPA must demand offsite cleanup even if it is unable to support an injunction under CERCLA, because there is no finding of "imminent and substantial endangerment." Whitman, supra note 20, at 42.

33. Curry et al., supra note 17, at 366; see RCRA § 3008(h), 42 U.S.C. § 6928(h) (1988). An interim status facility is a facility which is required to have a permit, or has applied for a permit, but has not yet received one. Setterlee & Anderson, supra note 3, at 186; see RCRA § 3005(e), 42 U.S.C. § 6925(e).

34. Frost, supra note 17, at 955. A diverse assembly representing a majority of the American industrial base ("Industry Representatives") stated that industrial facilities are swept into the RCRA corrective action program when they generate waste deemed hazardous under EPA's broad definition, and then must obtain RCRA permits to continue operations. Amici Curiae Brief, supra note 8, at 7-8. By
B. The Comprehensive Environmental Response, Compensation, and Liability Act

In 1980, Congress adopted CERCLA in response to the pre-HSWA limitations of RCRA corrective action authorities. CERCLA's primary purpose is to clean hazardous waste sites and to assure that those responsible for environmental damage bear the costs incurred in cleanup whether conducted by the responsible party or the government. In contrast to RCRA, which regulates present hazardous waste activities, CERCLA established a response program to address past hazardous waste activities.

CERCLA provides the government with two mechanisms to respond to releases or threatened releases. First, CERCLA sections 104 and 107 enable EPA to make responsible parties pay for EPA's estimate, more than 4600 facilities nationwide are in the RCRA "permitting universe," but the Industry Representatives consider this number conservative. Id. at 7 (citing letter from Don R. Clay, Assistant Administrator, Office of Solid Waste and Emergency Response, to Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations of the House of Representatives Committee on Energy and Commerce (August 9, 1991)). Approximately another 1000 facilities are subject to corrective action as a result of administrative orders. Id. Furthermore, EPA estimates that as many as 80,000 separate SWMUs at these facilities may require corrective action. Id. EPA also estimates that the average RCRA facility has 12 SWMUs while some individual facilities have as many as 1300. Id. at 7 n.4. Each federal facility is estimated to have an average of 55 SWMUs. Id.

EPA further estimates that "the groundwater cleanup portion of corrective action at privately owned RCRA facilities, excluding any cleanup of soils or surface water, is likely to cost from $7 billion to $42 billion." Id. at 8; see 55 Fed. Reg. 30,861 (July 27, 1990). The Industry Representatives' collective experience indicates that a more accurate estimate of the total cost of the corrective action program is at least several times higher. Amici Curiae Brief, supra note 8, at 7-8. They point to a recent study placing the figure at $234 billion with the range of plausible estimates varying from $170 billion to $377 billion. Id.; see M. RUSSELL ET AL., HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD 16, A-3.24 (December 1991).

35. Curry et al., supra note 17, at 367. By the time Congress amended RCRA § 7003 again in 1984, CERCLA §§ 106 and 107 had provided the government with a more effective method of dealing with hazardous problems. 2 Cooke, supra note 21, § 15.01(1)(b). In fact, notwithstanding HSWA, the scope of RCRA corrective action is limited. Curry et al., supra note 17, at 366. Except for § 7003, "RCRA corrective action authorities only apply to TSD facilities that are operating or seeking closure." Id. And, although RCRA § 7003 now applies to past or present generators, transporters or owners and operators of TSD facilities, it is still limited to releases that pose "an imminent and substantial danger to human health or the environment," and can only be enforced by court order. Id.; see RCRA § 3008(h), 42 U.S.C. § 6928(h) (1988).


38. Curry et al., supra note 17, at 367.
cleanup costs incurred by direct government action. Under CERCLA section 104, EPA can conduct its own short-term removal, or long-term remedial response. CERCLA section 107 allows EPA to recover response costs related to a hazardous substance release from responsible parties. CERCLA does not define “response costs,” but the meaning can be ascertained from its definitions of “respond” and “response” as “remove, removal, remedy and remedial action.”

40. CERCLA § 104 authorizes EPA’s Administrator to undertake or arrange for removal or remedial action in response to a release or threatened release. CERCLA § 104(a), 42 U.S.C. § 9604(a). Congress enacted a two-category response system under CERCLA, assuming that responses would take the form of either a removal action or a remedial action. Jerry L. Anderson, Removal or Remedial? The Myth of CERCLA’s Two-Response System, 18 COLUM. J. ENVTL. L. 103, 103 (1993). Removals are generally considered short-term interim actions taken to prevent a situation from deteriorating, whereas remedial action refers to the permanent remedy of a site and generally consists of long-term treatment. Id. at 124-25. Note, Developments in the Law - Toxic Waste Litigation, 99 HARV. L. REv. 1458, 1485 (1986). For a discussion of the importance of classification as removal or remedial to cost recovery under CERCLA § 107, see infra notes 47-48. Specifically, CERCLA defines “remove” or “removal” as:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other measures 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.

CERCLA § 101(23), 42 U.S.C. § 9601(23). CERCLA defines “remedy” or “remedial action” as:

[A]ctions 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.

Id. § 101(24), 42 U.S.C. § 9601(24). Both parties in the instant case agreed that if the government’s oversight activities are included under this provision, it is because they were “removal” rather than “remedial” activities. Rohm and Haas, 2 F.3d at 127.

41. CERCLA § 107(a), 42 U.S.C. § 9607(a). CERCLA § 107 authorizes the United States to bring suit to recover “all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan.” Id.

42. James L. Rogers, Jr. & Eugene C. McCall, Jr., The Private Plaintiff’s Prima Facie Case Under CERCLA Section 107, 41 S.C. L. REV. 833, 848 (1990); see CERCLA § 101(25), 42 U.S.C. § 9601(25). For a further discussion of CERCLA’s definitions of “remove” and “remedy,” see supra note 40 and accompanying text.

Much litigation has focused on whether response costs include costs of investigating or monitoring a site before actual cleanup begins. Rogers & McCall, supra, at 849. These investigative costs usually involve determining the existence, nature
Second, the imminent hazard authority of section 106 gives EPA two enforcement options. If EPA determines there may be an imminent and substantial danger to public health or the environment due to an actual or threatened release of a hazardous substance, the agency can either seek an injunction, or issue an administrative order compelling responsible parties to take cleanup measures.\(^{43}\) EPA increasingly uses CERCLA section 106 orders, because they give the agency substantial power and flexibility in requiring responsible parties to undertake cleanup.\(^{44}\)

CERCLA, as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"),\(^{45}\) altered the national trust fund, or "Superfund," which is used to finance the costs incurred in a cleanup.\(^{46}\) EPA must identify and prioritize releases by the nature and extent of an environmental problem. \(^{Id.}\) Such response costs have been found recoverable by a majority of courts. See, e.g., Cadillac Fairway/California, Inc., v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986); New York v. General Elec. Co., 592 F. Supp. 291, 298 (N.D.N.Y. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 597 F. Supp. 823, 850 (W.D. Mo. 1984). Because CERCLA is largely remedial, there seems to be little reason to distinguish between actual cleanup costs and investigative costs. Rogers & McCall, supra, at 849.

\(^{43}\) CERCLA § 106(a), 42 U.S.C. § 9606(a). Specifically, EPA may "ask the Attorney General to bring an action in federal district court for an injunction compelling responsible parties to take actions necessary to abate the danger or threat posed by a release." Whitman, supra note 20, at 102. Alternatively, EPA may issue an administrative order to perform short-term removal or long-term remedial activities. \(^{Id.}\) at 98. Administrative orders "are particularly useful in immediate removal situations since they can be issued quickly," can require specific segments of work and pose a threat of additional penalties for noncompliance. \(^{Id.}\) (quoting Lee M. Thomas, EPA Assistant Administrator, EPA Guidance Memorandum to Regional Administrators on the Issue of Administrative Orders for Immediate Removal Actions 1 (Feb. 21, 1984)). CERCLA § 106(b)(1) provides that any person who violates or does not comply with an order issued under § 106(a) may be fined up to $25,000 a day. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1). Allowing EPA these alternatives is consistent with CERCLA's emphasis on promoting private party cleanup. 2 Cooke, supra note 21, § 14.03(1)(c).

\(^{44}\) 2 Cooke, supra note 21, § 14.03(1)(c). The court noted in Rohm and Haas that CERCLA § 106 orders seem to be favored because they are quick and less costly than government cleanups conducted pursuant to CERCLA § 104. Rohm and Haas, 2 F.3d at 1270. Although not specified in CERCLA, EPA uses a third alternative in practice: since §§ 106 and 107 give EPA considerable power, EPA is in a position to encourage voluntary cleanup through informal negotiations and settlements. Ferrey, supra note 10, at 231 (citing CERCLA 1985: A Litigation Update, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,395, 10,396 (1985)).


\(^{46}\) Whitman, supra note 20, at 1. CERCLA permits Superfund money to be used "for either private or government-sponsored cleanup of closed or abandoned hazardous waste sites where no responsible parties can be found, private resources are inadequate, or an immediate government response is needed to avert imminent environmental damage." Howard, supra note 11, at 66; see CERCLA § 111, 42 U.S.C. § 9611. EPA must replenish the fund through "privately negotiated settle-
gating a National Priorities List ("NPL") based on the procedures set forth in the National Contingency Plan. Although EPA's authority to act is not limited to sites on the NPL, EPA cannot utilize governments with responsible parties later identified," or through litigation to recover cleanup costs. Howard, supra note 11, at 66; see CERCLA § 122, 42 U.S.C. § 9622.

