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NOTES

ARBITRATION ALLOCATES COSTS OF HAZARDOUS WASTE CLEANUP CLAIM UNDER SUPERFUND

*United States v. Acton Corp.*¹

I. INTRODUCTION

With the growth in volume and complexity of environmental enforcement cases, alternative dispute resolution (ADR) has assumed increasing importance in the allocation of costs among liable parties.² At the same time, the growth is less than might be expected because of obstacles in both the governmental and private sectors.³ This dichotomy is especially evident in cases involving pollution from hazardous wastes.⁴

Improper hazardous-waste disposal threatens the environment and the public's health and welfare. Congress dealt with this threat by enacting environmental legislation aimed at preventing and mitigating the damage.⁵ Statutes require parties responsible for release of harmful waste to pay for cleanups.⁶ But the cost and time demanded for the government to litigate each claim could eviscerate the Congressional aim of quick neutralization of released hazardous substances.⁷ Consequently, the government encourages liable parties to negotiate settlements

1. 733 F. Supp. 869 (D.N.J. 1990).

2. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 6-10 (1985). The Honorable Patricia Wald is a judge on the United States Court of Appeals for the District of Columbia.

3. *Id.*

4. *Id.*

5. See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-57 (1982 & Supp. III 1985)). CERCLA was so amended by The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9631-33 (Supp. IV 1986)).

6. Wald, *supra* note 2, at 11.

7. *Id.*

specifying cost allocation among responsible settling parties.⁸ Arbitration is one method of cost allocation.

A federal judge described environmental negotiation and arbitration as a "promising infant with unknown potential and a short track record."⁹ Successful enforcement of the government's increasingly complex environmental regulations calls for cooperation between government agencies and responsible parties in settling disputes.¹⁰ However, until recently, both the government and the private sector often resisted most attempts to apply alternative dispute resolution techniques to environmental enforcement.¹¹ One commentator even noted that "few potentially responsible parties are willing to arbitrate cost allocation issues related to Superfund cleanups."¹² Even when responsible parties propose in a consent decree to use arbitration to allocate cleanup costs, the decree may be opposed by an intervening, potentially liable party who refuses to participate in the proposed settlement.

The *Acton* court faced this issue: Whether to approve a consent decree stipulating arbitration of cost allocation among responsible parties in a hazardous-waste case when a third party who refused to join in the consent decree intervenes, claiming the decree and its arbitration procedure is unfair.¹³ The intervenor, who risks potential liability in an independent lawsuit, would lose his right of contribution against the settling parties if the decree were approved.¹⁴ Yet, the settling responsible parties could seek contribution from the intervenor.¹⁵ When third parties intervene in an action to approve a consent decree, the court must weigh their claims in light of public policy as expressed by Congress' intent in creating and funding the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁶

8. *Id.*

9. *Id.*

10. *Id.* at 3.

11. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: The Role of Binding Arbitration*, 18 ENVTL. L. REP. 10158, 10158 n.1 (1988).

12. *Id.* at 10158. However, some groups of potentially responsible parties have used binding arbitration to resolve cost allocation disputes: parties involved in the Wauconda Landfill site in Wauconda, Illinois, and parties at the Hardage site in Criner, Oklahoma, agreed to use binding arbitration if mediation efforts failed. *Id.* at n.2. Nonbinding arbitration has been used at several sites to settle cost-allocation disputes, including the Bayou Sorrel site in Louisiana and the MOTCO site in Texas. *Id.*

13. *Acton*, 733 F. Supp. at 870.

14. *Id.*

15. *Id.*

16. *Id.* at 872.

II. FACTS AND HOLDING

The instant case arises from entry of a consent decree pursuant to CERCLA and the Resource Conservation and Recovery Act.¹⁷ The purpose of the consent decree was to settle claims by the United States Environmental Protection Agency (EPA) against 116 settling defendants.¹⁸ The claims arose out of the cleanup of the Lone Pine Landfill in Freehold Township, New Jersey.¹⁹ Studies by the EPA and the New Jersey Department of Environmental Protection showed contaminants moving from the landfill to the Manasquan River, where future plans called for construction of a drinking-water intake 16 miles downstream from the landfill.²⁰ The EPA, along with the New Jersey Department of Environmental Protection, investigated the landfill in 1981 and 1982 to determine whether conditions at Lone Pine posed a threat to public health.²¹ Because of the large amount of contamination at Lone Pine, EPA ranked the site fifteenth on the Superfund National Priority List.²² The agency then notified potential defendants about the possibility of their liability for cleanup costs.²³ The EPA conducted public meetings and released for comment a three-volume "Draft Feasibility Study" of remedial possibilities.²⁴

After selecting a remedial cleanup plan for the landfill²⁵ estimated to cost approximately \$40 million,²⁶ the agency sent notices to potentially responsible

17. *Id.* at 870; Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-87 (1976)).

18. *Acton*, 733 F. Supp. at 870. The EPA and the settling defendants submitted separate briefs in support of the motion. *Id.*

19. *Id.* The Lone Pine Landfill is an inactive landfill of approximately 63 acres, with 45 acres used for landfill operations. *Id.* The site was owned and operated from 1959 to 1979 by Lone Pine Corporation and contained municipal, commercial and industrial wastes. *Id.* In 1977, Scientific Chemical Processing Company (SCP) in Newark and Carlstadt, New Jersey, began shipping industrial chemical wastes, liquid chemicals, and chemical sludges to the site. *Id.* A large fire broke out at the landfill in 1978. *Id.* An investigation by the New Jersey Department of Environmental Protection resulted in the closing of the landfill in 1979. *Id.*

20. *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 883 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986) (toxic substances reached the river by two routes: overland by surface run-off from the landfill, and through the soil under Lone Pine by leaching into aquifers that discharge into the river).

21. *Lone Pine Steering Comm. v. EPA*, 600 F. Supp. 1487, 1491 (D.N.J. 1985), *aff'd*, 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

22. *Lone Pine*, 777 F.2d at 883 (seventeen thousand drums containing chemical waste and more than one million gallons of hazardous bulk liquid were deposited at Lone Pine); see 40 C.F.R. § 300 (1985).

