No. _____

# In The Supreme Court of the United States

ABB INC.; ASHTON COMPANY, INC.; BALDOR ELECTRIC COMPANY; COMBUSTION ENGINEERING INC.; DON MACKEY OLDSMOBILE CADILLAC, INC.; DUNN EDWARDS CORPORATION; DURODYNE, INC.; FERSHA CORPORATION; FLUOR ENTERPRISES, INC.; THE GOODYEAR TIRE & RUBBER COMPANY; HOLMES TUTTLE FORD, INC.; INDUSTRIAL PIPE FITTING, LLC; LOCKHEED MARTIN CORPORATION; PIMA COUNTY COMMUNITY COLLEGE DISTRICT; ROLLINGS CORPORATION; ROWE ENTERPRISES, INC.; TEXAS INSTRUMENTS INCORPORATED; TEXTRON, INC.; TUCSON DODGE, INC.; TUCSON FOUNDRY & MFG., INC.; and WARNER PROPELLER AND GOVERNOR, LLC,

*Petitioners,*

v.

ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; TOMKINS INDUSTRIES INCORPORATED; RAYTHEON COMPANY; PIMA COUNTY; TUCSON ELECTRIC POWER COMPANY; TUCSON AIRPORT AUTHORITY; CITY OF TUCSON; GENERAL DYNAMICS CORPORATION; and STATE OF ARIZONA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether a split panel of the Ninth Circuit correctly ruled that District Courts must give heightened scrutiny to judicial consent decrees proposed by States rather than the United States under Section 113(f)(2) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(2).

2. Whether the District Court's discretion under 42 U.S.C. § 9613(f)(1) to resolve CERCLA contribution claims "using such equitable factors as the court determines are appropriate" is limited in cases where a State rather than the United States is the plaintiff and allocation proponent.

## PARTIES AND RULE 29.6 STATEMENT

Petitioners are:

ABB Inc. is a wholly owned subsidiary of ABB Holdings Inc. ABB Holdings Inc. is a wholly owned subsidiary of ABB Asea Brown Boveri Ltd. ABB Asea Brown Boveri Ltd. is a wholly owned subsidiary of ABB Ltd. ABB Ltd. is a publicly held corporation.

Ashton Company, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Baldor Electric Company has the following parent corporation that owns 10% or more of its stock: ABB Inc. ABB Inc. is a wholly owned subsidiary of ABB Holdings Inc. ABB Holdings Inc. is a wholly owned subsidiary of ABB Asea Brown Boveri Ltd. ABB Asea Brown Boveri Ltd. is a wholly owned subsidiary of ABB Ltd. ABB Ltd. is a publicly held corporation.

Combustion Engineering Inc. is a wholly owned subsidiary of ABB Holdings Inc. ABB Holdings Inc. is a wholly owned subsidiary of ABB Asea Brown Boveri Ltd. ABB Asea Brown Boveri Ltd. is a wholly owned subsidiary of ABB Ltd. ABB Ltd. is a publicly held corporation.

Don Mackey Oldsmobile Cadillac, Inc. has no parent corporation; no publicly held corporation owns 10% or more of its stock. Don Mackey Oldsmobile

**PARTIES AND RULE 29.6 STATEMENT** – Continued

Cadillac, Inc. is owned 100% by Don Mackey, a married man as his sole and separate property.

Dunn Edwards Corporation has no parent corporation; no publicly held company owns 10% or more of its stock.

Durodyne, Inc., now known as Eaton Industrial Corporation, is a wholly-owned subsidiary of Eaton Corporation PLC, a publicly traded company.

Fersha Corporation has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Fluor Enterprises, Inc. ("Fluor Enterprises"), is a wholly-owned subsidiary of Fluor Corporation; JPMorgan Chase & Co. owns 10% or more of Fluor Corporation's stock.

The Goodyear Tire & Rubber Company ("Goodyear") is a publicly traded company. BlackRock, Inc. is a publicly traded company that owns more than 10% of Goodyear's stock. Goodyear has no parent company and no other publicly traded company owns 10% or more of its stock.

Holmes Tuttle Ford, Inc. has no parent corporation; no publicly held corporation owns 10% or more of its stock.

**PARTIES AND RULE 29.6 STATEMENT –** Continued

Industrial Pipe Fitting, LLC is a wholly-owned subsidiary of PUTL, Inc.; no publicly held corporation owns 10% or more of PUTL, Inc.'s stock.

Lockheed Martin Corporation ("Lockheed Martin") is a publicly traded company. The State Street Corporation is a publicly traded company which owns more than 10% of Lockheed Martin's common stock. Lockheed Martin has no parent company and no other publicly traded company owns 10% or more of its common stock.

Pima County Community College District is a political subdivision of the State of Arizona and has no corporate disclosure to make.

Rollings Corporation has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Rowe Enterprises, Inc., dba Precision Toyota of Tucscon, has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Texas Instruments Incorporated has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Textron, Inc. has no parent corporation; T. Rowe Price Associates, Inc. owns 10% or more of Textron's stock. T. Rowe Price Associates, Inc. is a privately held subsidiary of T. Rowe Price Group, Inc., which is a publicly traded company.

**PARTIES AND RULE 29.6 STATEMENT** – Continued

Tucson Dodge, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Tucson Foundry & Mfg., Inc. is a wholly-owned subsidiary of Plastic & Metal Parts, Inc. No publicly held corporation owns 10% or more of Plastic & Metal Parts, Inc.'s stock.

Warner Propeller and Governor, LLC has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Petitioners are informed and believe that the State of Arizona will also be petitioning from the decision below by separate petition.

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## OPINIONS BELOW

The opinion of the divided panel of the United States Court of Appeals for the Ninth Circuit (App., *infra*, at pp. 2-50) is reported at 761 F.3d 1005. The Ninth Circuit's orders denying separate petitions for rehearing en banc by Petitioners and by the State of Arizona (App. at 113-116) are unreported. The District Court of Arizona's order requiring the State of Arizona to supplement its motion for entry of the decrees (App. at 100-112) is available at 2011 U.S. Dist. LEXIS 123219 (Oct. 11, 2011). The District Court's subsequent order approving the decrees (App. at 51-68) is available at 2012 U.S. Dist LEXIS 22074 (Feb. 21, 2012).

## JURISDICTION

The Ninth Circuit entered judgment and denied Petitioners rehearing en banc on November 10, 2014. The Ninth Circuit denied a separate petition for rehearing en banc by the State of Arizona on November 17, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 113(f)(1) and (2) of CERCLA, 42 U.S.C. § 9613(f)(1) and (2), provide:

**(f) Contribution**

**(1) Contribution**

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

**(2) Settlement**

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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

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## STATEMENT OF THE CASE

This case represents another instance of a court of appeals ignoring this Court's prior jurisprudence and concluding that CERCLA must mean something other than what it plainly says. This time around, a split panel of the Ninth Circuit has opined that Congress must have silently intended for courts to apply different standards of review to settlements and equitable cleanup cost allocations proposed by States rather than the United States.

The Court has repeatedly held that courts must neither disregard CERCLA's plain language nor read into the statute requirements that are not expressly stated therein. In *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157 (2004), the Court held that the lower courts could not ignore the plain language of CERCLA § 113(f), which authorizes a claim for contribution only "during or following" a civil action against the claimant. 543 U.S. at 165-168. That decision properly put an end to years of parties and courts treating CERCLA's contribution provision as a free-ranging federal cause of action, unmoored from the statutory preconditions. Similarly, in *United States v. Atlantic Research Corporation,* 551 U.S. 128 (2007), the Court held that liable volunteers with no right of contribution were entitled to seek direct recovery of their costs under § 107. *Id.* at 138-41. That decision properly halted the previously uniform practice of dismissing § 107 cost recovery claims by liable volunteers, based on the assumption that Congress must have silently intended that mere

liability precluded a working party from invoking § 107. Most recently, in *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009), the Court held that the Ninth Circuit erred by imposing joint and several liability on liable parties found by the District Court to have demonstrated an objectively reasonable basis for apportionment. *Id.* at 617-619.

In this case, a divided panel of the Ninth Circuit departed from this Court's clear guidance and imported into CERCLA two requirements found nowhere in the statute. First, the majority determined that, while Congress did not say so in § 113(f)(2), it must have intended that District Courts subject CERCLA consent decrees proposed by States to greater scrutiny than decrees proposed by the United States. App. at 20. Second, the panel majority concluded that the District Courts have less discretion under § 113(f)(1) to equitably allocate costs—in this instance by approving decrees that extinguish claims for contribution—in cases brought by States rather than the United States. *Id*. Neither proposition is supported by either CERCLA's plain language or the statute's legislative history.

The decision below additionally creates uncertainty on an issue of national importance. Most cleanup of hazardous waste and enforcement at contaminated sites is actually conducted by States rather than the United States. Declining to correct the Ninth Circuit's erroneous imposition of novel restriction on State authority and District Court discretion

would have wide-ranging and negative consequences on States, District Courts, and private parties interested in cost-effectively and quickly resolving their alleged liability. All of these consequences would be inconsistent with CERCLA, the statute's legislative history, and its long-established pro-settlement policy.

### A. Statutory Background.

CERCLA establishes a liability scheme for hazardous substance sites and confers upon the United States and States identical, broad authority to settle not only their own CERCLA claims, but also contribution claims by non-settling parties. Pursuant to the express terms of 42 U.S.C. § 9613(f)(2), claims for contribution are barred against parties that have resolved their alleged liability to either the United State or a State in an administrative or judicially approved settlement. When the government settlement takes the form of a judicial consent decree, a District Court's approval of the decree effectively resolves all contribution claims against the settling party. The District Court is empowered under 42 U.S.C. § 9613(f)(1) to resolve such contribution claims by allocating cleanup costs "using such equitable factors as the court determines are appropriate."

