# THE STANDARD OF REVIEW FOR NATURAL RESOURCE DAMAGES SETTLEMENTS WITH GOVERNMENTAL ENTITIES


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## I. INTRODUCTION

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] By way of example, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provides statutory incentives that encourage PRPs to settle, as well as strong disincentives for non-settling PRPs. Specifically, when a PRP completely resolves remediation or natural resource damages ("NRD") claims with a trustee or governmental agency under CERCLA, the settling party receives contribution protection from the claims of all other PRPs and triggers 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. When statutes such as CERCLA afford contribution protection to settling parties, non-settling PRPs are precluded from making contribution claims against the settling parties for matters addressed or resolved in the settlement.[4] And, when one PRP settles and completely resolves its liability to the government, the liability of all other PRPs is reduced only by the dollar amount of the settlement.[5] As such,

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[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.*, *United States. v. Atl. Richfield Co*., No. CV89-039-BU-SEH (D. Mont. Dec. 16, 2022) (consent decree entered citing CERCLA standards); *United States.* v. *Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213, 22 (M.D.N.C. 2020) (applying CERCLA standards to a proposed consent decree under CERCLA); *United States. v. Bayer CropScience, Inc.*, No. 1:12-cv-10847-NMG (D. Mass. 2012) (consent decree entered following briefing under CERCLA settlement standards); *United States 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. Liab. Litig.*, 33 F. Supp. 3d 259, 264 (S.D.N.Y. 2014) (applying CERCLA standards to the State of New Jersey's proposed NRD settlement under the New Jersey Spill Act).

[3] *See* 42 U.S.C. § 9613(f)(2).

[4] 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. *See, e.g.*, *United States v. Chem. Waste Mgmt., Inc.*, No. 3:22-cv-132, 2022 WL 4957567, at *2 (S.D. Ohio Oct. 4, 2022) ("The covenant [not to sue] only attaches when the remedy has been implemented."); *Premcor Ref. Grp. v. Apex Oil Co*., No. 3:17-CV-738-NJR, 2020 WL 1235675, at *5 (S.D. Ill. Mar. 13, 2020) ("Certain courts have held that a settlement must make clear in unambiguous language that it intends to resolve parties' potential CERCLA liability."); *United States v. Land O'Lakes, Inc*., No. CIV-16-170-R, 2017 WL 706346, at *5 (W.D. Okla. Feb. 22, 2017) ("Again, the Consent Decree's limited scope does not apply to Land O'Lakes or Brownfields with regard to the Government's current CERCLA claim."). 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, non-settling PRPs do not have the same risk of paying more than their proportional share. *See Asarco, LLC v. Union Pac. R.R*., No. 2:12-CV-00283-EJL-REB, 2017 WL 639628, at *10 (D. Idaho Feb. 16, 2017) (allowing contribution claims against a settling defendant for sites not identified in the consent decree); *W.R. Grace & Co. v. Zotos Int'l, Inc*., 559 F.3d 85, 91 (2d Cir. 2009) (concluding that a consent decree that made no reference to CERCLA only resolved state law claims).

[5] 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. *See id.*

contribution protection is a powerful tool provided to encourage cleanup, restoration, and settlements, and it has been likened to a carrot and a stick by various courts.[6] Providing the settling parties with contribution protection is a strong statutory incentive to settle, and the possibility that "the non-settlors, being jointly and severally liable, must make up the difference" if the "settlor pays less than its proportionate share of liability" is an even stronger disincentive against not settling.[7]

Moreover, CERCLA does not require the government to open settlement offers to all PRPs,[8] however, due to the risk of disproportionate liability for non-settling defendants, Congress enacted procedural safeguards that must be followed in order for contribution protection to apply. First, CERCLA requires settlements to be judicially approved.[9] Further, 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, CERCLA also requires a notice and comment period.[10] This provides formal notice of the settlement to non-settling defendants, facilitates settlement discussions among PRPs, and allows non-settling PRPs to object to and challenge the appropriateness of a consent decree[11] embodying a settlement with fewer than all PRPs.[12] As a result, non-settling PRPs can come forward and object to a settling defendant's attempt to settle all of its liability for too little or on unfair terms.[13] In these situations, it is incumbent upon the

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[6] *See Am. Special Risk Ins. v. City of Centerline*, 180 F. Supp. 2d 903, 906 (E.D. Mich. 2001) ("Courts have described the contribution provision of § 9613(f) as a 'carrot and stick combination.'"); *see also United States v. Union Gas Co.*, 743 F. Supp. 1144, 1152 (E.D. Penn. 1990); *In re Acushnet River New Bedford Harbor*, 712 F. Supp. 1019, 1026 (D.Mass. 1989). Contribution protection places all the risk of absorbing any resulting shortfall on the non-settling party while shielding the government from such risk.

[7] *United States v. Union Gas Co.*, 743 F. Supp. 1144, 1152 (E.D. Penn. 1990).

[8] *See United States v. Doe Run Res. Corp.*, No. 15-CV-0663-CVE-JFJ, 2017 WL 4270526, at *6 (N.D. Okla. Sept. 26, 2017) ("CERCLA does not require the EPA to permit all PRPs to participate in settlement negotiations, and the EPA is free [to] negotiate and settle with whomever it chooses as long as the EPA acts in good faith.").

[9] *See* 42 U.S.C. § 9613(f)(2) ("A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.").

[10] *See id.* § 9622.

[11] "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.*, No. 1:13-cv-01550-SLD-JEH, 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*, No. 4:13–cv–01522–RBH, 2013 WL 6193100, at *2 (D.S.C. Nov. 26, 2013) (citation omitted).

