IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 02-1469-SLR
	)	
E.I. DU PONT DE NEMOURS AND COMPANY and CIBA SPECIALTY CHEMICALS CORPORATION,	)	
	)	
Defendants.	)	

Colm F. Connolly, United States Attorney and Patricia Hannigan, Assistant United States Attorney, Wilmington, Delaware. Counsel for the United States. Of Counsel: Mary E. Rugala, Senior Assistant Regional Counsel for the United States Environmental Protection Agency, Philadelphia, Pennsylvania, Thomas L. Sansonetti, Assistant Attorney General, Mark C. Elmer, Trial Attorney for the United States Department of Justice, Washington D.C.

Richard D. Kirk, Esquire of Morris, James, Hitchens & Williams LLP, Wilmington, Delaware. Counsel for Defendants. Of Counsel: Pamela Meitner, Esquire of E.I. du Pont de Nemours & Company, Wilmington Delaware and Rachel E. Deming, Esquire of Ciba Specialty Chemicals Corp., Tarrytown, New York.

MEMORANDUM OPINION

Date: August 5, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff United States of America ("the government") filed the present action on September 12, 2002, pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (2004), to recover costs from defendants E.I. du Pont de Nemours and Company ("DuPont") and Ciba Specialty Chemicals Corporation ("Ciba"), which the government alleges to have incurred responding to the release or threatened release of hazardous substances at a Superfund site. (D.I. 1) The court has jurisdiction over the case pursuant to 28 U.S.C. § 1331. Presently before the court are the parties' cross motions for summary judgment. (D.I. 35; D.I. 39)

II. BACKGROUND

A. DuPont-Newport Superfund Site

The DuPont-Newport Superfund Site consists of approximately 120 acres in New Castle County, Delaware near the interchange of I-95, I-495 and Delaware State Route 141 ("the Site"). (D.I. 37, ex. A at ¶ 15) The Site includes a paint pigment plant ("Newport facility"), a former chromium dioxide plant ("Holly Run facility"), and two unlined, industrial landfills (the "North landfill" and "South landfill"). The Site also includes wetlands adjacent to each landfill ("North wetlands" and "South

wetlands"), a baseball field near the Newport Facility (the "Ballpark"), and a portion of the Christina River. (Id.)

The Newport facility was originally owned by Herik J. Krebs and operated by Krebs Pigment & Chemical Company ("Krebs"). Between 1902 and 1929, Krebs used the Newport facility for the manufacture of lithopone, a white pigment used in paints comprised of barium sulphate and zinc sulfide. (Id. at ¶ 16) In 1929, DuPont purchase Krebs and its Newport facility, after which DuPont continued to use the facility for the manufacture of lithopone. In 1932, DuPont phased out the production of lithopone in favor of another white pigment, titanium dioxide. (Id.)

During its history, DuPont used the Newport facility to manufacture other organic and inorganic pigments. In the 1940s, DuPont manufactured blue, green and yellow copper phthalocyanine pigments. In the 1950s, DuPont produced titanium metal. In the 1960s, it made nickel. In 1958, DuPont began producing quinarcidone pigment. Beginning in 1966, DuPont produced chromium dioxide, a coating for audio tapes, at the Newport facility. (Id. at ¶ 12)

In the late 1970s, the Holly Run facility was built at the Site to expand DuPont's production of chromium dioxide. DuPont later shifted its production of chromium dioxide to the Holly Run facility. In 1984, DuPont sold its Newport facility to Ciba.

Since 1984, Ciba has continued to produce quinarcidone pigment at the Newport facility. (Id. at ¶ 13)

The North and South landfills have been owned and operated by DuPont or Krebs since 1902. During DuPont's operation of the Newport facility, both landfills were used to dispose of waste and/or off-grade product. From 1902 to 1974, the North landfill was used to dispose of wastes from manufacturing operations. From 1902 until 1953, the South landfill was used to dispose of large quantities of lithopone waste. (Id. at ¶ 19)

As a result of decades of industrial activity, the Site became heavily contaminated with various hazardous substances, including heavy metals such as arsenic, barium, cadmium, lead and zinc, as well as volatile organic compounds including tetrachloroethene and tricholoroethene. (Id. at ¶ 20)

