If the EPA is happy, the case will stay settled.

As Environmental Regulatory Programs have matured, the government has taken a less flexible approach to negotiation and settlement of enforcement actions than was the case a decade past. There are laudable reasons for this evolution, principally conservation of limited personnel resources and application of consistent requirements and provisions on a national basis. This mechanized approach, however, can result in overly stringent or harsh agreements on particular issues, produce inequitable results, and impede resolution of contentious issues or dampen creative approaches to settling intractable disputes.

Negotiation and settlement attends enforcement at all levels — administrative, civil judicial, and criminal cases. If the government were forced to litigate every action, far fewer would be disposed of than can be resolved through negotiation and agreement. Accordingly, settlement is the cornerstone of the federal enforcement program. Indeed, Congress, in the 1986 Superfund Amendments and Reauthorization Act, emphasized settlements as a means to effectuate cleanup of hazardous wastes and to reduce the costs associated with protracted litigation, and EPA’s policy on self-policing furthers the settlement approach in enforcement actions. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg.
Section 122 of CERCLA42 U.S.C. §9622, provides specific authority for EPA to enter into negotiated settlements, and EPA’s mandate under section 122 is to seek settlement agreements whenever practicable and in the public interest in order to expedite remedial actions and to minimize litigation. See 42 U.S.C. §§9604(a)(1), 9606, and 9622. Guidance on CERCLA settlement policies include: Interim CERCLA Settlement Policy (Dec. 5, 1984); Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals (June 3, 1996); Addendum to the Interim CERCLA Settlement Policy (Sept. 30, 1997); Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties (Nov. 6, 2002). Given its quarter-century experience with CERCLA actions, EPA has devised model settlement documents for both judicial and administrative actions. Issuance of Model CERCLA Peripheral Party Cashout Consent Decree and Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree (Jan. 11, 2001); Issuance of Revised Model CERCLA Section 107 Consent Decree for Recovery of Past Costs and Revised Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs (Feb. 6, 2003); Issuance of Revised Model Administrative Order on Consent for Remedial Investigation and Feasibility Study (Jan. 21, 2004); Issuance of Model RD/RA Consent Decree (May 2001); Issuance of Revised Model CERCLA De Minimis Landowner Consent Decree and Revised Model CERCLA De Minimis Landowner Administrative Order on Consent (May 13, 2004); Issuance of Final Model Administrative Order on Consent for Remedial Design (Jan. 6, 2005); Issuance of Revised Model Administrative Order on Consent for Removal Actions (Jan. 30, 2007); Issuance of Revised Model RD/RA Consent Decree (August 1, 2011).

If EPA decides not to pursue settlement negotiations for a particular site, it is required to notify potentially responsible parties (PRPs) in writing, explaining the government’s decision. 42 U.S.C. §9622(a). Because settlement agreements generally are the preferred and most cost effective means for cleaning up sites, this paper addresses some of the principal issues associated with a typical negotiated settlement. This discussion first reviews the events normally associated with the settlement process and then explores some of the more commonly negotiated issues between EPA and PRPs, setting forth several negotiating issues and problems that arise regarding actual remediation efforts.

2. Normal Events In The Settlement Process

After EPA completes its task of identifying PRPs, it can initiate formal settlement action by notifying the PRPs that the government is willing to commence the settlement process. 42 U.S.C. §9622(a). In addition to this formal notification, CERCLA section 122 also requires that EPA provide certain information to these PRPs which is designed to enhance the likelihood that agreements can be reached among the PRPs. This information includes a listing of all identified PRPs by name and address, the volume and type of hazardous waste contributed by each PRP, and a ranking by volume of the hazardous substances at the site. 42 U.S.C. §9622(c)(1).

