Westlaw Journal
ENVIRONMENTAL
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 35, ISSUE 7 / OCTOBER 29, 2014

EXPERT ANALYSIS

9th Circuit Opinion May Create Hurdles For *De Minimis* Cercla Settlements

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Under Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, whenever a party has "resolved its liability to the United States or a state in an administrative or judicially approved settlement" or consent decree, that party "shall not be liable for claims for contribution regarding matters addressed in the settlement." Such settlements have become commonplace in the context of CERCLA actions, particularly with respect to what are known as "*de minimis* parties," a term generally referring to parties responsible for minimal amounts of contamination at a Superfund site.

These *de minimis* parties will often reach settlement agreements with federal or state agencies early on in the CERCLA process. By doing so, they avoid not only any future claims for contribution, but also potentially costly and time consuming litigation over both liability and the appropriate remedy for cleaning up the site. These settlements also serve as a means to simplify the CERCLA process going forward, as they allow federal and state agencies to more easily deal with and determine liability for potentially responsible parties that played a larger role in contamination.

Federal district courts have often given these settlement agreements a de facto "rubber stamp" of approval, deferring to the expertise and judgment of the government agencies that negotiated them. The seminal case on appellate review of a district court's approval of a CERCLA consent decree is *United States v. Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990). There, the 1st U.S. Circuit Court of Appeals explained:

> [A] district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling. In the first place, it is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to protection of the public interest has pulled the laboring oar in constructing the proposed settlement. ... Thus, the first layer of insulation implicates the trial court's deference to the agency's expertise and to the parties' agreement.
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> The second layer of swaddling derives from the nature of appellate review. Because approval of a consent decree is committed to the trial court's informed discretion, the court of appeals should be reluctant to disturb a reasoned exercise of that discretion. ... The double required deference — district court to agency and appellate court to district court — places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree.[1]

Based on this notion of a double layer of "swaddling," federal appellate courts have almost never reversed a district court's decision to approve a CERCLA consent decree. In fact, as noted in *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 373 (7th Cir. 2001), there appears to be only one such case where a circuit court found an inadequate factual basis to approve the consent decree: *United States v. Montrose Chemical Corporation of California*, 50 F.3d 741 (9th Cir. 1995). There, the 9th

Circuit reversed the opinion, holding that the District Court could not have possibly determined that the settlement in question was "fair and reasonable," because it had never been informed of the estimated total costs of the cleanup.[2]

Until recently, *Montrose* remained the lone instance where a circuit court had taken such action. Then came *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. Aug. 1, 2014), a split decision from the 9th Circuit. The majority in *Arizona* found that the District Court had failed to adequately scrutinize the terms of proposed consent decrees between the Arizona Department of Environmental Quality and a number of *de minimis* parties. The 9th Circuit, therefore, afforded the ADEQ undue deference when approving the proposed consent decrees.

The case did not technically alter the previous standard of review established by the 9th Circuit. It does indicate, however, that state agencies, as well as the parties with which they are settling, may need to provide more concrete evidence for district courts to adequately judge the terms of any proposed consent decree resolving CERCLA liability. It may also serve as a useful tool for parties challenging such settlements in the future.

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DISTRICT COURT APPROVES CONSENT DECREES

After the ADEQ conducted a substantial investigation of soil and groundwater contamination at the Broadway-Patano Landfill site in Tucson, the state began settlement negotiations with numerous potentially responsible parties. These parties sought not only to resolve their liability under CERCLA, but also under the Arizona state law counterpart, the Arizona Water Quality Assurance Revolving Fund.[3]

After reaching 18 different settlements with 22 *de minimis* parties, the ADEQ sought to obtain judicial approval of these settlements, as required by 42 U.S.C. § 9613(f)(2). The state filed a public notice stating its intent to enter into settlements with the parties and then moved to enter the 18 proposed consent decrees. According to the motion, the state estimated the total cost of remediation to be $75 million, and the settling *de minimis* parties were only liable for an estimated 0.01 percent to 0.2 percent of the total cost.[4]

Several parties objected to the *de minimis* settlements and filed motions to intervene. These parties argued that the state had failed to provide the U.S. District Court for the District of Arizona with sufficient information to adequately determine whether the consent decrees were fair.