B. Superfund Cleanup Process

Under CERCLA, the response to a release of hazardous substances is known as a "response action." Response actions are generally classified either as removal actions or remedial actions. Removal actions consist of a range of activities which include short-term actions necessary to stabilize or to clean up sites posing a threat to public health or the environment and includes certain planning actions such as remedial design. 42 U.S.C. § 9601(23). In contrast, a remedial action is more broadly comprised of response actions which are taken to

implement long-term solutions to an environmental release and contamination and permanent abatement of such releases and contaminations. 42 U.S.C. § 9601(24).

The Superfund cleanup process is described in the National Contingency Plan which contains specific procedures that govern response actions at CERCLA sites. 40 C.F.R. Part 300. The first step in the Superfund cleanup process is site identification. At this stage, potential sites are brought to the attention of the Environmental Protection Agency ("EPA") through a variety of ways, including state referrals, citizen complaints and certain federal and state environmental reporting requirements. 40 C.F.R. § 300.405. A database of these sites that have been or will require agency evaluation is maintained by the EPA. 40 C.F.R. § 300.5

Following site identification, a Preliminary Assessment ("PA") and a Site Inspection ("SI") will be conducted to determine if a site poses a potential hazard and to screen sites that do not warrant further study. During the SI, data is gathered concerning potentially hazardous substances, potential exposure pathways, and human and environmental receptors. 40 C.F.R. §§ 300.420 and 300.5

Following the PA/SI, the data gathered from the site is used to generate a score for use in the Hazard Ranking System ("HRS"). The HRS is a screening mechanism to assist in evaluating a site's

relative risk and determine its eligibility for placement on the National Priorities List ("NPL"). A site with a score of 28.50 or higher is eligible for placement on the NPL.

At any time during the Superfund cleanup process, a removal action may be implemented to stabilize or to clean up a site that poses a threat to human health or the environment. A removal action may consist of either short-term actions or various planning activities such as remedial design. 40 C.F.R. § 300.415.

At sites for which further study is required, a Remedial Investigation ("RI") and a Feasibility Study ("FS") will be performed. The purpose of a RI is to determine the nature and extent of contamination at a site and the associated health and environmental risks. A FS will use data obtained during the RI to develop and to evaluate options for remedial action. A FS may define the objectives of response action generally, develop remedial action alternatives, and undertake an initial screening and detailed analysis of those alternatives. 40 C.F.R. § 300.430.

Following completion of the RI/FS, the EPA will issue a proposed remedial action plan that identifies its preferred remedial alternative. The proposed plan includes information concerning the site and other remedial alternatives evaluated as part of the RI/FS. The proposed plan will also list

opportunities for public input and requests comments from the public on each of the remedial alternatives. Id.

After receipt and consideration of all public comments, the EPA selects a remedial alternative for the site and issues a document called a Record of Decision ("ROD"). 42 U.S.C. §§ 9604(c)(4) and 9621(a). A ROD presents a comparative analysis of the options developed as part of the FS and identifies the selected remedy for the site. A ROD also will contain performance standards, which are measures that a selected remedy must attain to ensure it meets the objectives of protecting the public health and environment. 40 C.F.R. § 300.430(f)(4) and (5). (D.I. 37, ex. A at ¶ 27) A selected remedy is subject to modifications based upon developments in science, technology or site conditions. Depending on the degree of change, an Explanation of Significant Differences ("ESD") may be submitted to supplement the administrative record or an amendment may be made to the ROD. 40 C.F.R. § 300.430(f)(4) and (5).

After issuance of the ROD, a planning phase known as Remedial Design ("RD") begins. The RD involves technical analysis and procedures which result in a detailed set of plan specifications for implementation of the selected remedy. 40 C.F.R. § 300.435. A RD may be performed by either the EPA or a potentially responsible party ("PRP"). When RD is performed by a PRP, it is typically done under a consent decree or

administrative order. At sites where the PRP conducts the RD, the EPA supervises to ensure that the PRP complies with CERCLA, the NCP, the ROD, the consent decree or administrative order, and any EPA-approved plans relating to the site.