The original $1.6 billion trust was financed through sales taxes on chemical corporations and general appropriations. Ferrey, supra note 10, at 223. With the passage of SARA, Congress added an $8.5 billion, five year reauthorization for Superfund, and expanded its taxbase to include a petroleum excise tax and an environmental tax on corporations, among others. Id. at 223-24.


EPA promulgated regulations which set forth the procedure and criteria for placing sites on the NPL. Henrichs, supra at 728; see 40 C.F.R. § 300.66(a)-(c) (1988). Essentially, the National Contingency Plan requires that a site meet one of three tests: (1) the release scores above a threshold level on the Hazard Ranking System; (2) the release is designated a state's highest priority; or (3) EPA determines that the site poses a significant threat to public health or the environment. Henrichs, supra at 728; see 40 C.F.R. §§ 300.66(b)(2)-(4). According to the 1990 revised National Contingency Plan, EPA must consider the following factors when considering the appropriateness of a removal action:

(1) actual or potential exposure to nearby populations, animals or food chains; (2) actual or potential contamination of sensitive ecosystems or drinking water supplies; (3) the presence of drums, tanks or other containers that may pose a threat of a release; (4) high levels of hazardous substances in the soil or near the surface that may migrate; (5) weather conditions that may cause migration; (6) threat of fire or explosion; (7) availability of other appropriate federal or state response mechanisms; and (8) any other factors or situations that may pose threats to public health, welfare or the environment.

Whitten, supra note 20, at 47. For a complete discussion of the process for listing sites and the consequences of listing, see Henrichs, supra, at 727-52.

Under CERCLA § 107, if the government incurs response costs consistent with the National Contingency Plan, it may recover those costs from responsible parties. Anderson, supra note 40, at 107; see CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). The distinction between removal and remedial responses is crucial to recovery of cleanup costs from responsible parties since removals and remedies are subject to different requirements under the National Contingency Plan. Anderson, supra note 40, at 106. For example, the government is not permitted to conduct Superfund-financed remedial action at a site, unless it is listed on the NPL; listing is unnecessary for removal actions. Id. Congress, however, provided
Superfund to pay for long-term remedial activities until a site is placed on the list. 48 Although SARA expanded CERCLA's cleanup program, it did not materially alter the liability provisions of CERCLA section 107. 49 Section 104(a) was amended, however, to require a party wishing to conduct a Remedial Investigation and Feasibility Study ("RI/FS") to agree to reimburse Superfund for EPA's costs of overseeing and reviewing the RI/FS. 50 SARA also amended section 111(c)(8) to allow EPA to: (1) pay for contracts entered into pursuant to section 104(a)(1) to oversee and review any RI/FS not conducted by EPA with Superfund monies; and (2) use Superfund to pay for costs of overseeing remedies at NPL sites resulting from consent orders or settlement agreements. 51

C. Procedures for Responding to a Hazardous Waste Problem

A response to a hazardous release generally consists of assessments, response formulations and execution of cleanup remedies. 52 Like RCRA corrective action, a CERCLA response action is designed to clean up contamination. 53 Although the RCRA correc-

little guidance for distinguishing between removal and remedial actions. Id. at 104.

48. CERCLA mandates NPL listing criteria to be used "for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." Anderson, supra note 40, at 113; see CERCLA § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A). Courts have interpreted this language to require NPL listing in order to use Superfund to finance remedial activity, but not for removal actions. Anderson, supra note 40, at 113. The National Contingency Plan confirms this interpretation since only releases listed on the NPL are eligible for Superfund financed remedial action, whereas removal actions are not limited to NPL sites. Id.; see 40 C.F.R. § 300.425(b)(1).

49. 2 Cooke, supra note 21, § 14.01(1). For a discussion of the peripheral changes to CERCLA that do affect cost recovery actions in terms of substantive requirements for government cleanup activity and the level of scrutiny courts are to use in evaluating such activity, as well as other changes, see id. § 14.01(2).


51. Id. § 111(c)(8), 42 U.S.C. § 9611(c)(8). This section provides that appropriate uses of Superfund include:

The costs of contracts or arrangements entered into under section 9604(a)(1) of this title to oversee and review the conduct of remedial investigations and feasibility studies undertaken by persons other than the President and the costs of appropriate Federal and State oversight of remedial activities at National Priorities List sites resulting from consent orders or settlement agreements.

Id.

52. Rohm and Haas, 2 F.3d at 1271.

53. Curry et al., supra note 17, at 369.
tive action program is modeled after CERCLA remedial response, there are several differences between the two programs. First, RCRA corrective action is solely the responsibility of the owner or operator of a facility, whereas CERCLA cleanups may be conducted and paid for by generators, transporters and past or present owners and operators. Also, there may be more flexibility to choose a response under RCRA, since CERCLA responses must be consistent with the National Contingency Plan.

RCRA corrective action proceeds in three stages. Initially, at the assessment level, a RCRA Facility Assessment is conducted by EPA or its contractors to identify potential releases that may require further investigation. If EPA finds that further action is necessary, the owner or operator will conduct a RCRA Facility Investigation ("RFI") to determine the extent of the release. If, based on the

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54. Id. at 371; Stoll, supra note 9, at 1309. In developing regulations, one of EPA's objectives has been consistency with the goals of CERCLA. Curry et al., supra note 17, at 371.

55. Setterlee & Anderson, supra note 3, at 195; see CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). Thus, the number of parties responsible under RCRA is much more limited than under CERCLA. Setterlee & Anderson, supra note 3, at 195.

56. Setterlee & Anderson, supra note 3, at 195. Furthermore, SARA added the requirement that the chosen CERCLA remedy must utilize permanent rather than temporary solutions to hazardous waste releases. Id.; see CERCLA § 121, 42 U.S.C. § 9621. Although EPA anticipates both programs will similarly solve environmental problems, one aspect in which RCRA is more flexible is that while the remedy must protect human health and the environment, the Administrator may take site-specific considerations into account when deciding the cleanup level to be achieved. Setterlee & Anderson, supra note 3, at 195; see 55 Fed. Reg. 30,798, 30,804 (1990) (to be codified at 40 C.F.R. 264, 265, 270, 271) (proposed July 27, 1990).

57. Setterlee & Anderson, supra note 3, at 187; see also Curry et al., supra note 17, at 376-78.

58. Setterlee & Anderson, supra note 3, at 187. Because of its subjective nature, the RCRA Facility Assessment ("RFA") will be conducted by EPA, the state or its contractors, rather than the owner or operator of the TSD. Id. at 188. The RFA itself consists of three stages: (1) the preliminary review; (2) the visual site inspection; and (3) the sampling visit. Id. (citing EPA, RCRA FACILITY ASSESSMENT GUIDANCE 1-2, 1-3 (NTIS 1986)). For a full discussion of the RFA process, see Setterlee & Anderson, supra note 3, at 188-89. The RFA is analogous to the Preliminary Assessment/Site Investigation ("PA/SI") conducted under CERCLA. 40 C.F.R. § 300.305. The PA/SI is the first step to NPL listing, and is conducted before an RI/FS which is the start of the true remedial process. Curry et al., supra note 17, at 373-74.

59. Setterlee & Anderson, supra note 3, at 187. The RFI is virtually the same as the Remedial Investigation performed under CERCLA. Stoll, supra note 9, at 1309; see 55 Fed. Reg. 8666, 8708 (1990) (to be codified at 40 C.F.R. § 300.430(d)); see also Setterlee & Anderson, supra note 3, at 187. For a further discussion of the purpose of a CERCLA Remedial Investigation, see supra notes 65-67 and accompanying text. The scope of a particular RFI will depend on the circumstances of the particular site. See Curry et al., supra note 17, at 376-77. A facility owner may be
RFI, EPA finds that a cleanup is likely, it will require the owner or operator to perform a Corrective Measures Study ("CMS"), which is similar to a CERCLA Feasibility Study. Finally, the agency will order implementation of any necessary corrective action based on the information in the CMS. The implementation of the RFI and the CMS phases "comprise the bulk of the activities outlined in the typical RCRA corrective action permit or administrative order." Although private parties have the greatest role in executing corrective action, EPA still plays a significant role in overseeing their performance.

CERCLA remedial action is intended to permanently remedy a site, and consists of investigations, studies, plans and reports designed to ensure that the chosen plan will protect human health and the environment. The process begins with an RI/FS which consists of two studies, a Remedial Investigation and a Feasibility Study, which EPA generally conducts simultaneously. The Remedial Investigation identifies the source and extent of contamination and the potential risk to human health and the environment. The Feasibility Study details engineering alternatives for cleanup, and estimates cost and environmental impact. Based on options illuminated by the RI/FS, EPA must select a viable remedy after considering cost, technology, reliability and public health effects.
D. National Priorities List/RCRA Deferral Policy

HSWA transformed RCRA into a kind of mini-CERCLA by expanding EPA's ability to require owners and operators of TSDs to take corrective action for releases at their facilities. The corrective action provisions of RCRA give EPA a choice to pursue enforcement under RCRA or CERCLA. Since the NPL was adopted in 1983, it has been EPA's policy to defer listing facilities subject to RCRA corrective action. Accordingly, sites subject to both CERCLA and RCRA are managed under RCRA. EPA only considers listing a site on the NPL for possible CERCLA response if RCRA corrective action measures are not likely to succeed. EPA's rationale is to maximize the number of sites handled under RCRA corrective action authorities in order to preserve Superfund monies for sites at which no other cleanup method is available. Thus, facilities subject to RCRA corrective action should be listed on the NPL only if their owners and operators are unwilling or unable to undertake corrective action.