In an effort to provide PRPs with the opportunity to meet and discuss their settlement options, a statutorily-mandated moratorium is imposed upon further EPA actions following the formal PRP notification. 42 U.S.C. §9622(c)(2). Once the moratorium period commences, EPA is generally prohibited from initiate-
ing any cleanup or remedial actions for 120 days and from commencing a Remedial Investigation (RI) and Feasibility Study (FS) for 90 days. An exception to the time-imposed moratorium exists however, when: (1) EPA must respond to a significant threat to public health or the environment; or (2) the PRPs fail to submit a settlement proposal within 60 days of notification. 42 U.S.C. §9622(c)(2)(B) and 9622(c)(5). Upon such a failure, EPA may begin financing a response action or initiating a Remedial Investigation and Feasibility Study (RI/FS). Following completion of the RI/FS, EPA makes the preliminary identification of the appropriate site remedy in its Record of Decision (ROD). 40 C.F.R. §300.430.

Even when PRPs make a settlement offer within 60 days, EPA is authorized to begin negotiations only if the offer comes from a sufficient number of the PRPs so as to constitute a substantial proportion of the site cleanup costs, or a substantial portion of the necessary remedial action. Getting a sufficient faction of PRPs to agree among themselves as to their percentage of responsibility or their share of expenses is usually a formidable task which can often prevent EPA from considering any PRP proposal because it fails to meet the “substantial proportion” requirement. In order to assist in the allocation and settlement process, EPA is authorized to issue a Nonbinding Preliminary Allocation of Responsibility (NBAR). 42 U.S.C. §9622(c)(3)(A). While not binding in any future settlement negotiations or litigation against PRPs, this process allows EPA to allocate percentages of the total response costs to the various PRPs.

EPA’s allocation is usually prepared during the RI/FS stage and EPA expects its costs will be reimbursed by the PRPs. (EPA issued interim guidance for NBARs on May 28, 1987, see 52 Fed. Reg. 19919.) This allocation procedure has been somewhat helpful in negotiating shares of responsibility between generators, based almost exclusively on volume of waste, and also between owners and operators, based mostly on length of ownership and culpability. The main drawback to this nonbinding allocation procedure has been EPA’s inability to determine an equitable way to allocate responsibility between generators and owners or operators. The NBAR allocation process should not be anticipated as a particularly helpful opportunity, because it is not often used in settlements. But note that in 1989, EPA participated in a consent decree which involved 533 settling parties. This negotiated compromise represented the largest number of participants in a single settlement as of that point in the history of the Superfund program. Hazardous Waste Lit. Rep. (Andrews) 17,328 (June 5, 1989).

That said, NBARs have not been popular with EPA or PRPs. The few that have ever been prepared were done soon after the 1986 CERCLA amendments. NBARs were possible only for sites at which much was known about the waste — in volume, waste types, and the identities of sources.

3. Negotiated Settlements

**Mixed Funding Settlements.** The 1986 CERCLA amendments provided numerous provisions that can assist EPA in reaching negotiated settlements. Chief among these was a provision specifically authorizing EPA to enter into “mixed funding” agreements. 42 U.S.C. §9622(b)(1). This particular amendment provided EPA with more flexibility in negotiating settlements by reducing the detrimental effects of joint and several liability and by enhancing the opportunity for agreements when there were nonsettling, undiscoverable or insolvent PRPs. Under the mixed funding concept, EPA is authorized to supplement the settling PRPs’ contributions to site cleanup or to reimburse them for cleanup costs attributed to recalcitrant or insolvent PRPs. EPA also is required to make reasonable efforts to recover the amount of such reimbursements from nonsettling PRPs.
Insolvents. As for insolvent PRPs who file for bankruptcy protection after commencement of a CERCLA action, EPA aggressively pursues its remedy provisions once the companies are reorganized. See Jonathan K. Van Patten and Richard D. Puetz, Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy, 35 S.D.L. Rev. 220 (1990) for a general discussion on the subject. For example, in In re Paris Industries Corp., a federal bankruptcy court approved a novel settlement whereby part of the purchase price of the bankrupt company was transferred to the state and used toward cleanup costs. 106 B.R. 344 (Bankr. D. Me. 1989).