C. Response Actions at the Site

The Site was identified as a potential threat to human health and the environment in the late 1970s and early 1980s. At that time, Dupont and the Delaware Department of Natural Resources and Environmental Control began sampling groundwater at the Site. The results indicated that the groundwater contained elevated levels of heavy metals and volatile organic compounds. (D.I. 37, ex. A at ¶ 22) In the mid 1980s, information was gathered by state and EPA officials to determine whether it should be placed on the NPL. In February 1990, the Site was placed on the NPL. (Id. at ¶ 23)

Pursuant to an Administrative Order on Consent ("AOC"), Dupont conducted an RI/FS which showed that soils, sediments, groundwater and plant tissue were extensively contaminated with numerous hazardous substances, including various heavy metals and volatile organic compounds. (Id. at ¶ 24) Results also demonstrated that elevated levels of contamination included at least one species of fish.

Using the results of the RI/FS, the EPA developed a proposed remedial action plan. The proposed plan and the RI/FS results

were published on November 13, 1992. (Id. at ¶ 25) Following public comment on the proposed plan, the EPA issued a ROD containing its selected remedy on August 26, 1993. (D.I. 37, ex. 1) The selected remedy contained measures addressing the effected areas of the Site, including the Ballpark, North landfill, South landfill, South wetlands, Christina River, Newport facility, Holly Run facility and groundwater. (Id.)

Following issuance of the ROD, the EPA sent special notice letters to DuPont and Ciba to initiate negotiations for the implementation of the ROD and demand payment for past and future response costs. (Id., ex. A at ¶ 28) When the parties were unable to reach agreement on implementation of the ROD, the EPA issued a unilateral administrative order to DuPont and Ciba, pursuant to § 106 of CERCLA, requiring them to implement the remedy described in the ROD. (Id. at ¶ 28; Id., ex. 2)

DuPont and Ciba, consistent with the UAO, implemented the remedy in two stages, remedial design and remedial action. The EPA provided oversight of DuPont's and Ciba's activities in both stages. (Id., ex. A at ¶ 29) The supervision is contemplated by CERCLA and required by the NCP to insure compliance with CERCLA, the NCP, the ROD, the UAO and other EPA-approved plans applicable to the Site. (Id. at ¶ 33) Through the course of implementation, the EPA agreed to modify certain aspects of the ROD through ESDs. (Id. at ¶ 30)

D. Incurred Costs

The parties have stipulated that, as a result of the response action at the Site, the government incurred costs through December 31, 2002, which total $2,164,615.97. These costs are categorized in four groups: Past Costs; Remedial Design Oversight Costs; Remedial Action Oversight Costs; and Litigation Costs. (D.I. 34) The government also seeks interest on each of these cost categories.

1. Past Costs

The first category consists of those costs associated with government travel and payroll relating to remedy selection, remedy changed and community relations (the "Past Costs"). The parties have agreed to settle this category for $499,803.81 and judgment shall be entered to that effect. (D.I. 34 at ¶¶ 4, 10, 11)

2. Remedial Design Oversight Costs

The second category consists of those costs incurred by the government through December 31, 2002, related to the oversight of remedial design at the Site ("Remedial Design Oversight Costs"). This category includes government payroll and contract costs associated with reviewing and approving (a) plans relating to the remedial design, (b) proposals to change cleanup criteria, (c) sampling methods, (d) construction schedules and (e) treatment technologies. (D.I. 37, ex. A at ¶ 37, 39; D.I. 34 at ¶ 5) The

parties have stipulated that the costs associated with this category amount to $746,279.77. (D.I. 34 at ¶ 3) Although the government brought suit to recover the Remedial Design Oversight Costs, it acknowledges that such costs are non-recoverable costs under Third Circuit precedent. See United State v. Rohm and Haas Co., 2 F.3d 1265 (3d Cir. 1993). The government has stated its intent to seek en banc review of this issue by the Third Circuit. (D.I. 36 at 22)

