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Methods To Minimize CERCLA Liability: Part 3

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As of Sept. 1, 2015, there are over 570 hazardous waste and substance sites listed in California alone. Each one of those sites is subject to action by the state under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as well as state environmental laws. State participation in the enforcement of CERCLA is critical to the statute's success. Niagara Mohawk Power Corp. v. Chevron USA Inc., 596 F.3d 112, 126 (2d Cir. 2010). To encourage potentially responsible parties to assist in the payment of costs for the investigation and cleanup of such sites without extensive litigation, Congress has given the U.S. Environmental Protection Agency and state agencies implementing CERCLA the right to enter into a consent decree that provides protection for the settling PRPs from contribution claims by the nonsettling parties. See 42 U.S.C. § 9613(f)(2). These decrees, however, must be approved by the appropriate federal district court. Id.

The standards for federal court approval of CERCLA consent decrees, although almost identical, are set by each federal circuit. States seeking approval of such decrees face a higher standard, however, in the Ninth Circuit based on Arizona v. City of Tucson, 761 F.3d 1005 (9th Cir. 2014) and its progeny. As a result, PRPs seeking CERCLA contribution protection through the execution of a consent decree with state environmental agencies must be careful to ensure the following two circumstances.

First, that the state presents substantial evidence of the comparative fault involved in "apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done." Id. at 1012 (quoting United States v. Charter Int'l Oil Co., 83 F.3d 510, 521 (1st Cir. 1996)). (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 87 (1st Cir. 1990); and, second, that the district court has made a record that it carried out its "obligation to independently scrutinize the terms of [such agreements]" by comparing "the proportion of total projected costs to be paid by the [settling parties] with the proportion of liability attributable to them." City of Tucson, 761 F.3d at 1008 (quoting United States v. Montrose Chem. Corp. of Cal., 50 F.3d 741, 747 (9th Cir. 1995)).

To approve a CERCLA consent decree, a district court in the Ninth Circuit must find the agreement to be procedurally and substantively "fair, reasonable, and consistent with CERCLA's objectives." City of Tucson, 761 F.3d at 1009 (quoting Montrose, 50 F.3d at 748). Moreover, in the Ninth Circuit, such

decrees presented by the EPA must be given ”deference.” As the court in Tucson held, however, the court is only required to give state-agency-based proposed decrees “some deference”:

We find the reasoning of the First Circuit on this issue persuasive, and we hold that where state agencies have environmental expertise they are entitled to ‘some deference’ with regard to questions concerning their area of expertise. But ‘[a] state agency's interpretation of federal statutes is not entitled to the deference afforded [to] a federal agency's interpretation of ... statutes’ that it is charged with enforcing. City of Tucson, 761 F.3d at 1014 (quoting Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997)).

This standard makes it more difficult in the Ninth Circuit to obtain approval of consent decrees proposed by state environmental agencies versus those proposed by the EPA. In addition, the Ninth Circuit’s standard makes obtaining approval for proposed consent decrees more difficult than in almost all other circuits.

Although this higher standard is a concern, it should not be a bar to approval for several reasons.

In most cases, at least some history about the site and the involvement of PRPs at the site is available. Questions that should be answered in preparing the proposed decree and presenting it to the court include, for example, the following:

- If an owner is involved, how long did that owner own the site?
- If they owned the site, did they also operate a facility at the site? For how long?
- Did others own the site? For how long?
- Did they operate a facility at the site? For how long?
- Compared to the total cleanup bill, what is the PRP's percentage of responsibility for the cleanup based on the ownership, operation or transportation of hazardous substances to the site?
- Did any of the PRPs contribute to the investigation of cleanup of the site?
- If other PRPs contributed but didn’t settle, how much did the contributing PRPs provide versus the nonsettling parties?
- If the settling PRPs transported to the site, how much did they take to the site versus the nonsettling parties?
- What is the financial status of the settling PRPs versus the nonsettling parties?
- How early in the action have the settling PRPs agreed to enter into the decree?
- What defenses do the settling PRPs have?

The last few questions may also be used to justify discounts from the allocation shares calculated by the state. Other factors to consider include whether the PRPs that are settling versus the nonsettling parties were in violation of a cleanup order or other state-based environmental laws and regulations. And, finally, what was the specific methodology used to calculate the allocation and the discount?

The bottom line is that, particularly in the Ninth Circuit, PRPs wishing to obtain the protection provided by a court-approved consent decree should be proactive to ensure that the state agency proposing the decree has a well-documented record to present to the district court regarding a fair allocation formula, the PRPs’ share in that allocation versus the nonsettling parties and the reasonable discounts supporting the settlement amount. Moreover, the parties involved must ensure that the district court is diligent in documenting its independent examination and evaluation of these facts.

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