The General Motors bankruptcy is another important example of the EPA’s pursuit of CERCLA settlements in bankruptcy proceedings. GM filed for Chapter 11 Bankruptcy in June 2009, and on November 29, 2009, the Department of Justice filed proof of claims on behalf of a number of government agencies that incurred cleanup costs in connection with GM properties. To resolve these claims, the parties entered into a settlement agreement in Oct. 2010 under which a $773 million Environmental Response Trust will be created for response, remediation, and oversight in connection with 89 GM-owned properties. Motors Liquidation Company Bankruptcy Settlement, http://www.epa.gov/compliance/resources/cases/cleanup/cercla/mlc/.

In March 2011, the bankruptcy court approved an additional seven settlements for a total of over $30 million dollars and additional amounts in unsecured bankruptcy claims to satisfy GM’s CERLCA liabilities at other sites.

De Minimis Settlements. Aside from mixed funding agreements, the 1986 amendments also enhanced EPA’s efforts in reaching negotiated settlements by providing a method for cashout settlements with de minimis PRPs. 42 U.S.C. §9622(g). Although CERCLA only refers to expedited settlements with de minimis polluters, EPA normally seeks to reach these agreements through cash-out settlements. Previously, many de minimis PRPs would refuse to participate in any settlement negotiations with EPA because their negotiation transaction costs quickly exceeded their actual liability. Section 122(g) helps resolve this dilemma by authorizing EPA to reach cash-out settlements with parties whose contributions to the site were minor in terms of volume and toxicity of waste contributed, or as to site owners, who were not aware, and had no reason to be aware, of the contamination when they purchased the property. A de minimis settlement must be entered as a consent decree or embodied in an administrative order. CERCLA’s de minimis provision has significantly improved EPA’s ability to reach negotiated settlements. EPA has issued several guidance documents on de minimis settlements. The most recent document, issued in 1995, contains the language of the Revised Model CERCLA Section 122(g)(4) De Minimis Contributor Consent Decree and the revised Model CERCLA Section 122(g)(4) De Minimis Contributor Administrative Order on Consent. 60 Fed. Reg. 62,849 (Dec. 7, 1995). See also, EPA Memorandum on Revised Model CERCLA De Minimis Landowner Consent Decree and Revised Model CERCLA De Minimis Landowner Administrative Order on Consent (May 13, 2004). EPA has also published guidance on its policy toward:

• Owners of property containing contaminated aquifers. Final Policy Toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34,790 (July 3, 1995);
• Early de minimis waste contributor settlements. Early De Minimis Waste Contributor Settlements, 57 Fed. Reg. 29,312 (July 1, 1992);


### 4. Releases From Future Liability

**Covenant Not To Sue.** Another major stumbling block to the settlement process before the 1986 amendments involved releases from future liability for settling parties. Most PRPs were hesitant to settle without any assurances of protection from future liability. Section 122 addresses this issue by authorizing EPA to grant releases when: (1) they are in the “public interest”; (2) such a covenant would expedite the response action; (3) the PRPs are in full compliance with the consent decree; and (4) the response action has been approved by EPA. 42 U.S.C. §9622(f)(1). EPA’s willingness to give expansive releases from liability is directly related to the confidence the Agency has that the remedy will ultimately prove effective and reliable. While these covenants provide security to settling PRPs, EPA must include in most consent decrees “reopener” clauses that allow for future liability for unforeseen and unknown conditions that arise following completion of the remedial actions. 42 U.S.C. §9622(f)(6)(A). The covenant not to sue does not take effect until EPA certifies that the remedial action has been completed. 42 U.S.C. §9622 (f)(3).

**Contribution Protection.** Closely tied to the covenant not to sue is the issue of contribution protection. Many PRPs previously refused to enter into settlement agreements because of their concern over their possible liability to nonsettling PRPs. Thus, settling PRPs sought a guarantee from the government that they would not later be found liable for contribution to those nonsettling PRPs subsequently sued by EPA. In an effort to encourage settlements, the 1986 amendments added two provisions (sections 122(g)(5) and 113(f)(2)) which provide that a party who has entered into an approved settlement with the federal or any state government shall not be held liable for any contribution claims pertaining to matters addressed in the settlement. In the typical consent decree contribution protection clause, EPA agrees to reduce its judgment against the nonsettling parties to the extent necessary to extinguish the settling party’s liability to the nonsettling third party.