CERCLA does not place limits on the District Courts' authority to resolve contribution claims, via settlement or otherwise, in cases involving State plaintiffs. Nor does any provision of CERCLA provide that District Courts can approve State-negotiated

consent decrees only after subjecting them to heightened scrutiny.

### B. Factual Background.

More than four years ago Petitioners began trying to resolve their modest alleged liability under CERCLA and a similar Arizona state law regarding the Broadway-Pantano Landfill ("Landfill"). Petitioners were alleged to be among the dozens of parties who sent waste containing what later became defined as CERCLA hazardous substances to the Landfill, operated largely prior to the establishment of modern federal and state environmental law. The Landfill came to their attention when the State of Arizona Department of Environmental Quality ("ADEQ") filed a petition to preserve the testimony of an ailing, exceedingly colorful former waste hauler, Joe Blankinship under Rule 27 of the Federal Rules of Civil Procedure. In an attempt to facilitate cross-examination of Mr. Blankinship, ADEQ established a public web site that contained summaries of its investigators' interviews not only with Mr. Blankinship, but also other witnesses who purported to recall transporting hazardous substances generated by a variety of parties to the Landfill. Mr. Blankinship was later cross-examined at length and then died, validating the State's grounds for its Rule 27 petition. The State's web site made available to all parties some 100,000 documents, including summaries of interviews of over 800 witnesses. Neither

counsel of record nor the District Court thought it necessary to read all of them.

Several potentially responsible parties ("PRPs") expressed to ADEQ their desire to immediately resolve their alleged liability and avoid incurring additional attorneys' fees.[1] After expressing some reluctance given the uncertainty regarding future cleanup costs, ADEQ eventually made settlement offers to all of the PRPs, using the same formula. As laboriously detailed in an affidavit prepared by ADEQ chemical engineer Ana Vargas, ADEQ developed a proposed settlement framework by first estimating, very conservatively, the potential future costs of cleaning up the Landfill. App. at 61-62. The agency then prepared and made individual settlement demands, based on its preliminary view of the relative culpability of all defendants. ADEQ's settlement framework first assigned an aggregate share of liability to different classes of CERCLA liable parties, and then further apportioned that class liability for settlement demand purposes based upon its wealth of anecdotal evidence about relative volumes of waste taken to the Landfill. App. at 60, n. 6. Waste solvents are the contaminant of concern at the Landfill, and ADEQ alleged that Petitioners and many others sent such wastes there in varying amounts. All of the settling parties allegedly sent the same sort of waste solvents to the site, and ADEQ's formula produced

[1] Counsel of record assumes without conceding that avoiding unnecessary attorney's fees is a good thing.

individual settlement demands based solely on the approximate volume of solvents sent to the Landfill, as estimated by the anecdotal evidence. ADEQ was unable to refine its relative volumetric estimates because of the absence of contemporaneous written records.

Arizona's counterpart to CERCLA, the Water Quality Assurance Revolving Fund (awkwardly, "WQARF"), imposes several rather than joint liability, provides for public funding of orphan shares, and gives a discount to those who opt to settle without contesting the agency's initial, unilateral shares. ADEQ is authorized to invoke CERCLA for the purpose of consummating settlements and conferring contribution protection, but is expressly prohibited from using the federal statute to circumvent the several-only liability scheme of WQARF. ADEQ eventually made individual settlement offers to all PRPs, using this necessarily imprecise formula and the conservative estimate of future site costs. Since the settlement offers proposed that settling parties be released from all liability in exchange for payment of a sum certain, the agency understandably calculated individual shares using a very conservative remedial cost estimate of $75 million. App. at 53, n. 2, and 60-61. Despite their contention that they actually had no liability, nearly two dozen parties quickly concluded that it would be economically preferable to settle as proposed by the State rather than pay lawyers a greater sum to defeat the State's claims of liability.

### C. Proceedings Below.

Petitioners' settlements were ultimately embodied in a series of CERCLA decrees with the State. Each decree provided the settling party with an identical covenant not to sue and contribution protection pursuant to 42 U.S.C. § 9613(f)(2). An illustrative decree, between the State and Petitioner Texas Instruments Incorporated, is at App. 69-98. The settlement amounts varied from $10,000 to $150,750. On October 22, 2010, the State filed a CERCLA case against Petitioners and lodged the proposed decrees to facilitate judicial review. Following a public comment period, the State moved for entry of the decrees on March 11, 2011. Respondents, who had been granted leave to intervene, objected. They expressed fear that approval of the settlements—and the accompanying contribution protection conferred on Petitioners—might expose them to disproportionate liability. On October 20, 2011, the District Court ordered the State to provide additional information regarding the methodology it had used to develop its individual settlement demands. App. at 111-112. The State did so by providing the affidavit of Ms. Vargas, which detailed the components of ADEQ's worst-case future cleanup cost estimate and the volumetric allocation approach developed by the State based on the anecdotal evidence in its public administrative record. App. at 59-62. On February 21, 2012, the District Court approved the decrees, finding them to be fair, reasonable, and consistent with CERCLA. App. at 66-67. The District Court noted that Arizona law

requires the taxpayers to absorb any settlement shortfall. Each consent decree also expressly provided that the State, and not the non-settling parties, must bear any shortfall in the amount paid to resolve liability. App. at 49, n. 12. The District Court did not order the State to submit to the Court all of its administrative record. Non-settling respondents did not include any such materials in their opposition.

After approval of the decrees, the settling parties paid an aggregate of $512,000, which the State had committed to use for site cleanup. CERCLA, it appeared, had worked as intended: Petitioners avoided defense costs by investing in speedy cleanup instead. Respondents thereafter appealed approval of the decrees to the Ninth Circuit, which ordered the parties to address at oral argument whether District Courts must give heightened scrutiny to CERCLA consent decrees negotiated by State enforcement agencies. Petitioners' decisions to help pay for the site cleanup rather than to pay attorneys to fight about relative culpability was, ironically, to be further litigated.

Petitioners wept.

### D. The Ninth Circuit's Decision Below.

On August 1, 2014, a split panel of the Ninth Circuit vacated and remanded the District Court's approval of the decrees.[2] App. at 10. The panel majority

[2] The majority panel included Circuit Judge Milan D. Smith, Jr. and, sitting by designation, Senior District Judge Edward R. Korman of the Eastern District of New York.

held that the District Court had "failed to independently scrutinize the terms of the settlements," citing *United States v. Montrose Chemical Corp. of Cal*., 50 F.3d 741 (9th Cir. 1995),[3] "and in so doing, afforded undue deference to the ADEQ." *Id*. The panel majority opined that "the mere fact that evidence sufficient to evaluate the terms of the agreement is either before the court or purportedly in the parties' possession is not alone sufficient." App. at 15. In that regard, the majority faulted the District Court for "declining to substantively engage with the parties' proposed agreements," App. at 16. That conclusion was based on the majority's review solely of the District Court's written order approving the decrees. App. at 15-16.

With regard to the deference issue, the majority stated that CERCLA consent decrees proposed by States are *per se* not entitled to the same level of deference as those proposed by the United States. App. at 18. The basis for this conclusion was not further explained, although the majority's citation of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), suggests that the majority equated consent decree approval with statutory interpretation. In any event, the majority concluded

[3] The present case and *Montrose* are the only two reported cases in which a court of appeals has found that a district court abused its discretion by approving CERCLA consent decrees. In *Montrose*, the cited abuse was the district court's complete lack of knowledge of the estimated cleanup costs at the site.

that "ADEQ is not entitled to deference, however, concerning its interpretation of CERCLA's mandate." App. at 20. The majority did not further explain what role ADEQ's "interpretation of CERCLA's mandate" had played, nor in what fashion it was erroneous. The panel majority did assert that, "if the district court applied the wrong deferential standard of review in assessing the decrees, we must hold that the court abused its discretion for that reason alone." App. at 18, n. 7. This was the case, the majority contended, even if an independent review of the record before the District Court would reveal the absence of an abuse of discretion. App. at 21, n. 10. That, it so happens, is precisely the review that dissenting Judge Consuelo M. Callahan conducted.

### E. The Dissent by Judge Callahan.

Judge Callahan's respectful but vigorous dissenting opinion faulted the panel majority's effective conclusion that courts asked to review proposed consent decrees should offer no deference whatsoever to decisions by States to enter into early settlements. App. at 23. This position, she asserted, contracted both rulings from other circuits and the Ninth Circuit's own precedent. From a policy perspective, Judge Callahan lamented that the majority's ruling would "ultimately make it more difficult for states to play the role that Congress envisioned for them in remediating the numerous polluted sites that blight our nation." App. at 23. Based on her review of the record—and not merely the portions of it expressly

referenced in one of the District Court's orders—Judge Callahan concluded that "each settling defendant paid damages directly corresponding to ADEQ's estimated degree of liability." App. at 44. In conclusion, Judge Callahan wrote:

> The majority's conclusion appears to be founded upon the flawed premise that state environmental agencies entering consent settlements under CERCLA are entitled to no deference concerning their conclusion that a settlement is fair and reasonable. In doing so, the majority fails to appreciate the origins of CERCLA deference. Moreover, the majority vastly and unwisely expands the required level of judicial scrutiny for CERCLA consent decrees. The majority's decision will significantly restrict state agencies' ability to enter into early CERCLA consent decrees to the detriment of the environment, the statutory framework envisioned by Congress, and PRPs seeking to resolve their liability early in the process.

