Nos. 04-4546, 04-4629

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY;
CIBA SPECIALTY CHEMICALS CORPORATION

Defendants-Appellees.

On Appeal from the District Court for the District of Delaware
No. 02-cv-01469 (Robinson, J.)

BRIEF OF AMICI CURIAE AMERICAN CHEMISTRY COUNCIL AMERICAN PETROLEUM INSTITUTE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL NATIONAL ASSOCIATION OF MANUFACTURERS NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION SUPERFUND SETTLEMENTS PROJECT IN SUPPORT OF AFFIRMANCE AND APPELLEES E.I. DUPONT DE NEMOURS AND COMPANY AND CIBA SPECIALTY CHEMICALS CORPORATION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus American Chemistry Council is a non-profit trade association. Amicus American Petroleum Institute is a non-profit trade association. Amicus The Chamber of Commerce of the United States of America is a non-profit business federation. Amicus Corporate Environmental Enforcement Council is a non-profit organization. Amicus National Association of Manufacturers is a non-profit trade association. Amicus National Petrochemical and Refiners Association is a non-profit trade association. Amicus Superfund Settlements Project is an unincorporated association. None of these organizations has a parent corporation, and no publicly held corporation owns 10 percent or more of the stock of any of them.

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DESCRIPTION OF THE AMICI

Amici curiae American Chemistry Council, American Petroleum Institute, The Chamber of Commerce of the United States of America, Corporate Environmental Enforcement Council, National Association of Manufacturers, National Petrochemical and Refiners Association, and Superfund Settlements Project are organizations and trade associations whose members are actively involved in the funding and performance of environmental response actions at hundreds of contaminated sites across the United States. The members of amici associations conduct their own response actions at a total cost in the billions of dollars. They therefore have an ongoing interest in how CERCLA is interpreted, how the Superfund program is administered, and how costs are assessed. The outcome of this case thus directly affects the economic interests of the organizations' members.

Appellant United States of America and Appellees E.I. Dupont De Nemours and Company and Ciba Specialty Chemicals Corporation have granted their consent to the submission of this amicus curiae brief.

I. INTRODUCTION

Under this Court's decision in United States v. Rohm & Haas, 2 F.3d 1265 (3d Cir. 1993), a private party that cleans up a contaminated site is not required under the Superfund law to reimburse the Environmental Protection Agency for the cost of watching and overseeing the private party's work. The legal issue before this Court is whether to change its well-established interpretation of the Comprehensive Environmental Response, Compensation and Liability Act.[1] A careful reading of CERCLA, under either a clear statement standard or a plain meaning standard, demonstrates that it should not.

In this brief, amici provide context for the Court's decision based upon their in-depth practical experiences with the Superfund program. Amici explain the waste and inefficiency in the practices of the Environmental Protection Agency ("EPA") regarding oversight expenditures, as well as the lack of accountability to Congress in EPA's expenditure of specific funds collected from potentially responsible parties. Amici underscore the importance of an interpretation of CERCLA that takes these factors into account.

Relying on National Cable Television Assn. v. United States, 415 U.S. 336 (1974), this Court held in Rohm & Haas that a "clear statement" by Congress is needed before an administrative agency may finance its activities that benefit the

[1] 42 U.S.C. § 9601 et seq. (hereinafter CERCLA or Superfund).

general public by assessing the costs against those whom it regulates. The Court does so to assure that Congress really intends that those funds be collected from regulated entities regardless of whether agency expenditure of such funds may be inefficient or without accountability to Congress. Rohm & Haas, 2 F.3d at 1273-4. Information about EPA's practices relating to their excessive costs and lack of accountability to Congress is clearly relevant to this clear statement standard. Amici's members have had first-hand experience with EPA's practices in performing numerous CERCLA cleanups.

Further, the Supreme Court has recently reaffirmed (in a case that did not involve agency collection of funds from regulated parties) that it will interpret CERCLA based upon the plain meaning of the statute, without regard to competing arguments about statutory purposes or policies. Cooper Indus., Inc. v. Aviall Services, 125 S.Ct. 577, 584 (2004). Using such a plain meaning standard, this Court has also affirmed in dicta, in Black Horse Lane Assoc. v. Dow Chem. Corp.,[2] that CERCLA does not authorize EPA to recover oversight costs from private parties that perform the actual cleanups. Under this plain meaning standard, the approach of the United States in its Opening Brief of moving away from plain meaning and forcing the words of the statute to support its claim for self-funding of oversight costs is problematic; that difficulty is magnified by the

[2] 228 F. 3d 275, 298 at n.13 (3d Cir. 2000).

well-documented excessive costs and non-accountability of the Superfund program.