23. *Lone Pine Steering Comm. v. EPA*, 600 F. Supp. at 1491.

24. *Id.* at 1492.

25. *Lone Pine*, 777 F.2d at 883-84. The EPA's plan called for placement of a clay cap over the landfill, construction of an underground slurry wall around the site and pumping and treatment of contaminated groundwater lying within the wall. *Id.*

26. Settling Defendants' Memorandum of Law in Support of the Government's Motion for Entry of the Consent Decree at 1, *United States v. Acton Corp.*, 733 F. Supp. 869 (D.N.J. 1990) (No. 89-3652) [hereinafter Settling Defendants' Memorandum].

companies on September 28, 1984.²⁷ By 1988, the potentially responsible parties had still not reached a settlement to implement the remedy.²⁸ In December 1988, the EPA told the parties that they had until May 15, 1989 to agree on a proposed settlement.²⁹ Failing this, the EPA would itself undertake the remedial action and later sue the responsible parties for costs incurred.³⁰ Finally, on August 25, 1989, the parties lodged their consent decree detailing how to accomplish the EPA's remedy.³¹

The decree divided the settling defendants into four categories for purposes of determining their obligation for funding the remedy, their participation in decision-making under the agreement, and their responsibility for payment of any penalties.³² Primary and secondary settling defendants' exact share of liability was to be determined through an ADR procedure prescribed by a separate agreement.³³ The settling defendants chose ADR as the method to allocate costs because of the complex factors involved and the difficulty in reaching an allocation acceptable to all potentially responsible parties within the six-month deadline set by the EPA.³⁴

The ADR procedure gave all participants a chance to present their allocation arguments to a neutral arbitrator who would consider liability standards and defenses under CERCLA, all other applicable law, the nature of the waste and any other factors the arbitrator deemed fair and equitable in reaching an allocation decision.³⁵ The arbitrator could decide that a settling defendant's liability was anything from 0 to 100 % of the cleanup costs.³⁶ The third and fourth group of

27. *Lone Pine*, 777 F.2d at 884. The remedy included capping the landfill to reduce infiltration of rainwater, erecting a slurry wall around the landfill to control migration of contaminants and groundwater and installing a groundwater and leachate collection and treatment system to prevent contamination leakage through the slurry wall. *Id.*

28. *Acton*, 733 F. Supp. at 870. Disagreement among potentially responsible parties for allocation of responsibility for cleanup hindered their ability to adopt a settlement. Settling Defendants' Memorandum, *supra* note 26, at 3-5. Lack of complete records concerning the dumping that occurred at the landfill also contributed to making negotiations slow and complex. *Acton*, 733 F. Supp. at 870.

29. *Id.*

30. Settling Defendants' Memorandum, *supra* note 26, at 4.

31. *Id.*

32. *Acton*, 733 F. Supp. at 870-71.

33. *Id.* at 871. The first group of settling defendants includes eight "primary settling defendants" whose waste was taken directly to the landfill site and exceeded 1% in volume of the waste at the site. *Id.* This group is jointly and severally liable for funding and performing the cleanup remedy and for providing financial assurance of the settlors' ability to complete the work. *Id.* The primary settling defendants also must pay any stipulated penalties for violations of the decree's cleanup provisions. *Id.*

The second category of defendants consists of 13 defendants whose waste went directly to the site, constituting 0.1% to 1% of the total waste, as well as two defendants whose waste arrived after being transhipped from Scientific Chemical Processing Company (SCP) in Newark and Carlstadt, New Jersey. *Id.* This group is also jointly and severally liable for funding and performing the remedial action. *Id.*

34. Settling Defendants' Memorandum, *supra* note 26, at 5.

35. *Id.* at 5-6.

36. *Id.* at 6.

defendants would pay a fixed amount based on their volumetric share of the waste.³⁷

Sixteen defendants (the Intervenor) intervened as of right to oppose the motion to enter the consent decree.³⁸ At the time, the Intervenor were defendants in a related action.³⁹ According to CERCLA provisions, the Intervenor's right to contribution extinguished against all settling defendants in the present case upon approval of the proposed consent decree.⁴⁰

The Intervenor claimed that the decree was unfair because if the settling parties claim a right of contribution against them, they would be forced to pay an amount disproportionate to their volumetric share of waste.⁴¹ This result would be especially disproportionate since toxicity of the waste would also be considered in determining liability.⁴² Furthermore, they argued, even if toxicity were relevant, no one had determined that the toxicity of their waste was significantly greater than the waste of any of the settling defendants'.⁴³ Therefore, like the third and fourth groups of settling defendants, the Intervenor claimed that they too should have the chance to pay a flat sum in settlement rather than be held to the terms decided by the arbitrator in the proposed ADR procedure set forth in the consent decree.⁴⁴

The Intervenor further contended that the EPA did not meet its obligation to negotiate in good faith with them.⁴⁵ This failure resulted from the exclusion of the Intervenor's views from the negotiation process when the EPA delegated its authority to a small group of potentially responsible parties to resolve details

37. *Acton*, 733 F. Supp. at 871. The third category of defendants under the agreement consists of 20 defendants, whose waste was dumped directly at the landfill site and whose waste volume does not exceed 0.1% of the total waste. *Id.* Defendants in this group will pay a fixed amount to the fund based on their assessed volumetric share of the waste. *Id.*

The fourth group comprises 80 customers of SCP. The customers sent liquid or sludge waste in drums, bulk liquids or solvents for recovery or unknown bulk or containerized waste to the company, indeterminate amounts of which ended up at the Lone Pine site. *Id.* This group also will pay a fixed amount based on their volumetric share plus an administrative fee. *Id.*

38. *United States v. Acton Corp.*, 131 F.R.D. 431, 432 (D.N.J. 1990). Sixteen of the intervenor are companies responsible for a portion of the waste at the Lone Pine Landfill site. The seventeenth is a waste disposal company, Freehold Cartage, Inc., which allegedly transported approximately 21% of the waste to the site. *Acton*, 733 F. Supp. at 870.

39. *Acton*, 733 F. Supp. at 870.

40. CERCLA § 9613(f)(2) (person who has resolved liability to the government in an administrative or judicially approved settlement is not liable for claims for contribution regarding matters addressed in the settlement).