App. at 50.

## REASONS FOR GRANTING THE WRIT

### I. The Level of Deference District Courts Must Give to State Environmental Agencies When Reviewing Proposed CERCLA Consent Decrees is of Exceptional National Importance.

Although CERCLA was passed over 34 years ago, the burden of remediating historically contaminated sites remains daunting. As has always been the case, the number of hazardous waste sites requiring cleanup exceeds the capacity of the federal government to address them. That leaves States to oversee cleanup at the vast majority of America's historically contaminated sites. U.S. EPA typically takes enforcement action only at the 1,600 or so contaminated sites that are or have been listed on its National Priorities List ("NPL").[4] Congress intentionally left the burden of dealing with tens of thousands of additional contaminated sites with the States. It is not a slight burden. In an exhaustive 2004 study, EPA concluded that in the next 30 years roughly 150,000 contaminated sites will need to be remediated under state jurisdiction.[5] EPA further estimated that the likely cost of dealing with those state-lead sites would be $30 billion, while warning that "several hundred thousand" additional

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[4] 40 CFR Part 300, Appendix B.

[5] U.S. ENVTL. PROT. AGENCY, EPA 542-R-04-015, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS Ex. 1-1 (2004), *available at* http://www.clu-in.org/download/market/2004market.pdf.

sites might be discovered after the initial 30-year period.[6] In 1997, the U.S. General Accountability Office ("GAO") had similarly concluded that "[t]he effort to clean up federal hazardous waste sites is likely to be among the costliest public works projects ever attempted by the government."[7] *See also* NATIONAL RESEARCH COUNCIL, ALTERNATIVES FOR GROUNDWATER CLEANUP 27 (1994) (number of sites with groundwater contamination ranges between 300,000 and 400,000); MILTON RUSSELL, ET AL., HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD (1991) (estimating that nation would need to spend $480 billion to $1 trillion over 30 years to remediate groundwater contamination).

Congress' amendment of CERCLA to empower States to confer contribution protection was made in the 1986 Superfund Amendments and Reauthorization Act. At that time, Congress estimated that approximately 10,000 Superfund sites might pose a serious risk to public health. H.R. Rep. No. 99-253, pt. 1, at 55, reprinted in 1986 U.S.C.C.A.N. 2835. Those were the days. Even at those levels, Congress recognized that the "EPA will never have adequate monies or man-power to address [all hazardous waste sites]." Congress accordingly anticipated that EPA would respond directly only to "the nation's worst sites," with the "vast majority" cleaned up under the direction of States. S. Rep. No. 107-2, at 2, 15 (2001).

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[6] *Id.* at Ex. 1-2.

[7] GAO, GAO/HR-97-14, *Superfund Program Management* 6 (1997), *available at* http://www.gao.gov/assets/230/223624.pdf.

Moreover, States face this burden without the ability to employ two tools reserved by Congress for the United States alone. Unlike the U.S. Environmental Protection Agency ("EPA"), States cannot issue unilateral and unappealable CERCLA cleanup orders pursuant to 42 U.S.C. § 9606. *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1494 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991). Nor can they directly access the CERCLA Hazardous Substance Trust Fund, established pursuant to 42 U.S.C. § 9611, which EPA uses as a revolving enforcement fund.

The primary enforcement tool given by CERCLA to the States is the ability to resolve the liability of alleged polluters. Congress gave both the United States and States equivalent authority to offer finality and certainty to those willing to settle. Under 42 U.S.C. § 9613(f)(2), parties who enter into judicially approved consent decrees with a State obtain contribution protection, or immunity from further claims for cleanup costs by non-settling private parties. Requiring District Courts to subject CERCLA consent decrees negotiated by States to *de novo* review or other heightened scrutiny would impair the ability of the States to use the best and essentially only CERCLA tool at their disposal. Doing so also would impair the ability of States to achieve the CERCLA goals of ensuring "prompt and efficient" remediation of hazardous waste sites. CERCLA was enacted "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup were borne by those responsible for the contamination."

*Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 602. Recognizing that "litigation is a cost-ineffective alternative which can squander valuable resources" *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 90 (1st Cir. 1990), CERCLA favors cleanup rather than "litigation for litigation's sake." *Cannons*, 899 F.2d at 92; *Niagara Mohawk Power Corp. v. Chevron USA*, 596 F.3d 112, 120 (2d Cir. 2010).

The importance of proper interpretation of CERCLA to the States has been reflected repeatedly in their vigorous participation as amici in matters before this Court. For instance, 38 States plus the District of Columbia and the Commonwealth of Puerto Rico filed a brief in *Atlantic Research* supporting the right of liable but working parties to seek cost recovery under Section 107. *See, e.g.,* Brief for the States of Washington, et al. as Amici Curiae in Support of Respondent, *Atlantic Research Corp.*, 551 U.S. 128 (2007) (No. 06-562), 2007 U.S. S. Ct. Briefs LEXIS 354, at *8 (amici are "vitally interested in ensuring that CERCLA is properly construed to promote its goal of expeditious cleanup action with respect to as many contaminated sites as practicable"). A coalition of 18 States and cities—including four not heard in *Atlantic Research*—made the same argument while urging the Court to accept certiorari to address the issue in its prior opportunity. *See* Brief for the States of Alabama, et al. as Amici Curiae in Support of Petitioners, *The Pinal Creek Group v. Newmont Mining Corporation, et al.*, 524 U.S. 937 (1998) (No. 97-795), p. 1 ("[T]he plain language of the

Superfund law must not be disregarded in favor of an interpretation that discourages liable private parties from undertaking remedial action"). A total of 42 states, then, saw fit to address the Court (and successfully so) on just the issue of liable party cost recovery. Consent decree approval is an issue of even greater importance to States.

As Judge Callahan stated in her dissent, "The majority's decision will significantly restrict state agencies' ability to enter into CERCLA consent decrees to the detriment of the environment, the statutory framework envisioned by Congress, and PRPs seeking to resolve their liability early in the process."

## II. The Panel Majority's Ruling Contradicts This Court's Prior CERCLA Precedent.

When a District Court approves a CERCLA consent decree containing contribution protection, of course, it effectively determines that it is "fair, reasonable, and consistent with CERCLA"[8] for the settling parties to be allocated the costs imposed on them under the decree, and no more. Reacting to the appellants' misplaced fear of disproportionate liability,[9] the panel

[8] *See, e.g., United States v. Montrose Chemical Corp*., 50 F.3d 741, 747 (9th Cir. 1995).

[9] As the dissent observed, under both the terms of the consent decrees and Arizona law, the settlors cannot be held liable for any shortfall in payments by the settling parties. App. at 49, n. 12 (citing Ariz. Rev. Stat. Section 49-281(d) and consent decrees). Under its own *Montrose* ruling, the fact that

(Continued on following page)

majority ruled that the District Court was required to heavily scrutinize the relative culpability of the settling and non-settling parties as a precondition to consent decree approval. The majority found the District Court's "numerical analysis" lacking in this regard. App. at 16. This mandate cannot be squared with this Court's recent rejection of another Ninth Circuit opinion holding that District Courts similarly could apportion CERCLA response costs only based upon exacting evidence. In *Burlington Northern*, this Court held that CERCLA costs can be apportioned—even after a full trial—based on a mere "reasonable basis," and on the "simplest of considerations." 556 U.S. at 617-619. There is no need for "sufficient data to establish the *precise* proportion of contamination that occurred" based on "*specific* and *detailed* records." *Id*. The panel majority's decision effectively imposes on District Courts an evidentiary burden in the State consent decree approval context that is more rigorous than what is required for allocation at trial.

In *Burlington Northern*, the Court twice reiterated that the Ninth Circuit should have evaluated whether the District Court properly found a "reasonable basis" for apportionment based on all of the facts in the record—not merely the laundry list of facts cited by the District Court. "The question is whether

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non-settlors do not bear the risk of any shortfall should have been of "considerable relevance" to the panel majority while evaluating whether the decrees were fair, reasonable, and consistent with CERCLA. 50 F. 3d at 747.

the record provided a reasonable basis for the District Court's conclusion." 556 U.S. at 615. *See also, id*. at 617 ("we conclude that the facts contained in the record reasonably supported the apportionment of liability." The panel majority's opinion demands in the consent decree approval process a level of precision that this Court has already declared that need not be met at trial. And it demands that this precision be expressly discussed.

## III. The Panel Majority's Ruling Cannot Be Squared With CERCLA's Plain Language or Its Policies.

The plain language of CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), makes no distinction between the authority given to the States and the United States. The plain language contemplates that courts may consider and approve CERCLA consent decrees negotiated by either States or the United States. No language states or suggests that the authority given to States is inferior, or that consent decrees negotiated by States must be given heightened scrutiny. Likewise, the plain language of § 113(f)(1), 42 U.S.C. § 9613(f)(1), allows District Courts to conduct equitable allocation using factors of their own choosing, without stating that the discretion enjoyed by the courts varies based upon the identity of the government plaintiff.

This Court has emphasized for years if not decades that, when a statute's terms are plain, they should be applied as written. *See, e.g.*, *Estate of*

*Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (when "a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished"); *Pavelic & Le Flore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (the task of the judiciary is "to apply the text, not to improve upon it.").