Regardless of the benefits of the Superfund program, the program has a long and well-documented history of inefficient spending. EPA's oversight expenditures in particular have been singled out as excessive. This problem has multiple dimensions, each of which is discussed below.

First, after making an express commitment in 1995 to reduce the amount of oversight it performs, EPA has failed to meet its commitment. Second, EPA relies far too heavily on outside contractors for the oversight it does perform. Third, EPA fails to manage its Superfund contractors effectively. Fourth, EPA does not negotiate effectively with its contractors, resulting in higher-than-necessary prices for Superfund work. Fifth, EPA's contractors charge the Superfund program for excessive "support" costs. Sixth, EPA's contractors have incentives to operate inefficiently.

EPA's poor documentation and billing practices further reduce any limited accountability that may exist for oversight costs. Finally, the monies that EPA receives for oversight costs are frequently managed in site-specific Special Accounts so that EPA can spend that money at its own discretion, without awaiting any Congressional appropriation or even being subject to the overall EPA budget process.

In sum, EPA's oversight costs under Superfund present the very same concerns underlying the Supreme Court's decision in National Cable, just as this Court recognized in Rohm & Haas.

II. AMICI CURIAE HAVE A SUBSTANTIAL INTEREST IN EPA'S ATTEMPT TO SHIFT THE COST OF OVERSEEING THE WORK OF PRIVATE PARTIES.

Amici curiae are organizations and trade associations whose members are actively involved in the funding and performance of environmental response actions at hundreds of contaminated sites across the United States. The members of amici associations conduct their own response actions, at a total cost in the billions of dollars.[3] They therefore have an ongoing interest in how CERCLA is interpreted, how the Superfund program is administered, and how costs are assessed. Because EPA typically performs excessive levels of oversight, using poorly managed contractors, and generating excessive costs, the outcome of this case directly affects the economic interests of the organizations' members.

[3] The percentage of remedial actions performed by potentially responsible parties ("PRPs") (rather than by EPA) varies among EPA regional offices. U.S. Environmental Protection Agency, Superfund: Building On The Past, Looking To The Future 73-74 (April 22, 2004) [hereinafter Building On The Past]. In EPA Region 3, which includes two states that are located in the Third Circuit – Delaware and Pennsylvania – PRPs performed 100 percent of the remedial actions commenced in 2003. Id. In EPA Region 2, which includes two jurisdictions located in the Third Circuit – New Jersey and the Virgin Islands – PRPs performed 92 percent of all remedial actions commenced in 2003. Id.

The American Chemistry Council ("ACC") is a non-profit trade association that represents over 140 of the leading companies engaged in the business of chemistry. These companies operate over 2,000 facilities across the United States.

The American Petroleum Institute ("API") is a nationwide, non-profit trade association representing over 400 member companies engaged in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, distribution, and marketing. API frequently represents its members on important legal and policy matters before the courts, agencies, and legislative bodies. API's members are or have been directly involved in the remediation—including voluntary remediations—of numerous sites under CERCLA, and often at great economic cost.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly advocates its members' views in court on environmental issues of national concern to the business community.

The Corporate Environmental Enforcement Council ("CEEC") is an organization of corporate counsel and environmental management representing 30 major companies from a wide range of industrial sectors, including metals,

chemicals, pharmaceuticals, paper, oil refining and natural resource exploration, mining, food, and home products. CEEC focuses on civil and criminal environmental enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policy makers. CEEC member companies are involved in investigation, removal, and remediation activities at hundreds of Superfund sites across the United States.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Petrochemical and Refiners Association ("NPRA") is the primary trade association of the U.S. petroleum refiners and petrochemical industry representing more than 450 companies. NPRA members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in

making plastics, clothing, medicine, computers and many other common consumer products.

The Superfund Settlements Project ("SSP") is a non-profit association of major corporations with substantial experience in the Superfund program. The SSP's member companies represent a broad range of American industry. Organized in 1987, the SSP is dedicated to improving Superfund's implementation by reducing barriers to settlement, minimizing transaction costs, and using existing legal authorities to make the program faster, fairer and more efficient. To date, the SSP's member companies have spent more than $6 billion on site cleanups.

All of the amici share a common interest in discharging their Superfund obligations with a minimum of delay and transaction costs. EPA's oversight activities generate very significant costs,[4] which EPA has long been unable or unwilling to manage efficiently. Shifting those costs to the private sector would have a direct and substantial impact on amici. For that reason, amici have joined together to provide the Court with some background information about EPA's oversight activities.