At the request of the court, the state submitted a supplemental affidavit, along with supporting documents, from an ADEQ chemical engineer. The documents said the ADEQ relied on the U.S. Environmental Protection Agency's guidelines to allocate responsibility to the various potentially responsible parties in question. Furthermore, the documents explained that the ADEQ arrived at the figures by reviewing over 100,000 pages of documents and over 800 witness interviews.

The intervenors said the state had still failed to provide the court with enough information, because it did not specify how each potentially responsible party's settlement figure or specific allocation was calculated.[5]

Finding that courts generally "give deference to the government's evaluation," the District Court approved the proposed consent decrees. In a footnote, the court provided the state's estimates for the total cost of remediation and the range of liability for the settling parties, but no other analysis of the figures. Instead, the court simply explained that the state had informed the court of the supporting materials and methods used to arrive at the figures.

In response to the intervenors' argument that further review and analysis was required, the court held that "such in-depth review of the facts and circumstances is not appropriate. Indeed, although intervenors argue that such review is needed, intervenors have not pointed to any controlling precedent that requires such in-depth review."[6]

9TH CIRCUIT OPINION

On appeal, the 9th Circuit vacated the District Court's decision to approve the consent decrees and remanded the case for further proceedings. Citing *Montrose*, the majority explained:

> In approving a CERCLA consent decree, the district court has an obligation to independently scrutinize the terms of the agreement. In so doing, the court must gauge the adequacy of settlement amounts to be paid by settling parties by comparing the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them, and then factor into the equation any reasonable discount for litigation risks, time savings and the like. A district court abuses its discretion where it does not fulfill its obligation to engage in this comparative analysis.[7]

The majority recognized that the District Court noted this obligation to independently scrutinize the terms of the agreements. It emphasized, however, that "nowhere in the District Court's opinion [was] there an analysis comparing each party's estimated liability with its settlement amount, or an explanation of why the settlements are fair, reasonable and consistent with CERCLA's objectives."[8] Instead, the majority found that the lower court had "merely accepted the state's representation that the settlements were substantively fair and reasonable."[9]

The majority also responded to the District Court's position that it owed deference to the ADEQ and "must defer to the ADEQ's judgment unless it is arbitrary, capricious and devoid of any rational basis." In countering, the majority said, "where a state, as opposed to the federal government, is a party to a proposed CERCLA consent decree, we do not defer to the state [to] the same degree ... as we would the federal government."[10]

In support of this position, the majority quoted language from *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70 (1st Cir. 2008), where the 1st Circuit said:

> Federal courts generally defer to a state agency's interpretation of those statutes it is charged with enforcing, but not to its interpretation of federal statutes it is not charged with enforcing. We choose to accord some deference to [the state's] decision to sign onto the consent decree, but not the same amount of deference we would accord the EPA in a consent decree involving the United States. We give deference in recognition that the state agency has some expertise. The lesser deference does not displace the baseline standard of review for abuse of discretion.[11]

Relying on *Bangor*, the majority found that the ADEQ's interpretation of CERCLA was not entitled to the same deference that would normally be afforded to EPA in a similar situation. Moreover, in a footnote, the majority suggested the amount of deference could vary from state to state: "State agencies, including those charged with enforcing environmental laws, may vary from state to state in terms of their competence, their resources and their philosophies concerning the enforcement of environmental laws. These considerations are ones that may properly take into account in assessing the deference owed to an agency's expertise."[12]