[12] *See American Special Risk Insurance v. City of Centerline*, 180 F. Supp. 2d 903, 909 (E.D. Mich. 2001) ("Section 9622 of CERCLA, which sets forth a very specific and detailed notice and comment procedure for administrative settlements entered into by the EPA, evidences Congress's concern with procedural due process in such situations.").

[13] The U.S. Courts of Appeals for the Eighth, Ninth, and Tenth Circuits have held that non-settling PRPs have standing to intervene as of right to oppose the entry of a consent decree. *See United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1150 (9th Cir. 2010) (reasoning that "non-settling PRPs have a significant protectable interest in litigation between the government and would-be settling PRPs"); *see also United States v. Albert Inv. Co.*, 585 F.3d 1386, 1397 (10th Cir. 2009); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1166-67 (8th Cir. 1995). When seeking to intervene as of right, non-settling defendants may do so pursuant to Federal Rule of Civil Procedure

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[14] as the settlement of litigation is highly favored by courts[15]—especially in the context of environmental litigation.[16] In fact, courts look so favorably upon the settlement of lawsuits[17] that they are likely to approve a settlement when provided with almost any viable rationale, however tenuous, for apportioning liability.[18] To add to the difficulties that non-settlors face, claims for NRD are more amorphous

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24(a)(2) and CERCLA. The intervention provisions in the Federal Rules and CERCLA are similar and require a showing of four elements: (1) timeliness, (2) sufficient interest, (3) impairment of interest, and (4) adequate representation. However, "CERCLA places the burden of demonstrating that the existing parties adequately represent the potential intervenor's interests on the government instead of the movant." *Albert Inv. Co*., 585 F.3d at 1392.

[14] 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. *See* Fleta Stamen, *CERCLA Actions: "To Settle or Not to Settle?"*, 68 FLA. B.J. 63, 63-64 (Feb. 1994) ("CERCLA's structure and the courts' interpretation of CERCLA is designed to force PRP's [sic] to settle.").

[15] "Voluntary settlement of civil controversies is in high judicial favor." *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982); *Ctr. for Biological Diversity v. Envtl. Prot. Agency*, 56 F.4th 55, 71 (D.C. Cir. 2022) ("'Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute.'"); *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").

[16] 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), *overruled on other grounds by United States v. Bestfoods*, 524 U.S. 51 (1998); *United States v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213, 217 (M.D.N.C. 2020) ("Courts considering CERCLA cases have recognized that the usual federal policy favoring settlements is even stronger in the CERCLA context" (citing *B.F. Goodrich Co*., 99 F.3d at 527)); *United States v. Hercules, LLC*, No. 2:18-cv-62, 2019 WL 6403416, at *5 (S.D. Ga. Nov. 27, 2019) ("When reviewing a consent decree, the Court must be mindful that CERCLA encourages settlements.").

[17] Part of the reason for such leniency is that "discounts" to the apportionment of liability can be applied. *See In re Acushnet River & New Bedford Harbor Proc. re Alleged PCB Pollution*, 712 F. Supp. 1019, 1031-32 (D. Mass. 1989). Examples of when discounts may be applied include when a settlement is reached early in the litigation, when it is derived quickly, 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.

[18] *See United States 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 cleanup cases that would become insurmountable and that 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 cleanup 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

than cleanup-related claims.[19] For that reason, courts routinely exercise their discretion to approve NRD settlements.[20]

This article examines the general requirements applicable to a court's approval of a consent decree as well as the specific standard applicable to NRD settlements.

## II. STANDARD OF REVIEW[21]

Courts have a limited role when reviewing CERCLA settlements.[22] "The requirement of court approval is intended to help ensure that the proposed settlement will serve the public interest by facilitating restoration of the environment and by adequately compensating the taxpayers for the cleanup costs that will be incurred."[23] Courts review settlements under

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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.

[19] 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. *See In re Acushnet River New Bedford Harbor*, 712 F. Supp. 1019, 1032 (D. Mass. 1989) (noting "the inherent problems of proof" in NRD cases). 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 United States v. Allied Signal, Inc.*, 62 F. Supp. 2d 713, 721 (N.D.N.Y 1999) ("Significantly, a Consent Decree imposing liability based on allegedly representative models may be capricious when the actual conditions of the Site and estimated remediation costs are known."). In other words, where fairly precise information exists, courts expect more precise information than where claims for soft or undetermined damages are being settled. *See id.*

[20] *See United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 911 (E.D. Wis. 2004) ("Further, as stated, there is also a strong statutory preference for settlement in CERCLA cases.").

[21] 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*, No. 10-cv-1303, 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 by courts across the country. *See, e.g.*, *United States v. IMC E. Corp*., 627 F.Supp.3d 166, 173 (E.D.N.Y. Sept. 12, 2022) ("In reviewing a proposed consent decree, a district court must determine if it 'is fair, reasonable, and faithful to the objectives of CERCLA.'"); *Arizona v. Ashton Co*., No. CIV 10-634-TUC-CKJ, 2016 WL 3745979, at *1 (D. Ariz. July 13, 2016) ("The inquiry regarding whether to approve the consent decrees is whether the proposed settlements are procedurally and substantively fair, reasonable, in the public interest, and are consistent with the polices of CERCLA."); *Me. People's All. v. Holtrachem Mfg. Co*., No. 1:00-cv-00069-JAW, 2022 WL 3102401, at *21 (D. Me. Aug. 4, 2022) ("[A] trial court must ensure that a proposed consent decree 'is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; and that it is consistent with the objectives of Congress.'" (cleaned up)).

[22] *See Seggos v. Datre*, No. 17-CV-2684 (SJF)(ARL), 2019 WL 13180721, at *2 (E.D.N.Y. Sept. 30, 2019) ("When reviewing a proposed consent decree in the CERCLA context, a trial court's [] function is circumscribed: it must ponder the proposal only to the extent needed to satisfy itself that the settlement is [1] reasonable, [2] fair, and [3] consistent with the purposes that CERCLA is intended to serve." (alterations in original)).