III. EPA'S OVERSIGHT COSTS ARE EXCESSIVE.

The simple fact is that EPA spends far too much money overseeing competent private parties who are performing response actions. Although

[4] The oversight costs at the Newport Site that are at issue in this appeal total roughly $1.4 million. See Gov't Br. at 15.

oversight may well be beneficial, EPA has persistently failed to strike a reasonable balance between the costs of oversight and the benefits. Despite years of scathing criticism from Congress, the Government Accounting Office ("GAO"), and EPA's own Inspector General, the Superfund oversight function remains ineffectively managed and inefficient.

The oversight problem is really a combination of several different problems. To begin with, EPA performs more oversight than is needed. EPA also relies too heavily on costly outside contractors, rather than EPA staff, to perform oversight. Moreover, EPA does not manage its Superfund contractors effectively. In particular, EPA does not negotiate effectively with its Superfund contractors, who charge for excessive levels of "support" costs and who have little incentive to operate efficiently. We discuss each of these issues below.[5]

A. EPA Performs More Oversight Than is Needed.

One of the primary determinants of oversight costs is the amount of oversight performed. Building On The Past, at 75. After years of criticism for excessive oversight, EPA announced in 1995 as one of its administrative reforms

[5] Responsible parties have urged the district courts to disallow particular EPA costs on grounds of unreasonableness. These arguments have been rebuffed. See, e.g., United States v. Helen Kramer, 913 F. Supp. 848, 867 (D. N.J. 1995) ("[A]rguments that individual [EPA] response costs are unreasonable, excessive, duplicative, improper, and not cost-effective . . . do not provide any defense in a cost recovery action").

that it would "significantly reduc[e] or tier[] oversight while continuing to exercise sufficient oversight to ensure that the work is performed properly and in a timely manner." U.S. Environmental Protection Agency, Superfund Administrative Reforms: Reform Initiatives 9 (Oct. 1995) (emphasis added).

On July 31, 1996, EPA issued guidance on the implementation of this reform. The guidance established a specific numerical goal for reducing oversight. According to the guidance, the EPA Regions had "already identified approximately 100 sites with cooperative and capable parties and [had] either already reduced oversight or plann[ed] to reduce oversight activities." Memorandum from Stephen D. Luftig to Director, Office of Site Remediation and Restoration Region I et al., Subject: Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties, OSWER Directive No. 9200.4-15 (July 31, 1996). Moreover, "EPA's overall goal is for a nationwide 25% reduction in oversight costs over the next year at these 100 sites." Id. (emphasis added).

In January of 1998, EPA released its Annual Report on implementation of the administrative reforms during Fiscal Year 1997. EPA did not claim that it had met its goal of a nationwide 25-percent reduction in oversight costs at the 100 selected sites. U.S. Environmental Protection Agency, Superfund Reforms Annual Report for FY 1997 46-47(January 1998). Instead, two years later, it gave the

reform a brand-new name: "Improving the Administration of PRP Oversight,"[6] and acknowledged that reductions could not be measured, see Memorandum from Stephen D. Luftig and Barry N. Breen to Superfund Division Directors and Regional Counsel, Subject: Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight, OSWER Directive No. 9200.0-32P, 2 (May 17, 2000).

The primary goal of EPA's oversight reform, as suggested by its name, was to reduce the amount of EPA oversight of responsible parties that consistently perform high-quality response actions.[7] EPA considers this reform fully implemented,[8] yet EPA has neither quantified nor documented any reduction in oversight, much less a 25-percent reduction at 100 sites. See U.S. Government Accounting Office, Superfund: Extent to Which Most Reforms Have Improved the Program Is Unknown, GAO/RCED-00-118, 82 (May 2000) [hereinafter 2000 GAO Report].

In fact, in 2004, EPA documented complaints that "several Regions continue to have high levels of oversight," and recommended that regions develop

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[6] U.S. Environmental Protection Agency, Superfund Reforms Annual Report for FY 1997 46-47(January 1998).

[7] See Building On The Past, at 75.

[8] See Superfund Reform Scorecard of Third Round (October 1995), available at http://permanent.access.gao.gov/websites/epa-gov/www.epagov/superfund/programs/reforms/doc.htm.

procedures to decrease the need for oversight expenditures. Building On The Past, at 75. It remains to be seen whether, or when, this latest recommendation will be implemented. For the time being, EPA continues to perform excessive oversight despite the Administrator's pledge, made a decade ago. This is one of the main reasons why EPA oversight costs continue to be excessive.