CERCLAs section 113 contribution protection provisions establish that: “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.” 42 U.S.C. §9613(f)(2). PRP contribution liability was also restricted by a recent U.S. Supreme Court ruling, *Cooper Industries, Inc. v. Aviall Services, Inc.* 543U.S. 157 (2004). In 1981, Cooper Industries sold properties to Aviall Services. Both Cooper and Aviall were responsible for contamination of these properties. Aviall notified the State of Texas about the contamination and performed a cleanup, but neither Texas nor the Federal government took any judicial or administrative measures regarding the cleanup. When Aviall sold the properties to a third party, it remained contractually liable for additional cleanup costs, which formed the basis of its cost recovery action under section 113 against Cooper Industries. However, since Aviall had never been sued under section
106 or section 107 of CERCLA, the Supreme Court held that Aviall could not obtain contribution under section 113 from Cooper.

Even though the Court expressly declined to address that issue, a few courts have held that the Aviall decision called into question whether a PRP that incurred response costs under an Administrative Order by Consent (AOC) could obtain contribution from other PRPs. While several courts have allowed a PRP to obtain contribution for work done pursuant to an AOC, a few courts have declined to do so based on a narrow reading of Aviall. See Responsible Environmental Solutions Alliance v. Waste Management, 493 F. Supp. 2d 1017 (S.D. Ohio 2007); Durham Mfg. Co. v. Merriam Mfg. Co., 294 F. Supp. 2d 251 (D. Conn. 2003); Central Illinois Public Service Co. v. Industrial Oil Tank & Line Cleaning Service, 730 F. Supp. 1498 (W.D. Mo. 1990). For example, in Pharmacia Corp. v. Clayton Chemical Acquisition, 382 F. Supp. 2d 1079 (S.D. Ill. 2005), the U.S. District Court for the Southern District of Illinois held that the AOC at issue did not satisfy the requirements of Aviall, since it constituted an administrative order and not an administrative settlement which would give rise to the right of contribution under section 113. To address the risk that a court might apply the Aviall decision narrowly and bar contribution claims for work under an AOC, settling parties should consider asking EPA to amend existing AOCs to reference section 122 and ensure that future AOCs also reference section 122.

The Aviall issue appears to be less significant in light of the Supreme Court’s holding in United States v. Atlantic Research 551 U.S. 128 (2007). In Atlantic Research, a company that retrofitted rocket motors for the U.S. Department of Defense voluntarily cleaned up soil and groundwater contaminated during the retrofit process and sought to recover the cleanup costs from the United States pursuant to CERCLA section 107(a). Resolving a post-Aiviall split in the federal circuit courts of appeal on the issue, the Supreme Court ruled that PRPs who voluntarily remediate a site may seek to recover costs incurred pursuant to section 107. Under Atlantic Research, actions for cost recovery are therefore not limited to “innocent” parties — as many federal courts had long held, but which some courts revisited post-Aiviall. Some courts have interpreted Atlantic Research to allow a successor in interest to seek recovery pursuant to CERCLA section 107(a). See ITT Industries, Inc., v. BorgWarner, Inc., 506 F.3d 452, 458 (6th Cir. 2007); Moraine Properties v. Ethyl Corporation, 2008 WL 4758692 (S.D. Ohio Oct. 27, 2008).

One commentator has suggested that the holding in Atlantic Research provides an end-run around the contribution protections afforded by section 113(f)(2), arguing that section 113 only affords protection for settling PRPs against claims for contribution. James D. Barnette and Matthew Bostick, Atlantic Research: Good Decision, Bad Outcome, and Ugly Results, Environment Reporter, November 2, 2007, at 2376, available at 2007 WL 3227381. Because section 107 cost recovery claims are now available to PRPs, these claims can be brought against PRPs who have already settled their claims with the U.S. government. This argument seems to be bolstered by a recent Ninth Circuit case, which held that a 107 claim brought by a PRP is not a claim for contribution. Koutros v. Goss-Jewett Co., 523 F.3d 924 (9th Cir. 2008).