41. *Acton*, 733 F. Supp. at 873.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* The group of responsible parties, the Lone Pine Steering Committee, consisted of the eight largest "direct" generators of waste at the site. *Id.* at 870. The group filed suit to block implementation of EPA's cleanup plan. *Id.* The court dismissed the action on the ground the plan could not be reviewed prior to enforcement. *Id.* (citing *Lone Pine Steering Comm. v. EPA*, 600 F. Supp. 1487).

of the settlement.⁴⁶ The Intervenor also claimed that the EPA failed to conduct a reasonable, independent review of the settlement proposal.⁴⁷ Finally, the Intervenor argued that the method proposed in the consent decree for dividing the responsible parties into four groups and deciding the amount of liability of the primary and secondary settlers through arbitration was unfair.⁴⁸

The settling parties claimed the decree was fair in that the decree was the product of informed, arm's-length negotiations; each potentially responsible party had the opportunity to participate on equal terms in the settlement negotiations and to use the ADR procedure to resolve cost-allocation issues.⁴⁹ The court held that entry of a consent decree will be approved when the decree is a reasonable, adequate, and fair settlement of liability issues.⁵⁰ The decree should provide that settling parties will pay for the entire cost of cleaning up a site, thereby satisfying Congress' intent that cleanup costs lie with the responsible parties.⁵¹ This, in turn, will ease the strain of the cleanup on public enforcement resources and the judicial system.⁵² The court stated this approval will be given even though nonsettling parties might be required to pay an amount disproportionate to their volumetric share of waste.⁵³

III. LEGAL BACKGROUND

A. CERCLA and Arbitration

Congress enacted CERCLA to provide for the cleanup of sites where the release or threatened release of hazardous materials poses a substantial danger to the environment and to public health and welfare.⁵⁴ The Act provides for liability, compensation, cleanup, and emergency response to hazardous substances released into the environment.⁵⁵

To accomplish this, the Act authorizes federal and state governments to undertake actions to contain and remove hazardous wastes.⁵⁶ CERCLA holds

46. *Id.*

47. *Id.*

48. *Id.*

49. Settling Defendants' Memorandum, *supra* note 26, at 9-10 ("By choosing not to join in the settlement and take advantage of the ADR proceeding, the non-settlers have assumed the risk of whatever their future liability may be.").

50. *Acton*, 733 F. Supp. at 871.

51. *Id.* at 872.

52. *Id.*

53. *Id.* at 873.

54. *See, e.g.*, S. REP. NO. 848, 96th Cong., 2d Sess. 62 (1980); Comment, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923, 923 (1988).

55. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982).

56. *Id.*; *see also* CERCLA § 9604.

responsible parties liable for government response costs and damages to natural resources, subject to specified dollar limits and certain enumerated defenses.⁵⁷

The goals of common-law tort actions—compensation, deterrence, and loss spreading—are also readily applicable to CERCLA actions.⁵⁸ The victims of the improper disposal of hazardous waste are humans and their environment. CERCLA satisfies the compensatory function of tort law (restoring victims to their pre-tort condition), at least as far as the environment is concerned, by seeking to restore a site to its condition before the dumping of hazardous wastes.⁵⁹ Deterrence is accomplished by requiring those responsible for the environmental hazard created by improper waste handling to pay for its amelioration.⁶⁰ Finally, holding responsible parties liable for hazardous waste cleanup costs spreads loss by shifting some of the burden away from the public and injured parties.⁶¹

The Act establishes the Hazardous Substances Response Fund to compensate state and federal governments for their response actions if the responsible parties cannot be identified or are unable to undertake the actions themselves.⁶² Industry and the federal government jointly finance the fund.⁶³ Judicial action is authorized when an imminent and substantial danger to public health, welfare or the environment is caused by the release or threatened release of a hazardous substance.⁶⁴

By 1988, the Environmental Protection Agency (EPA) identified 1,177 toxic waste sites as highest priority for CERCLA action and 30,000 sites altogether as containing hazardous substances that might threaten humans and their environment.⁶⁵ Total cleanup costs could exceed \$100 billion according to the Congressional Office of Technology Assessment.⁶⁶

The original CERCLA response fund established by Congress to curtail environmental danger amounted to \$1.6 billion over five years,⁶⁷ which accounted for only nine percent of the amount EPA estimated it would take to

57. *Reilly Tar*, 546 F. Supp. at 1111; see also CERCLA § 9607.

58. Note, *A Proposed Scheme of Municipal Waste-Generator Liability*, 100 YALE L.J. 805, 810-11 (1990) [hereinafter Note, *Municipal Waste-Generator*]. See generally Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 928-39 (1981); Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 576, 578 (1983).

59. Note, *Municipal Waste-Generator*, *supra* note 58, at 811. CERCLA fails to achieve full compensation for all the losses resulting from site contamination because it excludes certain claims, such as medical claims. *Id.*

60. *Id.*

61. *Id.*

62. *Reilly Tar*, 546 F. Supp. at 1111; see also CERCLA §§ 9611-12.

63. *Reilly Tar*, 546 F. Supp. at 1111.

64. *Id.*; see also CERCLA § 9606.

65. *EPA Turns to Negotiation: Superfund's Track Record Not So Super*, Consensus, March 1989, at 1, col. 3 (Public Disputes Network, Harvard Law School) [hereinafter *EPA Turns to Negotiation*].