B. EPA Relies Too Heavily on Contractors.

Another primary determinant of oversight costs is whether private contractors (rather than EPA staff) are used to perform the work. Building On The Past, at 75. Since Superfund's inception, EPA has relied very heavily upon private contractors both to perform response actions and also to oversee response actions performed by private parties. See generally, e.g., U.S. Government Accounting Office, Major Management Challenges And Program Risks, GAO-01-257, 39 (January 2001) [hereinafter January 2001 GAO Report] (noting that 50 percent of the Superfund budget is directed to contractors for cleanup of sites and monitoring of PRPs). The high cost of oversight by outside contractors sharply reduces, if not eliminates, the cost savings that can be achieved when private parties perform their own cleanups. See Bradford C. Mank, Superfund Contractors and Agency Capture, 2 N.Y.U. Envtl. L.J. 34, 48 (1993).

There is little reason to think that this practice has been (or will be) reversed. Indeed, several EPA Regions continue to rely heavily upon private contractors to

perform EPA's oversight function. Building On The Past, at 75 (citing comments from responsible parties).

C. EPA Does Not Manage its Contractors Effectively.

The problems surrounding EPA's management of its Superfund oversight contracts arise in the context of a program that has long been notorious for its overall poor financial management. For more than a decade, from 1990 through 2001, the Superfund program was listed as one of the federal programs that posed a "high risk" for waste, fraud, and abuse.[9] Virtually all of the oversight at issue in the instant case was performed during this same period. See, e.g., J.A. 134, 137 (showing EPA oversight at the Newport Site performed between July 1994 and December 2002).

In 1991, GAO documented that despite several years of GAO's reporting on deficiencies in EPA's Superfund contract management, EPA still had not adequately addressed most of GAO's recommendations to reduce the program's vulnerability to waste, fraud, and abuse. GAO highlighted numerous continued problems, including weaknesses in EPA's ability to estimate the appropriate costs for remedial studies, inadequate documentation concerning EPA's price negotiations with contractors, failure to review contractor invoices appropriately,

[9] GAO is the investigative arm of Congress charged with the duty of overseeing the expenditure of federal taxpayer dollars. For more information, see the GAO website at www.gao.gov/about/what.html.

and receipt of incentive payments by undeserving contractors. U.S. Government Accounting Office, Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems, GAO/RCED-92-95, 21-29 (Oct. 1991).

In Congressional testimony given in June of 1992, GAO noted a pattern in EPA's responses to reported contract management deficiencies. That pattern consisted of "extended study of the problems, sometimes leading to revised plans and procedures, but with insufficient follow through to actually get the problems corrected."[10] Statement of Peter F. Guerrero, Superfund: Current Progress and Issues Needing Further Attention, GAO/T-RCED-92-56, 8-9 (June 11, 1992).

In the spring of 1993, newly-appointed EPA Administrator Carol Browner testified before the House Energy and Commerce Subcommittee on Oversight and Investigations. Ms. Browner told Congress that she was "appalled" by EPA's failure to manage its Superfund contracts properly and vowed to undertake reform.[11] See EPA Contracting: Hearing Before The Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce: House of

[10] In this statement, GAO did acknowledge that EPA was taking some action to address the "chronic top [EPA] management disregard" of contract mismanagement. Statement of Peter F. Guerrero, Superfund: Current Progress and Issues Needing Further Attention, GAO/T-RCED-92-56, 9 (June 11, 1992).

[11] During Administrator Browner's testimony, members of the Subcommittee highlighted criticisms of the program. See EPA Contracting, 103rd Cong., at e.g. 2 (Statement of Cong. Dingell) (describing "outrageous charges").

Representatives, 103rd Cong. 7 (1993) [hereinafter EPA Contracting, 103rd Cong.]; Browner Assails Past Contract Management, Tells House Panel Sweeping Changes Coming, 23 Env't Rep. Cur. Dev. (BNA) 3012 (March 19, 1993). As Ms. Browner explained: "I have reviewed audit reports and received briefings from staff that clearly describe poor management practices, serious violations of rules, and intolerable waste of taxpayers' money."[12] EPA Contracting, 103rd Cong., at 7.

Since that time, EPA has achieved some improvements in its supervision of contractors. For example, EPA now appears to audit the work of its contractors on a regular basis. U.S. Government Accounting Office, Superfund: Progress, Problems, and Future Outlook, GAO/T-RCED-99-128, 6 (March 1999) [hereinafter March 1999 GAO Report]. Nevertheless, in 2001, GAO stated that EPA's management of contractors required further attention. See January 2001 GAO Report, at 40. GAO also noted that EPA still had not implemented all recommended initiatives and that the effectiveness of some of the agency's efforts remained unknown. Id.