[23] *United States v. Chem. Waste Mgmt., Inc.*, No. 3:22-cv-132, 2022 WL 4957567, at *2 (S.D. Ohio Oct. 4, 2022) (alterations in original).

CERCLA (whether for remediation costs or NRD) to determine if they are fair, reasonable, adequate, and consistent with CERCLA's objectives.[24] No single factor is dispositive to the evaluation process, and 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-settl[o]rs alike."[25] While the nebulous factors may prove frustrating to practitioners attempting to hammer out a viable settlement, their imprecise nature[26] can be construed to the advantage of parties seeking approval of proposed settlements and those opposing their entry, especially when there are data gaps regarding damage amounts or liability allocations.

In considering the standard of review courts employ, 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.[27] However, because reviewing courts are not "rubber stamps" for government-sponsored settlements,[28] it is equally important for counsel to maintain a sustainable settlement process and a record that demonstrates fairness and accountability for the bases of the settlement. Ensuring that the court is informed of a fair settlement process is especially important given a court's inability to modify proposed settlements.[29]

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[24] *See United States v Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1423 (6th Cir. 1991); *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990). This standard is applied to the review of CERCLA settlements, *see Cannons Eng'g Corp.*, 899 F.2d at 85, as well as settlements pursuant to other federal environmental laws, *see Me. People's All. v. Holtrachem Mfg. Co*., No. 1:00-cv-00069-JAW, at *49 (D. Me. Aug. 4, 2022) ("To determine the appropriate standard of review, the Court looks to caselaw on CERCLA consent decrees."); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983); *United States v. Browning-Ferris Indus. Chem. Serv., Inc.*, 704 F. Supp. 1355, 1356 (M.D. La. 1988). A decision by EPA or another governmental agency not to settle is not subject to judicial review and falls outside the scope of this article. *See* 42 U.S.C.A. § 9622(a); Caroline N. Broun & James T. O'Reilly, *Settlement and Consent Decrees in CERCLA Actions*, RCRA AND SUPERFUND: A PRACTICE GUIDE 3d § 13:1 (2014).

[25] *United States v. Kramer*, 19 F. Supp. 2d 273, 280 (D.N.J. 1998) (citing H.R. REP. NO. 253, pt. 3, 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

[26] 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*, No. C 12-5845 CRB, 2013 WL 3856386, at *3 (N.D. Cal. July 24, 2013).

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

[28] *In re MTBE Litig.*, 33 F. Supp. 3d 259, 264 (S.D.N.Y. 2014) ("Despite 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.'" (quoting *In re Taylor*, 158 N.J. 644, 657 (N.J. 1999)); *see also United States v. IMC E. Corp.,* 627 F.Supp.3d 166, 173 (E.D.N.Y. Sept. 12, 2022) ("While the Court may not simply rubber stamp these agreements, the Court is neither required nor encouraged to conduct a trial on the merits."). In addition, the deference government agencies receive "does not displace the baseline standard of review for abuse of discretion." *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008).

[29] *See United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990).

## 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 resolves NRD claims.

To warrant judicial approval, a consent 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 the case made by the pleadings, and (3) further the objectives of the law upon which the complaint is founded.[30] 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

Settlements arrived at by government entities enjoy a strong presumption of validity,[31] and are also afforded special deference by the reviewing courts.[32] However, the degree of deference courts give 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*

CERCLA delegated the primary responsibility of enforcing the statute and managing the cleanup of hazardous substances.[33] As such, courts must not "second-guess" the Executive

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[30] *See United States v. City of Waterloo*, No. 15-CV-2087-LRR, 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).

[31] *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986); *United States 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. *See* 42 U.S.C § 9607(f)(2)(C); 33 U.S.C § 2706(e)(2). This means that if trustees perform an NRD assessment in accordance with the regulations, the results of the assessment are presumptively correct. *See* U.S. Dep't 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.

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

[33] *See* 42 U.S.C. § 9604(a)(1).

Branch on a determination of what constitutes an appropriate settlement.[34] The prohibition on second-guessing the executive, typically EPA, 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.[35] This first layer of deference requires a district court to "defer to the EPA's expertise."[36] Courts show great deference to EPA's decision to settle because the federal executive is construing a statutory scheme that it has been "entrusted to administer."[37] 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, even if the public disagrees with the agency.[38] For example, in *United States v. Hercules, LLC*, EPA's proposed consent decree and chosen remedial plan received "voluminous public comments" that were critical of the decree and remedial plan.[39] However, the court determined that "the law requires the Court to give substantial deference to the EPA's judgments and selected remedial action plan as well as the parties' proposed resolution."[40] Accordingly, the court confirmed that despite the public's disapproval, courts "can only reject the decree if it is unlawful, unreasonable, or inequitable."[41]

The federal government is also entitled to another layer of deference. 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.[42] In their review, appellate courts "must confine

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[34] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). *But see In re MTBE Litig.*, 33 F. Supp. 3d 259, 264 (S.D.N.Y. 2014) (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).

[35] *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, No. 2:14-595 WBS EFB, 2015 WL 5026925, at *2 (E.D. Cal. Aug. 25, 2015); *see also United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011).

[36] *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995); *United States v. Chem. Waste Mgmt., Inc.*, 3:22-cv-132, 2022 WL 4957567, at *5 (S.D. Ohio Oct. 4, 2022) ("The presumption of settlement approval is particularly strong 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." (cleaned up)).

[37] *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *see also United States v. E.I. DuPont De Nemours & Co.*, No. 13-CV-810S, 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)); *United States v. BP Expl. & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001) (same).