E. Standards of Statutory Construction

Both RCRA and CERCLA have been characterized as lacking enlightening legislative history. This can present problems for


69. *Id.*

70. Curry et al., supra note 17, at 378; see 53 Fed. Reg. 30,005, 30,005 (1988). EPA will list sites subject to RCRA corrective action if their owners or operators are unwilling or unable to perform a cleanup. Curry et al., supra note 17, at 378; see 51 Fed. Reg. 21,054, 21,057 (1986). EPA identified three types of facilities that warrant such listing: (1) facilities whose owners or operators are bankrupt; (2) facilities that have lost authorization to operate and it appears that the owners or operators are unwilling to act; and (3) facilities that have not lost authorization to operate, but whose owners have a history of unwillingness to take action. Curry et al., supra note 17, at 378. EPA indicated that facility owners may be considered unwilling if they do not comply with an administrative order, judicial action or a RCRA permit condition that requires a response or corrective action. *Id.*

71. *Whitman*, supra note 20, at 42; Curry et al., supra note 17, at 379.

72. Curry et al., supra note 17, at 380. One purpose for the expansion of EPA's corrective action authorities was to prevent active waste management facilities from becoming a drain on Superfund. *Id.* at 379. Congress stated that the responsibility to control releases from SWMUs lies with the facility owner and should not be shifted to Superfund. *Id.;* see H.R. Rep. No. 198, 98th Cong., 1st Sess., pt. 1, at 61 (1988).

73. United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); Rogers & McCall, *supra* note 42, at 853; *Developments in the Law - Toxic Waste Litigation*, *supra* note 40, at 1485; Howard, *supra* note 11, at 53-54; 2 *Cooke*, *supra* note 21, § 14.01(1). CERCLA is an "eleventh hour compromise" between the House and Senate. Howard, *supra* note 11, at 53. During consideration of the legislation, Congress suspended normal rules, resisted amendments and limited floor debate. *Id.* Congress approved CERCLA only after deleting many of its
courts who must interpret and implement the statutory language.\textsuperscript{74} When an administrative agency is entrusted with administering a statute, the agency is presented with questions of statutory meaning and becomes involved in statutory construction.\textsuperscript{75} Judicial oversight of administrative statutory construction efforts has declined steadily and varying degrees of deference are given to agency interpretations.\textsuperscript{76}

In early cases that address the issue of what effect agency constructions should have on judicial determinations, the United States Supreme Court held that agency views provided guidance to courts and had the power to persuade.\textsuperscript{77} The Court later changed the applicable standard of review in cases where Congress expressly delegated authority to construe a statute to an agency, holding that a reviewing court is not free to set aside regulations because it would have interpreted a statute differently.\textsuperscript{78} In \textit{Chevron, U.S.A., Inc.}, v. early provisions. Coven, \textit{supra} note 9, at 178; Mark J. White, Comment, \textit{Private Response-Cost Recovery Actions Under CERCLA}, 34 U. Kan. L. Rev. 109, 109 (1985). Since a majority of the act originated during limited floor debates, the legislation lacks clarity in several provisions. Coven, \textit{supra} note 9, at 178.

\textsuperscript{74} Coven, \textit{supra} note 9, at 178. Since Congress cannot be expected to anticipate every conceivable problem that may arise, it relies on the administrators and courts to implement the legislative will. Skinner \textit{v.} Mid-Am. Pipeline Co., 490 U.S. 212, 222 (1989); Robert J. Gregory, \textit{When a Delegation is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps}, 39 Cath. U. L. Rev. 725, 728 (1990).

\textsuperscript{75} The notion that Congress can delegate \textit{lawmaking} authority to other branches of government did not originate with the creation of administrative agencies." Gregory, \textit{supra}, at 727 (emphasis in original). Commentators have long noted that legislatures implicitly delegated lawmaking authority to courts whenever it enacted statutes without providing ascertainable legislative meaning. \textit{Id.}; see B. Cardozo, \textit{The Nature of the Judicial Process} 113-41 (1921).

\textsuperscript{76} Saunders, \textit{supra} note 75, at 769-70. Historically, the degree of deference accorded interpretive rules has varied; the present trend, however, is toward subjecting them to less stringent standards of judicial review. \textit{Id.} at 770. For a further discussion of trends of judicial review, see \textit{infra} notes 77-97 and accompanying text.

\textsuperscript{77} Skidmore \textit{v.} Swift & Co., 323 U.S. 134, 140 (1944). Thus, a court could still substitute its own judgement for that of an agency. Saunders, \textit{supra} note 75, at 773; 2 K. Davis, \textit{supra} note 75, \textsection 7:13 at 59.

\textsuperscript{78} Batterton \textit{v.} Francis, 432 U.S. 416, 424-26 (1976).
Natural Resources Defense Council, Inc., the Supreme Court further deprived courts of authority to overturn agency interpretations. In *Chevron*, the Court accorded an agency view controlling weight, without finding an express delegation of authority to the agency. Thus, *Chevron* could be read to stand for the proposition that statutory constructions, issued by an agency with implicitly delegated authority to construe, are due legislative effect.

Even after *Chevron*, however, it is arguable that not every statutory ambiguity serves as a basis for a court to find an implicit congressional delegation of authority to construe statutory meaning. In *Immigration and Naturalization Service v. Cardoza-Fonseca*, the Supreme Court rejected the argument that the Immigration and Naturalization Service’s interpretation of a statute was entitled to substantial deference. Instead, the Court used traditional tools of statutory construction and held that Congress did not intend the agency’s interpretation. The Supreme Court relied on *Cardoza-Fonseca* in *National Labor Relations Board v. United Food & Commercial*
Workers Union,\textsuperscript{87} stating that if courts are able to determine congressional intent using traditional tools of statutory construction, that intent must be given effect.\textsuperscript{88} The Court noted that traditionally, agency interpretations are given deference if they are rational and consistent with the statute.\textsuperscript{89} In this regard, the Court considered how consistently the agency applied its interpretation, and whether that interpretation was adopted when the statute was enacted.\textsuperscript{90} In Cardoza-Fonseca, the Court found that inconsistency in statutory interpretations was an additional reason to reject an agency's request for heightened deference.\textsuperscript{91} This position was previously articulated in \textit{Bowen v. Georgetown University Hospital},\textsuperscript{92} where the Court noted that it never before applied \textit{Chevron}'s deference principle to agency interpretations wholly unsupported by regulations, rulings or administrative practice.\textsuperscript{93} The Court stated that "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."\textsuperscript{94}

Furthermore, courts will not automatically apply \textit{Chevron}'s level of deference where an agency is attempting to recover administrative costs under an ambiguous statute. In \textit{Skinner v. Mid-America Pipeline Co.},\textsuperscript{95} the Supreme Court readdressed its decision in \textit{National Cable Television Assn., Inc. v. United States} ("NCTA").\textsuperscript{96} The \textit{Skinner} Court stated that NCTA stood for the proposition that "Congress must indicate clearly its intention to delegate ... discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial bur-

\textsuperscript{87} 484 U.S. 112 (1987).
\textsuperscript{88} United Food & Commercial Workers Union, 484 U.S. at 123 (citing Cardoza-Fonseca, 480 U.S. at 446-48).
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 124 n.20.
\textsuperscript{91} Cardoza-Fonseca, 480 U.S. at 446 n.30.
\textsuperscript{92} 488 U.S. 204 (1988).
\textsuperscript{93} Bowen, 488 U.S. at 212. The Court declined to defer to agency counsel's interpretation of a statute since the agency itself had no position. Id.
\textsuperscript{94} Id.
\textsuperscript{95} 490 U.S. 212 (1989). In \textit{Skinner}, the Supreme Court held that a statute directing the Secretary of Transportation to establish a system of user fees to cover the costs of administering certain federal pipeline safety programs was not an unconstitutional delegation of the taxing power by Congress to the Executive Branch. Id. at 214.
\textsuperscript{96} 415 U.S. 336 (1974). In NCTA, the Court held that a regulatory agency authorized to charge and collect fees from regulated parties could not base those fees on the agency's total costs because some of the agency's activities were for the benefit of the public, and not the regulated parties. Id. at 340-44. The fee could reflect the benefit conferred on the regulated party, but the extent to which it benefitted the public it was a tax and required an explicit congressional delegation of authority. \textit{Rohm and Haas}, 2 F.3d at 1273-74 n.12.

http://digitalcommons.law.villanova.edu/elj/vol6/iss1/5
dens whether characterized as 'fees' or 'taxes' on those parties."

Skinner's interpretation of the NCTA doctrine requires Congress to clearly state its intent to authorize an agency to recover administrative costs that do not directly benefit the regulated party. Thus, when an agency seeks to recover administrative costs, ambiguity will neither necessitate a finding of implicit legislative delegation nor automatically impose Chevron deference to a reasonable agency interpretation.

III. UNITED STATES v. ROHM AND HAAS CO.

From 1917 until 1975, Rohm & Haas operated a landfill for the disposal of general refuse, damaged containers, process wastes and offgrade products generated by its two plastic and chemical manufacturing plants. In 1978, Rohm & Haas transferred this landfill site to its wholly owned subsidiary, Rohm and Haas Delaware Valley, Incorporated ("Rohm & Haas-DVI"). Since 1979, EPA has sampled and analyzed substances at the site and monitored, assessed and evaluated the activities of Rohm & Haas-DVI. In the spring of 1980, EPA placed the site on the "Potential Hazardous Waste Site Log."