3. Remedial Action Oversight Costs

The third category consists of those costs incurred by the government through December 31, 2002, relating to its oversight of remedial action at the Site ("Remedial Action Oversight Costs"). (D.I. 34 at ¶ 3) This category includes EPA payroll and contract costs associated with its monitoring activities, conducting site visits, reviewing and approving field change requests, and approving construction milestones. (D.I. 37, ex. A at ¶ 37, 39) The overall purpose of these oversight activities was to ensure that DuPont's and Ciba's actions complied with CERCLA, the NCP, the ROD and the UAO and to ensure that Site cleanup was consistent with the objective of protecting human health and the environment. The parties have stipulated that the costs in this category total $648,517.17. (D.I. 34 at ¶¶ 3, 33) It is the government's contention that these costs are not subject to the Third Circuit's decision in Rohm and Haas.

4. Litigation Costs

The fourth category consists of those costs associated with litigating this action and incurred by the government through December 31, 2002 ("Litigation Costs"). (D.I. 34 at ¶ 3) This category includes all Department of Justice costs and certain EPA payroll costs. The parties agree that the costs in this category total $145,064.27. (Id.) The government contends that it is entitled to all costs associated with litigation in the present case. DuPont and Ciba contend that the government is only entitled to those costs associated with litigation of recoverable costs.

E. Interest

The government sent a special notice and demand for payment of costs, dated September 30, 1993, received by DuPont and Ciba on October 5, 1993. (D.I. 34, exs. E, G) Ciba responded to the government's letter on November 29, 1993. (Id., ex. H) DuPont responded to the government's letter on December 8, 1993. (Id., exs. F)

On November 29, 1995, the government mailed a collection invoice to DuPont for response and oversight costs incurred under an AOC relating to the performance of an RI/FS. (Id., ex. I) DuPont paid the invoice in full on March 26, 1996. (Id., ex. J)

On May 28, 1997, the government mailed a second collection invoice to DuPont for oversight costs incurred under an AOC

relating to a removal action at the sight. (Id., ex. K) DuPont paid that invoice, plus interest, on September 24, 1997. (Id., ex. L)

On June 7, 2001, the government sent a letter containing a certified cost summary for un-reimbursed past costs incurred and related to the Site through July 26, 2000. (Id., ex. M) On June 27, 2002, the government mailed a revised certified cost summary for un-reimbursed past costs incurred and paid in regard to the site through November 21, 2001. (Id., ex. N)

On September 12, 2002, the government filed its complaint in the present action. (D.I. 1) DuPont and Ciba were mailed a copy of the complaint on November 26, 2002.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of

proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

In the case at bar, the parties agree that there are no material facts in dispute and that resolution of the government's claims is a matter solely of statutory construction. The four issues of law before the court include: (1) whether the

government may recover those costs associated with its oversight of remedial design at the Site; (2) whether the government may recover those costs associated with its oversight of remedial action at the Site; (3) whether the government may recover all costs associated with litigation in this action; and (4) whether the government is entitled to interest on its recoverable costs from October 5, 1993 or the date of payment, whichever is later. (D.I. 36; D.I. 41)

A. Remedial Design Oversight Costs

The government seeks to recover those costs associated with its oversight of DuPont's and Ciba's remedial design work for the Site. The government concedes that this claim for costs is on four corners with the claim at issue in the Third Circuit's decision in United States v. Rohm and Haas Co., 2 F.3d 1265 (3d Cir. 1993). Consequently, as that Third Circuit decision is the law in this jurisdiction, defendant is entitled to summary judgment as to the government's claim for remedial design oversight costs.

B. Remedial Action Oversight Costs

The government contends that it may recover costs incurred in its oversight of DuPont's and Ciba's implementation of the remedial plan. In so arguing, the government attempts to distinguish the Rohm and Haas decision as applying to only remedial design oversight costs.