[12] EPA "[c]ontractors have also improperly used taxpayer money for football tickets, alcohol at employee parties, beach houses, and corporate jets. CH2M Hill, EPA's largest private contractor, was charged with improperly billing $873,000 for corporate jets, $7700 for alcoholic beverages, $4100 for tickets to professional sports events, $1636 for candy for clients, and $483,900 in excessive employee relocation expenses." Bradford C. Mank, Superfund Contractors and Agency Capture, 2 N.Y.U. Envtl. L.J. 34, 58 (1993).

In sum, the perennial problem of Superfund contractor mismanagement is another one of the major causes of EPA's excessive spending on oversight of private parties.

D. EPA Does Not Negotiate Effectively With its Contractors.

Because private contractors perform a majority of the oversight and cleanup work conducted by EPA, total Superfund contract costs are driven in large part by EPA's ability to effectively negotiate contract prices and audit the efficiency of its contractors. The prices paid to contractors, however, are largely determined by the contractors themselves. At least as far back as 1991, EPA recognized weaknesses in its ability to prepare reliable independent cost estimates. See, e.g., U.S. Environmental Protection Agency, Executive Summary Of EPA Alternative Superfund Contracting Strategy (Oct. 1, 1991), reprinted in 22 Envtl. Rep. (BNA) 1505, 1507 (Oct. 4. 1991). As late as 1999, GAO continued to find that EPA's negotiations with contractors were hindered by the insufficient cost-estimating experience of EPA staff. U.S. Government Accounting Office, Superfund: Progress Made By EPA And Other Agencies To Resolve Program Management Issues, GAO/RCED-99-111, 5, 53, 57 (April 1999) [hereinafter April 1999 GAO Report]; see also March 1999 GAO Report, at 6.

EPA also failed to maintain historical information concerning actual costs for past projects and therefore was unable to produce reliable estimates of future

costs. April 1999 GAO Report, at 5, 53, 57. GAO concluded that although EPA had recognized these problems and had taken action to address them, the agency's efforts largely had failed. March 1999 GAO Report, at 6. EPA continued to encounter problems in producing accurate cost estimates in approximately 50 percent of the cases reviewed by GAO. In fact, in 2001, GAO still was documenting concerns about EPA's ability to produce reliable cost estimates.[13] January 2001 GAO Report, at 40.

E. EPA Contractors Charge for Excessive "Support" Costs.

At the same time that GAO documented failures in EPA's contract negotiations, it also analyzed a chronic problem concerning EPA's willingness to tolerate – and pay for – high levels of contractor program support costs. April 1999 GAO Report, at 5, 53. In addition to contractor waste, and abuse, GAO found that high support costs remained due to EPA's retention of contractors for whom EPA could not provide enough work. April 1999 GAO Report, at 59. Even though some contractors were conducting relatively little on-site work, they were continuing to generate administrative expenses. GAO found that EPA was continuing to pay the overhead costs of contractors during periods when those

[13] GAO made a cursory note of its continued concern, but did not provide details concerning the problems that remained in 2001. January 2001 GAO Report, at 40.

contractors had relatively little cleanup work to perform. April 1999 GAO Report, at 59.[14]

The problem of unreasonably high contractor support costs was well known and well documented in the early 1990s. Yet these problems largely remained unaddressed, as evidenced by the fact that in 1999, Superfund spending on cleanup work still represented less than half of all Superfund expenditures. March 1999 GAO Report, at 1. The majority of EPA's new contracts still involved support costs ranging from 16 to 76 percent of total costs. April 1999 GAO Report, at 5; March 1999 GAO Report, at 6; Mank, supra, at 48 (highlighting commentary about runaway contractor overhead costs). These amounts far exceed even EPA's stated goal of maintaining support costs at or below 11 percent of total costs. April 1999 GAO Report, at 5, 53.

By 2001, EPA had managed to reduce its program support costs on an aggregate basis. Nevertheless, contractor support costs remained high for a significant number of the contracts studied. January 2001 GAO Report, at 41 (stating that 5 out of 18 contracts studied had program support costs above EPA's goal). High program support costs increase the total cost of EPA oversight, as do the other factors described above.

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[14] EPA's cost summary package for the Newport Site included an invoice from one contractor for "the administrative costs of opening and closing" its work assignment. The contractor performed no actual work at the Newport Site because it "had a conflict of interest." J.A. 506.

F. EPA Contractors Have Incentives to Operate Inefficiently.

Finally, as suggested by the foregoing discussion, EPA's deference to its Superfund contractors means that they have little, if any incentive to operate efficiently. See Martina E. Cartwright, CERCLA at 25: A Retrospective, Introspective, and Prospective Look at the Comprehensive Environmental Response, Compensation and Liability Act on Its 25th Anniversary, 18 Tul. Env't. L.J. 299, 314 (2005); Office of Technology Assessment, Assessing Contractor Use In Superfund: A Background Paper of OTA's Assessment of Superfund Implementation, OTA-BP-ITE-51, 2 (1989) (EPA Superfund contractor system is largely "hidden from public scrutiny").