In 1983, Rohm & Haas-DVI hired an environmental consulting firm to study and sample the conditions at the landfill. In 1985,

97. Skinner, 490 U.S. at 224.

99. Rhom and Haas, 2 F.3d at 1268. Rohm & Haas also sold 14.5 acres to the Bristol Township Authority ("BTA") in 1963, and 10.94 acres to defendant Chemical Properties ("CP") in 1971. Id. Thus, the transfer to Rohm & Haas-DVI in 1978 consisted of the remainder of the site then owned by Rohm & Haas. Id. For a further discussion of the challenges raised by CP on appeal, see infra note 110.

100. Rhom and Haas, 790 F. Supp. at 1257. The landfill first came to EPA's attention in 1979 when Rohm & Haas reported to a congressional subcommittee that it disposed of wastes at the site. Id.

102. Id. The firm included the portions of the site owned by BTA and CP in its environmental conditions study. Id. Investigations conducted by EPA and Rohm & Haas revealed the presence of hazardous substances in the air, soil and groundwater. Rhom and Haas, 2 F.3d at 1268. Approximately 30 hazardous wastes as defined by CERCLA were found at the site: (1) in groundwater monitoring wells; (2) in a creek running through the site; (3) in the air over the landfill; and (4) in the surface and sub-surface soil. Rhom and Haas, 790 F. Supp. at 1257-58.
EPA proposed to add the site to the NPL. Based on its deferral policy and Rohm & Haas' willingness to negotiate and take corrective action, EPA agreed to manage the site under RCRA rather than CERCLA, and took the site off the proposed NPL in late 1989. Rohm & Haas-DVI and EPA entered into an Administrative Consent Order under which Rohm & Haas-DVI agreed to perform an RFI and a CMS on all portions of the site. This Consent Order did not provide for reimbursement of the government's costs incurred while implementing the order at the site.

In November 1990, the United States filed suit against Rohm & Haas to recover under CERCLA section 107 all costs incurred by EPA in connection with the site since 1979, and to seek an injunction declaring all future costs incurred at the site recoverable.

For a list of substances and chemicals detected at the Bristol site, see id. at 1258 n.2.

103. Rohm and Haas, 790 F. Supp. at 1258. EPA continued to monitor Rohm & Haas-DVI's activity at the site. Id. This included monitoring preparation of a cleanup investigation, and removal of approximately 11,700 cubic yards of waste and soil from BTA's portion of the site. Id. On August 28, 1986, EPA sent Rohm & Haas-DVI a draft consent order pursuant to CERCLA § 106, which required Rohm & Haas-DVI to conduct an RI/FS. Id. It also provided for reimbursement of the government's response and oversight costs. Rohm and Haas, 2 F.3d at 1268. Rohm & Haas-DVI did not sign the order, but sent EPA a letter stating that in its opinion, the site was not appropriate for handling under CERCLA according to published policy, and should be managed under RCRA. Id. For a further discussion of the National Priorities List/RCRA deferral policy, see supra notes 68-72 and accompanying text.

104. Rohm and Haas, 790 F. Supp. at 1258.

105. Id. at 1259.

106. Rohm and Haas, 2 F.3d at 1268. Furthermore, none of the defendants agreed in the Administrative Consent Order or elsewhere, to reimburse the government for response costs incurred at the site or the costs of overseeing Rohm & Haas-DVI's performance of the FI or CMS. Rohm and Haas, 790 F. Supp. at 1260. The evidence presented at trial indicated that Rohm & Haas believed a waiver resulted from the consent order since it did not mention such costs. Id. at 1261. At trial, however, the court concluded that the government did not waive recovery of oversight costs. Id.

107. Rohm and Haas, 2 F.3d at 1268-69. The United States sought to recover its costs of, inter alia, an Administrative Consent Order entered into under RCRA § 3008 and interest totalling $401,348.78. Rohm and Haas, 790 F. Supp. at 1259. EPA calculated the interest on its costs as of June 18, 1991, pursuant to CERCLA § 107(a) (4), and as of that date EPA has incurred a total cost of $379,063.45 at the site. Id. EPA spent $252,352.89 for contractors and field investigations. Id. The balance of $126,710.56 represents EPA’s payroll, indirect and travel costs. Id.

Indirect response costs include overhead costs for site and non-site office space, payroll and benefits for managers and other support staff as well as pay earned by site coordinators while on leave performing tasks not directly associated with a site. Rohm and Haas, 790 F. Supp. at 1262-63 n.4. Such indirect response costs have been found to be consistent with the NCP and thus recoverable under CERCLA. Id. The Third Circuit noted, however, that the instant case did not involve the issue of whether indirect costs associated with government removal or remedial activity are recoverable under CERCLA § 107(a). Rohm and Haas, 2 F.3d
The district court rejected each defense raised, and held that Rohm & Haas was liable under CERCLA for all costs incurred. In addition, the court held that the government's oversight costs constituted removal costs under CERCLA. On appeal, Rohm & Haas challenged the award of any costs incurred by EPA while overseeing the investigation and remediation Rohm & Haas performed at its landfill. The Third Circuit reversed and held that the government was not entitled to recover the costs of its oversight activities.

IV. NARRATIVE ANALYSIS

A. Contentions of the Parties

EPA claimed that its oversight of Rohm & Haas' performance of RCRA corrective action was within the CERCLA definition of a "removal," thus making Rohm & Haas liable for the oversight costs under CERCLA section 107(a). EPA also argued that RCRA's failure to authorize recovery of costs of overseeing corrective action conducted under RCRA was irrelevant. Rohm & Haas responded at 1273. As of March 31, 1991, the Department of Justice, including the Environmental and Natural Resource Division of the United States Attorney's office for the Eastern District of Pennsylvania, has incurred $6,523.96 in connection with the Bristol site. Id.

108. Rohm and Haas, 2 F.3d at 1269. The district court held that RCRA's remedies were not exclusive in the case despite the fact that EPA chose to manage the site under RCRA and not CERCLA. Rohm and Haas, 790 F. Supp. at 1262. The court also rejected Rohm & Haas' arguments that: (1) EPA was barred by the Administrative Consent Order from recovering costs; and (2) including enforcement and indirect costs is inappropriate because they do not constitute response costs. Id. at 1262-63.

109. Rohm and Haas, 790 F. Supp. at 1262-63. For a further discussion of CERCLA's definition of "removal," see supra note 40 and accompanying text.

110. Rohm & Haas Brief, supra note 23, at 3. Rohm & Haas did not contest recovery by EPA of any of the agency's non-oversight costs incurred prior to its switch from CERCLA to RCRA. Appellant's Reply Brief at 2, United States v. Rohm & Haas Co., 2 F.3d 1265 (3d Cir. 1993) (No. 92-1517) [hereinafter Reply Brief]. In addition, defendant CP argued that it should not be jointly and severally liable for the full costs incurred by the government. Rohm and Haas, 2 F.3d at 1269. The Third Circuit held that CP was jointly and severally liable for any costs that the government was entitled to recover under CERCLA § 107. Id. at 1281. For a further discussion of CP's challenge and this aspect of the courts decision, see id. at 1279-81.

111. Rohm and Haas, 2 F.3d at 1281.

112. Id. at 1272.

113. Id. Rohm & Haas argued that Congress addressed RCRA four times since it was enacted, yet never included language in any of the amendments authorizing the government to recover oversight or other regulatory costs from private parties. Rohm & Haas Brief, supra note 23, at 26. EPA acknowledged that RCRA contains no authority for recovery of costs incurred overseeing action ordered under RCRA. Rohm and Haas, 2 F.3d at 1272. EPA maintained, however,
that the costs EPA sought did not constitute removal costs under
the definition of "removal" set forth in CERCLA section 101(23). Rohm & Haas reasoned that oversight of a private party's removal
and remedial activity is not itself a removal action under any statutory authority. Furthermore, Rohm & Haas contended that even
if CERCLA section 107(a) contemplates government recovery of
costs incurred while overseeing private party responses under CER-
CLA, it does not impose liability for the costs of overseeing activities
conducted under RCRA.

B. Applicability of the NCTA Doctrine

Before the Third Circuit examined the statutory language, the
court defined the required standard of clarity. Rohm & Haas ar-
gued that under the NCTA doctrine, in order for the court to
hold that RCRA oversight costs are recoverable under CERCLA, the
court would have to find that CERCLA clearly reflects Congress' intent to authorize a federal agency to impose regulatory costs on a
regulated private party. Conversely, the government contended
that the NCTA doctrine was inapplicable because it was a narrow,
fact-specific holding. Specifically, the government argued that
the circumstances were distinguishable because NCTA involved an agency's imposition of a fee for services absent a congressional dele-

that Rohm & Haas was liable because Congress intended § 107(a) to impose liabil-
ity in these circumstances. Id. EPA based its position on CERCLA § 107(a),
which imposes liability for removal actions notwithstanding any other provision or
rule of law. Id.

114. Rohm and Haas, 2 F.3d at 1272.

115. Id.

116. Id. Rohm & Haas acknowledged that facilities subject to regulation
under RCRA may be subject to government removal and remedial action under
CERCLA in some circumstances, and that the private party then may be liable for
the government's costs under CERCLA § 107(a). Id. at 1272-73.