The Court has uniformly applied these traditional rules in CERCLA cases, rejecting arguments that the text of the statute could be improved upon. *Atlantic Research* and *Aviall, supra*, vividly illustrate that.

The plain language of CERCLA suffices to demonstrate the error of the Ninth Circuit panel majority, which tried to "improve upon" the language Congress used. While there is accordingly no need to delve into CERCLA's legislative history and policies, doing so only reinforces the conclusion that the Ninth Circuit's new test cannot stand.

Section 113(f) was "'designed to encourage settlements and provide PRPs[10] a measure of finality in

[10] The SARA Amendments, indeed, had the effect intended by Congress. For example, when reporting on Superfund in 1988, then Acting Assistant Administrator Timothy Fields, Jr. stated that "responsible parties are performing or funding approximately 75% of Superfund long-term cleanups, saving taxpayers more than $ 12 billion to date." Hearing Before the Subcomm. on Finance and Hazardous Materials (Feb. 4, 1998), *available at* http://www.epa.gov/superfund/action/congress/test0204.htm. Similarly, then Assistant Administrator Steven A.

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return for their willingness to settle.'" *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 103 (1st Cir. 1994) (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990)); *see also* H.R. Rep. No. 99-253, at 80, reprinted in 1986 U.S.C.C.A.N. 2835, 2862. During the 1986 debate over SARA, the House Judiciary Committee noted that "encouraging * * * *negotiated* clean-ups will accelerate the rate of clean-ups and reduce their expense by making maximum use of private sector resources." H.R. Rep. No. 99-253, *supra,* Pt. 3, at 29 (emphasis added). Similarly, the House Energy and Commerce Committee explained that "[t]he 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" and added that "[t]hese provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups." H.R. Rep. No. 99-253, *supra,* Pt. 1, at 58-59.

The Ninth Circuit's heightened scrutiny standard will be especially unworkable in precisely those situations CERCLA was intended to prioritize the

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Herman emphasized that "responsible parties play a vital, and in our view, irreplaceable role in cleaning up the nation's Superfund sites." Hearing Before the Subcomm. on Commerce, Trade and Hazardous Materials of the Sen. Comm. on Commerce (July 18, 1995) (Serial No. 104-54), *available at* http://babel.hathitrust.org/cgi/pt?id=pst.000025256697.

most: old sites with few records, dying or dead witnesses, and a state enforcement agency that requires quick settlements to fund cleanup work.

## IV. The Panel Majority Has Created Uncertainty on an Important Question of Federal Law That Should Be Addressed Immediately by This Court.

Given the important and expressly conferred role of State-negotiated consent decrees, it is crucial that this Court clarify immediately whether such decrees must, indeed, be subjected to heightened scrutiny. The majority panel and the dissent disagree about whether the panel's ruling imposing a heighted scrutiny standard, in addition to all of its other flaws, creates a conflict among the circuits. At a minimum, the panel's decision, if not its language, is hard to square with the rulings by the First and Third Circuits. *See City of Bangor v. Citizens Communications Co.*, 532 F.3d 70 (1st Cir. 2008), and *In re: Tutu Water Wells CERCLA Litigation*, 326 F.3d 201 (3d Cir. 2003).

That kerfuffle misses the bigger issue: the Ninth Circuit's flat conclusion that some recognized doctrine must justify some sort of heightened scrutiny of State-negotiated consent decrees threatens to do

enough damage to CERCLA—even standing alone—that it should be reviewed and corrected without further delay.

Supreme Court Rule 10 expressly allows the Court to accept certiorari to decide an important question of federal law that needs to be settled by this Court, regardless of the confusion below. As described above, few issues of CERCLA are more important than understanding whether State-negotiated decrees require heightened judicial scrutiny.

Indeed, the Court's prior practice with regard to accepting certiorari in CERCLA cases reflects its determination to resolve important issues when it is necessary and important to do so, and not wait until all or most of the circuits have chosen a side. A split among the circuits may be sufficient to compel Supreme Court review, but it is not necessary.

The Court's decision to accept certiorari in *Atlantic Research*—despite the complete absence of a split among the circuits—is illustrative. At the time the Court granted the petition for certiorari to *Atlantic Research*, the circuit courts had unanimously held that mere liable party status disqualified parties that had incurred cleanup costs from seeking to recover them under § 107.[11] Of course, those courts were

[11] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th

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uniformly wrong. Had this Court placed a priority on awaiting a split among the circuits over fixing consistent but erroneous jurisprudence addressing important national issues, *Atlantic Research* would never have been heard. The same dynamic applies here. What level of deference District Courts should provide to State-negotiated consent decrees is so crucial that this Court should address it now rather than await further flailing by the lower courts. The issue is squarely presented and ripe for review. Conversely, the potential negative consequences of delay are alarming. For instance, once this Court ruled properly in *Aviall* in 2004 that contribution claims could be brought only "during or following" an action against their claimants, it became clear that the uniform circuit court opinions making § 107 cost recovery categorically unavailable to liable parties would have to fall. During that period, however, many claimants were deprived of any relief because they lacked a contribution claim following *Aviall*, but the

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Cir. 1998), *cert. denied*, 525 U.S. 963 (1998); *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *New Castle Cnty. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States v. Colo. & E. R. Co.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100-103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

lower courts refused to anticipate *Atlantic Research* and allow them to proceed under § 107.[12] It would be unwise to allow the Ninth Circuit's similar mistaken rule in the present case to apply indefinitely in order to await further purported circuit conflict.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition be granted.

Respectfully submitted this 9th day of February, 2015.

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[12] *See ASARCO, Inc. v. Union Pac. R.R. Co*., No. 4-2144, 2006 U.S. Dist. LEXIS 2626, at *12 n. 3 (D. Ariz. Jan. 24, 2006), Dkt. No. 68; Order Granting Defendant Union Pacific Railroad Company's Motion for Partial Dismissal, *ASARCO, Inc. v. Union Pac. R.R. Co*., No. 4-2144 (April 15, 2005), Dkt. No. 15 (in a case decided after *Aviall* and before *Atlantic Research*, rejecting the "dubious argument" that the Court's ruling in *Aviall* that liable volunteers could not seek contribution meant that the circuit courts would inevitably have to allow them to seek cost recovery under § 107).

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**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

STATE OF ARIZONA,

*Plaintiff-Appellee*,

v.

CITY OF TUCSON,

*Intervenor-Plaintiff-Appellee*,

v.

ASHTON COMPANY INCORPORATED CONTRACTORS AND ENGINEERS; BALDOR ELECTRIC COMPANY; DON MACKEY OLDSMOBILE CADILLAC, INC.; DUNN-EDWARDS CORPORATION; DURODYNE, INC.; FERSHA CORPORATION; FLUOR CORPORATION; GENERAL DYNAMICS CORPORATION; GOODYEAR TIRE & RUBBER COMPANY; LOCKHEED MARTIN CORPORATION; HOLMES TUTTLE FORD, INC.; INDUSTRIAL PIPE FITTINGS, LLC; TUCSON FOUNDRY & MANUFACTURING INCORPORATED; ROWE ENTERPRISES INCORPORATED; PIMA COUNTY COMMUNITY COLLEGE DISTRICT; ROLLINGS CORPORATION; TEXTRON INCORPORATED; ABB INCORPORATED; COMBUSTION ENGINEERING INCORPORATED; TEXAS INSTRUMENTS, INC.; TUCSON DODGE INCORPORATED; WARNER PROPELLER

No. 12-15691

D.C. No. 4:10-cv-00634-CKJ

OPINION

& GOVERNOR COMPANY, LLC; FLUOR ENTERPRISES, INC.,

*Defendants-Appellees*,

v.

RAYTHEON COMPANY; PIMA COUNTY,

*Intervenors-Appellants*,

UNIVERSITY OF ARIZONA; ARIZONA BOARD OF REGENTS; TOMKINS INDUSTRIES, INC.; TUCSON AIRPORT AUTHORITY; TUCSON ELECTRIC POWER COMPANY,

*Intervenor-Defendants-Appellants*.

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted
February 10, 2014 – San Francisco, California

Filed August 1, 2014

Before: Consuelo M. Callahan and
Milan D. Smith, Jr., Circuit Judges, and
Edward R. Korman, Senior District Judge.*

Opinion by Judge Milan D. Smith, Jr.; Partial Concurrence and Partial Dissent by Judge Callahan

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* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

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**OPINION**

M. SMITH, Circuit Judge:

In this appeal, we address a district court's obligation to scrutinize the terms of a proposed consent decree under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601-75 (CERCLA). In so doing, we reaffirm that a district court has an "obligation to independently scrutinize the terms of [such agreements]," by, *inter alia,* comparing "the proportion of total projected costs to be paid by the [settling parties] with the proportion of liability attributable to them." *United States v.*

*Montrose Chem. Corp. of Cal.,* 50 F.3d 741, 747 (9th Cir. 1995) (internal quotation marks and emphasis omitted).

We conclude that the district court properly declined to issue declaratory relief regarding the intervening parties' (Intervenors) future CERCLA liability. We further hold that the district court erred in entering the parties' proposed CERCLA consent decrees, because the court failed to independently scrutinize the terms of the agreements, and in so doing, afforded undue deference to the Arizona Department of Environmental Quality (ADEQ). We therefore affirm in part, reverse in part, and remand for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

This case concerns liability under CERCLA and its state law counterpart, the Arizona Water Quality Assurance Revolving Funds (WQARF), A.R.S. § 49-281-391, for cleanup costs resulting from the contamination of the Broadway-Patano Landfill Site (the Site) – a hazardous waste site in Tucson, Arizona.

