THE STANDARD OF REVIEW FOR NATURAL RESOURCE DAMAGES (CERCLA) SETTLEMENTS WITH GOVERNMENT AGENCIES: 2016 UPDATE

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I. INTRODUCTION*[1]

Under many federal and state environmental laws, the effect of a settlement between a potentially responsible party ("PRP") and the government is determined by statute and reference to related case law.[2] When a PRP completely resolves remediation or natural resource damage ("NRD") claims with a trustee or governmental agency under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for example, the settling party receives contribution protection from the claims of all other PRPs and activates a statutorily-defined credit mechanism that reduces the liability of non-settling parties by the dollar amount of the settlement.[3] Finality, in the form of contribution protection for a party that completely resolves its liabilities, can occur at great cost to non-settling parties because, unlike under the common law, the non-settling defendants only receive a dollar-for-dollar credit for the amount the settling party pays.[4]

In other words, where statutes such as CERCLA afford contribution protection, non-settling PRPs are precluded from making contribution claims against the settling parties for matters addressed or resolved in a settlement.[5] And, when one PRP settles and completely resolves its

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[1] The first version of this article was initially published in LSI's Eighth Annual Advanced Conference on Litigating Natural Resource Damages (July 2014). This article is intended to incorporate recent case law developments concerning the standard of review applied to natural resource damage settlements with state and federal government agencies.

[2] Natural resource trustees seeking approval of settlements under their statutory authorities have generally followed the settlement standards established under CERCLA case law. *See, e.g., U.S. v. Bayer CropScience, Inc.*, No. 1:12-cv-10847-NMG (D. Mass. 2012) (consent decree entered following briefing under CERCLA settlement standards); *U.S. v. Polar Tanker*, No. 10-00429-JCC (W.D. Wash. 2010) (order entered for Oil Pollution Act ("OPA") settlement citing CERCLA standards for settlement); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liability Litig.*, 2014 WL 2722002, at *5 (S.D.N.Y. June 11, 2014) (applying CERCLA standards to the State of New Jersey's proposed NRD settlement under the New Jersey Spill Act).

[3] 42 U.S.C. § 9613(f)(2) (2016).

[4] This scheme is contrary to the common law rule where the non-settling defendant is able to obtain a finding of the settling party's proportionate responsibility and have the judgment against the non-settling party reduced by the settling party's share of liability. *Young v. Latta*, 123 N.J. 584, 591 (N.J. 1991). This requires a determination at trial of the percentage of fault for each party in the litigation; it is the nonsettling defendant's responsibility to raise and prove the percentage of fault as to each settling party. *Green v. Gen. Motors Corp.*, 310 N.J. Super. 507, 546 (N.J. App. Div. 1998).

[5] At the outset, it is important to distinguish a settlement that provides a settling PRP true finality and complete contribution protection from a settlement that provides only a credit against ultimate liability or a limited covenant not to sue. If the matters addressed in the settlement at issue are limited so as to provide only a credit, with the balance of liability for costs or damages to be reopened in the future, the non-settling PRPs do not have the same risk of shouldering the settling PRP's share.

liability to the government, the liability of all other PRPs is reduced by the dollar amount of the settlement.[6] Contribution protection is a powerful tool provided to encourage clean up, restoration, and settlements that resolve the government's claims, and it has been likened to a carrot and a stick by various courts.[7] Providing the settling parties with contribution protection is a strong incentive to settle, and the possibility that if the "settlor pays less than its proportionate share of liability, the non-settlors, being jointly and severally liable, must make up the difference" is an even stronger disincentive against not settling.[8]

In an effort to protect non-settling parties from drastically unfair results, and to ensure the fairness of settlements to the public and all PRPs involved, non-settling defendants have an opportunity to object to and challenge the appropriateness of a consent decree[9] embodying a settlement with fewer than all PRPs, which, at least under CERCLA, must be reviewed and entered by the court in order for contribution protection to apply to the settling PRP. As a result, non-settling PRPs can come forward and object to a settling defendant's attempt to settle out of all of its liability for too little or on unfair terms. In these situations, it is incumbent upon the settling parties to demonstrate that the settlement is fair, reasonable, adequate, and consistent with the governing statute. If they are unable to do so, the settlement will fail.

Ultimately, a non-settlor's position can be an unenviable one,[10] as the settlement of litigation is highly favored by courts—even more so in the environmental context than in other litigation.[11] In fact, courts look so favorably upon settlement—for numerous reasons[12] including

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[6] Marc L. Frohman, *Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions: An Argument in Support of the Pro Tanto Credit Rule*, 66 U. COLO. L. REV. 711, 714-15 (1995). This is known as the *pro tanto* approach, which was first articulated in the Uniform Contribution Among Tortfeasors Act of 1955. *Id.*

[7] *U.S. v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990); *U.S. v. Union Gas Co.*, 743 F.Supp. 1144, 1152 (E.D. Penn. 1990). Contribution protection places all the risk on the non-settling party while encouraging settlement and shielding the government from the risk of a settlement shortfall.

[8] *Union Gas Co.*, 743 F.Supp. at 1152.

[9] "A consent decree is a court order embodying the terms that the parties have negotiated and agreed upon; it is essentially a contract." *United States v. PolyOne Corp.*, 2014 WL 2781831, at *3 (C.D. Ill. June 19, 2014) (citing *United States v. Alshabkhoun*, 277 F.3d 930, 934 (7th Cir. 2002)). A "consent decree is also a continuing order, one having prospective effect." *United States v. Town of Timmonsville*, 2013 WL 6193100, at *2 (D.S.C. Nov. 26, 2013) (citation omitted).