117. For a discussion of the development of the NCTA doctrine, see supra
notes 95-97 and accompanying text.

118. Rohm and Haas, 2 F.3d at 1273. The government countered that since
Rohm & Haas did not raise this issue at trial, or cite NCTA to the district court,
Rohm & Haas should not be permitted to raise NCTA on appeal. Id. at 1273 n.11.
The Third Circuit, however, stated that the trial record clearly showed Rohm &
Haas argued that without statutory authority EPA could not recover the costs in
question. Id. at 1273. The court did not view Rohm & Haas' reliance on NCTA as
a new claim or defense, but rather as offering additional case support for propositions
made at trial. Id. Furthermore, the court found NCTA involved a fundamental
issue of the congressional indication necessary to impose liability. Id. The
court stated that ignoring the Supreme Court's guidance might lead to misinter-
pretation of the statutes and adversely affect future parties in positions similar to
the defendants. Id.

119. Id. at 1273.
igation of taxing authority and proof that the regulated parties received agency services.\textsuperscript{120} Although the court recognized that \textit{NCTA} involved different circumstances, the court rejected a narrow reading of \textit{NCTA}; rather, the court found the principle of \textit{Skinner}, that Congress must clearly indicate its intention to authorize an agency to recover administrative costs that do not directly benefit the regulated party, applicable to the present case.\textsuperscript{121} The court characterized the oversight costs at issue as the kind of administrative costs discussed in \textit{NCTA}.\textsuperscript{122} The Third Circuit reasoned that the costs were incurred due to government monitoring of private party compliance with legal obligations, which was intended to protect the public's interests rather than merely the interests of the overseen party.\textsuperscript{123}

The court explained that the budget and appropriation process holds agencies accountable to Congress, giving them incentive to be efficient, but this incentive and accountability are lost when agencies assert a right to finance activities by assessing costs against regulated parties.\textsuperscript{124} The court also stated that recognizing the authority claimed by EPA could result in a shift of funding of EPA activity away from general revenue to specific levies on private parties.\textsuperscript{125} Thus, the Third Circuit refused to find that Congress intended regulated parties to pay large portions of an overseeing agency's administrative costs unless clearly required by the statutory language.\textsuperscript{126}
C. Statutory Interpretation

1. CERCLA Section 107's Applicability to RCRA Costs

After the Third Circuit determined the appropriate standard of statutory clarity, the court examined the statutory language of RCRA and CERCLA. The court was not persuaded by Rohm & Haas' argument that RCRA and CERCLA represent two separate statutory schemes, and that costs incurred under RCRA are not recoverable under CERCLA section 107.\textsuperscript{127} The court stated that the result of the defendant's interpretation would be that costs which are removal costs under CERCLA would not be removal costs under RCRA.\textsuperscript{128} According to the Third Circuit, all removal costs incurred by the government are recoverable under CERCLA section 107(a).\textsuperscript{129} The court found that neither section 107(a) nor CERCLA's definition of "removal" contain language exclusive to CERCLA.\textsuperscript{130} Furthermore, the court noted that section 107(a) expressly provides for conflicting statutory provisions in its opening clause: "notwithstanding any other provision or rule of law"; this phrase mandates that where both section 107(a) and another statute apply, section 107(a) prevails.\textsuperscript{131} Thus, the Third Circuit concluded that if EPA's oversight activity qualifies as removal under the CERCLA definition, the oversight costs are recoverable under the unambiguous language of section 107(a), regardless of whether RCRA or CERCLA statutory authority is invoked.\textsuperscript{132}

\textsuperscript{127} Rohm and Haas, 2 F.3d at 1274. On appeal, Rohm & Haas asserted that the government "erroneously ascribe[d] . . . arguments which we did not make." Reply Brief, supra note 110, at 1. Rohm & Haas stated that it did not claim: (1) that RCRA and CERCLA are mutually exclusive "statutory avenues"; (2) that CERCLA does not apply to RCRA sites; and (3) that the government cannot recover costs incurred under CERCLA with respect to a RCRA site. Id. at 3. Rather, Rohm & Haas' basic point was that since EPA first applied CERCLA and then chose to handle the site under RCRA, it could not recover RCRA costs as if it had pursued CERCLA. Id.\textsuperscript{128}

\textsuperscript{128} Rohm and Haas, 2 F.3d at 1274-75.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 1274; see CERCLA § 101(23), 107, 42 U.S.C. §§ 9601(23), 9607.

\textsuperscript{131} Rohm and Haas, 2 F.3d at 1274. Accordingly, if both RCRA and CERCLA are applicable to the present situation, a lack of authority to recover oversight costs under RCRA would be irrelevant if such authority is found in § 107(a). Id.\textsuperscript{132}

\textsuperscript{132} Id. at 1274-75. The court found no textual language or legislative history of CERCLA suggesting that identical oversight activity should be considered re-
2. The Definition of "Removal"

After concluding that a removal action under CERCLA is also a removal if undertaken pursuant to RCRA, the court considered what constitutes a "removal" under CERCLA. The court framed the issue as whether the definition of "removal" properly includes government oversight of removal or remedial activity which is paid for and conducted by private parties. The Third Circuit stated that if EPA's oversight of private party corrective activity is characterized as a government removal action, the government is entitled to recover its costs under CERCLA section 107(a); if such oversight activity is outside the definition of removal, however, section 107(a) does not permit the government to recover its costs. Following the NCTA doctrine, the Third Circuit looked to the statutory language for clear congressional intent that the costs of government oversight of private party corrective actions under RCRA were meant to be recoverable.

The CERCLA definition of "removal" does not expressly refer to oversight of private party corrective activity, nor is there an explicit statement that Congress intends costs incurred while overseeing such activity to be removal costs. Yet, EPA argued that Congress clearly indicated this was its intent by including the phrase, "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," in the definition of "removal." Although the court noted the possibility that this clause could be interpreted to encompass some oversight of private party activity, the court stated that this is not the only plausible reading. The court reasoned that it was more likely that the language only referred to actual monitoring of removal under CERCLA, but not under another environmental statute. Id. at 1275. The court perceived no reason why Congress might have wished this result, because the provisions of RCRA and CERCLA which authorize EPA to order private parties to undertake corrective activity are so similar. Id. at 1275.
leases or threatened releases, not to the oversight of private party monitoring and assessment activities. Most importantly, however, the Third Circuit determined that this clause does not constitute a statement of clear congressional intent as required by NCTA.

3. Context of CERCLA Enactment

The Third Circuit next considered the historical context in which CERCLA was enacted. The court found Congress' failure to mention oversight or government activity conducted under section 106 in the definition of "removal" significant. The court re-emphasized that when Congress passed and later amended CERCLA, it contemplated two methods of dealing with the problems of hazardous waste releases: (1) government cleanup followed by reimbursement by private parties under sections 104(a) and 107; or (2) use of suits and administrative orders to force private parties to undertake cleanup at their own expense. The court reasoned that RCRA section 7003 proves that Congress was familiar with the concept of forcing responsible parties to undertake corrective action; the court also noted the importance of RCRA's lack of a general recovery provision for costs incurred by the government while overseeing corrective action at RCRA permitted sites. The Third Circuit emphasized that since Congress preferred settlements and section 106 consent orders, it could have expected that corrective

139. Rohm and Haas, 2 F.3d at 1275-76. According to the court, this reading is consistent with an understanding of the definition of "removal," which distinguishes at the assessment, response formulation and execution stages, between actions taken to determine the extent of the risk of the release or threatened release and actions taken to evaluate the performance of other parties. Id. at 1276.

140. Id. According to the court, EPA would have had a stronger argument if the agency used the catch-all category of the definition. Id. at 1276 n.17. The court stated that this category, which covers "actions as may be necessary to prevent, minimize, or mitigate damage to the public health or...the environment" is arguably broad enough to include EPA's costs of overseeing Rohm & Haas' activities. Id. The court stated, however, that the language could also refer to actions of the same character as those described within the other categories of the definition (such as actions dealing with the risks created by the release), rather than actions to oversee the performance of those who are dealing with the risk. Id.

141. Id. at 1276.

142. Id.

143. Rohm and Haas, 2 F.3d at 1276. In addition to the preexisting congressional preference for private party corrective action, the court found it to be significant that there are no environmental statutes predating CERCLA which authorize imposing EPA's regulatory costs of monitoring activity upon the regulated parties. Id.
action conducted and paid for by private parties would be more common than government cleanups under section 104.\textsuperscript{144}

The Third Circuit found that a holding entitling EPA to recover all oversight costs of private party corrective actions undertaken pursuant to any applicable environmental statute would force a dramatic change in federal policy, given the expected extent of private party activity.\textsuperscript{145} The court based its finding on the extent of private party activity, as well as on the established practice of financing oversight activities from Superfund.\textsuperscript{146} The court stated that Congress would not choose to manifest such a policy change by including oversight activity within CERCLA's definition of "removal" simply by reference to "such actions as may be necessary to monitor, assess, and evaluate the release of [sic] threat of release of hazardous substances."\textsuperscript{147} According to the court, Congress more likely distinguished EPA oversight of private party removal activity from actual government removal activity and intended EPA to recover costs of the latter but not the former.\textsuperscript{148} The Third Circuit was confident that if Congress intended oversight costs to be recoverable, Congress would have made some reference to section 106 government action when providing examples of removal actions.\textsuperscript{149}

4. Other Provisions Included in CERCLA

After considering the context in which CERCLA was enacted, the Third Circuit analyzed other provisions which Congress included in the statute. Based on these surrounding provisions and the general structure of CERCLA, the court concluded that Congress did not intend to include oversight activity in the definition of

\textsuperscript{144} Id. The Third Circuit believed that Congress was undoubtedly aware that EPA would be forcing private parties to take corrective action and would be overseeing these directives. \textit{Id.} The court pointed to several environmental statutes which contain provisions to allow EPA to force private parties to take corrective action at their own expense. \textit{Id.} at 1276 n.18.