[38] *See United States v. E.L Du Pont de Nemours & Co.*, No. 5:16-cv-00082, 2017 WL 3220446, at *36 (W.D. Va. July 28, 2017) ("On balance, while the trout community's concerns about exclusion of monies for trout-specific projects have some merit, the court is 'not willing to scrap on this basis the positive features of the settlement'").

[39] No. 2:18-cv-62, 2019 W: 6403416, at *2 (S.D. Ga. Nov. 27, 2019) ("These comments are overwhelmingly critical of the EPA's selected remedial action plan.")

[40] *Id.*

[41] *Id.*

[42] *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995); *Emhart Indus. v. U.S. Dep't of the Air Force*, 988 F.3d 511, 522 (1st Cir. 2021) ("The District Court's approval of the Decree 'is encased in a double layer of swaddling.'"). This level of deference is so great that appellate courts are "reluctant" to invalidate a district

[them]selves to a consideration of only the administrative record that was [] in place" at the time of the district court's review.[43] But, despite owing deference to EPA's 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."[44] For example, the U.S. Court of Appeals for the First Circuit recently affirmed a district court's approval of a consent decree in which the federal agencies paid merely $550,000 despite the fact that the estimated response costs totaled $100 million based not only on the deference owed to EPA, but also to the district court.[45]

### *2. Settlements with State Government Entities*

Courts give less deference to a state's decision to settle NRD claims than they would the federal government.[46] State entities are entitled to "some deference" (as opposed to no deference due to a private party)—but only to the extent the state agency has some expertise concerning the settlement.[47] 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.[48] For example, state agencies receive no deference on their interpretation of CERCLA requirements.[49] As a result of the reduced deference owed to state agencies, the

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court's entry of a consent decree "solely because the court failed adequately to set forth its reasons or the evidence on which they were based." *Emhart Indus.*, 988 F.3d at 530.

[43] *Emhart Indus. v. U.S. Dep't of the Air Force*, 988 F.3d 511, 523 (1st Cir. 2021) ("Accepting this understanding of the relevant record in this appeal, we reject the appellants' challenge to the District Court's decision to approve the Decree[.]").

[44] *United States v. Cornell-Dubilier Elecs., Inc.*, No. 12-5407 (JLL), 2014 WL 4978635, at *3 (D.N.J. Oct. 3, 2014).

[45] *See Emhart Indus. v. U.S. Dep't of the Air Force*, 988 F.3d 511, 529 (1st Cir. 2021) ("For the reasons that we have given, however, the District Court in the present case did not abuse its discretion in finding that here the EPA did provide such an explanation.").

[46] *See Arizona v. Ashton Co*., No. 10-634-TUC-CKJ, 2016 WL 3745979, at *2 (D. Ariz. July 13, 2016) (noting that the level of deference in approving settlements is reduced when a state, and not the federal, government is involved); *Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014).

[47] *Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014); *see also Arizona v. Ashton Co.*, No. 10-634-TUC-CKJ, 2016 WL 3745979, at *2 (D. Ariz. July 13, 2016) (finding ADEQ had expertise in environmental matters and determining that the court "will afford some deference to ADEQ's judgment concerning the environmental issues underlying the consent decrees"). However, at least one recent opinion implies that federal and state environmental agencies' settlement decisions should be accorded the same weight. *See United States v. PolyOne Corp.*, No. 1:13-cv-01550-SLD-JEH, 2014 WL 2781831, at *4 (C.D. Ill. June 19, 2014) ("[T]he 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)).

[48] *Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014) ("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").

[49] *See id.* at 1014-15.

double-swaddling test applicable to settlements with federal agencies does not apply to settlements with state government agencies.

### C. Standard of Review for CERCLA Settlements

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.

#### *1. Fairness*

The court must consider substantive and procedural components when evaluating a settlement's fairness in the CERCLA context.[50] Procedural fairness requires "candor, openness, and bargaining balance" in the negotiation process, while substantive fairness involves "corrective justice and accountability."[51] 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."[52]

##### a. Procedural Fairness

Procedural fairness requires courts to "look to the negotiation process and attempt to gauge its candor, openness and bargaining balance."[53] If parties engaged in settlement negotiations forthrightly, in good faith, and at arm's length among experienced counsel, procedural fairness will be satisfied.[54]

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[50] *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990).

[51] *Id.* at 86-87.

[52] *Dep't of Toxic Substance Control v. Technichem, Inc.*, No. C 12-5845 CRB, 2013 WL 3856386, at *3, *5 (N.D. Cal. July 24, 2013).

[53] *United States v. Doe Run Res. Corp.*, No. 15-CV-0663-CVE-JFJ, 2017 WL 4270526, at *6 (N.D. Okla. Sept. 26, 2017) ("CERCLA clearly states that the right of contribution of a settling PRP against non-settling PRPs is subordinate to the interests of the United States"); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990).

[54] *See United States v. Doe Run Res. Corp.*, No. 4:20-cv-00234-SRC, 2020 WL 3972001, at *3 (E.D. Mo. July 14, 2020) ("Relevant facts in determining procedural fairness include . . . whether the parties are knowledgeable about the issues, whether the parties have conflicting interests, and whether the parties are represented by experienced lawyers."); *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680-81 (D.N.J. 1999); *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); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990) (consent decrees at issue were procedurally fair where they were "negotiated at arm's length among experienced counsel" and "in good faith").