[10] Some commentators argue that the voluntary aspect of settling a CERCLA case "is an illusion"—that in determining whether to settle under CERCLA, there can be only one conclusion: to settle. To do otherwise would be to expose oneself to excessive risk. Fleta Stamen, *CERCLA Actions: "To Settle or Not to Settle?"*, FLA. B.J., 63, 64 (Feb. 1994) ("CERCLA's structure and the courts' interpretation of CERCLA is designed to force PRP's to settle").

[11] "Voluntary settlement of civil controversies is in high judicial favor." *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982); *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003) (stating that deference must be given to "the law's policy of encouraging settlement."). And, courts "have recognized that the usual federal policy favoring settlements is even stronger in the CERCLA context." *B.F. Goodrich Co. v. Betkoski*, 99 F.3d 505, 527 (2d Cir. 1996), *cert. denied sub nom Zollo Drum Co. v. B.F. Goodrich Co.*, 524 U.S. 926 (1998).

[12] Part of the reason for such leniency is that "discounts" to the apportionment of liability can be applied. *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1031-32 (D. Mass.

the savings and the ability to begin remediation earlier—that a court can approve a settlement if provided with almost any viable rationale, however tenuous, for apportioning liability.[13] To add to the difficulties that non-settlors face, claims for NRD damages are more amorphous than clean-up related claims.[14] For that reason, approval of NRD settlements, which is a judicial act committed to the informed discretion of the trial court,[15] is commonplace in the context of environmental litigation. After a cursory review of general requirements applicable to a court's approval of a consent decree, this article will examine the standard generally applicable to the judicial review of NRD settlements.

II. STANDARD OF REVIEW[16]

Courts review settlements under CERCLA (whether for remediation costs or NRD) to determine that the proposed settlement is fair, reasonable, adequate, and consistent with the objectives of the governing statute.[17] No single factor is dispositive to the evaluation process, and

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1989). Examples of when discounts may be applied include when a settlement is arrived at early in the litigation, when it is derived quickly, and/or when it is cost-effective. That, coupled with the "special deference" courts give to settlements agreed to by governmental agencies (most particularly when they have played a large role in structuring the settlement) and the strong presumption of validity that such settlements carry, can go a long way in defeating arguments that a settlement should not be approved without an accurate determination of damages.

[13] *U.S. v. Se. Penn. Transp. Auth.*, 235 F.3d 817, 824 (3d. Cir. 2000) (where natural resource damages were estimated at $5.3 million among three parties, two parties were able to settle for a total of $850,000 over the non-settlor's objections, because "[a]s long as the measure of comparative fault on which the settlement terms are based is not 'arbitrary, capricious, and devoid of a rational basis,' the district court should uphold it.") Settlement is the cornerstone of environmental litigation. From a governmental perspective, it is essential to prevent a backlog of clean-up cases that would become insurmountable and which would prevent achieving the goals of CERCLA and its counterparts: to protect human health and the environment from threats posed by the releases of hazardous substances and to clean up such hazardous sites. *See SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1361 (D.N.J. 1996) (citing Pub. L. No. 96-510, 5 Stat. 2767 (1980)). From a private party perspective, settlement is often desirable because it provides security and enables parties to move forward without the time and financial expenses resulting from being enmeshed in decade-long litigation.

[14] Measuring the value of the service losses and/or restoration and replacement values of natural resources is usually far more difficult than ascertaining remediation costs. Thus, in cases involving single sites where damages are capable of precise measurement—typically in situations involving landfills at which dumping records were maintained—courts will require more precise liability allocations and damage calculations. *See generally, e.g., U.S. v. Allied Signal, Inc.*, 62 F. Supp. 2d 713 (N.D.N.Y 1999). In other words, where fairly precise information exists, courts expect more precise information than where claims for soft or undetermined damages are being settled.

[15] *U.S. v. Hooker Chem. & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir. 1985).

[16] Discussions regarding the correct standard of review for general CERCLA settlement agreements have been frequent and much more extensive than for NRD settlements; however, most courts have simply applied the CERCLA standard without discussion. *See generally, Colorado v. City & Cnty. of Denver*, 2010 WL 4318835 (D. Colo. Oct. 22, 2010); *Utah v. Kennecott Corp.*, 801 F. Supp. 553 (D. Utah 1992). Although various courts have enunciated slightly different expressions of the standard, or weighted factors somewhat differently, the same factors have been consistently applied in courts across the country.

[17] *See U.S. v Akzo Coatings of Am., Inc.*, 949 F2d 1409, 1423 (6th Cir. 1991); *Tutu*, 326 F.3d at 207; *Cannons*, 899 F.2d at 84. This standard is applied to the review of CERCLA settlements, *Cannons*, 899 F2.d at 85, as well as settlements pursuant to other federal environmental laws. *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983); *U.S. v. Browning-Ferris Indus. Chem. Serv., Inc.*, 704 F. Supp. 1355, 1356 (M.D. La. 1988). A

all of the factors are intertwined, overlapping, and incapable of precise definition or delineation. Instead, "Congress anticipated that the federal courts would apply standards with broad generality to determine whether the proposed decrees are both fair and faithful to the statute, taking into account the interests of the public at large, the settling parties and the non-settlers alike."[18] While the nebulous factors may prove frustrating to practitioners attempting to hammer out a viable settlement agreement, what is clear is that their imprecise nature[19] can be construed to the advantage of both parties seeking approval of proposed settlements and those fighting against their entry, especially when they are doing so with incomplete information regarding damage amounts and/or liability allocations.