5. Consent Decrees

Despite the many potential settlement impediments, if the negotiation process leads to an agreement between a significant percentage of PRPs and EPA, then a consent decree must be filed by EPA in federal district court. The entry of the consent decree is not construed as a finding that an imminent and substantial endangerment exists to the public or environment nor is it considered an admission of liability. Except for
certain de minimis settlements and cost recovery settlements not exceeding $500,000, the Attorney General must approve the consent decree before it is effective. 42 U.S.C. §9622(g)(4).

The Attorney General is required to allow nonparties, including nonsettling PRPs, an opportunity to comment on the proposed settlement prior to its entry by the court as a final judgment. 42 U.S.C. §9622(d)(2)(B). EPA has sought to have courts defer to its Superfund expertise so as to make clear to PRPs that it is in their best interest to settle.

**Terms Regarding Remediation Of Sites.** With this brief summary of how the initial settlement process begins and the numerous provisions of the 1986 amendments that enhance EPA's ability to reach negotiated settlements, it is relevant to discuss some of the issues involved in actual remediation of the hazardous waste site. Obviously one of the most important elements to be incorporated into any settlement agreement and subsequent consent decree relates to the actual remedial work to be performed. Whether or not there is a settlement, PRPs are likely to end up paying for the remedial action sooner or later in light of EPA's cost recovery authority. Consequently, most PRPs will have a compelling interest in controlling remedial costs. One advantage available to PRPs who enter into settlement agreements is that their exposure becomes “relatively” fixed and ascertainable. Additionally, when PRPs perform their own studies and remedial operations, they have more incentive and opportunity to control cleanup costs.

**Control Over Work.** The typical consent decree is likely to subject PRPs to strict performance and reporting requirements, as well as extensive oversight by EPA. One typical consent decree provision requires that all remedial design and action work be performed by the PRPs under the direction and supervision of a qualified professional engineer who is subject to EPA approval. All Remedial Design (RD) and Remedial Action (RA) work plans, and other work plans, documents and schedules also are subject to review, modification and approval by EPA. PRPs also must comply with stringent reporting and quality assurance requirements during the cleanup process. As an example, PRPs, or their appropriate contractors or agents, must submit periodic progress reports to EPA describing the actions that have been taken in compliance with the consent decree. While these examples only scratch the surface in describing what is required of PRPs during remedial efforts, it should be clear that all phases of the cleanup project are postured to be scrutinized and reviewed by the government.

**Time For Performance.** In many situations, settling PRPs will seek some protection from the performance time limits set forth in the remedial design and remedial action work plan by including a force majeure clause in the negotiated settlement. Because PRPs are subject to fines for delays in cleanup, the force majeure clause prevents imposition of penalties for delays caused by forces beyond the PRPs’ control. The typical consent decree defines force majeure as any event arising beyond the control of the settling PRPs, which includes, but is not limited to fires, natural disasters, riots, strikes, wars, and matters that delay or prevent the performance of any obligation under the settlement. To be protected by such a clause, PRPs usually must notify EPA within a certain number of days of the event causing the delay. PRPs also have the burden of proving the force majeure claim as a defense to compliance with the consent decree. If EPA agrees that the delay was caused by the force majeure event, then the remedial design and remedial action work plan is modified accordingly.
Occasions do arise, however, where EPA disagrees with the PRPs’ contention that the delay was caused by a force majeure event. Accordingly, most consent decrees contain a dispute resolution provision to assist in resolving such conflicts, as well as others. When any dispute arises, most dispute resolution clauses require that EPA and the PRPs enter into an informal negotiation period usually not to extend beyond 30 days. Normally, EPA seeks to include in the dispute resolution clause several provisions favorable to the agency. One such clause states that following an unresolved dispute, EPA’s decision is binding unless the PRP, within 10 days of the decision, files a petition with the court. Another pro-EPA provision found in several consent decrees states that the burden of persuasion rests with the PRPs in all disputes. EPA’s Model Consent Decree contains both these provisions.