When settling parties comply with the CERCLA-mandated notice and comment period, procedural fairness is presumed to be satisfied.[55] For that reason, very few examples exist of settlements lacking procedural fairness outside the context of improper settlement negotiations that were not conducted at arm's length or in which the non-settling parties were unfairly excluded from participation in settlement discussions.[56]

### b. Substantive Fairness

Substantive fairness concerns whether a party is bearing "the cost of the harm for which it is legally responsible."[57] However, CERCLA does not require settling parties to apply a particular formula when assessing liability.[58] Settling parties should therefore apportion liability "according to rational (if necessarily imprecise) estimates of how much harm each PRP has done."[59] In other words, settlement terms must be based upon—and roughly correlated with—some acceptable measure of comparative fault.[60] For example, courts have found parties' assignment of liability based on periods of ownership and operation to be an "acceptable

[55] *See Garrison Southfield Park LLC v. Closed Loop Ref. & Recovery*, No. 2:17-cv-783, 2021 WL 4397865, at *2 (S.D. Ohio Sept. 27, 2021) ("There is a strong presumption of procedural fairness when CERCLA settlements are entered into voluntarily"); *United States v. Keystone Sanitation Co.*, No. 1:CV-93-1482, 1996 WL 33410106, at *7 (M.D. Pa. Apr. 29, 1996) ("[T]he procedures the EPA is mandated to follow prior to entering into Section 122(g) settlements afford non-settling parties with the appropriate procedural safeguards.").

[56] 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. *See United States v. IMC E. Corp.*, 627 F.Supp.3d 166, 174 (E.D.N.Y. Sept. 12, 2022) ("That Objecting Defendants were not included in these settlement discussions does not impact their fairness."); *United States v. Cornell-Dubilier Elecs., Inc.*, No. 12-5407 (JLL), 2014 WL 4978635, at *5 (D.N.J. Oct. 3, 2014) ("'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.'" (alteration in original) (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990))); *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.").

[57] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990).

[58] *See United States v. IMC E. Corp.*, 627 F.Supp.3d 166, 174 (E.D.N.Y. Sept. 12, 2022) ("Objecting defendants seek to impose a requirement of mathematical precision on the United States, but that standard is, however, contrary to the legislative directive the court is operating under."); *New York v. Next Millennium Realty, LLC*, No. 06-CV-1133 (SJF)(AYS), 2016 WL 11189177, at *3 (E.D.N.Y. 2016) ("Although accountability is of paramount importance, practical considerations prevent liability from being apportioned with absolute certainty or exacting precision.").

[59] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990); *United States v. Se. Penn. Transp. Auth.*, 235 F.3d 817, 825 (3d. Cir. 2000); *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 908 (E.D. Wis. 2004).

[60] *See In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003).

measure of comparative fault."[61] Courts have also accepted parties' use of EPA-approved models.[62]

The judiciary'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.[63] Courts use the highly deferential "arbitrary, capricious, and devoid of a rational basis" standard when analyzing the government's chosen method for assessing liability.[64] And, as the court in *United States v. Cannons Engineering Corp.* explained, the "judiciary [should] take a broad view of proposed settlements, leaving highly technical issues . . . to the discourse between parties . . . and [] treat each case on its own merits, recognizing the wide range of potential problems and possible solutions."[65] Accordingly, government agencies are allowed leeway to "diverge from an apportionment formula in order to address special factors not conducive to regimented treatment."[66]

Despite the court's deferential review, providing the court with a benchmark can assist it in determining a consent decree's substantive fairness.[67] A party supporting the 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."[68] However, as discussed above, since no set formula exists for measuring comparative fault,[69] courts will uphold any method that is not otherwise "arbitrary, capricious, and devoid of a rational basis."[70]

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[61] *United States v. Doe Run Res. Corp*., No. 4:20-cv-00234-SRC, 2020 WL 3972001, at *4 (E.D. Mo. July 14, 2020).

[62] *See Arizona v. Ashton Co.*, No. CIV 10-634-TUC-CKJ, 2016 WL 3745979, at *3 (D. Ariz. July 13, 2016) ("The allocation by ADEQ included using an established and accepted EPA model for allocations at landfill sites.").

[63] *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990).

[64] *Haber Land Co. v. Am. Steel City Indus. Leasing*, No. 1:18-cv-04091-JMS-MJD, 2020 WL 3259016, at *3 (S.D. Ind. June 1, 2020).

[65] 899 F.2d 79, 85-86 (1st Cir. 1990).

[66] *Id.* at 87-88.

[67] *Arizona v. Ashton Co.*, No. CIV 10-634-TUC-CKJ, 2016 WL 3745979, at *3 (D. Ariz. July 13, 2016) ("Here, the State has provided information from which the Court can evaluate the settlements.").

[68] *Dep't of Toxic Substance Control v. Technichem, Inc*, No. C 12-5845 CRB, 2013 WL 3856386, at *4 (N.D. Cal. July 24, 2013). (internal quotations omitted); *Garrison Southfield Park LLC v. Closed Loop Ref. & Recovery*, No. 2:17-cv-783, 2021 WL 4397865, at *10 (S.D. Ohio Sept. 27, 2021) ("In reaching a CERCLA settlement, parties may 'factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified.'").

[69] *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86-88 (1st Cir. 1990).

[70] *Id.* at 87; *Dep't of Toxic Substance Control v. Technichem, Inc*, No. C 12-5845 CRB, 2013 WL 3856386, at *3-4 (N.D. Cal. July 24, 2013); *Arizona v. Nucor Corp.*, 825 F. Supp. 1452 (D. Ariz. 1992). This arbitrary and capricious standard is expressly set forth in 42 U.S.C.A. § 9613(j).