In considering the standard of review, it is important for counsel to keep in mind the deference courts give to settlements involving government entities and those vested with governmental authority, such as NRD trustees.[20] It is equally important, however, to ensure that there is a sustainable settlement process and a record that demonstrates fairness and accountability for the bases of a settlement. Reviewing courts have noted that in exercising their discretion to approve a settlement, they are not "rubber stamps" for government-sponsored settlements.[21] In addition, a reviewing court may approve or reject a proposed consent decree, but it lacks the authority to modify the proposed decree.[22]

A. Preliminary Considerations for Approval of a Consent Decree

Before examining the standard applicable to the judicial review of NRD settlements, it should be noted that the following requirements are generally applicable to a court's approval of any consent decree, regardless of whether it involves an NRD settlement.

For a court to approve a consent decree, the decree must: (1) spring from and serve to resolve a dispute within the court's subject matter jurisdiction; (2) fall within the general scope of

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decision by the EPA or another governmental agency not to settle is not subject to judicial review and falls outside the scope of this article. 42 U.S.C.A. § 9622(a); Caroline N. Broun and James T. O'Reilly, *Settlement and Consent Decrees in CERCLA Actions*, RCRA AND SUPERFUND: A PRACTICE GUIDE, 3d § 13:1 (2014).

[18] H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3042.

[19] At least one court has noted that "[a] perfect allocation of liability in CERCLA cases is impossible." *Dep't of Toxic Substance Control v. Technichem, Inc*, 2013 WL 3856386, at *3 (N.D. Cal. July 24, 2013).

[20] Laura Rowley, *NRD Trustees: To What Extent are They Truly Trustees?*, 28 B.C. ENVTL. AFF. L. REV. 459, 477 (2001).

[21] *In re MTBE Litig.*, 2014 WL 2722002, at *5, n.34 (quoting *In re Taylor*, 158 N.J. 644, 657 (N.J. 1999), that "[d]espite this deference, the court's review of an agency decision is 'not simply a *pro forma* exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence.'"). In addition, the deference government agencies receive "does not displace the baseline standard of review for abuse of discretion." *Bangor*, 532 F.3d at 94

[22] *U.S. v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) *aff'd*, 899 F.2d 79 (1st Cir. 1990) (citations omitted).

the case made by the pleadings; and (3) further the objectives of the law upon which the complaint is founded.[23] Only once a court determines that these items have been satisfied may it continue to weigh whether a proposed settlement is fair, reasonable, adequate, and consistent with the objectives of the governing statute.

B. Deference to Government Settlements

Not only do settlements arrived at by government entities enjoy a strong presumption of validity,[24] but judicial review of a settlement negotiated by any governmental agency of the United States is also subject to special deference.[25] However, the degree of deference given to governmental entities depends on several factors—most notably whether the government entity is a federal or state entity.

1. Settlements with Federal Government Entities

Courts must not "second-guess[] the Executive Branch" on a determination of what constitutes an appropriate settlement.[26] This prohibition on second-guessing the executive is the first layer of deference some appellate courts refer to as the "double layer of swaddling" protecting a CERCLA consent decree involving the federal government, typically the EPA, as a party.[27] The first layer of deference requires a district court to "defer to the EPA's expertise."[28] This deference

[23] *United States v. City of Waterloo*, 2016 WL 254725, at *3 (N.D. Iowa Jan. 20, 2016); *see also United States v. BP Expl. & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001) (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986)).

[24] *U.S. v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982) *aff'd*, 749 F.2d 968 (2d Cir. 1984). CERCLA provides federal and state trustees, and OPA provides federal, state, and tribal trustees, with "the force and effect of a rebuttable presumption" for the determination and assessment of damages to natural resources if they are performed in accordance with the assessment regulations promulgated under the respective statute. CERCLA §107(f)(2)(C); OPA §1006(e)(2). This means that, if trustees perform an NRD assessment in accordance with the regulations, the results of the assessment are presumptively correct. Dept. of the Interior, *Natural Resource Damage Assessment Primer* (Feb. 1993). With that said, few instances exist in which trustees have sought to engage in a full blown assessment process and then to obtain the presumptive benefits of the "rebuttable presumption." Doing so comes with risks that may present issues for settlement. First, the presumption is rebuttable, and thus it creates evidentiary issues that might impede a settlement. Second, engaging in a full-fledged NRD assessment is time consuming and cost intensive and may not promote quick settlements, which by their nature require compromise.

[25] *Cannons*, 899 F.2d at 84.

[26] *Id. But see In re MTBE Litig.*, 2014 WL 2722002, at *5 (noting that the court will engage in a review process to ensure that the standards of reasonableness, adequacy, and consistency with the objectives of the governing statute are met).

[27] *California Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 2015 WL 5026925, at *2 (E.D. Cal. Aug. 25, 2015) (quoting *Cannons*, 899 F.2d at 84); *see also United States. v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011).

[28] *U.S. v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995) (quoting *Cannons*, 899 F.2d at 84).

is accorded because the federal executive[29] is construing a statutory scheme which it has been "entrusted to administer."[30] Thus, the agency is presumed to have expertise in that area, and its decisions concerning that statutory scheme are to be deferred to as appropriate. The second layer of deference is to the district court's judgment; a district court's approval of a proposed agreement is reviewed for an abuse of discretion.[31] But, despite owing deference to EPA expertise and CERCLA's policy of encouraging settlement, a court's "true measure of the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances."[32]

2. Settlements with State Government Entities

Where a state is a party to a proposed CERCLA consent decree, courts give less deference to the state than they would the federal government.[33] Courts do give "some deference" (as opposed to no deference due to a private party) to a state's decision to enter into a consent decree—but only to the extent the state agency has some expertise concerning the settlement.[34] State agencies receive no deference on settlements falling outside their area of expertise. Thus, while federal courts typically give some deference to a state agency's interpretation of statutes which the agency is charged with enforcing, state agencies' interpretation of federal statutes receives no deference unless they are charged with enforcing those statutes. For example, state agencies receive no deference on their interpretation of CERCLA requirements.[35] As a result of the reduced deference owed to state agencies, the double-swaddling test applicable to settlements with federal agencies does not apply to settlements with state government agencies.