Like the other problems surveyed above, this one is not new. Long after EPA had vowed to institute better controls over its contractors, GAO still found instances of EPA managers deferring entirely to contractors to shape their own work assignments and to estimate the reasonable cost of the assignments they had developed. April 1999 GAO Report, at 56. In fact, according to GAO, one EPA manager expressly stated that the "contractor knows best." Id.

This attitude may help explain cases where EPA's outside contractors, charged with performing EPA's oversight function, required private parties performing the work to revise their work even though EPA likely would have accepted the work as originally submitted. See Mank, Supra, at 48. Indeed, EPA's

Superfund contractors have incentives to find problems with the work they review, thereby expanding the amount of oversight they perform. See generally, Mank, supra, at 55 (raising possibility that contractors may overestimate risks or to justify their employment or to earn excessive compensation). The deference that EPA affords its contractors necessarily entrenches their ability to perform unnecessary work and incur unreasonable expenditures.

*** * * ***

In sum, a decade's worth of audits, hearings, and investigations confirms that EPA's oversight costs are excessive as outlined above. Surely Congress never intended to create such a murky and wasteful system, much less to make it self-funding. EPA's administration of oversight costs is marked by the inefficiencies and lack of accountability that the Supreme Court sought to avoid by applying the clear statement rule in National Cable.

IV. EPA'S POOR DOCUMENTATION AND BILLING PRACTICES FURTHER REDUCE ACCOUNTABILITY.

Apart from the excessive level of oversight and the ineffective management of its contractors, EPA's poor documentation and billing practices further limit any accountability that might exist for EPA's oversight activities. For example, audits performed by EPA's own Inspector General have revealed such problems as protracted periods of delay in oversight billings and inadequate documentation to

justify the costs incurred.[15] Office of Inspector General, Report of Audit on Region 2's Billing of Superfund Oversight Costs (1998) [hereinafter 1998 IG Report for Region 2]; Office of Inspector General, Report of Audit on Region 3's Billing of Superfund Oversight Costs (1997) [hereinafter 1997 IG Report for Region 3] (noting prior audits for Region 3 and other regions).

According to the Inspector General, EPA Superfund staff in several regional offices repeatedly failed to address these issues long after the problems had been identified and in spite of the fact that the same problems were being cited year after year.[16] The problems found in EPA Region 2 (New Jersey, New York, and Puerto Rico) and EPA Region 3 (Delaware, Pennsylvania, the Virgin Islands, and the District of Columbia) are particularly troubling.[17] See 1998 IG Report for Region 2; 1997 IG Report for Region 3.

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[15] It does not appear that the Office of Inspector General produced audit reports after 1999 that were specifically dedicated to oversight costs, and the reports generated prior to 1999 focused upon only certain EPA regions.

[16] In 1990, for example, the EPA Inspector General informed Region 2 that it had failed to bill eight sites for oversight costs incurred prior to 1987. Eight years later, EPA still had not issued oversight bills for two of the eight previously identified sites, despite the Inspector General's findings that those sites had accumulated significant oversight costs. 1998 IG Report for Region 2, at 20.

[17] The Inspector General documented problems with oversight billing in other EPA regions as well. 1997 IG Report for Region 3, at 4 (citing earlier audits detailing delays in Regions 6 and 8). For the sake of brevity, we have confined our comments to highlighting problems in the two EPA regions that include jurisdictions within this Circuit.

There is no dispute that, at a minimum, billing on an annual basis is necessary to give the responsible parties a meaningful opportunity to review oversight charges. See 1998 IG Report for Region 2, at 6. Nevertheless, even where Region 3 had agreed with responsible parties to bill oversight costs on an annual basis, bills instead were sometimes delayed for "extraordinary amounts of time." 1997 IG Report for Region 3, at 6.

In 1996, the Inspector General reviewed 15 outstanding oversight dockets for Region 3 and discovered significant billing delays in over 50 percent of the cases. 1997 IG Report for Region 3, at 6-7. For example, the audit detailed one instance where an oversight bill for approximately $1.3 million included costs accumulated over an eight-year period.[18] 1997 IG Report for Region 3, at ii, 7. In addition, in 3 out of the 15 cases studied in the 1997 audit, EPA had yet to provide any oversight bills whatsoever, even though EPA had been incurring oversight costs since as early as 1988. 1997 IG Report for Region 3, at 7, 10. The Inspector General found no compelling project-related justifications for these delays. Region 3 personnel merely cited difficulties with the billing process and expressed a general view that oversight billing was a low priority. 1997 IG Report for Region 3, at 7.