\textsuperscript{145} \textit{Id.} at 1276-77.

\textsuperscript{146} \textit{Id.} at 1276.

\textsuperscript{147} \textit{Rohm and Haas,} 2 F.3d at 1277. The phrase quoted by the court from CERCLA's definition of "removal" accurately reads: "such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment." CERCLA § 101(23), 42 U.S.C. § 9601(23).

\textsuperscript{148} \textit{Rohm and Haas,} 2 F.3d at 1277.

\textsuperscript{149} \textit{Id.} The court pointed to the examples of removal actions provided by Congress at the end of the definition of "removal." \textit{Id.} These examples include certain activity taken under CERCLA § 104(b). \textit{Id.} at 1277 n.19. Also, provisions added to RCRA in 1984 explicitly allow the government to recover the cost of health assessments made by the Toxic Substances and Disease Registry as a response cost under CERCLA § 107. \textit{Id.; see} 42 U.S.C. § 6939 (a), (b), (g).
"removal." Although section 104(a) authorizes the government or private parties to undertake corrective action, the court noted that a private party may not perform an RI/FS unless: (1) EPA determines that the party is qualified; (2) EPA contracts or arranges for assistance in overseeing conduct of the RI/FS; and (3) the private party agrees to reimburse Superfund for the costs incurred by EPA. The court stated that an RI/FS is a removal action, and that the section 104(a) requirement that private parties reimburse government RI/FS oversight costs would be unnecessary if Congress considered government oversight a removal action in itself, since section 107(a) would authorize recovery. The court stressed that section 104(a) only provides for reimbursement of government oversight costs in regard to an RI/FS, although it authorizes EPA to permit private parties to perform various corrective activities. The Third Circuit concluded that if Congress intended government costs of overseeing private party removal and remedial activity other than an RI/FS to be recoverable, it would have indicated this intent in section 104(a).

The court pointed to equally strong evidence of congressional intent in CERCLA section 111, which sets forth six categories of authorized Superfund payments. Under section 111(a)(1), payment of government response costs incurred pursuant to section 104 may be made from Superfund. A separate category allows

150. Rohm and Haas, 2 F.3d at 1277.
151. Id.; see CERCLA § 104(a), 42 U.S.C. § 9604(a).
152. Rohm and Haas, 2 F.3d at 1277. The court found that an RI/FS is an investigation as contemplated in § 104(b). Id. An RI/FS is usually undertaken after initial removal activity and is a prerequisite to remedial activity. Anderson, supra note 40, at 140. Thus, it falls between the two types of action. Id. at 140-41. The National Contingency Plan does not categorize the RI/FS as either a removal or remedy, but most decisions place the RI/FS in the removal category for two reasons: (1) courts point to the definition of removal which includes actions taken "to monitor, assess or evaluate a release"; and (2) action taken pursuant to CERCLA § 104(b), which authorizes investigations, surveys and other testing, is also listed under the removal definition. Id. at 141; CERCLA § 101(23), 42 U.S.C. § 9601(23). Since an RI/FS is not a short-term action taken to prevent further environmental damage, it is somewhat inconsistent to classify it as a removal action. Anderson, supra note 40, at 140. The CERCLA definition of "removal," however, clearly includes assessment and evaluation, so despite the fact that an RI/FS is aimed at providing a long-term remedy, it is classified as a removal action. Id. at 141-42.
153. Rohm and Haas, 2 F.3d at 1277.
154. Id.
155. Id. at 1277-78.
156. Id. at 1277-78; see CERCLA § 111(a)(1), 42 U.S.C. § 9611(a)(1).
costs specified in section 111(c) to be paid from Superfund.\textsuperscript{157} CERCLA section 111(c)(8) authorizes Superfund payment of the costs of contracts entered into under section 104(a)(1) to oversee a private party RI/FS, and the costs of appropriate federal and state oversight of remedial activity at NPL sites.\textsuperscript{158} If EPA’s costs of overseeing removal or remedial activities are themselves removal costs, they would be covered under section 111(a)(1) which authorizes Superfund payment of government response costs. Accordingly, section 111(c)(8) would be unnecessary.\textsuperscript{159} 

D. Summary of the Third Circuit’s Statutory Analysis

While CERCLA section 104 is essentially concerned with government cleanup of hazardous waste sites, CERCLA section 106 and RCRA sections 7003 and 3008(h) are concerned with private party remediation.\textsuperscript{160} According to the Third Circuit, government oversight of a private party cleanup is neither a removal action nor an “activity peripherally connected to such removal.”\textsuperscript{161} The court stated that it appears Congress enacted CERCLA section 107 with section 104 in mind, since it provides for recovery of the government’s section 104(a) removal and remedial activity costs as well as section 104(b) investigatory costs.\textsuperscript{162} There is no clear indication in CERCLA, however, that government oversight costs incurred pursuant to CERCLA section 106 or RCRA section 3008(h) and 7003 are intended to be recoverable removal costs.\textsuperscript{163} Thus, the court found no clear indication of congressional intent as required by NCTA and held that the United States was not entitled to recover the oversight costs it sought.

The Third Circuit completed its discussion of oversight costs by clarifying the distinction between recoverable and non-recoverable costs. Direct government action to investigate, monitor, or evaluate

\textsuperscript{157.} Rohm and Haas, 2 F.3d at 1277-78; see CERCLA § 111(a)(4), 42 U.S.C. § 9611(a)(4). CERCLA § 111(c) lists more than 14 items which can be funded from the Superfund. See CERCLA § 111(c), 42 U.S.C. § 9611(c).

\textsuperscript{158.} Rohm and Haas, 2 F.3d at 1277-78; see CERCLA § 111(c)(8), 42 U.S.C. § 9611(c)(8).

\textsuperscript{159.} Rohm and Haas, 2 F.3d at 1278. The court stated that the drafters of § 111(a) viewed the items included by virtue of § 111(a)(4) as quantitatively different than those in § 111(a)(1). \textit{Id.}

\textsuperscript{160.} \textit{Id.}

\textsuperscript{161.} \textit{Id.}

\textsuperscript{162.} \textit{Id.}

\textsuperscript{163.} Rohm and Hass, 2 F.3d at 1278. The court noted that CERCLA § 106 “contains its own remedies separate and apart from those contemplated in § 107,” such as penalties for a private party’s non-compliance with agency directives. \textit{Id.} at 1278 n.21 (emphasis in original).
a release, threat of release, or danger posed by a release is removal activity and is recoverable.\(^\text{164}\) Although the costs of overseeing an RI/FS are not removal costs under the CERCLA definition of "removal," section 104(a) clearly authorizes the government to recover such costs.\(^\text{165}\) Finally, even at the execution stage, costs of activities associated with planning and directing government response activity are recoverable.\(^\text{166}\) Conversely, costs the government incurs while monitoring private party performance, rather than the release itself, are not recoverable.\(^\text{167}\) Such non-recoverable costs include EPA's costs of hiring contractors to review the plans and corrective activity of private parties.\(^\text{168}\) The court stated that since CERCLA section 106 and RCRA section 3008(h) orders generally involve private party removal and remedial activity, government costs incurred in connection with administering such orders will not normally be recoverable.\(^\text{169}\)

V. CRITICAL ANALYSIS

Courts have struggled with the issue of how to treat agency interpretations of statutes since the large-scale federal administrative system emerged early in this century.\(^\text{170}\) *Chevron* established a two-step analysis. First, a reviewing court must determine whether Congress addressed the precise issue presented; if Congress did, any agency interpretation is irrelevant and the court must apply the statute as unambiguously expressed.\(^\text{171}\) If Congress did not address the issue or the statute is ambiguous, a court must give effect to any agency interpretation that is a "permissible construction of the statute."\(^\text{172}\) If the Supreme Court's decision in *Chevron* is read broadly,

\(^{164}\) *Id.* at 1278. The court stated that the government may recover "the costs, no matter at what stage incurred, of ascertaining whether and to what extent the risk has been reduced or eliminated," and the costs incurred in determining the appropriate action to take. *Id.*

\(^{165}\) *Id.* Unlike RI/FS oversight costs, the costs of overseeing an RFI or CMS are not specifically provided for in the statute, and therefore are not recoverable. *Id.* at 1278 n.22.

\(^{166}\) *Id.* at 1278-79. The court stated that such activity includes government supervision of the contractors it hires to conduct removal actions. *Id.* at 1279 n.23. The costs of this type of supervision are materially different from non-recoverable oversight costs incurred while EPA oversees the performance of the party that has assumed responsibility for the cleanup. *Id.*

\(^{167}\) *Rohm and Haas*, 2 F.3d at 1279.

\(^{168}\) *Id.*

\(^{169}\) *Id.*

\(^{170}\) Callahan, *supra* note 80, at 1278.

\(^{171}\) *Id.* at 1280-81.

\(^{172}\) *Id.* (quoting *Chevron*, 467 U.S. at 843).
courts must accept reasonable agency interpretations of unclear or ambiguous statutes when no clear congressional intent exists. This approach, which is followed by many courts, suggests that EPA's interpretation of CERCLA as authorizing recovery of its regulatory or oversight costs is entitled to deference if it is deemed reasonable.