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[29] *United States v. E.I. DuPont De Nemours & Co.*, 2014 WL 3548965, at *1 (W.D.N.Y. July 17, 2014) ("Acceptance of a settlement agreement is especially appropriate 'where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field.'") (internal citations omitted); *BP Expl. & Oil Co.*, 167 F. Supp. 2d at 1050 (same).

[30] *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

[31] *Montrose*, 50 F.3d at 746.

[32] *United States v. Cornell-Dubilier Elecs., Inc.*, 2014 WL 4978635, at *3 (D.N.J. Oct. 3, 2014) (internal citations omitted).

[33] *Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014), *cert. denied sub nom. ABB Inc. v. Arizona Bd. of Regents*, 136 S. Ct. 30 (2015), and *cert. denied sub nom. Arizona v. Ashton Co. Inc. Contractors & Eng'rs*, 136 S. Ct. 30 (2015) (citing *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 93-94 (1st Cir. 2008).

[34] *Id.* at 1014 (quoting *Bangor*, 532 F.3d 70 at 94). However, at least one recent opinion implies that federal and state environmental agencies' settlement decisions should be accorded the same weight. *United States v. PolyOne Corp.*, 2014 WL 2781831, at *4 (C.D. Ill. June 19, 2014) ("the Court notes that it accords substantial weight to federal and state environmental agencies' decision to settle as embodied in this decree, because of the agencies' expertise in environmental matters and the EPA's broad mandate from Congress to minimize threats posed by hazardous wastes") (internal citations omitted).

[35] *City of Tucson*, 761 F.3d at 1014-15.

Regardless of whether settlements involve government entities—and consequently enjoy governmental deference—the same basic factors apply in the judicial review of a proposed settlement: fairness, reasonableness, adequacy, and consistency with the governing statute.

C. Fairness

In evaluating a settlement's fairness, both substantive and procedural fairness must be considered.[36] Procedural fairness requires "candor, openness, and bargaining balance" in the negotiation process, while substantive fairness involves "corrective justice and accountability."[37] Critically, the "fairness doctrine that guides a court's review of a consent decree is not a guarantee to non-settling PRPs of rigorous protection from having to pay more than their fair share" because, although courts do consider the effect of a settlement on non-settling parties, protection of "non-settling parties does not take priority in the context of CERCLA, a legislative scheme that consistently encourages settlements and capping liability."[38]

1. Procedural Fairness

Procedural fairness requires the court "to look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance."[39] In evaluating procedural fairness, courts look to whether the settlement negotiations were conducted forthrightly, in good faith, and at arm's length among experienced counsel.[40]

The CERCLA-mandated comment period prior to entering a settlement nearly ensures procedural fairness and thus essentially builds in a presumption of its existence. For that reason, very few examples exist of settlements lacking procedural fairness outside of the context of improper settlement negotiations that were not conducted at arm's length or in which the defendants were unfairly excluded from participation in settlement discussions.[41]

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[36] *Cannons*, 899 F.2d at 86.

[37] *Id.* at 87.

[38] *Technichem*, 2013 WL 3856386, at *3-4.

[39] *Cannons*, 899 F.2d at 86 (citing *U.S. v. Rohm & Haas Co.*, 721 F. Supp. 666, 680-81 (D.N.J. 1999)).

[40] *Tutu*, 326 F.3d at 207; *Rohm & Haas*, 721 F. Supp. at 680-81; *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988) (CERCLA settlement that was a product of an informed, arm's length bargaining process was presumptively valid); *Cannons*, 899 F.2d at 87 (consent decrees at issue were procedurally fair where they were "negotiated at arm's length among experienced counsel" and "in good faith").

[41] No court has yet to define what constitutes unfair exclusion. What is clear is that settlement negotiations may be procedurally fair without being all-inclusive affairs and without giving every party the opportunity to participate in a settlement. *Cornell-Dubilier Elecs.*, 2014 WL 4978635, at *5 (citing *Cannons Eng'g Corp.*, 899 F.2d at 84 ("The CERCLA statutes do not require the agency to open all settlement offers to all PRPs. . . . Under the SARA Amendments, the right to draw fine lines, and to structure the order and pace of settlement negotiations to suit, is an agency prerogative."); *United States v. Grand Rapids, Mich.*, 166 F.Supp.2d 1213, 1221 (W.D. Mich. 2000) ("Even if Intervenors had been excluded from the settlement, such exclusion would not indicate procedural unfairness. CERCLA does not require the EPA to open all settlement offers to all PRPs.").