Judge Consuelo Maria Callahan wrote a dissenting opinion arguing that the majority should not have addressed the issue of deference owed to state agencies, which was not raised by the parties, and that the majority incorrectly decided the issue. Judge Callahan said the majority's decision was "inconsistent with the principles that guide ... review of consent decrees in general and the decisions of [other] circuits in this context." She also said states will now have a more difficult time playing "the role that Congress envisioned for them in remediating" sites under CERCLA.[13]

In support of this position, Judge Callahan cited *Cannons* and *Montrose*. She argued that the rationale for affording deference to the EPA in reviewing CERCLA consent decrees is based on "(a) CERCLA's policy of encouraging settlements; (b) ... settlements [being] constructed by a government actor committed to protect[ing] the public interest; (c) respect for the agency's expertise; and (d) respect for an arm's-length agreement reached by sophisticated parties."[14]

According to Judge Callahan, all of these factors similarly "support extending significant deference to state environmental agencies."[15]

POSSIBLE RAMIFICATIONS OF *ARIZONA V. TUCSON*

District court review of CERCLA consent decrees is not a new concept, and it is well settled that district courts must independently evaluate consent decrees to ensure they are fair and

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reasonable. District courts, however (at least those in the 9th Circuit and any other circuits that follow the 9th Circuit's rationale), could be required to dive deeper into CERCLA consent decrees than they might have previously.

Relying on an agency's explanation of the methods used to arrive at the settlement figures, no matter how thorough, will likely not suffice. The court will need enough data to compare the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them.

Regulatory agencies should similarly view the opinion as a warning that their settlement agreements may not receive automatic approval, and that sufficient evidence must be provided in the record to support them. This will be particularly true in the case of early *de minimis* settlements, where there may not be much information available, and the methodologies behind apportioning liability remain relatively inexact.

Notably, the majority said, "[e]ven if the EPA had been a party to the proposed consent decrees in this case, the district court would have failed to fulfill its duty to independently scrutinize the parties' agreements."[16] Therefore, the opinion serves as a reminder to both state and federal agencies of their duty to sufficiently support their settlement agreements.

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Additionally, while district courts may afford broader deference to the EPA in reviewing these settlement agreements, the majority's opinion suggests that state agencies may be given significantly less deference. As is suggested in Judge Callahan's dissenting opinion, such a position is arguably at odds with Congress' intent that states have a central role in enforcing CERCLA and the ability to independently enter into early settlement agreements with potentially responsible parties.

Congressional intent aside, the EPA does not have the resources to address the overwhelming number of contaminated sites throughout the country and must rely on state agencies. Nonetheless, the majority's opinion is in harmony with the 1st Circuit's opinion in *Bangor.* State agencies, as well as the parties with which they are settling, must be keenly aware that they are unlikely to be afforded the same deference as EPA with respect to CERCLA settlements.

Lastly, because potentially responsible parties who do not enter into settlement agreements may ultimately be forced to pay a disproportionate share of liability, courts have generally held that those parties have standing to intervene in CERCLA actions, opposing the settlements.[17] The majority's decision could, therefore, prove to be a valuable tool for any non-settling potentially responsible parties who intervene and object to CERCLA settlement agreements, particularly those with state agencies.

NOTES

[1] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (citations and quotations omitted).

[2] *United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 747 (9th Cir. 1995).

[3] 761 F.3d 1005, at *1.

[4] *Id.* at *1–2.

[5] *Id.* at *8.

[6] *Id.* at *8–9.

[7] *Id.* at *4 (citations and quotations omitted).

[8] *Id.* at *5.

[9] *Id.*

[10] *Id.* at *5–6 (quotations omitted).

[11] *Id.* at *6 (quoting *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008) (internal citations omitted)).

[12] *Id.* at *6, n.8.

[13] *Id.* at *7.

[14] *Id.* at *12.

[15] *Id.* at *14.

[16] *Id.* at *7.

[17] *See, e.g., United States v. Aerojet Gen. Corp.*, 606 F.3d 1142 (9th Cir. 2010).

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