In Rohm and Haas, an action was brought pursuant to § 107 of CERCLA for the recovery of costs incurred by the government in monitoring a PRP's remedial design. Rohm and Haas, 2 F.3d at 1268-69. The costs in that case included direct costs, such as hiring contractors to conduct sampling and field support, and indirect costs, including travel and payroll. The costs resulted from the EPA's monitoring of a PRP's removal of approximately 11,700 cubic yards of waste and soil. Id. at 1268 n.2. The parties in that case stipulated that the oversight activities at issue pertained to removal rather than remedial activities. Id. at 1271. The Third Circuit framed the "fundamental question" as "whether CERCLA's provision allowing recovery of federal removal and remedial costs contemplates recovery of costs incurred monitoring a private party's removal and remedial action." Id. at 1268.

The government contends that, the language of Rohm and Haas notwithstanding, this court should construe the Third Circuit's opinion narrowly as to apply only to government oversight of removal actions and not remedial actions. To the extent Rohm and Haas indicates that it applies to oversight of both remedial and removal actions, the government argues this to be dictum.

The government contends that the definition of remedial action is more expansive than that of removal action. The court agrees that the plain language of the statute contemplates that

remedial actions be broader in scope. See 42 U.S.C. §§ 9601(23) and (24). In particular, § 9601(23) defines "removal" actions to include "**such actions as may be necessary** to monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23)(emphasis added). Whereas § 9601(24) defines "remedial" actions to include "**any monitoring reasonably required** to assure that such actions protect the public health and welfare and the environment." 42 U.S.C. § 9601(24)(emphasis added). If the Third Circuit's decision in Rohm and Haas had turned on whether the remedial design oversight was necessary monitoring or simply reasonably necessary, then the government's argument might be persuasive; that, however, was not the crux of the decision.

The Third Circuit in Rohm and Haas stated that § 9601(3) "could be understood to encompass at least some oversight of the activities of a private party," but could also be interpreted to refer "only to actual monitoring" and not the oversight of another's monitoring and assessment activities. Rohm and Haas, 2 F.3d at 1275-76. It was the latter construction, which limited recoverable expenses to actual monitoring, that the court found to be the most consistent with the statutory scheme and remedial purpose. Id. at 1276.

In reaching this conclusion, the Third Circuit relied upon National Cable Television Ass'n, Inc. v United States, 415 U.S.

336, 342 (1974).[1] The Court of Appeals stated that National Cable stood for the proposition that, where Congress seeks to impose administrative costs upon a regulated party which do not inure directly to the benefit of the regulatory party, the statute must contain a "clear statement" of congressional intent. Rohm and Haas, 2 F.3d at 1273. The Third Circuit found that CERLCA failed to evince a clear statement of congressional intent with respect to imposing the costs of government oversight of PRP-lead cleanup efforts. Id. at 1276.

Section 9601(24), like § 9601(23), may be reasonably susceptible to two interpretations; it lacks, however, a clear statement of congressional intent to permit the government to recover the costs associated with its oversight of a PRP-lead remedial action. But for the Third Circuit's reasoning in Rohm and Haas, the government's argument that these costs are recoverable would be persuasive. It is, nevertheless, contrary to the established law in this jurisdiction. Consequently, relying upon Rohm and Haas, the court concludes that the government may not recover costs incurred in the oversight of a private party's remedial activities and defendant is entitled to

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[1]The court notes that courts outside of this jurisdiction have found the National Cable "clear statement doctrine" to be inapplicable to CERLCA. See United States v. Dico, Inc., 266 F.3d 864, 877078 (8th Cir. 2001); United States v. Lowe, 118 F.3d 399, 400-01 (5th Cir. 1997); Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 568 (10th Cir. 1996).

summary judgment on this issue.

C. Recovery of Litigation Costs

The government contends that, irrespective of whether the costs at issue were recoverable under CERCLA,, it is entitled to full recovery for all of its Litigation Costs. The government argues that only three requirements may be satisfied in order for it to recover its Litigation Costs: (1) the costs were incurred by the United States; (2) the costs were incurred in connection with a CERLCA cost recovery action relating to a specific site; (3) the party against whom recovery is sought is a responsible party within the meaning of CERCLA. (D.I. 36 at 34) The government asserts its right to recover litigation costs has only three limitations: (1) recovery must be consistent with the National Contingency plan; (2) Fed. R. Civ. P. 11; and (3) the court's inherent authority to control discovery. (Id. at 35) Conversely, defendant contends that in order for the Litigation Costs to be recoverable as a response cost, the underlying cost sought in litigation must also be a recoverable response cost under CERCLA. (D.I. 40 at 16)

The fundamental issue of law to be determined, and one of first impression, is whether the government's expenditures in pursuit of recovering non-recoverable costs under CERCLA are themselves recoverable costs. The answer to that question must be in the negative.