2. Substantive Fairness

Substantive fairness considers whether a party is bearing "the cost of the harm for which it is legally responsible."[42] Settlement terms must therefore be based upon—and roughly correlated with—some acceptable measure of comparative fault.[43] In other words, liability should be apportioned "according to rational (if necessarily imprecise) estimates of the harm each party has caused."[44] A court's role in evaluating the substantive fairness of a settlement is not to determine the best method—or the method that should have been applied—for measuring fault and apportioning liability.[45] And, as the *Cannons* court explained, the "judiciary [should] take a broad view of proposed settlements, leaving highly technical issues . . . to the discourse between the parties . . . and [] treat each case on its own merits, recognizing the wide range of potential problems and possible solutions."[46]

Providing the court with a benchmark can assist a court in determining a consent decree's substantive fairness. Specifically, a party seeking to support entry of a consent decree should provide the court with the information necessary to "compare the clean-up costs that the settling PRPs will pay under the consent decree with the portion of the total cost of clean-up that is allocated to them based on their comparative fault and then factor in "reasonable discounts for litigation risks, time savings, and the like that may be justified."[47] However, no set formula exists for measuring comparative fault.[48] Rather, the court's role is to uphold the method proposed by the government unless it is "arbitrary, capricious, and devoid of a rational basis."[49] Government agencies are accordingly allowed leeway to "diverge from an apportionment formula in order to address special factors not conducive to regimented treatment."[50] As discussed above, great deference must be given to a federal environmental agency's settlement choices, and whatever settlement scheme or formula the agency advances should be upheld if the agency "supplies a plausible explanation."[51] In other words, a court's role in reviewing a settlement is to determine

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[42] *Cannons*, 899 F.2d at 87.

[43] *Tutu*, 326 F.3d at 207.

[44] *Cannons*, 899 F.2d at 87; *Se. Penn. Transp. Auth.*, 235 F.3d at 825; *U.S. v. Fort James Operating Co.*, 313 F.Supp.2d 902, 908 (E.D. Wis. 2004).

[45] *Cannons*, 899 F.2d at 87.

[46] *Id.* at 85-86.

[47] *Technichem*, 2013 WL 3856386, at *4 (internal citations omitted).

[48] *Id.* at 86-88.

[49] *Id.* at 87; *Technichem, Inc.*, 2013 WL 3856386, at *3-4; *Arizona v. Nucor Corp.*, 825 F. Supp. 1425 (D. Ari. 1992). This arbitrary and capricious standard is expressly set forth in 42 U.S.C.A. § 9613(j).

[50] *Cannons*, 899 F.2d at 87-88.

[51] *Id.*

whether any acceptable measure of comparative fault, taking into account all of the other potential issues related to the case, has been used to arrive at the settlement terms.[52]

Even where a record is "seriously lacking in factual data by which a precise measure of relative culpability may be calculated," the lack of proof is not necessarily fatal to a settlement.[53] In such a case, a court "may infer substantive fairness through a finding of procedural fairness together with other circumstantial indicia of fairness."[54] The key to substantive fairness is having a rational estimate of each party's liability when the settling party is achieving finality. The estimate does not need to be precise or accurate: it merely has to exist and be consistent with the goals of the governing law—and not be arbitrary, capricious, or clearly in error.[55]

Where a final settlement is proposed with no estimate of comparative fault, it may be subject to rejection by the reviewing court.[56] For example, in *Commissioner v. Century Alumina Co.*, the court rejected a proposed settlement for lacking substantive fairness where the movants failed to provide the court with either a calculated apportionment of liability or any other substantive qualitative methodology used in determining the amount that the settling defendant would pay in exchange for its discharge from liability.[57]

Moreover, even when the government has a strong case, a fair settlement may take into account the benefit of early resolution and reduced litigation costs in offering a settlement for less than full recovery.[58] Uncertainty of future events and the timing of settlement decisions are included in those factors.[59] Furthermore, courts have recognized the need to encourage and reward such early, cost-effective settlements, and quick settlements may equate to lowered settlement

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[52] *U.S. v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 577 (W.D. Wis. 1990) ("It is not within this Court's purview to closely scrutinize the allocation of liability among the potentially responsible parties. The Court's core concern must be whether the proposed consent decree furthers the interest of CERCLA, and one of these interests is to encourage settlement to promote the speedy resolution of harmful environmental concerns."); *U.S. v. GenCorp, Inc.*, 935 F. Supp. 928, 934-35 (N.D. Ohio 1996) (approving settlement which did not disclose for each party the settlement amount, the proportion of liability and the rationale).

[53] *New York v. Panex Indus., Inc.*, 2000 WL 743966, at *3 (W.D.N.Y. 2000).

[54] *Id.*; *U.S. v. Davis*, 261 F.3d 1, 23 (1st Cir. 2001) ("A finding of procedural fairness may also be an acceptable proxy for substantive fairness, when other circumstantial indicia of fairness are present.").

[55] It is important to note that providing a calculated apportionment of liability or a substantive qualitative methodology may not pass muster where they are clearly or facially error-laden, inconsistent, or unsubstantiated (which is another way of stating that they must not be arbitrary or capricious). Broun and O'Reilly, *Settlement and Consent Decrees in CERCLA Actions*, § 13:1.

[56] *Commissioner v. Century Alumina*, 2008 WL 4693550, at *6 (D.V.I. 2008).

[57] *Id.*

[58] *Rohm & Haas*, 721 F. Supp. at 680.

[59] *Cannons*, 899 F.2d at 88.

figures.[60] Other factors assessed in evaluating fairness are (1) a comparison of the strength of the government's case versus the amount of the settlement offer; (2) the likely complexity, length, and expense of the litigation; (3) the amount of opposition to the settlement among affected parties; (4) the opinion of counsel; (5) the stage of the proceedings and amount of discovery already undertaken at the time of the settlement; (6) the possible risk of and transaction costs involved in litigation under CERCLA; (7) the ability of the defendant to withstand greater judgment; and (8) the effect of the proposed settlement on non-settling parties.[61] However, as noted above, a settlement is not unfair merely because a non-settling party may have to pay a disproportionate share of the plaintiff's costs.[62]