66. *Id.*

67. Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253, 261 (1981).

clean sites contaminated by hazardous substances.⁶⁸ Although the Superfund Amendments and Reauthorization Act (SARA) increased the funding level of the response fund, the amount still fell far short of what was required for damage prevention and mitigation at identified sites.⁶⁹

The discrepancy between the level of funding and projected cleanup costs reflects Congress' intention that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."⁷⁰ The response fund is used to fund cleanups only when it is impossible to recover costs directly from the parties responsible for polluting the environment, either because they cannot be located or because they lack finances themselves.⁷¹

CERCLA does not expressly provide for joint and several liability,⁷² but without it, recovery would be very difficult. Costs usually are allocated among several parties who contaminate a site, because dumped chemicals react with others to form new or more toxic substances, or because records are unavailable.⁷³ In response, courts hold that Congress did not intend to reject the theory of joint and several liability, but rather omitted it to avoid a mandatory legislative standard that might produce inequities if applied in all cases.⁷⁴ Courts analyzed the legislative history underpinning CERCLA and found that Congress intended the propriety of applying joint and several liability to CERCLA defendants is to be determined on a case-by-case basis.⁷⁵ In addition, courts have pointed out that at most sites the wastes are commingled, making it hard to establish a reasonable basis for division according to contribution of each defendant.⁷⁶

In addition to seeking recovery of cleanup costs from responsible parties, Congress enacted CERCLA to enable the federal government to quickly respond to the threat posed nationally by improper disposal of hazardous substances.⁷⁷ At least one federal court stated that CERCLA should be given a broad and liberal construction in order to implement these concerns.⁷⁸ "The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided."⁷⁹

68. *Id.* at 253-54.

69. *See EPA Turns to Negotiation*, *supra* note 65 (SARA allocated \$8.5 billion for five years).

70. *Reilly Tar*, 546 F. Supp. at 1112.

71. Eckhardt, *supra* note 67, at 261; CERCLA §§ 9604(a)(1), 9607(a).

72. Comment, *When EPA Cleans a CERCLA Site: Preclusion of Pre-Enforcement Judicial Review with Respect to Generators and Transporters*, 36 J. URB. & CONTEMP. L. 187, 194 (1989).

73. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-06 (S.D. Ohio 1983).

74. *Id.* at 808.

75. *Id.*; *see also O'Neil v. Picilo*, 682 F. Supp. 706, 724 (D.R.I. 1988).

76. *Chem-Dyne Corp.*, 572 F. Supp. at 811.

77. *Id.* at 805; H.R. REP. NO. 1016, 96th Cong., 2d Sess. at 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119-20; S. REP. NO. 848, *supra* note 54, at 62.

78. *Reilly Tar*, 546 F. Supp. at 1112.

79. *Id.*

B. Settlement under CERCLA

Congress evidenced its desire to speed cleanups and cost recovery when it enacted provisions of SARA describing how liable parties could settle with the government.⁸⁰ A congressional committee report states, "[s]ome have criticized the existing program for spending more on wasteful litigation than on actual cleanups The settlement procedures now set forth are expected to be a significant inducement for parties to come forth, to settle, to avoid wasteful litigation and thus to begin cleanup."⁸¹

SARA's settlement provisions plus the courts' imposition of joint and several liability increase the incentive of responsible parties to negotiate settlement agreements.⁸² Other inducements to settle include escaping litigation costs, having more control over cleanup and remedial actions, avoiding increased costs caused by further deterioration at the site during delayed resolution of the claim, and avoiding bad publicity.⁸³

Unfortunately, certain factors work against successful settlement of CERCLA cases. For example, many potentially responsible parties refuse to join a settlement agreement out of fear their portion of allocated cleanup costs will increase rather than decrease as a result of settlement negotiations.⁸⁴ These parties hope they can limit their costs to defending themselves against contribution actions brought by settling parties.⁸⁵ As a result, this approach makes settlement less attractive to parties that might otherwise settle.⁸⁶ In addition to bearing their share of the cost allocation worked out among settling responsible parties, the joining parties also will have to pay court costs involved in seeking to recover contribution from nonsettling parties.⁸⁷

Another common impediment to settlement is "the seemingly inevitable dispute" among responsible parties over the fair allocation of cleanup costs.⁸⁸ This issue often raises a stumbling block that halts negotiations.⁸⁹ And since the

80. CERCLA § 9622(a). Several provisions in SARA facilitate settlements: non-binding preliminary allocation of responsibility; de minimis settlements for parties who are either responsible for a very small part of the total hazardous waste problem or who "innocently" bought land on which the site is located; covenants by the government not to sue, protection for settling parties from contribution claims; and a mixture of federal and private funding for cleanups. Comment, *supra* note 54, at 930-39.

81. H.R. REP. NO. 253, 99th Cong., 1st Sess. at 58-59, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2840-41.

82. Comment, *supra* note 54, at 941.

83. *Id.*

84. Cohen, *supra* note 11, at 10160-61.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

EPA can count on joint and several liability to recover cleanup costs, its interest in taking part in negotiating cost allocation is minimal.⁹⁰

Allocation questions involve complex technical and scientific facts analogous to commercial disagreements rather than questions of policy, legislative intent, or statutory interpretation.⁹¹ Therefore, the EPA usually prefers to let potentially responsible parties determine cost allocation among themselves.⁹²

Despite factors inhibiting settlement, the EPA and the potentially liable parties may indeed agree on a settlement rather than resorting to litigation.⁹³ When the negotiation between the EPA and a significant number of settling defendants is completed, the proposed consent decree is filed with the proper federal district court.⁹⁴ Almost all consent decrees call for the use of ADR if the parties disagree in the course of implementing the consent decree.⁹⁵

C. The Role of ADR

The role of ADR between the government and responsible parties in CERCLA settlements is evolving. The original 1980 CERCLA statutes provided for negotiation and arbitration when private parties cleaned a site and then asserted claims against Superfund to recover costs incurred.⁹⁶ The claims procedure prescribed five steps in the process, from the initial presentation of a claim by a party, to the final payment of an award.⁹⁷

Congress streamlined the claims procedure when it amended CERCLA in 1986.⁹⁸ The amended section 9613 eliminated provisions for negotiations with responsible parties and substituted an administrative hearing process for claim adjustment and arbitration.⁹⁹ In explaining the deletion, the EPA's director stated that: "[t]he arbitration procedure is a vestige of certain economic damage claims which were not enacted in 1980. In that the claims procedures will involve only reimbursement of costs, there is no reason for claims to be arbitrated."¹⁰⁰

Despite strong encouragement from the administrator of the EPA to use alternative dispute resolution techniques in environmental enforcement cases, the

90. *Id.* at 10161.