Section 9607(a)(4)(A) provides that a responsible party is liable for "all costs of removal or remedial action incurred by the United States Government ... not inconsistent with the national contingency plan." CERCLA defines removal and remedial action to "include enforcement activities related thereto." 42 U.S.C. § 9601(25). Section 9604(b) further authorizes the government to "undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." It is, therefore, not disputed that the government may recover as response costs its CERCLA enforcement-related expenditures; that is not the issue in the case at bar.

Here the government has expressly stated its objective, which is not one of per se enforcement, but is instead an effort to obtain a review and reversal of existing Third Circuit precedent. Under the government's theory, not only must DuPont and Ciba pay for their own defense, which rests upon clearly established law, but also must pay the government's costs. Put another way, DuPont and Ciba were confronted with the conundrum of either paying the government for costs which are not recoverable under the law in this jurisdiction or paying the government's costs in seeking to overturn the law; that cannot be

the intent of Congress.

The government argues that its enforcement costs in the case at bar are analogous to those cases where the government litigates the issue of potentially responsible party liability generally. There may be compelling justifications to impose the full cost of enforcement upon those parties ultimately determined to be responsible; part of the cost of enforcement is identifying who, among potentially responsible parties, is legally liable. See United States v. Gurley Roofing Co., 43 F.3d 1188 (8th Cir. 1995). In the facts at bar, however, the responsible parties were identified and do not contest their liability with respect to the Site. Further, the parties agree that there are no issues of disputed fact, only questions of statutory construction. With respect to its largest alleged claim, Remedial Design Oversight Costs, the government concedes that its recovery is foreclosed by binding precedent. Nevertheless, the government seeks to charge DuPont and Ciba for its "enforcement" of that claim.

The government also asserts that its right to recover costs is unrelated to whether it prevails. Presumably, therefore, the government would argue that even if the Third Circuit's decision is upheld, DuPont and Ciba must pay the government's costs. There is a fundamental unfairness if a prevailing party is forced to pay for the government's efforts to reverse existing

precedent.[2] This is not to say that the government must necessarily be a prevailing party on all of its asserted claims to permit recovery of its enforcement expenses; it, however, cannot lump all of its activities under a broad label of enforcement and demand reimbursement when its objective is clearly more than enforcement.

With respect to the allocation of Litigation Costs between claims upon which the government is entitled to recovery and those which it is not, the government contends that it "does not track costs that way ... [and] it is hard to see how the government could" do so. (D.I. 43 at 14) On the next page of its answering brief, however, the government contradicts itself and asserts that "the overwhelming majority of [the Litigation Costs] were necessarily incurred in connection with the government's claim to costs other than oversight." (Id. at 15)

DuPont and Ciba argue that the court should exercise its discretion and deny the government's litigation costs in toto. It is not clear, however, that such an alternative is within the court's discretion as the government is entitled by statute to recover its enforcement costs. Consequently, the court will

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[2]The government has been candid that its intent is to use the present case as a "vehicle" to challenge Rohm and Haas. (D.I. 36 at 26) It maintains, nevertheless, that DuPont and Ciba must pay all of the government's litigation costs. To expand upon the government's analogy, not only does the government wish to use its dispute with DuPont and Ciba as a vehicle, but it would like them to pay for the gas.

award the government 30.9% of its claimed Litigation Costs.[3]

D. Interest

The final issue before the court is whether the government's letter of September 30, 1993 constitutes a demand for purposes of triggering the payment of interest on its recoverable costs.