[18] Despite its own eight-year delay, EPA threatened to charge interest of 5.85 percent if the responsible party did not pay the bill in full within one month. 1997 IG Report for Region 3, at 7.

In Region 2, the story is much the same. Of the 115 Superfund sites that were subject to oversight reimbursement in 1998, 89 sites had yet to receive a single bill, some for periods as long as 11 years. 1998 IG Report for Region 2, at 6-7. Out of the 89 unbilled sites, 56 of them had not received oversight bills for more than 5 years. 1998 IG Report for Region 2, at 7. The delayed charges were not insubstantial. The Inspector General's report highlights multiple instances where, after periods of five, nine, or even ten years, unbilled oversight costs had accumulated in the range of $1 million. 1998 IG Report for Region 2, at 8-9.

EPA's pattern of lengthy delay adversely affects a PRP's ability to verify the accuracy and fairness of charges.[19] See 1997 IG Report for Region 3, at 8-10 (detailing complaint from responsible party that billing delays prejudiced ability to determine accuracy and appropriateness of charges). EPA has taken some significant steps to eliminate its backlog of unbilled costs. Nevertheless, EPA still is holding PRPs responsible for costs incurred in the distant past.

More importantly, without adequate supporting documentation to substantiate EPA's costs, timely billing alone will not resolve the unfairness faced by PRPs who are left without the necessary tools to confirm the appropriateness of

[19] In response to a five-year delay in billing in Region 2, one responsible party stated that, had EPA earlier disclosed the costs that were accruing, the responsible party would have attempted to negotiate a less costly approach to the cleanup. 1998 IG Report for Region 2, at 11-12.

the large sums they are asked to pay.[20] EPA continually has failed to provide PRPs with reasonable documentation to support its oversight costs. 1998 IG Report for Region 2, at 23; see 1997 IG Report for Region 3, at 7 (noting requests from PRPs for more documentation).

Furthermore, when PRPs request documentation, EPA often has not been forthcoming. In 4 of the 15 cases studied by GAO in Region 3, EPA failed to provide requested documentation to PRPs for periods of eight months to seven years. 1997 IG Report for Region 3, at 7. EPA's failure to provide documentation is crippling to a PRP's ability to review EPA's charges.

The need for meaningful review is apparent from EPA's pattern of erroneous billing. The Inspector General's 1998 audit of Region 2 revealed that 25 percent of the oversight bills issued from 1989 to 1997 contained errors, including large overstatements. 1998 IG Report for Region 2, at 5. Between 1989 and 1997, Region 2 had to revise 17 oversight bills containing $5.6 million dollars of erroneous charges. 1998 IG Report for Region 2, at 14. The errors included double billings, billing for costs not attributable to oversight activities, and costs lacking adequate support. 1998 IG Report for Region 2, at 14.

[20] EPA was motivated to clear its backlog of unbilled charges not out of concern for fairness to PRPs, but largely for its own financial benefit. See 1998 IG Report for Region 3, at 6 (emphasizing that billing delays hindered collections, but largely ignoring the issue of fairness to responsible parties). EPA does not have the same motivation to provide PRPs with adequate and timely documentation to support its bills.

If this Court were to overturn Rohm & Haas, many responsible parties performing cleanups would be required to pay – in addition to their actual response costs – the substantial oversight costs generated by an EPA documentation and billing process that lacks credibility. Over the years, some improvements have been claimed, and in some instances verified, but PRPs still have little reason for confidence in the accuracy or fairness of EPA's documentation and billing practices. Assurances from EPA provide little comfort in light of the agency's failure to resolve billing irregularities after repeated appeals from its own Inspector General over a period of years.

V. MUCH OF THE MONEY THAT EPA COLLECTS IS PLACED INTO ACCOUNTS CONTROLLED ONLY BY EPA, WITH LITTLE ACCOUNTABILITY TO CONGRESS.

In Rohm & Haas, this Court expressed concern about whether EPA would be adequately accountable to Congress for oversight costs collected from PRPs. EPA asserts in its opening brief that some monies from Superfund cost recoveries are deposited with the U.S. Treasury and must be appropriated by Congress in order to be spent. Gov't Br. at 34. This is not the whole story.