In January 2009, following an extensive investigation by the ADEQ, the State of Arizona filed a petition in the United States District Court for the District of Arizona, seeking to preserve the testimony of Ernest Joseph Blankinship – an elderly witness who had extensive knowledge of the Site's contamination. During the course of the proceedings, several parties, who were potentially responsible for the

Site's contamination (i.e., potentially responsible parties), approached the State seeking to enter into early settlement agreements, releasing them from additional liability under CERCLA and WQARF.

On June 18, 2010, the State sent early settlement offers to those parties who requested early agreements, and the State ultimately reached eighteen proposed agreements with twenty-two parties. The proposed agreements require the settling parties to pay specified damages to the State, in exchange for a full release of liability under CERCLA and WQARF. Consistent with Section 113(f)(2) of CERCLA, the proposed agreements further release the settling parties from any obligation to pay contribution to non-settling parties in the future. *See* 42 U.S.C. § 9613(f)(2).

In order to obtain judicial approval of the proposed agreements under 42 U.S.C. § 9613(f)(2), the State initiated this action against the settling parties (Defendants-Appellees), alleging liability for the Site's cleanup under CERCLA and WQARF. Shortly thereafter, the State filed public notice of its intent to enter into consent decrees with the Defendants-Appellees. A number of non-settling parties filed comments objecting to the proposed consent decrees and the State filed responses.

On March 11, 2011, the State filed a motion to enter the consent decrees. The State's motion explained that the total estimated cost of remediation was $75 million, and that the State calculated the

liability of the settling parties to be *de minimis* – 0.01% to 0.2% of the total cost. Several potentially responsible parties, who were not parties to the settlements, subsequently moved to intervene in the action.[1] The district court granted these motions over the State's objection.[2]

Intervenors opposed the State's motion to enter the consent decrees. In so doing, they primarily argued that the State did not provide sufficient information for the parties or the court to determine whether the consent decrees were substantively "fair,

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[1] The State informed Intervenors that the State considered them to be potentially responsible parties for contamination at the Site. The State sent each Intervenor a settlement offer, but Intervenors rejected these agreements.

[2] After granting the motions to intervene, the court ordered the parties to brief whether additional discovery was necessary prior to the court's ruling on the State's motion to enter consent decrees. The State took the position that additional discovery was not necessary. Intervenors disagreed. The court ultimately declined to order formal discovery, but instead ordered the State to supplement its motion to enter consent decrees with "additional information regarding the [ ] formula/methodology used to calculate settlement amounts." On appeal, Intervenors challenge the district court's order denying formal discovery.

"[B]road discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Hallett v. Morgan,* 296 F.3d 732, 751 (9th Cir. 2002) (internal quotation marks omitted). Here, the district court did not abuse its discretion in ordering the State to provide additional information through supplemental briefing, in lieu of ordering formal discovery.

reasonable, and consistent with CERCLA's objectives." *Montrose,* 50 F.3d at 748. Intervenors' brief in opposition to the motion further requested a court order declaring that the State could not, in the future, hold Intervenors jointly and severally liable for costs related to the Site's cleanup.[3]

The district court denied Intervenors' request for declaratory relief and issued a twelve-page opinion aproving the consent decrees. The district court's opinion lays out the procedural background of this case and the legal framework under which proposed CERCLA consent decrees are reviewed. Although the district court recognized its obligation to independently scrutinize the terms of the settlements, the district court did not engage in a substantive analysis of the settlements' terms. In approving the consent decrees, the court declined to even discuss the parties' individual or aggregate settlement amounts, and merely deferred to the ADEQ's judgment that "the public interest is best served through entry of th[e] agreement[s]." Intervenors timely appealed.

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[3] Throughout this litigation, the State has asserted that WQARF prohibits the State from holding Intervenors jointly and severally liable in future litigation. CERCLA contains no such limitation. *See Burlington N. & Santa Fe Ry. Co. v. United States,* 556 U.S. 599, 614 (2009) (liability under CERCLA is generally joint and several).

## JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's grant or denial of declaratory relief for abuse of discretion. *Cal. Ass'n of Rural Health Clinics v. Douglas,* 738 F.3d 1007, 1011 (9th Cir. 2013). We also review the approval of a consent decree for abuse of discretion. *Turtle Island Restoration Network v. U.S. Dep't of Commerce,* 672 F.3d 1160, 1165 (9th Cir. 2012) (citing *Montrose,* 50 F.3d at 746). For the following reasons, we affirm in part, vacate in part, and remand.

## DISCUSSION

### I. The District Court Properly Denied Intervenors' Request for Declaratory Relief

We affirm the district court's order denying Intervenors' request for declaratory relief, because this request was not properly before the district court.

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . ." 28 U.S.C. § 2201.

A request for declaratory relief is properly before the court when it is pleaded in a complaint for declaratory judgment. *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc.,* 560 F.3d 935, 943 (9th Cir. 2009). Requests for declaratory judgment are not properly before the court if raised

only in passing, or by motion. *Id.* (denying "motion for declaratory judgment" because such a motion is "inconsistent with the Federal Rules" (internal quotations marks omitted)).

Here, Intervenors' request for declaratory relief was not properly before the district court. Intervenors did not request this relief in their complaints. Rather, they requested an order regarding their future liability in their brief opposing the State's motion to enter the consent decrees. If Intervenors wish to obtain a declaratory judgment, they must either file a separate action seeking such relief, or move to amend their complaints on remand. *Id.*

## II. The District Court Erred in Entering the Consent Decrees

We vacate and remand the district court's order approving the consent decrees, because the court failed to independently scrutinize the terms of the agreements, *see Montrose,* 50 F.3d at 747-48, and in so doing, afforded undue deference to the ADEQ.

### A. Legal Standard

#### 1. CERCLA

"CERCLA is a comprehensive statute that [among other things] grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v.*

*United States,* 511 U.S. 809, 814 (1994). We have explained:

> [T]he Federal Government may clean up a contaminated area itself . . . or it may [seek an injunction to] compel responsible parties to perform the cleanup. . . . Under the first option . . . the government pays for the cleanup [using Superfund money] under § 9604 and then seeks recovery for its costs from [potentially responsible parties] under § 9607. This option has an obvious drawback for the government: It must pay first and sue for recovery of costs later (often in protracted litigation). The second option – compelling [potentially responsible parties] to perform the cleanup – therefore has its advantages.

*City of Rialto v. W. Coast Loading Corp.,* 581 F.3d 865, 869 (9th Cir. 2009) (internal quotations and citations omitted).

CERCLA also encourages states, localities, and private parties to assist in the cleanup of hazardous waste sites. Under Section 104, a state may enter into a contract with the Environmental Protection Agency (EPA), pursuant to which both the state and the EPA engage in cleanup efforts on a cost-sharing basis. 42 U.S.C. § 9604(c), (d). A state may also independently engage in CERCLA remediation efforts, so long as those efforts are not inconsistent with the EPA's National Contingency Plan. *See New York v. Shore Realty Corp.,* 759 F.2d 1032, 1047-48 (2d Cir. 1985).

CERCLA imposes strict liability on certain classes of parties who are potentially responsible for a site's contamination. *Burlington,* 556 U.S. at 608; *Anderson Bros., Inc. v. St. Paul Fire and Marine Ins. Co.,* 729 F.3d 923, 929 (9th Cir. 2013). Under Section 107(a), the federal government or a state can sue responsible parties for "all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the [EPA's] [N]ational [C]ontingency [P]lan." 42 U.S.C. § 9607(a)(4)(A).[4]

CERCLA liability is generally joint and several, *see Anderson,* 729 F.3d at 926, 930, and a defendant seeking to avoid joint and several liability "bear[s] the burden of proving that a reasonable basis for apportionment exists," *Burlington,* 556 U.S. at 614. A defendant who is held jointly and severally liable under Section 107 may, however, seek contribution from other responsible parties under Section 113(f)(1). 42 U.S.C. § 9613(f)(1); *Cooper Indus., Inc. v. Aviall Servs., Inc.,* 543 U.S. 157, 162-63 (2004).

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[4] The state need not obtain EPA authorization to engage in CERCLA remediation efforts and to recover costs under Section 107. *Shore Realty,* 759 F.2d at 1047-48 ("[W]e reject [the] argument that the State's response costs are not recoverable because the State has failed to . . . obtain[ ] EPA authorization. . . . Congress envisioned states' using their own resources for cleanup and recovering those costs from polluters under section 9607(a)(4)(A). We read section 9607(a)(4)(A)'s requirement of consistency with the [National Contingency Plan] to mean that states cannot recover costs inconsistent with the response methods outlined in the [EPA's National Contingency Plan].").

### 2. Early Settlements

"Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.,* 710 F.3d 946, 971 (9th Cir. 2013) (quoting *In re Cuyahoga Equip. Corp.,* 980 F.2d 110, 119 (2d Cir. 1992)). Consistent with this objective, Section 113(f)(2) provides that a party who has resolved its CERCLA liability through a judicially approved consent decree "shall not be liable [to other responsible parties] for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). This statutory framework contemplates that potentially responsible parties who do not enter into early settlement agreements may ultimately bear a disproportionate share of the CERCLA liability. For this reason, potentially responsible parties who do not enter into such agreements have standing to intervene in CERCLA actions to oppose the entry of CERCLA consent decrees. *United States v. Aerojet Gen. Corp.,* 606 F.3d 1142, 1150-53 (9th Cir. 2010).