Under CERCLA, the accrual of interest on response costs is subject to two statutory triggers. 42 U.S.C § 9607(a)(4)(D). Section 9607(a)(4)(D) provides that "interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." Consequently, the latter of two events will trigger the accrual of interest, the "date of demand" or the "date of the expenditure." It is the government's position that once it has issued a demand letter with respect to a responsible person, it has satisfied the statutory requirements under § 9607(a)(4)(D) for the accrual of interest for all recoverable costs, including those subsequently incurred.

In support of its position, the government first contends that Congress' use of the article "a" in the "date of demand" provision indicates that Congress intended that, once a single demand letter is issued, interest is triggered for all future expenditures. Further, the government contends that a different

[3]The court determined this apportionment based upon the government's recoverable Past Costs as a percentage of its total asserted costs, excluding Litigation Costs. (D.I. 34 at 2)

interpretation would render the "date of expenditure" trigger meaningless.

If, as the government contends, a single demand letter triggers interest on all future expenditures without any actual notice of those specific expenditures, then the "date of demand" provision's plain requirement that the amount be "specified" is superfluous. Such an interpretation would also impose no limit on the government's ability to delay seeking reimbursement for its costs, allowing interest to build, and would afford a responsible party no opportunity to pay those costs and avoid unnecessary expense. There is no authority to support the conclusion that this was the result Congress intended.

Contrary to the government's assertion, requiring a demand letter to trigger the accrual of interest with respect to a specified set of costs does not render the "date of expenditure" provision of § 9607(a)(4)(D) superfluous. Instead, this provision relates to those circumstances where a previous demand for payment has been made and the responsible party denies liability or otherwise fails to reimburse the government. In such cases, interest would then accrue on subsequent government expenditures while the account was in arrears or in dispute. See, e.g., Colorado v. United States, 867 F. Supp. 948, 951 (D. Col. 1994). The second provision insures that when a responsible party disputes liability, the government may obtain prejudgment

interest on all of its subsequently incurred recoverable response costs without being required to continue to send demand letters.

The essence of demand is that a responsible party is put on notice that its failure to pay a specified sum will result in the accrual of interest. See, e.g., Bethlehem Iron Works, Inc. V. Lewis Indus., Inc., 1996 WL 557592, at 74 (E.D. Pa. Oct. 1, 1996). Consequently, the court concludes that a demand letter pursuant to § 9607(a)(4)(D) will trigger interest only for those expenditures which the demand asserts with specificity.

In case at bar, the undisputed record shows that Dupont and Ciba periodically received demand letters containing certified cost summaries which were promptly paid with interest owed. These previous demands, once satisfied, cannot trigger interest on unspecified future expenditures. Therefore, the court finds that interest began to accrue when DuPont and Ciba received notice of a specific amount of recoverable costs which, in this case, was the filing of the complaint.

E. Declaratory Judgment

As DuPont and Ciba do not contest the issue of their liability under CERCLA with respect to the Site, the government is entitled to a declaratory judgment that DuPont and CIBA are liable for future recoverable response costs. 42 U.S.C. § 9613(g)(2).

IV. CONCLUSION

For the reasons stated, the court will grant in part and deny in part the government's motion for summary judgment and grant Dupont's and Ciba's joint motion for summary judgment. (D.I. 35; D.I. 39) Dupont and Ciba shall pay to the government the Past Costs indicated in the parties' cost stipulation, together with prejudgment interest determined from the date the complaint was filed. Consistent with the parties' request at oral argument, the court will order the parties to provide a proposed joint order for entry of judgment including a calculation of interest. An order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 02-1469-SLR
	)	
E.I. DU PONT DE NEMOURS AND COMPANY and CIBA SPECIALTY CHEMICALS CORPORATION,	)	
	)	
Defendants.	)	

O R D E R

At Wilmington this 5th day of August, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff United States of America's motion for summary judgment is granted in part and denied in part. (D.I. 35)

2. Defendants E.I du Pont de Nemours and Company's and Ciba Speciality Chemicals Corporation's joint motion for summary judgment is granted. (D.I. 39)

3. The parties are ordered to file with the court a joint proposed order for entry of judgment consistent with the court's memorandum opinion by **August 30, 2004** .

Sue L. Robinson
United States District Judge