Thus, to prove substantive fairness, a government entity must simply show that it "selected a reasonable method of weighing comparative fault."[71]

Additionally, courts recognize that determining culpability in the CERCLA context may prove to be difficult and often rely on additional factors in cases that are "seriously lacking in factual data by which a precise measurement of relative culpability may be calculated."[72] For example, a court "may infer substantive fairness through a finding of procedural fairness together with other circumstantial indicia of fairness."[73] Moreover, due to uncertainty of future events, a fair settlement may take into account the benefit of early resolution and reduced litigation costs.[74] Other factors that courts may assess in evaluating substantive fairness include (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 a greater judgment; and (8) the effect of the proposed settlement on non-settling parties.[75]

Ultimately, providing the court with a rational estimate of each party's liability when the settling party is achieving finality is the key to satisfying substantive fairness. The estimate does not need to be precise or accurate; it merely has to exist, be consistent with the goals of the governing law, and not be arbitrary, capricious, or clearly in error. And although the standard of review is deferential, settling parties who fail to disclose an estimate of comparative fault risk rejection by the reviewing court.[76] 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."[77]

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[71] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 88 (1st Cir. 1990).

[72] *New York v. Panex Indus., Inc.*, No. 94-CV-0400E(H), 2000 WL 743966, at *3 (W.D.N.Y. June 6, 2000).

[73] *Id.*; *United States 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."); *Emhart Indus. v. U.S. Dep't of the Air Force*, 988 F.3d 511, 529 n.10 (1st Cir. 2021) ("But, procedural and substantive fairness are not entirely discrete concepts; it is 'appropriate' for us 'to consider the adequacy of the process' in evaluating substantive fairness."); *United States v. Doe Run Res. Corp.*, No. 4:20-cv-00234-SRC, 2020 WL 3972001, at *4 (E.D. Mo. July 14, 2020) ("The Court is further assured of the substantive fairness of the Consent Decree by the fact that the United States provided public notice and an opportunity to comment on the Consent Decree and received no comments.").

[74] *See United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680 (D.N.J. 1989).

[75] *See id.*; *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 908-09 (E.D. Wis. 2004).

[76] *See Comm'r of Dep't of Planning & Nat. Res. v. Century Alumina Co.*, Nos. 2005/0062, 2007/114, 2008 WL 4693550, at *6 (D.V.I. Oct. 22, 2008).

[77] *See id.*

### *2. Reasonableness*

Additionally, when deciding whether to approve a CERCLA settlement, courts must determine whether it is reasonable.[78] The "reasonableness" requirement in a CERCLA settlement is "multifaceted" and should be "a pragmatic one, not requiring precise calculations."[79] Courts consider three primary factors when evaluating this requirement: (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.[80]

The first factor recognizes that settlements reduce environmental damage that would be caused by lengthy and protracted litigation.[81] Settlements naturally facilitate environmental cleanup by expediting the start of response actions and the receipt of funds—sometimes many years earlier than would otherwise be possible if parties went through the entire trial and appellate phases of litigation. Conversely, the delay of settlement may cause significant delays in the response to the environmental damage.[82] Thus, "[e]xcept in cases which involve only recoupment of cleanup costs already spent," the first factor is concerned "with the probable effectiveness of proposed remedial responses."[83]

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[78] *See United States v. Gen. Elec. Co.*, 460 F. Supp. 2d 395, 401 (N.D.N.Y. 2006). Some courts view "fairness" and "reasonableness" as "comparative" factors. *See State v. City of Tucson,* 761 F.3d 1005, 1012 (9th Cir. 2014) ("'Fair' and 'reasonable' are comparative terms."); *United States v. Pioneer Nat. Res. Co*., 452 F. Supp. 3d 1005, 1013 (D. Colo. 2020) (analyzing "fairness" and "reasonableness" as one factor); *United States v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213, 219 (M.D.N.C. 2020) (same).

[79] *United States v. Grand Rapids, Mich.*, 166 F. Supp. 2d 1213, 1226 (W.D. Mich. 2000); *United States v. Hercules, LLC*, No. 2:18-cv-62, 2019 WL 6403416, at *9 (S.D. Ga. Nov. 27, 2019) ("The reasonableness inquiry reflects the Court's limited duty to inquire into the technical aspects of the cleanup program proposed by a consent decree in order to ensure that the proposed settlement adequately addresses environmental and public health concerns." (cleaned up)).

[80] *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 89-90 (1st Cir. 1990); *United States v. Alsol Corp*., No. 2:13-cv-00380 (KSH) (CLW), 2021 WL 1050373, at *3 (D.N.J. Mar. 19, 2021) (considering "(1) the technical effectiveness of the plan for environmental cleanup; (2) the amount of monetary compensation to the public; (3) and the overall fairness of the decree in light of the relative strengths of the parties and foreseeable risk of loss."); *United States v. IMC E. Corp*., 627 F.Supp.3d 166, 176-77 (E.D.N.Y. Sept. 12, 2022) ("When assessing the reasonableness of a proposed consent decree, courts consider whether the judgment: (1) effectively ameliorates environmental contamination; (2) satisfactorily compensates the public for actual and anticipated costs; and (3) effectively weighs the relative strength of the parties' litigating positions.").

[81] This factor has no bearing when analyzing a consent decree that largely focuses on the recoupment of response costs. *See United States v. Dico, Inc*., 516 F. Supp. 3d 839, 848 (S.D. Iowa 2021) ("However, in a case like this in which the issue is largely that of the recoupment of cleanup costs already spent, the Court need not consider the 'technical adequacy' of the response actions.").

[82] *See Dep't of Toxic Substance Control v. Technichem, Inc*, No. C 12-5845 CRB, 2013 WL 3856386, at *3-4 (N.D. Cal. July 24, 2013).

[83] *United States v. Cannons Eng'g Corp*, 899 F.2d 79, 89-90 (1st Cir. 1990).