**Performance Standards.** A remedial action agreement is required to comply with applicable or relevant and appropriate requirements (ARARs). 42 U.S.C. §9621(d)(2)(A). ARARs include both state and federal environmental requirements, which are usually site specific based on the types of pollutants at the site, the site characteristics, and the proposed remedy. On certain occasions EPA is not required to meet all ARARs. In these particular instances, the state may intervene as a matter of right and has several options. One option is for the state to agree with EPA’s assessment that the ARAR is unnecessary and then simply sign the consent decree. When the state does not concur with EPA’s decision but desires to have the ARAR met, the state can intervene and force the remedial action to conform to the ARAR if it can show that based on the administrative record, EPA’s decision to waive the ARAR was not supported by substantial evidence. 42 U.S.C. §9621(f)(2)(B). Even when the court rules in favor of EPA’s exclusion of the ARAR, a third option allows the state to incorporate the ARAR into a modified consent decree if the state is willing to pay the additional costs attributed to meeting the ARAR. *Id.*

In addition to ARARs, EPA is required to keep the appropriate states abreast of all significant negotiation and remedial action developments and allow for “substantial and meaningful” state involvement in the initiation, development, and selection of remedial actions. 42 U.S.C. §9621(f)(1). See, e.g., *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991). When EPA fails to adequately allow for state participation in determining the adequacy of the remedial action, states have the ability to undermine any such settlement reached by EPA. Obviously this will concern PRPs who receive releases from EPA because they might still be liable for additional costs from states that could pursue them following any EPA-directed cleanup.

with site-specific information to initiate the settlement process. EPA directs its negotiation teams to inform PRPs that many provisions are nationally consistent boilerplate provisions that EPA will not negotiate. EPA regional offices must obtain headquarters approval before agreeing to significant changes in the provisions relating to access, contribution protection, covenants, dispute resolution, force majeure, additional response actions, certification of completion, stipulated penalties, and indemnification.

**Review Of Settlement Terms.** Final negotiation of a consent decree does not signify the end of the settlement process. The Justice Department and EPA must internally review and execute it in accordance with their procedures. It then must be lodged in federal district court, along with a complaint. Public notice with opportunity for comment must be published pursuant to 28 C.F.R. §50.7. After receipt of comments, the Department will file responses with the court and move for entry of the decree, or the Department may withdraw the proposed decree and seek to modify it through further negotiations with the defendant. By then, of course, a complaint having been filed, the matter is in litigation, but at lodging the Department would also have filed a motion suspending the time for filing an answer.

Most consent decrees are entered without significant delay in proceedings after close of the comment period. Some, however, are formally protested in the comment period and non-parties may seek to intervene and gain party status. There is a strong presumption of validity favoring consent decrees in the environmental area, given the Attorney General’s inherent discretion to settle litigation and EPA’s expertise in environmental matters. *United States v. Hooker Chems. and Plastics Corp.*, 540 F. Supp. 1067, 1080 (W. D. N. Y 1982), aff’d, 749 F.2d 968 (2d Cir. 1984). The trial court has the discretion to deny intervention. *United States v. Texas E. Transmission Corp.*, 923 F.2d 410 (5th Cir. 1991). The court may conduct a hearing. See, e.g., *Hooker supra,* and *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982). The test for entry by the court generally is whether the consent decree is legal, fair, adequate, and reasonable. *United States v. City of Miami,* 664 F.2d 435, 444 (5th Cir. 1981); *Akzo,* supra, at 1423-26; *Seymour,* supra.

**Modification Of Consent Decree After Entry.** After entry a federal court has the inherent equitable power to modify a consent decree., *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. City of Fort Smith,* 760 F.2d 231, 233 (8th Cir. 1985); *Monsanto Co. v. Ruckelshaus,* 753 F.2d 649, 653 (8th Cir. 1985). However, such relief is extraordinary and granted only in rare circumstances. *Id.* Because courts view a consent decree as a contract between the parties, courts place a heavy burden on the party seeking modification. *Id.;* See Timothy Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101 (March, 1986).

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