D. Reasonableness

Reasonableness is "primarily concerned with the probable effectiveness of proposed remedial responses."[63] As a result, an assessment of reasonableness should be "a pragmatic one, not requiring precise calculations."[64] Moreover, the "reasonableness" factor in a CERCLA settlement is "multifaceted." Three primary factors considered are (1) a settlement's efficiency as a vehicle for cleansing the environment; (2) whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial response measures; and (3) the relative strength of the parties' litigation positions.[65]

Settlements naturally facilitate environmental clean-up in the respect that they enable clean-up to commence and/or to be funded much earlier—sometimes many years earlier—than would be possible if parties went through the entire trial and appellate phases of litigation. Conversely, the delay of settlement may be a delay in the response to the environmental damage.[66] Thus, even where the outer limit of the trustee or government agency's claims may not be precisely known at the time of settlement negotiations, that should not necessarily be an impediment to approving the settlement agreement.[67] Arguably, no settlements would ever occur if uncertainty

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[60] *In re Acushnet River Proceedings*, 712 F. Supp. at 1032 ("in the general run of CERCLA cases, this Court imagines the defendants will generally settle for substantially less—indeed, often for far less given the inherent problems of proof in these cases—than the asserted damages. The Court further imagines that in all of these cases the non-settlors will be able to muster the very argument raised here: fairness requires a proportionate reduction. And so the last phrase of the statute, squarely placing the balance of the settled share of the non-settlors, disappears. This Court will not frustrate Congress's will.")

[61] *Rohm & Haas*, 721 F. Supp. at 680; *Fort James Operating*, 313 F.Supp.2d at 908.

[62] *Tutu*, 326 F.3d. at 208.

[63] *U.S. v. Gen. Elec. Co.*, 460 F. Supp. 2d 395, 401 (N.D.N.Y. 2006) *aff'd sub nom Town of Ft. Edward v. U.S.*, 2008 WL 45416 (2d Cir. 2008).

[64] *Grand Rapids*, 166 F. Supp. 2d at 1226.

[65] *Cannons*, 899 F.2d at 89-90.

[66] *Technichem*, 2013 WL 3856386, at *3-4.

[67] *Id.*

about the exact total of clean-up costs or allocation of liability could prevent the settlement of claims.

Although the degree to which a settlement compensates the public for remedial costs (a factor that overlaps with the comparative fault allocation aspect of substantive fairness) may seem to require a concrete estimate, courts' interpretation of this factor has been very lenient. For example, the *Cannons* court stated that "if the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise."[68] Further, comparative fault discounts are justifiable under numerous circumstances, including: where the settling party assumes an open-ended risk, where the parties desire a speedy resolution to litigation, or where the settlement will result in the savings of transactional costs.[69]

Litigation risks are the third facet of reasonableness.[70] Arguably, "the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible."[71] And, again, courts "should permit the agency to depart from rigid adherence to formulae wherever the agency proffers a reasonable good-faith justification for such a departure."[72]

With that said, the judicial review process is not a rubber stamp,[73] and parties should carefully and diligently calculate their comparative fault determinations and negotiate their settlements with these factors in mind.

E. Adequacy[74]

Adequacy is a "pragmatic concept," requiring "common sense, practical wisdom, and a dispassionate assessment of the attendant circumstances."[75] "[T]he proper way to gauge the adequacy of settlement amounts to be paid by settling PRPs is to compare the proportion of total projected costs to be paid by the settlers with the proportion of liability attributable to them, and

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[68] *Cannons*, 899 F.2d at 90.

[69] *Id.* at 88.

[70] *Rohm & Haas*, 721 F. Supp. at 680.

[71] *Dep't of Pub. Advocate, Div. of Rate Counsel v. N.J. Bd. of Pub. Utils.*, 206 N.J. Super. 523, 528 (N.J. App. Div. 1985).

[72] *U.S. v. Charter Int'l Oil Co.*, 83 F.3d 510, 521 (1st Cir. 1996); *Cannons*, 899 F.2d at 88.

[73] *In re Taylor*, 158 N.J. at 657 (internal citations omitted).

[74] While some courts consider adequacy to be a separate factor in the standard of review for NRD settlements, *see, e.g.*, *Akzo Coatings*, 949 F2d at 1423, others view adequacy as a subset of substantive fairness.

[75] *Cornell-Dubilier Elecs.*, 2014 WL 4978635, at *10 (citing *Charles George Trucking, Inc.*, 34 F.3d at 1085 (1st Cir. 1994)).

then to factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified."[76] At least one court has quantified adequacy by likening total damages to a "denominator" and a party's approximate share of the damages as the "numerator."[77]

Adequacy is related to, if not derived almost entirely from, how fair and reasonable a settlement is. Because adequacy rarely has been discussed outside of the contexts of fairness and reasonableness, examples of the types of settlements courts have found to be inadequate are particularly helpful here. In one case, a proposed final settlement of $34,844 was rejected where the court held that it could not evaluate the fairness and reasonableness of the settlement because there was no preliminary estimate presented of the natural resource damages at issue.[78] Similarly, in *U.S. v. Allied Signal, Inc.*, the court rejected a settlement because the settling defendant had a majority of the liability but paid a much smaller portion of the total damages, which occurred only at a single site and which were capable of precise measurement.[79] Further, a court rejected a proposed settlement of $35,000 where a preliminary estimate of the settling defendant's total liability was $646,000.[80] No reasons were offered as to why the settlement was so low. The court therefore found that the settlement was not roughly correlated to an acceptable measure of comparative fault and did not apportion liability according to rational estimate of fault.[81]

Nevertheless, as stated in the reasonableness and fairness sections, as long as the data used by the agency to apportion liability for purposes of a settlement "falls along the broad spectrum of plausible approximations, judicial intrusion is unwarranted."[82]