It is generally understood that *Chevron* displaces case-by-case analysis, but the exact scope of its deference requirement is questionable. A broad reading of the case could be construed to require deference to reasonable agency constructions whenever an implementing agency comments on a statute's meaning. There are strong indications in *Chevron*, however, that the Supreme Court did not intend "to relegate legislative meaning to the black hole of agency discretion." First, the Supreme Court gave ultimate authority with respect to statutory interpretation to the judiciary, stating that courts "must reject administrative constructions which are contrary to clear congressional intent." Furthermore, the court stressed that deference to an agency's construction applies only where specific legislative meaning cannot be determined. If a court determines that Congress expressed an intention on the issue in question through traditional statutory construction, that intention is the law and must be given effect. Thus, the mere presence of ambiguity does not always require deference to the agency since

173. See, e.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 262 (3d Cir. 1992) (stating interpretation of statute EPA is charged with enforcing entitled to considerable deference and must be adhered to if reasonable and consistent with language of statute); Chemical Mfrs. Ass'n v. Natural Resources Defense Council Inc., 470 U.S. 116, 125-26 (1985) (stating agency charged with administration of statute entitled to considerable deference and agency interpretation need not be only permissible construction).

174. Callahan, *supra* note 80, at 1294. "Once a court determines that consideration of an agency's views is either required or appropriate, it must decide upon the extent of that consideration." Id. at 1276 n.3. A court can consider an agency's view along with other factors, or it can simply accept that view alone. Id. at 1276 n.3. *Chevron*, which requires courts to defer to agency interpretations which are permissible constructions of a statute's silence or ambiguity, represents an intermediate approach. Id.

175. Id. at 1294. Some language in the opinion supports this broad reading. See *Chevron*, 467 U.S. at 842-43. Some members of the Supreme Court also endorse a broad interpretation of the case. See *Cardoza-Fonseca*, 480 U.S. at 453-55 (Scalia, J., concurring in judgment) (refusing to accept majority's narrow construction of *Chevron*).


177. Id.

178. Id. *Chevron* prevents a court from applying its own construction to a statute if it finds expressed congressional intent on the issue. Id. at 743-44. The court, however, makes the initial determination of whether Congress addressed the issue through the use of traditional tools of statutory construction. Id. at 744.
Congress may have had a specific intent, but failed to clearly convey it.\textsuperscript{179}

The Supreme Court has applied \textit{Chevron} narrowly. In \textit{Cardoza-Fonseca}, the Court stated that a pure question of statutory construction is a matter for a court to decide.\textsuperscript{180} The Supreme Court relied on \textit{Cardoza-Fonseca} when it reviewed the validity of an agency's regulations in \textit{United Food \& Commercial Workers Union}, stating that a court's task is to determine congressional intent using traditional tools of statutory construction.\textsuperscript{181} The Court stated that if Congress' intent can be ascertained, that interpretation must be given effect and any regulation must be fully consistent with it.\textsuperscript{182} Similarly, in \textit{Rohm and Haas}, the Third Circuit determined what Congress intended by analyzing RCRA and CERCLA through traditional tools of statutory construction. Conventionally, the tools of statutory construction are language, structure and history, but because statutory terms are not self-defining, the meaning also depends on context.\textsuperscript{183} After concluding that a removal was the same pursuant to CERCLA or another statute, the Third Circuit focused on the plain meaning of CERCLA's definition of "removal" to determine whether it encompasses oversight activity.\textsuperscript{184} Since the plain language of the definition makes no explicit reference to government oversight of remediation conducted and paid for by private parties, the Third Circuit looked to the context in which

\textsuperscript{179} \textit{Id.} at 744. Because the Supreme Court in \textit{Chevron} could not ascertain Congress' intent from the language of the statute, it deferred to EPA's interpretation. \textit{Chevron}, 467 U.S. at 865.

\textsuperscript{180} \textit{Cardoza-Fonseca}, 480 U.S. at 446. The Court employed traditional tools of statutory construction and rejected the Immigration and Naturalization Service's interpretation of a statute because it was contrary to Congress' intent. \textit{Id. Cardoza-Fonseca} does not expressly reject a broad reading of \textit{Chevron}; rather it demonstrates that deference is not required in every case in which an agency interprets an ambiguous statute's meaning. Callahan, \textit{supra} note 80, at 1297. The case also reaffirms the court's responsibility to use the tools of statutory construction to ascertain whether Congress had an intention on the precise issue in question. Gregory, \textit{supra} note 74, at 746.

\textsuperscript{181} Callahan, \textit{supra} note 80, at 1297.

\textsuperscript{182} \textit{United Food \& Commercial Workers Union}, 484 U.S. at 123.


\textsuperscript{184} \textit{Rohm and Haas}, 2 F.3d at 1275-76. "Under the plain meaning doctrine of statutory interpretation, the language of the statute is exclusively examined. . . . The theory underlying this doctrine is that the best way to ascertain the meaning of statutory language is to consider the language of the statute itself." Robert J. Araujo, S.J., \textit{The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke}, 16 \textit{Seton Hall Legis. J.} 57, 69-70 (1992). Using the plain meaning approach restricts analysis to the specific language in the portion of the statute that is the subject of litigation. \textit{Id.} at 73.
CERCLA was enacted.\textsuperscript{185} Because contextualism analyzes a statute in the present and is concerned with the context in which the statute is applied, statutes with an impact unforeseeable by the legislature are given meaning.\textsuperscript{186} The court found, however, that when Congress enacted and later amended CERCLA, it was undoubtedly aware that EPA would be forcing private parties to perform corrective action and overseeing such activity.\textsuperscript{187} The Third Circuit also stated that Congress might have expected that private party activity would be more common than government cleanups given the congressional preference for settlements and CERCLA section 106 consent orders.\textsuperscript{188}

By looking to the general structure of CERCLA, the Third Circuit was able to determine that Congress did not intend oversight costs of private party corrective action to be recoverable under CERCLA section 107(a).\textsuperscript{189} Interpreting a statute in a way that makes a disputed provision fit awkwardly into the rest of the statute, or that produces internal redundancy should be avoided.\textsuperscript{190} The court pointed to CERCLA provisions indicating that two parts of the statute would be unnecessary if oversight activity were included in CERCLA's definition of removal. First, the court cited section 104(a) which requires reimbursement of costs incurred while over-
seeing a private party RI/FS. Since an RI/FS is a removal action\textsuperscript{191} and an investigation under section 104(b), this provision would be unnecessary if CERCLA's definition of "removal" included oversight activity because section 107(a) authorizes recovery for costs of response actions.\textsuperscript{192} Second, the court cited two parts of section 111 authorizing different categories of payments that may be made from Superfund: (1) CERCLA section 111(a)(1) authorizing government response costs incurred under section 104; and (2) CERCLA section 111(c)(8) which authorizes the costs of contracts entered into under section 104(a)(1) to oversee and review a private party RI/FS. If EPA's costs of overseeing removal or remedial activities are response costs, section 111(c)(8) would be unnecessary. Since EPA's interpretation contradicts and makes meaningless this other provision, there is good reason to reject its interpretation.\textsuperscript{193} Thus, by analyzing the structure of CERCLA as a whole, the court was able to hold that oversight does not come within the definition of "removal" and that oversight costs are not recoverable under CERCLA section 107(a).

In addition to analyzing statutory structure, a traditional method of responding to problems of statutory interpretation is to look to the legislative history of a statute to determine the intent of those who enacted it.\textsuperscript{194} Recently, the Supreme Court has been divided about the significance of legislative history.\textsuperscript{195} Even so, the Court generally finds that legislative history is important to identifying congressional intent.\textsuperscript{196} This poses a problem in \textit{Rohm and Haas}, since both RCRA and CERCLA have been criticized for their lack of enlightening legislative history.\textsuperscript{197} Nevertheless, while it is proper to look to a statute's background in the form of enacted and repealed provisions, the legislative history was not enacted, and

\begin{itemize}
\item \textsuperscript{191} For a further discussion of the classification of an RI/FS as a removal, see \textit{supra} notes 152-54 and accompanying text.
\item \textsuperscript{192} \textit{Rohm and Haas}, 2 F.3d at 1277. The court also noted that although § 104(a) authorizes EPA to permit private parties to undertake various response actions, it only discusses oversight and reimbursement of oversight costs with regard to RI/FSs. \textit{Id.}
\item \textsuperscript{193} Sunstein, \textit{supra} note 183, at 425.
\item \textsuperscript{194} \textit{Id.} at 426, 428. The goal here is to determine how the enacting legislature would have resolved the issue, focusing on legislative history. \textit{Id.} at 429.
\item \textsuperscript{195} \textit{Id.} at 429.
\item \textsuperscript{196} \textit{Id.} Justice Scalia, however, finds that legislative history is manipulated by interest groups and does not reflect the "general congressional will." \textit{Id.}
\item \textsuperscript{197} For a further discussion of the lack of legislative history in RCRA and CERCLA, see \textit{supra} note 73 and accompanying text.
\end{itemize}
should not be permitted to supplant the language of the actual statute.¹⁹⁸

When the Supreme Court was deciding whether deference was warranted in United Food & Commercial Workers Union and Cardoza-Fonseca, the Court considered whether an agency’s interpretation of the statute being construed was adopted contemporaneously with the statute’s enactment and the consistency with which an agency applied that interpretation.¹⁹⁹ In Cardoza-Fonseca, the Supreme Court stated that an agency’s inconsistent position is an additional reason to reject heightened deference.²⁰⁰ This principle was previously articulated in Bowen, when the Court declined to defer to what appeared to be merely an agency’s convenient litigating position, stating to do so would be inappropriate.²⁰¹ These decisions are consistent with Chevron because the Supreme Court considered whether the agency examined the matter “in a detailed and reasoned fashion” before deciding to defer.²⁰² In Rohm and Haas, the Third Circuit also questioned whether deferring to EPA’s position would be appropriate under the circumstances since the agency did not explicitly adopt the position that it could recover RCRA oversight costs under CERCLA until more than ten years after CERCLA was enacted.²⁰³ In fact, the government’s litigating position, that CERCLA section 107 authorizes recovery of oversight costs, actually conflicts with EPA’s prior statements on the issue.²⁰⁴  

¹⁹⁸. Sunstein, supra note 183, at 420. Justice Scalia has expressed doubt about legislative history; in his view, the role of courts is to ascertain statutory meaning rather than legislative intent, particularly because legislative history is not enacted and is therefore not the law. Id. at 429-30.