### 3. Standard of Review

In order to approve a CERCLA consent decree, a district court must conclude that the agreement is procedurally and substantively "fair, reasonable, and consistent with CERCLA's objectives." *Montrose,* 50 F.3d at 748. "Fair" and "reasonable" are comparative terms. *Id.* at 747. Thus, in order to approve a CERCLA

consent decree, a district court must find that the agreement is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done." *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)).

In approving a CERCLA consent decree, the district court has an "obligation to independently scrutinize the terms of [the agreement]." *Montrose,* 50 F.3d at 747 (internal quotation marks omitted). In so doing, the court must "gauge the adequacy of settlement amounts to be paid by settling [parties by comparing] the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them, and then . . . factor into the equation any reasonable discount for litigation risks, time savings, and the like. . . ." *Id.* (emphasis omitted); *Charter Int'l Oil,* 83 F.3d at 515 (holding that the district court's assessment must include "an appraisal of what the government is being given by the [settling party] relative to what the [settling party] is receiving"). A district court abuses its discretion where it does not fulfill its obligation to engage in this comparative analysis. *Montrose,* 50 F.3d at 746-47.

We have further explained that the district court's review of a CERCLA consent decree may not be made in an "informational vacuum," or where the

record contains "no evidence at all on an important point." *Id.* But, the mere fact that evidence sufficient to evaluate the terms of an agreement is either before the court or purportedly in the parties' possession is not alone sufficient. The district court must actually engage with that information and explain in a reasoned disposition why the evidence indicates that the consent decrees are procedurally and substantively "fair, reasonable, and consistent with CERCLA's objectives." *Id.* at 748. As we have explained in other contexts: "Without some indication or explanation of how the district court arrived at [its conclusion], it is simply not possible for this court to review [the district court's determination] in a meaningful manner," and we have no way of knowing whether the district court abused its discretion. *Padgett v. Loventhal,* 706 F.3d 1205, 1208 (9th Cir. 2013) (internal quotation marks omitted).

### B. Application

Although the district court recognized its obligation to independently scrutinize the settlements, "[a]cknowledging that obligation and fulfilling it . . . are two different things." *Montrose,* 50 F.3d at 746. And here, the district court failed to adequately review the agreements.

*Montrose* requires that the district court "gauge the adequacy of settlement amounts to be paid by settling [parties]" by engaging in a comparative analysis. *Id.* at 747. But nowhere in the district court's

opinion is there an analysis comparing each party's estimated liability with its settlement amount, or an explanation of why the settlements are "fair, reasonable, and consistent with CERCLA's objectives." *Id.* at 748. The court's entire numerical analysis is found in a single footnote, which provides: "The State's analysis indicates that, based upon a preliminary estimate of remedial action costs of $75 Million, the range of liability for each settling party extended from 0.01% of the estimated total clean up costs to 0.2%, or as expressed in dollar figures, from $10,000.00 to $150,750.00." The opinion goes on to acknowledge, however, that the State did not provide any evidence supporting this estimated liability, or even "information from which the [district court could] confirm that the settling parties are [in fact] *de minimis* contributors." The opinion even fails to mention the parties' individual or aggregate settlement amounts.

Rather than engaging in the analysis that *Montrose* requires, the district court merely accepted the State's representation that the settlements were substantively fair and reasonable because: "[t]he State . . . informed the Court of the factual bases (files, interviews, documents) for its conclusions . . . [and] explained the methods (software, past costs, estimates) to reach remediation costs." In so doing, the court did not fulfill its responsibilities to independently assess the adequacy of the agreements and to provide a reasoned explanation for its decision.

In declining to substantively engage with the parties' proposed agreements, the district court further

explained that "review of the specific evidence relating to each party would require [the district court] to conduct an in-depth review of the evidence, second guess the agency, and deny the required deference to [the] ADEQ." According to the district court, it must defer to the ADEQ's judgment "unless it is arbitrary, capricious, and devoid of any rational basis."[5]

As the First Circuit has observed, "almost all of the law regarding approval of CERCLA consent decrees comes from cases in which the [EPA is] a party." *City of Bangor v. Citizens Commc'ns Co.,* 532 F.3d 70, 89 (1st Cir. 2008). In such cases, the approval of a CERCLA consent decree "reaches the appellate level 'encased in a double layer of swaddling.'" *Montrose,* 50 F.3d at 746 (quoting *Cannons,* 899 F.2d at 84); *see also United States. v. George A. Whiting Paper Co.,* 644 F.3d 368, 372 (7th Cir. 2011). The first layer of swaddling requires the district court to "refrain from second-guessing the Executive" and to defer to the EPA's expertise. *Montrose,* 50 F.3d at 746 (quoting *Cannons,* 899 F.2d at 84).[6] This is so, because

[5] The State argues that under 42 U.S.C. § 9607(f)(2)(C) the State's judgment is entitled to a "rebuttable presumption of correctness." But this "presumption of correctness" specifically applies to an appointed trustee's natural resource damage assessment that is performed pursuant to the procedures set out in 42 U.S.C. § 9651(c). No such assessment is at issue here.

[6] The deference we owe to a federal agency's administration of statutes it is charged with enforcing varies with the circumstances. *United States v. Mead Corp.,* 533 U.S. 218, 227-28 (2001). While the courts of appeals agree that the EPA is afforded significant deference when it seeks judicial approval of a

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"considerable weight [is] accorded to [a federal] executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Mead,* 533 U.S. at 227-28 (internal quotation marks omitted). We then defer to the district court's judgment and review its approval of the proposed agreement for abuse of discretion. *Montrose,* 50 F.3d at 746.

But where a state, as opposed to the federal government, is a party to a proposed CERCLA consent decree, we do not defer to the state to the same degree as we would the federal government.[7] *Bangor,*

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proposed CERCLA consent decree, courts have not established whether the deference that we afford the EPA is the deference described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the deference described in *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), or some other type of deference.

[7] Our dissenting colleague faults us for discussing deference and suggests that the issue of whether the district court abused its discretion in approving the consent decrees can be separated from "[the] different issue" of the degree to which a district court ought to defer to a state's decision to enter into an early settlement under CERCLA. While these two issues may be "different," they are inextricably intertwined. We cannot decide whether a judge abused her discretion in approving a consent decree without deciding what degree of deference is owed to the party proposing the agreement. This is so because the threshold issue in deciding whether a district court abused its discretion is whether the district court "identified the correct legal rule to apply to the relief requested." *Perry v. Brown,* 667 F.3d 1078, 1084 (9th Cir. 2012) (internal quotation marks omitted). For this reason, if the district court applied the wrong deferential standard of review in assessing the consent decrees, we must hold that the court abused its discretion for that reason alone.

532 F.3d at 93-94. In *Montrose* we adopted the First Circuit's "double-swaddling" test to review CERCLA consent decrees sponsored by the EPA. Nonetheless, we declined to apply or discuss this test in *Arizona v. Components Inc.,* 66 F.3d 213, 215 (9th Cir. 1995), a case involving a state sponsored CERCLA settlement, which we decided just six months after *Montrose.* In *Components,* we merely held that there was sufficient evidence before the district court for it to review the state-sponsored consent decree and that the district court properly reviewed that evidence. *Id.* at 216-17. We declined to discuss what, if any deference, was owed to the state agency's interpretation of CERCLA.

The First Circuit has similarly declined to apply its "double-swaddling" standard to CERCLA consent decrees sponsored by state agencies. In *Bangor,* the First Circuit held:

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

*Bangor,* 532 F.3d at 94 (internal citations omitted).

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. *Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495 (9th Cir. 1997) (emphasis added); *see also Bangor,* 532 F.3d at 94. Applying these principles, if the district court finds that the ADEQ has expertise concerning the cleanup of the Site, it may afford "some deference" to the ADEQ's judgment concerning the environmental issues underlying the CERCLA consent decrees at issue in this case.[8] The ADEQ is not entitled to deference, however, concerning its interpretation of CERCLA's mandate. Nor may the district court abdicate its responsibility to independently determine that the agreements are "fair, reasonable, and consistent with CERCLA's objectives," *Montrose,* 50 F.3d at 748, by deferring to the ADEQ's judgment that the agreements satisfy *Montrose.*[9]

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[8] State agencies, including those charged with enforcing environmental laws, may vary from state to state in terms of their competence, their resources, and their philosophies concerning the enforcement of environmental laws. These considerations are ones that a district judge may properly take into account in assessing the deference owed to an agency's expertise.

[9] The dissent concedes that whether a particular agreement is "fair, reasonable, and consistent with CERCLA's objectives," *Montrose,* 50 F.3d at 748, "may present questions of statutory

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## CONCLUSION

Even if the EPA had been a party to the proposed consent decrees in this case, the district court would have failed to fulfill its duty to independently scrutinize the parties' agreements, as required by *Montrose*. That error is compounded where, as here, the court deferred completely to a state agency's judgment that the proposed agreements were fair, reasonable, and consistent with federal law. *See id.*

For these reasons, we vacate the district court's order entering the consent decrees, and we remand for the court to reconsider the agreements under the principles set forth in this opinion. In reaching this conclusion, we express no opinion as to whether the consent decrees at issue in this case ought to be affirmed on remand, after the district court has fulfilled the responsibilities discussed in this opinion.[10]

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interpretation." *See Orthopaedic Hosp.,* 103 F.3d at 1495-96 ("[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).

