

Environmental Law Alert

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Third Circuit Precedent Overruled: EPA May Recover Oversight Costs Under CERCLA

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On December 22, 2005 the Third Circuit Court of Appeals, sitting *en banc*, reversed its 1993 decision in *United States v. Rohm & Haas*, and held that the U.S. Environmental Protection Agency (EPA) may recover costs incurred in overseeing private party remedial and removal actions under §107 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or “Superfund,” 42 U.S.C. §9601 *et seq.*) *United States v. E.I. duPont de Nemours and Company, Inc.*, No. 04-4546 (3rd Cir., Dec. 22, 2005). This decision aligns the Third Circuit with its sister Courts of Appeals and provides EPA clear authority to recover any costs incurred overseeing private party remediation activity at contaminated sites.

Procedural History

The *Dupont* case involves the Dupont Newport Superfund Site (the “Site”), a former industrial site located in Delaware owned and operated at various times by E.I. duPont de Nemours & Company, Inc. and Ciba Specialty Chemicals Corporation (collectively, Dupont). The Site was identified by EPA as being severely contaminated in the early 1980’s, and placed on EPA’s National Priority List (NPL) in 1990. EPA developed a remedial plan and issued a Unilateral Administrative Order (UAO)

ordering the parties to remediate the site in accordance with that plan. The UAO also provided that EPA would oversee and approve the site remediation project.

Dupont complied with the UAO, ultimately expending approximately \$35 million in a “removal action” involving the development of project specifications and schedules, and a “remedial action” including soil excavation, construction of a remedial cap, groundwater barrier installation, groundwater monitoring and treatment, and wetland restoration. EPA incurred costs of approximately \$1.4 million in overseeing the removal and remedial actions at the site. In a suit to recover these costs, EPA was denied recovery, with the trial court relying on the Third Circuit’s 1993 decision in *United States v. Rohm & Haas*, 2 F.3d 1265 (3rd Cir. 1993). In its appeal the government conceded that *Rohm & Haas* barred recovery of oversight costs, but asked the Third Circuit to reconsider that decision *en banc* and allow the EPA to recover. The Third Circuit granted the petition, noting the importance of the issue and intervening decisions of sister courts of appeals questioning or rejecting the analysis of *Rohm & Haas*. *Dupont* at 6.

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Rohm & Haas

The *Dupont* Court first addressed its prior holding in *Rohm & Haas* which held that costs incurred by EPA in overseeing private party remedial and removal actions are not recoverable under §107 of CERCLA. In *Rohm & Haas*, the government sued Rohm & Haas for recovery of its costs in overseeing Rohm & Haas' remedial activities at a former landfill facility. Rohm & Haas argued that CERCLA provided no authority for the government to recover the costs incurred by EPA in overseeing a private party's performance of remedial and removal activities.

The Third Circuit agreed with Rohm & Haas' arguments. Relying on *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974) the Court concluded that "Congress must indicate clearly its intention to ... recover administrative costs not inuring directly to the benefit of regulated parties ... whether characterized as 'fees' or 'taxes.'" *Rohm & Haas* at 1273 (additional citations omitted). The Court found that the oversight costs at issue were incurred by the government in monitoring a private party's compliance with its legal obligations, and were intended to protect the public interest rather than the interests of those being overseen. Therefore, the Court ruled that such costs could not be recovered absent express Congressional intent. *Id.* The Court concluded that CERCLA did not provide the required language. *Id.*

Further Case Law Developments

Following *Rohm & Haas* the Fifth, Eighth and Tenth Circuits expressly questioned or criticized

Rohm & Haas, holding that EPA's oversight costs were recoverable under §107 of CERCLA. See *United States v. Lowe*, 118 F.3d. 399 (5th Cir. 1997); *United States v. Dico, Inc.*, 266 F.3d 864 (8th Cir. 2001); *Atl. Richfield Co. v. American Airlines, Inc.*, 98 F.3d. 564 (10th Cir. 1996). The Second and Ninth Circuits also allow recovery of oversight costs. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Hyundai Merch. Marine Co.*, 172 F.3d 1187 (9th Cir. 1999). Thus, over time, only in the Third Circuit, consisting of New Jersey, Pennsylvania, Delaware and the U.S. Virgin Islands, was EPA precluded from recovering its oversight costs, although most EPA consent decrees provided for contractual recovery of such costs.

The Dupont Decision

In *Dupont*, the Court found, that "oversight costs" fell squarely within the definition of "removal action" (42 U.S.C. §9601(23)) and "remedial action" (42 U.S.C. §9601 (24)) so that statutory interpretation was not required to find the costs recoverable. In so holding, the Court cited CERCLA's cost recovery provision, which provides for recovery of "all costs of removal or remedial action" incurred by the United States and not inconsistent within the National Contingency Plan. 42 U.S.C. §9607(c)(1)-(4)(A) (emphasis added).