¹⁹⁹. United Food & Commercial Workers Union, 484 U.S. at 124 n.20; Cardoza-Fonseca, 480 U.S. at 446 n.30.

²⁰⁰. Cardoza-Fonseca, 480 U.S. at 446 n.30.


²⁰³. Rohm and Haas, 2 F.3d at 1274 n.14. Government counsel offered no authoritative EPA statement made prior to Rohm and Haas, which indicated that it believed government costs incurred while overseeing private party corrective action under RCRA were recoverable from the owner or operator under CERCLA. Reply Brief, supra note 110, at 15-16. In fact, EPA did not officially take government counsel’s position until after the trial in this case. Id. at 16. Shortly before the district court issued its opinion, EPA published a guidance document dealing with oversight of RCRA corrective action in which it abandoned its prior statements and noted it “believes that RCRA oversight costs are recoverable under Section 107 of CERCLA.” Amici Curiae Brief, supra note 8, at 20.

²⁰⁴. Amici Curiae Brief, supra note 8, at 18. For example, EPA promulgated a final rule defining the circumstances in which the agency would defer to RCRA rather than list sites on the NPL. Id. at 18-19; see 54 Fed. Reg. 41,000 (Oct. 4, 1989). In response to the concerns expressed by commenters on the proposed rule eliminating CERCLA cost recovery at RCRA sites, EPA stated that CERCLA’s
The Supreme Court’s decision to defer to EPA’s statutory interpretation in *Chevron* was predicated upon the need to reconcile conflicting policies.\(^{205}\) Arguably, *Rohm and Haas* involved balancing the competing policies of forcing private parties to conduct and pay for corrective action and ensuring that corrective measures are performed properly. Because it would effect a dramatic change in federal policy, the Third Circuit declined to hold responsible parties liable to the government for all oversight costs without clear statutory intent.\(^{206}\) Yet, when a court interprets imprecise statutory language, that court is in effect resolving a policy issue.\(^{207}\) As long as the court follows a process of reasoned decision-making, however, judicial policy-making through interpretation is generally appropri-.
Even so, judicial policy-making is occasionally guised as statutory interpretation, since in many cases analysis of the statute will not support a holding that Congress actually resolved the issue. When Congress has resolved an issue, however, the court is dealing with an issue of law and the court's role is to enforce congressional intent. The Third Circuit's statutory analysis in *Rohm and Haas* is not disguised as interpretation. Rather, the court's careful reading of the statutes in question and well-reasoned analysis based on traditional tools of statutory construction revealed the unreasonableness and inconsistencies in EPA's interpretation of CERCLA's definition of "removal" and section 107(a).

The doctrinal basis for the Supreme Court's decision in *Chevron* is unclear. Explanations generally fall into two categories: (1) those based on an inferred congressional intent to delegate interpretive responsibility to agencies; and (2) those based on a separation of powers principle. Both of these explanations assume that *Chevron's* restriction on the interpretive authority of federal courts is required by the Constitution or the constitutionally sanctioned actions of Congress. Arguably, *Chevron's* required deference is best understood as a judicially self-imposed deference requirement similar to various prudentially-based limitations on justiciability in federal courts. Prudential deference applies when warranted by the circumstances and can be disregarded where deference is inappropriate. This reading, which supports a flexible application of deference, is neither inconsistent with *Chevron* nor the subsequent Supreme Court cases *Cardoza-Fonseca* and *United Food & Commercial Workers Union*.

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208. Pierce, *supra* note 205, at 306. By enacting statutes that raise but do not solve policy issues and by permitting parties to bring judicial actions pursuant to such statutes, Congress creates cases and controversies that courts have no choice but to resolve through a process of judicial policy-making. *Id.* at 306.

209. *Id.* at 306.

210. *Id.*

211. Callahan, *supra* note 80, at 1281.

212. *Id.* at 1277.

213. *Id.*

214. *Id.* at 1289. If either a congressional intent or separation of powers theory underlies *Chevron*, then its deference is mandatory. *Id.* If *Chevron* mandates judicial deference in every case, it substantially weakens federal courts' constitutional check on the legislative and executive branches and displaces the federal courts' supervisory role over administrative agencies. *Id.* at 1282-89. These constitutional difficulties do not arise if *Chevron* is regarded as a self-imposed restraint on the federal judiciary because the required deference can be considered a prudential limitation on justiciability. *Id.* at 1289.

Thus, the Third Circuit was not bound to defer to EPA's interpretation that oversight costs are included in CERCLA's definition of "removal" and are thus recoverable under CERCLA section 107(a). The Third Circuit, however, bypassed *Chevron* in a footnote, relying instead on the *NCTA* doctrine. Finding that only a clear statement of congressional intent would enable the court to impose EPA's administrative costs on a regulated party, the court stated that the usual deference accorded reasonable agency interpretations of ambiguous statutes was inapplicable. The court rejected the government's argument that *NCTA* involved an agency's imposition of fees for services without a delegation of taxing authority. Rather, it stated that oversight costs are an example of the type of administrative costs referred to in *Skinner*. Reading the *NCTA* principle as applicable only in circumstances involving imposition of fees for services absent an express delegation of taxing authority or proof that a regulated party received agency services, would be underinclusive; as the Third Circuit stated, the guiding principle is sound.

V. IMPACT

When the district court held that Rohm & Haas was liable to the government for EPA's oversight costs, the court failed to consider the tremendous impact of its decision. If the Third Circuit had upheld this ruling, "a new, multi-million dollar revenue-raising program for EPA that would affect hundreds of businesses and individuals and thousands of regulated facilities" would have been created. At many RCRA sites, owners submit sound remediation plans on time, only to have implementation delayed during EPA review, which usually results in approval of, or minimal changes to, the plans. Thus, EPA's role necessarily lengthens the time needed to complete a project, which inevitably increases costs.

EPA owes a duty to the public, however, to ensure that cleanups are complete. Arguably, response activity conducted by private parties may not result in the most effective cleanup, because they
may be more concerned with correcting damage quickly and inexpensively. A number of recent studies, however, have exposed serious problems with EPA’s management of Superfund, due to irresponsible handling of contracts with parties hired to implement appropriate remedies.\textsuperscript{222} If the agency is allowed to recover all costs from responsible parties, EPA has no incentive to keep Superfund costs reasonable. Furthermore, it is not in a contractor’s interest to challenge excessive and unnecessary costs.\textsuperscript{223}

Therefore, there are serious policy issues which indicate that the Third Circuit’s holding that oversight costs are not recoverable under CERCLA section 107(a) is reasonable as well as correct. Furthermore, there are implications that sweep beyond the facts of this case. If the court had held that the government’s oversight costs were recoverable, EPA could obtain reimbursement for agency activity under environmental statutes other than RCRA.\textsuperscript{224} The Third Circuit’s decision, however, will encourage private parties to undertake corrective action themselves, before EPA steps in and potentially invokes CERCLA. This will give private parties more influence and control over the remedy implemented. Hopefully, by becoming involved early, private parties will correct any hazardous situa-

\textsuperscript{222}. Brantly, \textit{supra} note 37, at 975. Records of Remedial Investigations completed before 1987 conclude that EPA did not adequately monitor and control contractor costs and that inadequate contractor performance increased the costs incurred at a majority of the sites studied. \textit{Id.} Further, two audits conducted by the EPA Inspector General confirmed these results. \textit{Id.} at 976. These audits also found that EPA paid excessive award fees to contractors for deficient work and that EPA intended to make award fees not earned in the first year of the contract available to the contractors the following year contrary to regulations. Office of the Inspector General, EPA, Audit Report No. E5EH7-03-0273-81966, \textit{Report of Audit on EPA’s Utilization of the Zone I Field Investigation Team} 19, 24-25 (1988). Another audit found that contractor invoices were paid without being reviewed and verified and that EPA overpaid for work delivered by underqualified persons. Office of the Inspector General, EPA, Audit Report No. E5EH7-03-0290-81949, \textit{Report of Audit on the Management of the Technical Assistance Team Services} 5, 20-21 (1988).

\textsuperscript{223}. Brantly, \textit{supra} note 37, at 970.

\textsuperscript{224}. Amici Curiae Brief, \textit{supra} note 8, at 24. To stress the magnitude of this result, Amici state that the nation currently spends more than $80 billion each year on pollution control measures. \textit{Id.} Approximately half of this work is performed by private parties and is subject to EPA review and supervision. \textit{Id.} Even if EPA oversight costs amounted to only ten percent of the cost of actual work, the liability calculated pursuant to the district court’s holding could exceed $4 billion per year nationwide. \textit{Id.} at 24-25. It is unlikely that Congress would have imposed such massive liability on the private sector without some indication in the statutory language. \textit{Id.} at 25.
tions before they develop into more significant threats to human health and the environment.

Leigh Adele Aberbach