[10] The dissent has undertaken a review of the record *de novo,* and, having done so, concludes that there is sufficient evidence in the record to approve the consent decrees. This is contrary to the law of our circuit. The decision of whether to approve consent decrees in the first instance is entrusted to the sound discretion of the district court, not to our court. For this reason, if a district court fails to engage in the appropriate analysis, we are required to remand for the district court to complete its work. *See Montrose,* 50 F.3d at 743, 748.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

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CALLAHAN, Circuit Judge, concurring, in part, and dissenting, in part:

I agree with Part I of the majority's decision where it concludes that the district court properly denied the intervening parties' ("Intervenors") request for declaratory relief and did not abuse its discretion in denying the Intervenors' request for formal discovery. However, because I would conclude that the district court properly approved the proposed consent decrees, I dissent from Part II of the majority's decision.

The issue on appeal is whether the district court **abused its discretion** in approving consent decrees that the State of Arizona entered into with a number of potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75. In the process of deciding that question, however, the majority raises and decides – incorrectly in my opinion – a different issue: the degree to which a district court ought to defer to a state's decision to enter into an early settlement with PRPs under CERCLA. Although the majority recognizes that state agencies may have environmental expertise and be entitled to "some deference" with regard to "environmental issues," it goes on to suggest that the states and their environmental agencies are entitled to no

deference in their decisions to enter into early settlements with PRPs. In doing so, the majority fails to recognize the critical role that Congress envisioned for the states under CERCLA and expands the level of scrutiny required for state-sponsored CERCLA settlements. The majority's decision is inconsistent with the principles that guide our review of consent decrees in general and the decisions of our sister circuits in this context. The decision will ultimately make it more difficult for states to play the role that Congress envisioned for them in remediating the numerous polluted sites that blight our nation. Applying the proper level of deference in this case, I would hold that the district court did not abuse its discretion when it approved the consent decrees.

## I

Arizona brought this action seeking remediation costs that it incurred and expected to incur under CERCLA, 42 U.S.C. § 9607(a), and Arizona's parallel law, the Water Quality Assurance Revolving Fund ("WQARF"), Arizona Revised Statutes § 49-285. As the majority acknowledges, several PRPs approached Arizona early on during its investigation seeking to enter into settlements. Arizona sent early settlement offers to all PRPs. After reaching agreements with some of them, Arizona filed the present action and shortly thereafter, filed a motion seeking approval of the consent decrees.

The district court subsequently ordered Arizona to supplement its motion. Arizona then submitted an affidavit with supporting materials from Ana I. Vargas, an Arizona Department of Environmental Quality ("ADEQ") chemical engineer. Vargas explained that ADEQ relied on EPA guidelines that allocate responsibility by PRP category (i.e., owner/operator, transporter, generator/arranger). Applying these guidelines, ADEQ reviewed the available information to come up with responsibility allocations for each PRP. For example, owners' and operators' allocations were largely based on length of ownership or operation, while generators' and transporters' allocations were based primarily on volume. Thus, ADEQ allocated each generator a share of liability based on volume and other factors which was multiplied by 0.60 (corresponding to the 60% allocation for generators/arrangers), which resulted in a final apportionment of liability for the generator. Vargas also provided a breakdown of ADEQ's $75 million total cost estimate, of which, the settlements totaled $512,000. ADEQ then multiplied each PRP's share of liability by the cost estimate to arrive at an individualized settlement offer for each PRP. Accordingly, under ADEQ's formula, each settling defendant paid damages directly corresponding to ADEQ's estimated apportionment of liability.

The allocations were based upon ADEQ's review of 800 witness interviews and 100,000 pages of documents and its analysis of "information about the site to determine those areas about which it had no

information." Arizona provided that information to the Intervenors. Although Vargas did not specify how ADEQ arrived at each PRP's specific allocation or settlement figure, she explained that ADEQ had proceeded in accord with EPA guidelines, which provide that "EPA will not provide a detailed explanation for the results due to the enforcement-sensitive nature of the discussions involved."

The Intervenors argued that Arizona had not supplied enough information for the court to approve the consent decrees because it had not specified what information it used to arrive at each PRP's apportionment of liability or the cost calculation for each PRP. In its decision approving the consent decrees, the district court observed that courts "give deference to the government's evaluation of" proposed consent decrees, citing *Arizona ex rel. Woods v. Nucor Corp.,* 825 F. Supp. 1452, 1456 (D. Ariz. 1992), *aff'd on other grounds sub nom. Arizona v. Components Inc.,* 66 F.3d 213, 215 (9th Cir. 1995). The court then reviewed the record, and relying heavily on Vargas's affidavit, determined that Arizona had provided sufficient information for it to evaluate the settlements. The district court noted: "The State's analysis indicates that, based upon a preliminary estimate of remedial action costs of $75 Million, the range of liability for each settling party extended from 0.01% of the estimated total clean up costs to 0.2%, or as expressed in dollar figures, from $10,000.00 to $150,750.00." The district court further explained:

> The State has informed the Court of the factual bases (files, interviews, documents) for its conclusions. It has explained the methods (software, past costs, estimates) to reach remediation costs. Although the Court agrees with Intervenors that the State has not provided the Court with specific factual details as to each settling party (e.g., witness N of the 800 witnesses stated that settling party X deposited a specified tonnage of a specified type of waste), such in-depth review of the facts and circumstances is not appropriate. Indeed, although Intervenors argue that such review is needed, Intervenors have not pointed to any controlling precedent that requires such in-depth review.

The district court observed that it was not its "role to determine whether the settlement agreement is the best possible settlement that ADEQ could have achieved, but rather whether it is within the reaches of the public interest." It concluded that the proposed consent decrees were reasonable and in the best interests of the public.

## II

The majority concludes that the district court applied the wrong level of deference to ADEQ's judgment. It declares that "where state agencies have environmental expertise they are entitled to 'some deference' with regard to questions concerning their area of expertise." However, it then concludes that the district court erred in deferring to ADEQ's judgment

that the agreements were "fair, reasonable, and consistent with CERCLA's objectives."[1]

I cannot agree. Congress gave the states a critical role to play in CERCLA enforcement that will be severely undermined by the majority's decision. Moreover, we defer to the EPA's decision to settle with PRPs in light of: (a) our recognition of CERCLA's policy of encouraging settlements; (b) recognition that the settlements are constructed by a party acting in the public interest; (c) respect for the EPA's expertise; and (d) respect for an arms-length agreement. These considerations are equally applicable to state environmental agencies, which accordingly are also entitled to significant deference.[2]

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[1] I note that the parties did not raise the level of deference owed to ADEQ as a consequence of it being a state agency before the district court or on appeal. I would hold that the Intervenors forfeited any such argument by failing to raise it in their opening brief. *See Avenetti v. Barnhart,* 456 F.3d 1122, 1125 (9th Cir. 2006) (finding that the Social Security Commissioner waived an argument that deference applies to an administrative law judge's interpretation of a disability listing by failing to argue it in his opening brief). The majority reaches this issue by proclaiming ipse dixit that it is "inextricably intertwined" with the "correct legal rule." Curiously, although we were confronted with the same exact scenario in *Arizona v. Components,* 66 F.3d 213, 215 (9th Cir. 1995), we **affirmed** the district court. What the majority has really done is invented a new legal rule, retroactively evaluated the district court's decision against it, and faulted the district court for failing to anticipate it.

[2] The importance of this issue is underscored by the fact that the States of Colorado and Nevada filed a letter brief

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A

Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States,* 556 U.S. 599, 602 (2009). "The Act was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Id.* (internal quotation marks omitted). CERCLA provides a number of powers to the President, who has delegated most of his authority to the EPA, "[t]o ensure the prompt cleanup of hazardous waste sites." *Pakootas v. Teck Cominco Metals, Ltd.,* 452 F.3d 1066, 1072 & n.11 (9th Cir. 2006).

Although states do not have as large of a role as the EPA does in enforcing CERCLA, Congress envisioned a crucial role for the states in remediating hazardous waste sites. Most significantly, Congress provided that the various categories of PRPs "shall be liable for" certain remediation costs "incurred by the United States Government **or a State** or an Indian Tribe." 42 U.S.C. § 9607(a) (emphasis added); *see also Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.,* 596 F.3d 112, 120 (2d Cir. 2010) ("CERCLA empowers the federal government **and the states** to initiate comprehensive cleanups and to seek recovery

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supporting Arizona's position less than one month after the issue was initially raised.

of expenses associated with those cleanups." (emphasis added)).

Congress also envisioned that states would play a central role by enforcing CERCLA through early settlements. One of CERCLA's central purposes is to encourage "early settlement between PRPs and environmental regulators." *Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.,* 729 F.3d 923, 929-30 (9th Cir. 2013) (citation and alteration marks omitted). PRPs have a strong incentive "to participate in settlement talks at the earliest possible opportunity because 'non-settling PRPs may be held jointly and severally liable for the entire amount of response costs minus the amount of the settlement.'" *Id.* at 930 (citation and alteration marks omitted). This is because settlements provide settling parties with protection against contribution actions from other PRPs:

> 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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2) (emphasis added). Nonetheless, a settling PRP may still seek contribution from non-settling PRPs. § 9613(f)(3)(B). Thus, as the First Circuit has observed: "Congress has . . . recognized a

special role for states in authorizing judicial approval for consent decrees in which the state is a party, and then authorizing both contribution protection and contribution claims." *City of Bangor v. Citizens Commc'ns Co.,* 532 F.3d 70, 90 (1st Cir. 2008). States can therefore act independently to definitely resolve a PRP's CERCLA liability without authorization from the EPA. *Niagara Mohawk,* 596 F.3d at 127.[3]

Indeed, the EPA itself has recognized that "because of the number and variety of contaminated sites across the country, states play a critical role in effectuating the purposes of CERCLA." *Id.* at 126 (alteration marks omitted) (quoting the EPA's amicus brief). The EPA has elaborated:

> When Congress first enacted [CERCLA] in 1980, it required States to be active partners in conducting Superfund response actions. . . . CERCLA, as amended, strengthens the partnership between the Federal Government and State and local authorities. State and local governments play an important role

[3] CERCLA also provides special roles for states in other contexts, such as allowing them to pursue claims for damages to their natural resources. *See* § 9607(f). States are also "given a special role in defining allowable costs and cleanup standards." *City of Bangor,* 532 F.3d at 91. Specifically, state remediation efforts are presumed to be consistent with the "national contingency plan," which consists of EPA "procedures for preparing and responding to contaminations." *Id.* at 91 & n.8. CERCLA also gives states the authority to enforce any applicable state or federal standard. *Id.* at 91 (citing § 9621(e)).