F. Consistency with CERCLA

[76] *See, e.g., Montrose*, 50 F.3d at 746; *Ariz. Dep't of Envt'l Quality v. Acme Laundry & Dry Cleaning Co.*, 2009 WL 5170176, at *2 (D. Ariz. 2009) ("We cannot evaluate the fairness and reasonableness of the parties' proposed consent decree at this time because they have not provided a preliminary estimate of the natural resource damages at issue."); *Century Alumina Co.*, 2008 WL 4693550, at *3-7 (court could not evaluate fairness of settlement "without an estimation of the total response costs"). In *Montrose*, the Ninth Circuit reversed approval of a CERCLA settlement whose overall basis was not in the record. 50 F.3d at 747. There, the district court had no information from which to conclude that the overall $45.7 million settlement figure was reasonable. The district court had failed to compare "the proportional relationship between the $45.7 million to be paid by the settling defendants and the government's current estimate of total damages . . . in light of the degree of liability attributable to the settling defendants." *Id.*

[77] *Boeing Co. v. N. W. Steel Rolling Mills, Inc.*, 2004 WL 540706, at *2-3 (9th Cir. 2004).

[78] *Acme Laundry & Dry Cleaning*, 2009 WL 5170176, at *2.

[79] 62 F. Supp. 2d at 719-22.

[80] *Kelly v. Wagner*, 930 F. Supp. 293, 298-99 (E.D. Mich. 1996).

[81] *Id*.

[82] *Cannons*, 899 F.2d at 90.

Congress enacted CERCLA in 1980 "[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[83] The *Cannons* court has stated that the intent and purpose of CERCLA were to provide accountability to responsible parties, the desirability of a clean environment, and the promptness of response activities.[84] Other courts have similarly remarked that the Congressional goal behind enacting CERCLA was to expedite effective remedial action and minimize litigation.[85] One commentator aptly characterized CERCLA's three overarching goals as "(1) the primacy of full restoration to damaged environments; (2) the encouragement of cooperative and effective settlement agreements; and (3) economic efficiency."[86] Consequently, delaying resolution of litigation until precise information is available runs counter to the purpose of environmental statutes: prompt settlement and prompt response activities.[87]

Again, in light of CERLCA's policy of encouraging early settlements, when a government agency charged with protecting the public interest "has pulled the laboring oar in constructing the proposed settlement," that settlement should be looked upon with greater favor by the court.[88] In other words, settlements arrived at and supported by a governmental agency receive more deference than settlements proposed by other parties. A review of what a government agency, such as the EPA, considers in constructing settlement guidelines is therefore informative to any party attempting to forge together a settlement agreement that can withstand judicial review. Nonetheless, as previously noted, while courts are generally willing to grant substantial deference to government agencies, especially federal agencies, they are not willing to accord *carte blanche* status to proposed settlements providing absolute finality.[89]

The EPA has internal guidelines on the appropriateness of CERCLA settlements. In its 1984 "Interim CERCLA Settlement Policy," it outlined ten key criteria for evaluating settlements, which are as follows:[90] (1) volume of wastes contributed to the site by each PRP; (2) nature of the wastes contributed;[91] (3) strength of evidence tracing the wastes at the site to the settling parties;

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[83] *See A.A.A. Realty Co.*, 935 F. Supp. at 1361 (citing Pub. L. No. 96-510, 5 Stat. 2767 (1980)).

[84] *Cannons*, 899 F.2d at 90-91.

[85] *Rohm & Hass*, 721 F. Supp. at 680.

[86] Martin Desjardins, *Ecosystem Services: Unifying Economic Efficiency and Ecological Stewardship Via Natural Resource Damage Assessments Under CERCLA*, 21 GEO. MASON L. REV. 717, 723 (2014).

[87] *Montrose*, 50 F.3d at 745.

[88] *Id.* at 746.

[89] *In re MTBE Litig.*, 2014 WL 2722002, at *5.

[90] "Interim Enforcement Policy for Private Party Settlements Under the Comprehensive Environmental Response, Compensation, and Liability Act," 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

[91] *Id.* ("If a waste contributed by one or more of the parties offering a settlement disproportionately increases the costs of clean up at the site, it may be appropriate for parties contributing such waste to bear a larger percentage of cleanup costs than would be the case by using solely a volumetric basis.") How this policy guidance may apply in an

(4) ability of the settling parties to pay;[92] (5) litigation risks in proceeding to trial (admissibility of evidence, adequacy of evidence, and the availability of defenses); (6) public interest considerations; (7) precedential value (whether in going to trial to set case law or approving a settlement that has precedential value); (8) value of obtaining a present sum certain;[93] (9) inequities and aggravating factors; and (10) the nature of the case that remains after settlement. These same standards might provide guidance to NRD trustees and settling parties, as they mirror standards articulated by reviewing courts.

G. The Record and Articulation of Analysis

Two final considerations for parties either supporting or attacking a consent decree are whether the record contains the requisite evidence and whether the court has adequately articulated its analysis of the settlement.

The record should contain at least some evidence concerning every important point.[94] However, merely providing the court with evidence sufficient to evaluate an agreement's terms is not enough to satisfy an appellate review; instead, a "district court must actually engage with that information and explain in a reasoned disposition why the evidence indicates that the consent decrees are procedurally and substantively 'fair, reasonable, and consistent with CERCLA's objectives.'"[95] In order for a settlement to survive appellate review, a district court must indicate or explain how it arrived at its conclusion in approving that settlement.[96] Without such an explanation an appellate court has no way of determining whether the district court abused its discretion.[97]

H. An Example of CERCLA Settlement Standards at Work

NRD setting may depend on the impact and adverse changes caused to resource services, which can be a complex matter.