The second factor concerns the amount of past and future costs contemplated in the settlement. 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 of those costs, courts have interpreted this factor leniently. For example, one 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."[84] Thus, reasonableness may be satisfied despite uncertainty concerning a trustee or government agency's estimated cost of cleanup at the time of settlement negotiations.[85] Arguably, no settlements would ever occur if uncertainty about the exact total of cleanup costs or allocation of liability could prevent the settlement of claims.

Litigation risks are the third facet of reasonableness.[86] "[T]he 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."[87] And, again, courts "should permit the agency to depart from rigid adherence to formulae wherever the agency proffers a reasonable good-faith justification for departure."[88]

With that said, the judicial review process is not a rubber stamp,[89] and parties should carefully and diligently calculate their comparative fault determinations and negotiate their settlements with these factors in mind.[90]

### *3. Adequacy*[91]

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[84] *Id.* at 90.

[85] *See id.*

[86] *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680- (D.N.J. 1999).

[87] *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).

[88] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 88 (1st Cir. 1990).

[89] *See In re Taylor*, 158 N.J. 644, 657 (N.J. 1999).

[90] *See United States v. Alsol Corp.*, No. 2:13-cv-00380 (KSH) (CLW), 2021 WL 1050373, at *3 (D.N.J. Mar. 19, 2021) ("A settlement may be deemed unreasonable . . . if it is based on a clear error of judgment, a serious mathematical error, or other indicia that the parties did not intelligently enter into the compromise." (citations omitted))

[91] Not all courts consider adequacy to be a separate factor in the standard of review for CERCLA settlements. *See, e.g.*, *id.*, at *3; *United States v Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1423 (6th Cir. 1991). Some courts view adequacy as a subset of substantive fairness, while others view it as a subset of reasonableness. And some courts abstain from considering this factor at all. *See United States v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213, 218 (M.D.N.C. 2020) (finding that the consent decree was adequate without analyzing the "adequacy" factor independently).

CERCLA settlements must also be adequate. Adequacy is a "pragmatic concept," requiring "common sense, practical wisdom, and a dispassionate assessment of the attendant circumstances."[92] "[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 settlors with the proportion of liability attributable to them, and then to factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified."[93] 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.[94]

Adequacy is related to, if not derived almost entirely from, how fair and reasonable a settlement is. Because adequacy has rarely been discussed outside 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 NRD at issue.[95] Similarly, in another case, the court rejected a settlement because the settling defendant was found to be primarily responsible for the damage, but paid a much smaller portion of the total damages.[96] Further, another court rejected a proposed settlement of $35,000 where a preliminary estimate of the settling defendant's total liability was $646,000, and the parties failed to offer an explanation for the low settlement amount.[97]

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[92] *United States v. Cornell-Dubilier Elecs., Inc.*, No. 12-5407 (JLL), 2014 WL 4978635, at *10 (D.N.J. Oct. 3, 2014) (citing *United States v. Charles George Trucking, Inc.*, 34 F.3d at 1085 (1st Cir. 1994)).

[93] *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 747 (9th Cir. 1995) (emphasis omitted). *See also*, *e.g.*, *Ariz. Dep't of Envt'l Quality v. Acme Laundry & Dry Cleaning Co.*, No. CV-09-01919-PHX-FJM, 2009 WL 5170176, at *2 (D. Ariz. Dec. 21, 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 [NRD] at issue."); *Comm'r of Dep't of Planning & Nat. Res. v. Century Alumina Co.*, Nos. 2005/0062, 2007/114, 2008 WL 4693550, at *3-7 (D.V.I. Oct. 22, 2008) (concluding it could not evaluate fairness of settlement "without an estimation of the total response costs"). In *United States v. Montrose Chemical Corp.*, the U.S. Court of Appeals for the Ninth Circuit reversed approval of a CERCLA settlement where the record did not contain the settlement's overall basis. *See* 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 governments' current estimate of total potential damages . . . in light of the degree of liability attributable to the settling defendants." *Id.*

[94] *See Boeing Co. v. N. W. Steel Rolling Mills, Inc.*, No. 97-35973, 2004 WL 540706, at *2-3 (9th Cir. Mar. 17, 2004).

[95] *See Ariz. Dep't of Envt'l Quality v. Acme Laundry & Dry Cleaning Co.*, No. CV-09-01919-PHX-FJM, 2009 WL 5170176, at *2 (D. Ariz. Dec. 21, 2009).

[96] *See United States v. Allied Signal, Inc.*, 62 F. Supp. 2d 713, 719-22 (N.D.N.Y 1999).

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

Nevertheless, as stated in the reasonableness and fairness sections, "judicial intrusion is unwarranted" as long as the agency apportions liability by using data that "falls along the broad spectrum of plausible approximations[.]"[98]

### *4. Consistency with CERCLA*

Parties should consider CERCLA's objectives when negotiating a settlement. 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."[99] Due to the legislative history and the statute's unambiguous language, the intent and purpose of CERCLA to provide "accountability, the desirability of an unsullied environment, and promptness of response activities" has been accepted as settled law for several decades.[100] 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."[101]

Furthermore, given courts' deference to federal agencies, parties attempting to forge a settlement that can withstand judicial review should carefully review the principles EPA references when evaluating CERCLA settlements. In its 1984 "Interim CERCLA Settlement Policy," EPA outlined the following ten key criteria for evaluating settlements[102]: (1) volume of wastes contributed to the site by each PRP; (2) nature of the wastes contributed[103]; (3) strength of evidence tracing the wastes at the site to the settling parties; (4) ability of the settling parties to pay[104]; (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);

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[98] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 88 (1st Cir. 1990).

[99] *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1361 (D.N.J. 1996) (citing Pub. L. No. 96-510, Stat. 2767 (1980)).