91. *Id.*

92. *Id.*

93. Comment, *supra* note 54, at 932.

94. *Id.*

95. Mays, *Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act*, 17 ENVTL. L. REP. 10101, 10111 (1987). Before SARA's enactment, "[The] EPA agreed to dispute resolution provisions that required the parties to negotiate in good faith over the issue in dispute for a specified period of time before submitting the dispute to the court for resolution," and the amendments made such provisions mandatory. *Id.*

96. CERCLA § 9612 (1980), amended by SARA 42 U.S.C. §§ 9631-33 (Supp. IV 1986).

97. *Id.*

98. SARA, 42 U.S.C. §§ 9631-33.

99. H.R. Rep. No. 253, *supra* note 81, at 2915-16.

100. *Id.* at 2916.

assistant and regional administrators were slow to implement this request.¹⁰¹ As of February 1, 1988, EPA's ten regional offices had nominated only seven cases for consideration for use of ADR.¹⁰²

Richard H. Mays is an attorney who served as senior enforcement counsel and acting assistant administrator for EPA.¹⁰³ Mays, who helped develop the agency's *Guidance on the Use of Alternative Dispute Resolution Techniques in Environmental Enforcement Cases*,¹⁰⁴ noted that impediments to the use of ADR exist in both the private sector and in government.¹⁰⁵ Impediments on the government's side include the following: the belief of some environmental enforcement personnel that the most severe punishment of environmental law violators is always the best approach; the fear that in bringing in a mediator or arbitrator, EPA attorneys will lose control of the case; lack of understanding or training in ADR; lack of institutional incentives to use ADR; and the reluctance to attempt to learn a new procedure, even though in the long run the new process may save time and money.¹⁰⁶

Former Attorney General William French Smith posited three more reasons why government agencies resisted adoption of ADR: (1) government lawyers are usually unconcerned about the cost of litigating in courts and administrative hearings, (2) government officials fear public criticism for submitting environmental disputes to informal hearings rather than courts, and (3) officials are unclear about whether Congress has authorized the use of ADR or, if so, who in the agency has power to approve the use of the techniques and how the agency will pay for using ADR.¹⁰⁷

Despite these impediments to the use of ADR in environmental enforcement cases, one commentator noted that CERCLA lends itself well to ADR.¹⁰⁸ This is partly due to the fact that law creates practical problems that can only be resolved through the use of intensive resources in a short time.¹⁰⁹ Another reason is because "the nature of the disputes as well as the appearance of the same

101. Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?*, 18 ENVTL. L. REP. 10087, 10087 (1988) (Lee M. Thomas, Administrator of the EPA, sent a memorandum titled "Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions" on August 14, 1987).

102. *Id.* Only four cases were enforcement cases; in the other three, the EPA was defendant. *Id.* at n.3. Six cases proposed use of mediation and/or fact-finding. The seventh proposed use of a mini-trial. *Id.*

103. *Id.* at 10087.

104. *Id.* Mays is currently employed at ICF Incorporated, a national environmental consulting firm in Fairfax, Virginia. *Id.*

105. *Id.* at 10090.

106. *Id.* at 10090-91.

107. *Id.* at 10092 (citing Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. DISP. RESOL. 1, 9-23).

108. Rennie, *Private Facilitating and Adjudicative Functions, Superfund Disputes and the Role of Clean Sites, Inc.*, 17 ENVTL. L. REP. 10263, 10263 (1987).

109. *Id.*

parties in many of these cases give rise to an interest among the parties in being able to maintain ongoing relationships," an interest that ADR helps promote.¹¹⁰

In the private sector, one impediment to the use of ADR in enforcement cases is the reluctance of many trial attorneys to use ADR.¹¹¹ On the other hand, many private attorneys realize their clients' interests are not served by trying most environmental cases unless an important, unsettled legal principal needs to be resolved by the court.¹¹² These lawyers know defending environmental enforcement cases in the face of strict and joint and several liability is often a losing battle.¹¹³ Furthermore, they know their clients' compliance costs and attorneys' fees will increase as the litigated case drags on.¹¹⁴ Finally, lawyers realize the publicity and public concern generated by environmental cases create a negative image for companies and increase the potential for third-party tort cases.¹¹⁵

Even though use of ADR rather than litigation may favor corporations, corporate managers may not recognize that fact and may resist spending the money necessary to settle environmental cases.¹¹⁶ In addition, some of the same factors impeding use of ADR in the government sector may also be at work in the private sector: lack of institutional incentives, lack of knowledge or training, and reluctance to learn a new technique.¹¹⁷

Currently, the EPA can undertake any ADR technique, such as mediation, that does not bind the agency; but it may not participate in any binding form of ADR for claims over \$20,000.¹¹⁸ An exception was created in new legislation amending CERCLA and new regulations promulgated by EPA that call for arbitration procedures for de minimis Superfund cost-recovery claims arising under section 9622(h)(2)(k) of CERCLA.¹¹⁹ The fact that Congress gave the EPA the authority to arbitrate de minimis claims may signal legislators' intent to broaden that authority to other claims as well.¹²⁰

Another signal of such intent may be the new Administrative Dispute Resolution Act of 1990.¹²¹ Congress' purpose in passing the act is to "encourage Federal agencies to use mediation, conciliation, arbitration, and other

110. *Id.*

111. Mays, *supra* note 101, at 10092.

112. *Id.* at 10093.

113. *Id.* at 10092.

114. *Id.* at 10093.

115. *Id.* at 10092.

116. *Id.* at 10093-94.

117. *Id.* at 10094.

118. *Id.* at 10095.

119. CERCLA § 9622(h)(2); 40 CFR §§ 304.10-42 (1989) (provides that these claims must not exceed \$500,000, exclusive of interest).