[92] *United States v. Coeur d'Alenes Co.*, 767 F.3d 873, 875 (9th Cir. 2014).

[93] "If money can be obtained now and turned over to the Fund, where it can earn interest until the time it is spent to clean up a site, the net present value of obtaining the sum offered in settlement can be computed against the possibility of obtaining a larger sum in the future. This calculation may show that the net present value of the sum offered in settlement is, in reality, higher than the amount the Government can expect to obtain at trial." 3 LAW OF CHEM. REG. AND HAZARDOUS WASTE, App. 6C (2014).

[94] *City of Tucson*, 761 F.3d at 1012.

[95] *Id.*

[96] *Jim Dobbas, Inc.*, 2015 WL 5026925, at *2 (where a district court does not set forth its analysis comparing the estimated liability of each party to a settlement with the settlement amount, "the court d[oes] not fulfill its responsibilities to independently assess the adequacy of the agreements and to provide a reasoned explanation for its decision")

[97] *City of Tucson*, 761 F.3d at 1012.

The United States District Court's opinion in *In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation* provides an example—albeit not of a proposed CERCLA NRD case—of how CERCLA settlement standards were applied in a multiparty case to defeat a proposed settlement involving uncertain and difficult to estimate damages.[98] The New Jersey Department of Environmental Protection ("NJDEP") alleged that numerous defendants contaminated, or threatened to contaminate, groundwater at or near service stations, refineries, and terminals throughout New Jersey.[99] The case concerned over 5,000 sites, but discovery was streamlined to focus on certain test sites. NJDEP had incomplete information about many of the sites' conditions making it difficult to estimate damages. The court held that this ultimately complicated the State's ability to build a viable record in support of its proposed settlement.

Plaintiffs sought damages for, among other things, "(1) the costs of restoring MTBE-contaminated groundwater ('restoration costs'), (2) the costs of past and future MTBE testing of all public water supplies, [and] (3) the costs of past and future treatment of all drinking water supplies containing detectable levels of MTBE . . . ."[100] NJDEP moved for judicial approval of a consent order that resolved all claims against one defendant, Citgo Petroleum Corporation ("Citgo"), and provided complete contribution protection for $23.25 million.[101] Several non-settling defendants objected to the settlement. The non-settling defendants argued that the proposed settlement was substantively unfair because it was not supported by the record, was disproportionate to the potential total damages, and there was not enough information in the record to evaluate whether Citgo was paying its proportionate share of damages.[102]

Specifically, the non-settling parties objected to NJDEP's method for estimating and calculating total damages, which ranged between a low and high end of $1.99 to $3.32 billion.[103] The non-settlors argued that NJDEP provided little to no basis for its assumptions that total estimated restoration costs at most sites would be roughly $50,000 per site. Further, the non-settlors maintained that NJDEP could not ignore one of its own expert's damages calculations, which tended to suggest that total damages might be substantially higher than those used to support the settlement rationale.[104] This damage estimate, they argued, tended to show greater total damages and further demonstrated that the proposed settlement was a substantively unfair, disproportionate settlement.

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[98] *See generally, In re MTBE Litig.*, 2014 WL 2722002.

[99] *Id.* at *2.

[100] *Id.*

[101] *Id.* at *3.

[102] *Id.* at *3 -*5.

[103] *Id.* at *4.

[104] This last argument was unpersuasive to the court, which noted that "Plaintiffs are free to ignore [the expert's] damages calculations, especially since they will not rely on them at trial. . . . Non-Settling Defendants will not be prejudiced." However, the court found the balance of the non-settlors' arguments convincing. *Id.* at *8-9.

The court held that NJDEP's methodology and assumptions for its damages calculations were lacking in enough foundation and substance to support the proposed settlement.

The court's opinion demonstrates, in part, that a comprehensive record based on substantial evidence and well-grounded assumptions is vital to bolstering and sustaining a proposed final settlement. This is a valuable lesson, especially for the very large and complex NRD cases, in which the governmental plaintiff is providing complete contribution protection to the settling PRP and there is a dispute as to the total injury or as to the allocation of harm or responsibility (whether allocating between different hazardous substances, distinct periods of discharges and impacts upon baseline, or one contaminant discharged at thousands of sites). The existence of such disputes may form the basis of valid objections to a proposed settlement that provides finality and absolute contribution protection to the settling PRP. These differences might be significant in determining a "fair" measure of damages and the proportionality of a final settlement amount attributed to one or more settling parties when compared to a realistic appraisal of potential total damages. Therefore, in order to withstand a challenge mounted by non-settling defendants subject to increased exposure, it is important that the settling parties construct a well-reasoned record to support complete contribution protection to the settling PRPs.

III. CONCLUSION

Despite the multitude of cases analyzing the factors involved in approving the settlement of environmental and NRD claims, only a few cases reject final settlements providing absolute contribution protection for settling PRPs as unfair to the remaining, non-settling defendants. Demonstrating that governing settlement standards have been breached requires a substantial showing. Nevertheless, settling parties and trustees should not take for granted court approval or overly rely upon the high barriers to attacking final settlements. Instead, they should take heed of those standards so that they can better defend a proposed settlement.

The cases make clear that settling parties must conduct a procedurally fair, arms-length assessment and settlement process. Settling parties would be wise to establish a substantial and transparent administrative record that supports the rationale of a proposed settlement, which is not built on mere assumptions. A sound record and proof that supports a proposed settlement may help demonstrate a solid basis for a proposed settlement with a PRP that wants finality. This type of proof assists a court in determining that a settlement is fair and in the public's interest.