[100] *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 91 (1st Cir. 1990*); Garrison Southfield Park LLC v. Closed Loop Ref. & Recovery*, No. 2:17-cv-783, 2021 WL 4397865, at *11 (S.D. Ohio Sept. 27, 2021) ("CERCLA's primarily goal is to facilitate the prompt cleanup of hazardous waste sites."); *Mission Linen Supply v. City of Visalia*, No. 1:15-CV-0672 AWI EPG, 2020 WL 5878275, at *4 (E.D. Cal. Oct. 2, 2020) ("One of CERCLA's central purposes is to facilitate expeditious and efficient cleanup of hazardous waste sites.")

[101] Martin Desjardins, *Ecosystem Services: Unifying Economic Efficiency and Ecological Stewardship Via Natural Resource Damage Assessments Under CERCLA*, 21 GEO. MASON L. REV. 717, 736 (2014).

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

[103] *Id.* ("If a waste contributed by one or more of the parties offering a settlement disproportionately increases the costs of cleanup 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 NRD setting may depend on the impact and adverse changes caused to resource services, which can be a complex matter.

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

(8) value of obtaining a present sum certain; (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.

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.[105]

### D. The Importance of Maintaining a Record of the Settlement Process

Two final considerations for parties either supporting or attacking the entry of 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.[106] However, merely providing the court with evidence sufficient to evaluate a settlement's terms is not enough to withstand 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.'"[107] For a settlement to survive appellate review, a district court must indicate or explain how it arrived at its conclusion in approving that settlement.[108] Without such an explanation, an appellate court has no way of determining whether the district court abused its discretion.[109]

### E. An Example of CERCLA Settlement Standards at Work

The U.S. District Court of the Southern District of New York'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.[110] The New Jersey Department of Environmental Protection ("NJDEP") alleged that numerous defendants contaminated, or threatened to contaminate, groundwater at or near service

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[105] *See In re MTBE Litig.*, 33 F. Supp. 3d 259, 264 (S.D.N.Y. 2014).

[106] *See Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014).

[107] *Id.*

[108] *See Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, No. 2:14-595 WBS EFB, 2015 WL 5026925, at *2 (E.D. Cal. Aug. 25, 2015) (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").

[109] *Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014). *But see Emhart Indus. v. U.S. Dep't of the Air Force*, 988 F.3d 511, 530 (1st Cir. 2021).

[110] *See In re MTBE Litig.*, 33 F. Supp. 3d 259, 264 (S.D.N.Y. 2014).

stations, refineries, and terminals throughout New Jersey.[111] 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 NJDEP's ability to build a viable record in support of its proposed settlement.

NJDEP 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[.]"[112] 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.[113] 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, it 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.[114]

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.[115] 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.[116] This damage estimate, they argued, tended to show greater total damages and further demonstrated that the proposed settlement was a substantively unfair, disproportionate settlement.

The court held that NJDEP's methodology and assumptions for its damages calculations were lacking in sufficient 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

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[111] *See id.* at 260-61.

[112] *Id*. at 261.

[113] *See id.* at 262.

[114] *See id.* at 265-67.

[115] *See id.* at 263.

[116] 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." *Id.* at 267. However, the court found the balance of the non-settlors' arguments convincing. *See id.* at 269-71.

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, 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 multiple 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 demonstrate 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 that 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 desires finality. This type of proof assists a court in determining that a settlement is fair and in the public's interest.

## AUTHOR BIOGRAPHIES

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Bill Jackson is co-chair of the Kelley Drye & Warren LLP's national Environmental Law practice group and a member of the firm's Executive Committee. Bill has one of the most sophisticated and successful environmental and natural resource damages litigation practices in the country. For over twenty-five years, Bill has represented states, port authorities, railroads and energy-sector clients in noteworthy contamination cases that are often valued into the hundreds of millions or billions of dollars at stake.

Notably, Bill is currently serving as lead counsel for fifteen states and sovereign territories in both litigation and administrative actions related to contamination and natural resource damages from Per- and polyfluoroalkyl substances (PFAS). He is lead counsel for several states bringing natural resource damages claims for PFAS discharges from industrial sites, and he is serving on the Plaintiffs Executive Committee and as Chair of the State/Sovereign Committee in the sprawling AFFF MDL in Charleston, South Carolina. Bill previously served as lead counsel in the record-setting representations of the State of New Jersey in its $355 million recovery in the Passaic River litigation, as counsel for the State of Louisiana in its $20 billion recovery in the Deepwater Horizon matter, and as counsel for the State of New Mexico in its record-setting recoveries on the Gold King Mine matter.

Bill is nationally recognized as a leader in environmental and natural resources law. Chambers and Partners recognized Bill as "Tier 1" in Environmental Law in Texas, and he has been recognized repeatedly by US Legal 500, US News/Best Lawyers, Law Dragon, and Super Lawyers for his work in the Environmental Litigation. For years, Bill has chaired LSI's Advanced Natural Resource Damages Program, and he is a regular speaker on environmental and natural resource damages matters. Bill taught Natural Resource Damages at the University of Houston Law Center, and he is now teaching Environmental Law & Policy at Rice University.

### Maria Pimienta

Maria Pimienta is an associate in the firm's Houston office. She focuses her practice on environmental and energy law. Her environmental practice includes serving as counsel for states, territories, and private-sector clients in disputes related to contamination and natural resource damages from emerging contaminants. In addition, Maria maintains a pro bono practice, focusing on issues related to immigration.

Prior to joining Kelley Drye, Maria served as a legal intern at the U.S. Department of Justice in the Civil Rights Division, Immigrant and Employee Rights Section. At Georgetown University Law Center, Maria served as Senior Proofing Editor of the Georgetown Immigration Law Journal and authored an article on the Deferred Action for Childhood Arrivals that was selected for publication. She also participated in Georgetown's Street Law program by teaching

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