120. Mays, *supra* note 101, at 10095.

121. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736, (1990) (codified at 5 U.S.C. §§ 581-590 (1990)).

techniques for the prompt and informal resolution of disputes."¹²² The Act calls for each federal agency to adopt a policy to use alternative means of dispute resolution and case management in enforcement actions, rule making, formal and informal adjudications, contract administration, issuing and revoking licenses or permits, litigation, and other agency actions.¹²³

One commentator recommends that EPA personnel give potentially liable parties "informal advice, similar to that of a non-binding arbitrator," on how to equitably allocate costs.¹²⁴ However, EPA's current philosophy is that responsible parties should "work out among themselves questions of how much each will pay towards settlement at a site."¹²⁵

Courts, too, play a role in settlement of environmental disputes, a role that has changed with the proliferation of statutes and regulations.¹²⁶ Federal Judge Harold Leventhal noted that courts no longer play a major part in formulating rules governing the environment.¹²⁷ As executive officials and regulatory agencies assumed the primary responsibility for rule making, courts maintained a supervisory function of reviewing agency decisions.¹²⁸

According to Judge Leventhal, the government agency has the latitude to select policies deemed in the public interest, while the court's function is to assure that the agency has "given reasoned consideration to all the material facts and issues" in making its decision.¹²⁹ If the agency takes a "hard look" at the pertinent problems and genuinely engaged in reasoned decision-making, the court should exercise restraint and affirm the agency's decision "even though the court would on its own account have made different findings or adopted different standards."¹³⁰ The process of judicial review of agency decisions "combines judicial supervision with . . . judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instruments.'"¹³¹

122. *Id.*

123. *Id.*

124. Comment, *supra* note 54, at 946.

125. *Id.*

126. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 510 (1974).

127. *Id.*

128. *Id.* at 511 (the problems of allocating roles between regulatory agencies and courts occurred earlier in contexts outside of environmental law). Writing for the court in *Greater Boston Television Corp. v. F.C.C.*, a case marking the culmination of a 16-year struggle to determine which licensee could operate a television station on a certain channel, Judge Leventhal said the court must "satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

129. *Greater Boston Television Corp.*, 444 F.2d at 851.

130. *Id.*

131. *Id.* at 851-52 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Braniff Airways v. C. A. B.*, 379 F.2d 453 (D.C. Cir. 1967); *Niagara Mohawk Power Corp. v. F. P. C.*, 379 F.2d 153, 160 n.24 (D.C. Cir. 1967); *WAIT Radio v. F. C. C.*, 418 F.2d 1153, 1156 (D.C. Cir. 1969)).

B. Consent Decrees and Intervention under CERCLA

The commonality of consent decrees is a recent occurrence in environmental cases.¹³² Because consent decrees are negotiated voluntarily like a contract but are enforceable with court sanctions like a judgment, many consider them to be the most effective and cheapest way to implement a remedial plan.¹³³

One hallmark of public-law litigation is its tendency to affect third parties.¹³⁴ When third parties seek to enjoin implementation of a consent decree on grounds the decree requires a defendant to take action violating the third party's rights, courts require the third party to intervene pursuant to Federal Rule of Civil Procedure 24 rather than bring a separate action.¹³⁵ CERCLA provides a similar right to intervene.¹³⁶ Both CERCLA and Federal Rule 24 establish a four-part requirement for an intervention of right: the motion must be timely; the applicant must have sufficient interest in the litigation; disposition of the action may impair or impede that interest; and the interest is not adequately represented by an existing party to the litigation.¹³⁷

Use of intervention pursuant to Rule 24 accommodates two potentially conflicting goals: "achieving judicial economies of scale by resolving related issues in a single lawsuit, [and preventing the lawsuit from becoming] fruitlessly complex or unending"¹³⁸

Approval of a proposed consent decree is a matter of district court discretion, which is to be exercised in light of the strong policy favoring voluntary settlement of disputes.¹³⁹ The controlling criteria is not what might have been agreed on nor what the district court believes might have been the optimal settlement.¹⁴⁰

132. Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 321 (1988) (consent decrees were previously thought to be mainly part of antitrust law); see Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 328 & n.5; Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888.

133. Kramer, *supra* note 132, at 328 (citing *United States v. City of Jackson*, 519 F.2d 1147, 1152 n.9 (5th Cir. 1975); *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981) (en banc); McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 47 (1984); Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1830 (1986)).

134. *Id.* at 321.

135. *Id.* at 332. The third party may bring an independent action alleging the consent decree breached prior contractual rights if the remedy sought is damages. *Id.*

136. CERCLA § 9613(i).

137. *United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 576 (W.D. Wis. 1990); see *Harris v. Pemsley*, 820 F.2d 592, 596 (3d Cir. 1987), *cert. denied sub nom.*, 484 U.S. 947 (1987).

138. *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991) (citing *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969)).

139. *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990) (citing *United States v. Hooker Chem. & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir. 1985) (court approved consent decree under CERCLA where 47 settling defendants agreed to accept the decree's terms and seven non-settling defendants opposed the decree on fairness grounds)).

140. *Cannons Eng'g Corp.*, 720 F. Supp. at 1036.

In evaluating the fairness of a consent decree, the court "should examine both procedural and substantive aspects of the proposed decree".¹⁴¹ Fairness "should be examined from the standpoint of both signatories and non-parties to the decree, [but the effect on non-settlers] is not determinative of the court's evaluation".¹⁴² Just because different types of settlements exist in a single CERCLA action, the settlements are not necessarily unfair.¹⁴³

The court in *United States v. Cannons Engineering Corp.*¹⁴⁴ stated that allowing potentially responsible parties to join the settlement of their choice might thwart Congress' goal of encouraging early settlement, thereby complicating CERCLA settlements and defeating the public's interest in prompt cleanup.¹⁴⁵ "In fact, the statutory scheme is designed to discourage 'free riders' by imposing a greater share of cleanup costs on those who delay agreeing to contribute to remedial action. The primary way to discourage free riders is to impose a cost for delay."¹⁴⁶

For a district court reviewing a consent decree, the question is not whether the settlement is perfect, but "whether it is one which is fair, adequate, and reasonable", and within the reaches of the public interest.¹⁴⁷ Reviewing a consent decree under CERCLA, the court in *United States v. Rohm & Hass Co.*¹⁴⁸ said its task was not to thoroughly investigate as if it were trying the case *de novo* and making findings of fact as to "whether the settlement figure is exactly proportionate to the share of liability appropriately attributed to the settling parties."¹⁴⁹ Instead, the court stated the goal of its review was to determine if the settlement "represents a reasonable compromise, all the while bearing in mind

141. *Id.* at 1039.

142. *Id.* at 1040.