At many Superfund sites, including the Newport Site, EPA deposits money that it collects from private parties into site-specific Special Accounts. These accounts allow EPA to spend that money at its own discretion, without the Congressional appropriation that would normally be needed for government spending. Special

Accounts, which accrue interest, hold settlement funds to be used for future response actions at Superfund sites. [21]

As of March 31, 2005, EPA had created Special Accounts for nearly 500 sites, which represent about 40 percent of the 1,241 sites on EPA's entire National Priority List. 40 C.F.R. Part 300, App. B (2004). As of the end of FY 2003, EPA had collected over $1 billion in these Special Accounts and earned some $177 million in interest within those accounts. See Building on the Past, at 69. That money is available to EPA for spending with no appropriation and no approval by Congress. See U.S. Environmental Protection Agency, Consolidated Guidance on the Establishment, Management, and Use of CERCLA Special Accounts at 6 (Oct. 4, 2002) (statutory limits on use of Trust Fund dollars do not apply to use of Special Account funds). Because Congress has no control over those funds, and cannot direct them elsewhere through the budget process, the Supreme Court's concern for accountability, as articulated in National Cable, is directly implicated in this case.

[21] See U.S. Environmental Protection Agency, Consolidated Guidance on the Establishment, Management, and Use of CERCLA Special Accounts 6 (Oct. 4, 2002), available at http://www.epa.gov/superfund/programs/reforms/reforms/3-12.htm. EPA deposits oversight costs that it collects into Special Accounts along with money that it collects for other costs. Id. at 4-5 (directing EPA staff to "[d]eposit oversight payments into the site-specific special account and use these funds to pay for EPA's oversight").

VI. A RULING THAT CERCLA AUTHORIZES SHIFTING OVERSIGHT COSTS TO PRPS WILL AFFECT EPA ENFORCEMENT UNDER OTHER ENVIRONMENTAL LAWS.

Finally, the issue now before this Court has impacts that extend far beyond Superfund sites. If the Court were to overturn its decision in Rohm & Haas, amici's member companies would then face EPA demands for payment of oversight costs for environmental remedies at many sites that are not Superfund sites.[22] For example, current EPA policy allows the use of CERCLA § 106 unilateral administrative orders as an enforcement tool at sites where the environmental problem is covered by other environmental statutes, such as the Clean Air Act, 42 U.S.C. § 7401 et seq., or the Clean Water Act, 33 U.S.C. § 1251 et seq.[23] Among the examples given are sites where the environmental problem might be addressed by installing certain pollution control equipment or by shutting down, either temporarily or permanently, an operating plant – situations typically resolved under the primary statute that applies to the situation, such as the Clean

[22] In Rohm & Haas, for example, EPA sought to recover oversight costs associated with a site that was addressed under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., and the Court ruled that CERCLA could be used for that purpose if oversight costs were permitted. 2 F. 3d at 1274-1275.

[23] See Memorandum from Barry N. Breen to Regional Counsel, Regions I-X et al., Subject: Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes (Jan. 18, 2001), available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ise-crossmedia.pdf) [hereinafter CERCLA § 106 Memo].

Air Act or the Clean Water Act.[24] Thus, EPA policy allows the use of CERCLA authorities in garden-variety enforcement actions under other environmental statutes.

If this Court's decision in Rohm & Haas were overturned, EPA would be free to label its Clean Air Act and Clean Water Act enforcement costs as "oversight" and shift them to the many industrial facilities that hold permits under those statutes. Clearly that outcome was never contemplated by Congress when it drafted CERCLA, and an interpretation allowing such an outcome does not meet the clear statement standard of National Cable or the plain meaning standard set forth in Aviall.

VII. CONCLUSION

In Rohm & Haas, this Court adhered to the Supreme Court's teaching that the normal budget and appropriation process "gives executive agencies an incentive to operate efficiently and makes them accountable to the Congress." 2 F.3d at 1274. This Court also recognized that "[w]hen an agency asserts the right to secure financing of its activities by assessing its costs against those whom it regulates, that incentive and accountability are lost." Id.

The well-documented history of EPA's Superfund oversight program shows an agency without incentive to operate either efficiently or accountably. EPA's

[24] See CERCLA § 106 Memo, at 1.

pattern of excessive costs and poor management has survived despite over a decade's worth of audits, investigations, and hearings. This sorry spectacle only underscores the importance of interpreting CERCLA as this Court did in Rohm & Haas.

Accordingly, that decision should be reaffirmed.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to the requirements of L.A.R. 46.1(e), I hereby certify that I am one of the attorneys whose name appears on this brief, and that I am a member of the bar of the Court of Appeals for the Third Circuit.

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CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6591 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font and Times New Roman style.

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CERTIFICATION OF COMPLIANCE WITH LAR 31.1(c)

1. The text of this electronic brief is identical to the text of the paper copies of Appellants' Brief timely filed with this Court.

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CERTIFICATE OF SERVICE

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