The Third Circuit rejected the characterization of oversight costs as "fees" or "taxes" which, under *National Cable* are not recoverable, and characterized them, instead, as "restitutionary payment" imposed on those responsible for

pollution to cover the costs of cleanup. *DuPont* at 17. The Court reasoned that, even if CERCLA implicated *National Cable*, §107 provides a clear statement of the power conferred (that of recovery of all costs incurred by the government in a removal or remedial action) and limiting principles on the exercise of the power (such costs must be “not inconsistent” with the National Contingency Plan). *Id.* at 18. The Court, thus, found that holding parties responsible for restitutionary payments was a reasonable exercise of legislative authority with appropriate and clear limits and not the “unbounded delegation of taxing authority” subject to *National Cable* limitations. *Id.*

Once the Court found *National Cable* inapposite, it applied ordinary principles of statutory construction to determine whether CERCLA authorized the recovery of EPA’s oversight costs. In a nod to the Supreme Court’s most recent foray into CERCLA, the Court cited *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) for the proposition that, if the statute is clear and unambiguous, then there is no need to consider the purpose of CERCLA at all. The Court found that EPA’s oversight activity fell squarely within the definitions of “removal action” and “remedial action.” *DuPont* at 24. In so holding the Court provided an exhaustive 22-page analysis of the language, purpose and legislative history of CERCLA.

The Court noted that the term “monitor,” found in the CERCLA definitions of both “removal action” and “remedial action,” describe EPA’s activities in providing “oversight” of remedial and removal actions. Given the statutory purpose of CERCLA, to “impose the costs of clean up on those responsible for the contamination,” the Court

concluded that “monitor” should necessarily include the costs of agency oversight of those actions. *DuPont* at 24-29. In addition, the Court reasoned that the definitions of both “removal action” and “remedial action” include actions taken to minimize damage to human health and the environment, which is also the purpose of EPA oversight. *Id.* at 29. Furthermore, the Court noted that EPA’s oversight activities could properly be considered “enforcement” activities, which are expressly included in the definition of both “remedial action” and “removal action.” *Id.* at 32.

The Court went on to note that §107’s express authorization to recover “all” governmental costs of monitoring and enforcement demonstrate Congress’ intent to allow EPA to recover the costs of overseeing a critical stage of the cleanup process - the remediation itself. *Id.* at 32-33. The Court also dismissed *DuPont*’s arguments that reading oversight cost recovery into §107 rendered other portions of the statute meaningless, including §104’s requirement that EPA obtain “an explicit promise” to pay oversight costs in settlements under that section and §111(c)’s provision for states to recover oversight costs directly from the Superfund. *DuPont* also argued that these provisions clearly showed Congress’ ability to provide for oversight cost recovery when it so desired. The Court, however, reasoned that these provisions merely provided additional support for the proposition that EPA should recover oversight costs under §107. *Id.* at 33-40.

Finally, the Court notes that recovery of oversight costs comports with CERCLA’s functional objective - that of promoting successful cleanups and effective remedial actions. Interestingly, despite the practical results-oriented rationale described above, the Court

explicitly states that although public policy concerns may support the Court's holding, such policy concerns do not form the basis or foundation of the holding. *See Dupont* at n. 10.

The Court explained that Congress' effort to address a complex environmental problem by holding responsible parties strictly liable for all costs incurred by the government in responding to hazardous waste contamination was a reasonable exercise of the Legislature's authority. In addition, contrary to *National Cable*, the Court found that the Legislature provided the EPA with sufficient guidelines and restraints in exercising the delegated power that it should be upheld. *Dupont* at 20. The guidelines and restraints include the PRPs' ability to argue that EPA's costs are only recoverable if they are "not inconsistent" with the National Contingency Plan. Of course, as every Superfund practitioner knows, this standard is nearly impossible to overcome, particularly given the Court's deference to the agency and the "arbitrary and capricious" standard of such review.

Conclusion

The *Dupont* decision once again aligns the Third Circuit with the rest of the country with respect to recovery of EPA's oversight costs in private party removal and remedial actions. Because prior to *Dupont*, the EPA generally negotiated payment of oversight costs into judicial and administrative settlement agreements for site remediation, in such instances, the practical impact of *Dupont* will be minimal. However, in those instances where remedial action is being taken pursuant to a unilateral administrative order or some other mechanism where the responsible party has not agreed to pay oversight costs, the government now has another arrow in its quiver to recover these costs.

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