143. *Id.*; *United States v. Seymour Recycling*, 554 F. Supp. 1334, 1339 (S.D. Ind. 1982) (court found nothing unfair in government's decision to structure two settlements with two groups of defendants in different ways and to make separate settlement offers to different parties, even where the sum to be paid by non-parties to the decree was greater than the sum being paid by the parties to the decree). The *Seymour* court noted, "There is a public interest in encouraging parties to come forward first in an effort to settle enforcement cases." 554 F. Supp. at 1339 (the consent decree is printed in the case at 1342-50).

144. 720 F. Supp. 1027.

145. *Id.* at 1040.

146. *Id.*

147. *United States v. Rohm & Hass Co.*, 721 F. Supp. 666, 680 (D.N.J. 1989) (the court approved a proposed consent decree pursuant to a CERCLA claim despite non-settling defendants' claim the settling parties' payment did not adequately reflect their proportionate share of the waste). The court held: "[t]here is a real risk that the dollar figure is disproportionate to the volumetric share of the settlers, and thereby, of significant prejudice to the non-settling defendants. At the same time, however, the settlement is a reasonable and fair compromise." *Id.* at 696.

148. 721 F. Supp. 666.

149. *Id.* at 696.

the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolution."¹⁵⁰

The court in *United States v. Mid-state Disposal, Inc.*¹⁵¹ approved a consent decree despite Intervenor's objection, noting "[i]t is not within the Court's purview to closely scrutinize the allocation of liability among the potentially responsible parties."¹⁵² The court stated its core concern was whether the consent decree furthers the goals of CERCLA, one of which is "to promote the speedy resolution of harmful environmental concerns."¹⁵³

The instant case presented the court an opportunity to approve an environmental consent decree with a binding arbitration provision that third-party intervenors opposed on fairness grounds.¹⁵⁴

IV. THE INSTANT OPINION

The *Acton* court noted that public interest deserves considerable weight in evaluating the reasonableness of a consent decree.¹⁵⁵ Under the proposed decree, the settling parties would pay the entire cleanup costs, a result preferable to requiring the EPA to use Superfund monies to fund the costs.¹⁵⁶ The court noted that Congress' intent in enacting CERCLA was to have response activities funded by the parties responsible for the contamination.¹⁵⁷ The court also stated that approval of the consent decree would ease the strain caused by the cleanup on public enforcement resources and the court.¹⁵⁸ Therefore, the court held that public policy as reflected in CERCLA favored settlement and Congress' goal "should not be thwarted absent overriding fairness concerns".¹⁵⁹

The court stated its scope of review did not allow for a *de novo* study of the liability allocation and that a compromise settlement in an action such as the instant case always contains a degree of uncertainty as to each party's liabili-

150. *Id.* at 680-81. The court used a six-factor test to evaluate the reasonableness of the decree: 1) relative costs and benefits of litigating the case under CERCLA; 2) risks of establishing settlors' liability; 3) good-faith efforts and adversarial relationship of the settlement negotiators; 4) reasonableness of the settlement compared to settlors' potential volumetric contribution; 5) settlors' ability to withstand a greater judgment; and 6) the settlement's effect on public interest as expressed in CERCLA. *Id.* at 687.

151. 131 F.R.D. 573.

152. *Id.* at 577.

153. *Id.*

154. *Acton*, 733 F. Supp. at 870.

155. *Id.* at 872; see *infra* notes 156-61 and accompanying text.

156. *Acton*, 733 F. Supp. at 872.

157. *Id.* "Congress was aware when it enacted CERCLA that the Superfund provided only a limited source of fiscal resources to be used to protect and restore the nation's environment and that the cost of necessary response activities would greatly exceed the capacity of the fund." *Id.* (quoting *Rohm & Haas*, 721 F. Supp. at 696).

158. *Id.*

159. *Id.*

ty.¹⁶⁰ The court declared its function was to determine whether the existing settlement was reasonable, not whether a better settlement could have been reached.¹⁶¹

The Intervenor's claimed the settlement decree was unfair in that they might have to pay a share of the cleanup costs disproportionate to their volumetric share.¹⁶² However, as the court noted, liability for removal costs may partly depend on toxicity and waste toxicity is an important factor to consider in entering into consent decrees.¹⁶³

The court further noted that the settling defendants developed the particular ADR procedure because they could not determine exactly how to apportion liability among the main responsible parties within EPA's time limits.¹⁶⁴ The decree's proposed ADR procedure called for an independent arbitrator to determine liability based on CERCLA's standards, which included toxicity as well as volume.¹⁶⁵ The settling defendants designed the ADR process to insure fairness in assessing parties' liability by allowing each party to conduct discovery and submit briefs.¹⁶⁶ In addition, the ADR process permitted evidentiary hearings.¹⁶⁷

The court further explained that the settling defendants developed the ADR procedure because they could not determine exactly how to distribute liability.¹⁶⁸ Because of this reason and because toxicity is an acceptable factor to use in determining liability, the court held the decree was not unfair in terms of the procedure it proposed for allocating cleanup costs among responsible parties.¹⁶⁹

The court stated that independent court evaluation of the relative toxicity of the Intervenor's waste compared to the settling defendants' waste exceeded the court's scope of review.¹⁷⁰ In addition, the court said that the Intervenor's concerns that they would be required to pay a disproportionate share were speculative for two reasons.¹⁷¹ First, if the government and settling defendants were to seek recovery from the Intervenor's, the recovery amount would be determined by judicial proceedings which would provide procedural and substantive protection as a matter of law.¹⁷² Second, any liability the ADR

160. *Id.*

161. *Id.*; see *supra* notes 147-53 and accompanying text.

162. *Acton*, 733 F. Supp. at 872.

163. *Id.* at 873 (citing 42 U.S.C. § 9622(e)(3); 52 Fed. Reg. 19919, 19920 (1987)).

164. *Id.*

165. *Id.* at n.2 (CERCLA standards of liability include waste volume, toxicity, mobility, persistence, ignitability, corrosivity, reactivity, volatility, flammability, and any other factor the arbitrator deems fair and equitable).

166. *Id.*

167. *Id.*

168. *Id.* at 873.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

process imposed on the primary and secondary settling defendants, together with any future decisions by EPA or the settlors to pursue other responsible parties, would also affect the Intervenors' potential liability.¹⁷³ Therefore, the court declined to hold that the decree was unfair in not providing the Intervenors a chance to pay a flat fee in the settlement of claims.¹⁷⁴

The court noted that requiring EPA to negotiate individual settlements with each responsible party, as the Intervenors proposed, would vitiate Congress' intent to encourage prompt settlements under CERCLA.¹⁷⁵ In contrast, EPA's approach to achieving settlement by first negotiating with a representative group of responsible parties and then letting them settle details among themselves, in this case through arbitration, is "practical and reasonable."¹⁷⁶

The court stated that the Intervenors met with EPA officials on several occasions and attended all consent decree negotiations until they declined to join the settlement.¹⁷⁷ Because the Intervenors did not convince the court that their views were excluded from the negotiation process and because EPA's practice of negotiating with representative groups of potentially liable parties was reasonable, the court held EPA negotiated with the Intervenors in good faith.¹⁷⁸

The court stated that division of the responsible parties into four groups was reasonable in light of the creation of an ADR procedure, which allows responsible parties to present their case to an arbitrator before determining their liability.¹⁷⁹ The court also found that the division was reasonable considering the lack of records concerning ownership of the waste.¹⁸⁰ Because the consent decree was a fair, adequate, and reasonable settlement and because Congress' policy favors settlement of CERCLA claims, the court approved entry of the consent decree.¹⁸¹

V. COMMENT

The instant case is a prototype of those in which consent decrees specify use of ADR to resolve cost-allocation impasses among responsible parties in CERCLA enforcement cases and where third parties intervene to oppose entry of the consent decree on fairness grounds. In the early 1980's the government designated the Lone Pine Landfill as one of its top priority sites to be cleaned up under CERCLA.¹⁸² Yet potentially responsible parties had not agreed on a settlement

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 874.

180. *Id.*

181. *Id.*

182. *See supra* notes 22-28 and accompanying text.

proposal as of 1988.¹⁸³ A major hang-up to settlement was the issue of cost allocation among the parties.¹⁸⁴

The delay in reaching a settlement insured delay in removing hazardous wastes from the landfill. This delay in turn meant one of Congress' goals in enacting CERCLA—insuring that responsible parties rather than the public bear the cost of restoring contaminated sites¹⁸⁵—directly conflicted with another of Congress' goals in enacting CERCLA—the prompt cleanup of such sites.¹⁸⁶

Lone Pine Landfill was one of the earliest of the approximately 30,000 hazardous waste sites designated by EPA for cleanup.¹⁸⁷ Soon, courts can expect to see increasing numbers of such cases, where the consent decree for remedial cleanup proposes a method to allocate costs among potentially responsible parties and is opposed by intervening non-settlers. Courts in the future will have to weigh the fairness of the consent decree to the intervenors against the public's interest in the speedy resolution of CERCLA enforcement cases.

If the *Acton* court had denied approval of the consent decree, a cleanup case initiated in the early 1980's would have suffered further delay in resolution. Potentially responsible parties would have had to return to the drawing board to craft a viable settlement policy, or the EPA would have had to conduct the remedial action and then sue the responsible parties for cost reimbursement.¹⁸⁸

Furthermore, the ramifications of the court's denial could have extended beyond the present case. If potentially responsible parties in similar actions had observed the non-settlers' success in blocking approval of a settlement, they would have been tempted to not join in the proposed settlement of their own cases. Potentially, the lesson could have spread to non-settling parties involved in cost-allocation disputes under other environmental legislation.

However, the *Acton* court recognized and stressed the importance of implementing Congress' goals in passing CERCLA: insuring quick cleanup of hazardous waste sites¹⁸⁹ and holding potentially responsible parties rather than the government liable for paying cleanup costs whenever possible.¹⁹⁰ The court stated that the settling parties' choice of ADR as a mechanism to allocate cleanup costs among themselves was a factor in its determination that the consent decree was fair.¹⁹¹ The court's recognition and approval of using ADR in allocating costs may encourage other groups of settling parties to use ADR in similar situations.

183. See *supra* note 28 and accompanying text.

184. See *supra* notes 29, 164 and accompanying text.

185. See *supra* notes 69-70 and accompanying text.

186. See *supra* notes 77-79 and accompanying text.

187. See *supra* notes 22-28, 66 and accompanying text.

188. See *supra* note 30 and accompanying text.

189. See *supra* notes 77-79 and accompanying text.

190. See *supra* notes 155-56 and accompanying text.

191. See *supra* text accompanying notes 164-69, 175-76.

Hopefully, the significance of the Lone Pine settling defendants' proposal to use ADR to solve their cost-allocation dispute will be recognized by EPA officials. Traditionally, the EPA refused involvement in the issue of determining cost allocation among settling parties because of EPA's reliance on joint and several liability to recover cleanup costs.¹⁹² But the EPA is charged with implementing the goals Congress set in enacting CERCLA. One of those goals is the speedy cleanup of hazardous waste sites.¹⁹³ To the extent failure to allocate costs among responsible parties is a stumbling block to early settlement and cleanup, the EPA should seek to promote and encourage strategies that lead to early cost-allocation agreements. Passage of the Administrative Dispute Resolution Act of 1990, which directs federal agencies to use ADR in enforcement actions and other situations, gives the EPA an even greater incentive to actively encourage potentially responsible parties to use ADR to promptly determine cost allocation.¹⁹⁴

The *Acton* court's approval of the consent decree and recognition of ADR as a fair means of allocating costs among potentially responsible parties embroiled in complex environmental enforcement cases sends an important message to similarly situated parties in other environmental cases and to EPA officials responsible for enforcing Congress' environmental-protection acts. The *Acton* decision exemplifies the partnership between the EPA and the courts¹⁹⁵ in furthering the public's interest in efficient resolution of hazardous waste enforcement.

NANCY P. O'BRIEN

192. See *supra* note 90 and accompanying text.

193. See *supra* note 77 and accompanying text.

194. See *supra* notes 121-23.

195. See *supra* note 131 and accompanying text.