> in ensuring effective, efficient and well-coordinated cleanups.

EPA, Pub. No. 9375.5-01/FS, *State and Local Involvement In the Superfund Program* (1989).

As a practical matter, state participation in CERCLA enforcement is absolutely necessary because there are more contaminated sites than the EPA is capable of addressing on its own. As several commentators have explained, under CERCLA:

> the role of the States at national priorities list (NPL) sites ranges from required cost sharing at federally funded cleanups to active site management. A vast number of contaminated sites do not meet the criteria for inclusion on the NPL. For these non-NPL sites the federal government's role is likely to be limited to site assessment and emergency response or removal activities. For many non-NPL sites, the federal government may not be involved at all. Thus, if any government-supervised activity is to occur at non-NPL sites, States will have to oversee, enforce, or fund cleanups. For these reasons, the role of the States in addressing contaminated sites, independently and in concert with the federal government, has become increasingly important.

Linda K. Breggin, James McElfish & John Pendergrass, *State Superfund Programs on Overview of the Environmental Law Institute's* (*ELI'S*) *1998 Research, Alb. L. Envtl. Outlook,* Winter 1999, at 1; *see also* Caroline N. Broun & James T. O'Reilly, *CERCLA*

*Players and Their Roles,* in 1 *RCRA and Superfund: A Practice Guide* § 10:3 (3d ed. 2013) (indicating that the states are "key players in Superfund").

Indeed, there are an estimated 450,000 contaminated sites in the nation. *See* Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes,* 16 N.Y.U. Envtl. L.J. 225, 232 (2008) (citing S. Rep. No. 107-2, at 15 (2001)) [hereinafter, *Preemption Paradox*]. Yet, less than 2,000 sites are listed on the EPA's national priorities list. *See* U.S. Environmental Protection Agency, *National Priorities List* (*NPL*), http://www.epa.gov/superfund/sites/npl/ (listing sites as of Feb. 27, 2014). Thus, without state participation, most contaminated sites will remain polluted. *Preemption Paradox, supra,* at 233 ("The federal government, through the . . . EPA[ ], plays an active regulatory role at only a small percentage of the nation's contaminated sites. Instead, a state or local government agency serves as the lead regulatory authority at the vast majority of sites."). Practical considerations also preclude states from proceeding solely under state law. Although many states – like Arizona – have their own parallel laws, settling parties, desiring greater certainty, will insist on CERCLA contribution protection and judicial approval.[4]

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[4] *Compare Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.,* 423 F.3d 90, 95-97 (2d Cir. 2005) (concluding that a state law settlement did not affect the settling party's CERCLA liability, and therefore, did not allow the party to seek

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B

The seminal decision on CERCLA consent decrees is *United States v. Cannons Engineering Corp.,* 899 F.2d 79 (1st Cir. 1990). Drawing on the legislative history of § 9613, the First Circuit concluded that, when evaluating consent decrees, "the trial court's review function is only to 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'"[5] *Id.* at 85 (quoting H.R. Rep. No. 99-253, pt. III, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042). Thus, the First Circuit determined that district courts should evaluate consent decrees according to their fairness, reasonableness, and fidelity to the statute. *Id.* at

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contribution under CERCLA), *and General Time Corp. v. Bulk Materials, Inc.,* 826 F. Supp. 471, 475-76 (M.D. Ga. 1993) (concluding that a settlement of state law liability did not provide contribution protection under CERCLA), *with* Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes,* 33 Ecology L.Q. 1, 66 n.289 (2006) ("Generally, settlements with some but not all PRPs at a site are difficult to obtain without contribution protection for the settling party; a PRP will be unlikely to settle a cleanup cost lawsuit with the plaintiff only then to be sued for contribution by the non-settling defendants.").

[5] As is relevant here, the courts' judicial review function originates with 42 U.S.C. § 9613(f)(2). CERCLA separately sets forth procedures – including judicial approval – for settlements between the United States and private parties under § 9622, which do not apply here. *See City of Bangor,* 532 F.3d at 93. Notably, § 9613(f)(2) refers to "an administrative or judicially approved settlement," indicating that **administrative** approval is sufficient to provide contribution protection to PRPs settling with state agencies.

85-90. As that court subsequently observed, these factors are "similar to the one[s] used by courts when reviewing consent decrees generally." *City of Bangor,* 532 F.3d at 93. We are in accord. *See Turtle Island Restoration Network v. U.S. Dep't of Commerce,* 672 F.3d 1160, 1165 (9th Cir. 2012) ("A district court may approve a consent decree when the decree is 'fair, reasonable and equitable and does not violate the law or public policy.'" (citation omitted)).

In *Cannons,* the First Circuit further observed that:

> We approach our task mindful that, on appeal, a district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling. In the first place, it is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement. While "the true measure of the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances," the district court must refrain from second-guessing the Executive Branch.
>
> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit

> at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance. The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute. Thus, the first layer of insulation implicates the trial court's deference to the agency's expertise and to the parties' agreement. While the district court should not mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement de novo.

899 F.2d at 84 (citations omitted). Thus, the First Circuit's rationale for deferring to the EPA rested on: (a) CERCLA's policy of encouraging settlements; (b) its recognition that the settlements are constructed by a government actor committed to protect the public interest; (c) respect for the agency's expertise; and (d) respect for an arms-length agreement reached by sophisticated parties. The court distilled these factors from decisions discussing judicial approval of consent decrees in a variety of circumstances. *See id.* (citing cases). The court further explained that the "second layer of swaddling" is the deferential nature of appellate review for a district court's decision approving a consent decree. *Id.* We adopted this

framework in *United States v. Montrose Chemical Corp.,* 50 F.3d 741, 743, 746 (9th Cir. 1995).

C

Few courts have been called upon to consider what level of deference district courts should accord to state-sponsored consent decrees. Nonetheless, two of our sister circuits have addressed this issue and provided persuasive guidance. In *City of Bangor v. Citizens Communications Co.,* 532 F.3d 70 (1st Cir. 2008), the First Circuit decided to accord "some deference" to the state agency. It explained:

> The question becomes what deference, if any, should be given to a state agency which is not charged with implementing CERCLA. We recognize the [Maine Department of Environmental Protection ("DEP")] does have a mandate under state law to "prevent, abate and control the pollution of the air, water and land and preserve, improve and prevent diminution of the natural environment of the State."
>
> Federal courts generally defer to a state agency's interpretation of those statutes it is charged with enforcing, but not to its interpretation of federal statutes it is not charged with enforcing.
>
> We choose to accord some deference to Maine's decision to sign onto the Consent Decree, but not the same amount of deference we would accord to the EPA in a consent

> decree involving the United States. We give deference in recognition that the state agency has some expertise. The lesser deference does not displace the baseline standard of review for abuse of discretion.

*Id.* at 94 (citations omitted). Arguably, the First Circuit overstated the case when it suggested that states are "not charged with implementing CERCLA," as they do have substantial roles under the statute as discussed above. Nonetheless, the First Circuit recognized that state agencies are still due "some deference" when courts evaluate a state environmental agency's decision to enter into a consent decree.

In *Commissioner v. Esso Standard, Oil S.A.,* 326 F.3d 201, 205 (3d Cir. 2003), the district court approved a CERCLA consent decree between the Virgin Islands' Department of Planning and Natural Resources and several settling PRPs. The Third Circuit affirmed. *Id.* at 210. In doing so, the court accorded deference to the territorial agency, explaining: "there is deference to the administrative agencies' input during consent decree negotiations and the law's policy of encouraging settlement. Where the appropriate agency has reviewed the record and has made a reasonable determination of fault and damages, that determination is owed some deference." *Id.* at 207. Thus, although the Third Circuit did not explicitly address how this level of deference differed from the level of deference owed to the EPA, it plainly recognized that the EPA was not a party and still accorded deference to the territorial agency.

We previously had an opportunity to address this issue, but declined to do so. In *Arizona ex rel. Woods v. Nucor Corp.,* 825 F. Supp. 1452, 1459 (D. Ariz. 1992), the nonsettling PRPs argued that the district court lacked sufficient technical data to approve the settlement, including information regarding the extent of contamination, cleanup cost, and apportionment of liability. The district court reviewed the information submitted by Arizona (including an affidavit from Vargas) and found that the there was adequate support for the settlement. *See id.* at 1459-65. Throughout its analysis, the court suggested that it was according ADEQ deference, noting that its role was "not to determine the best method for measuring fault and apportioning liability, but rather to uphold the method proposed by the ADEQ unless it is 'arbitrary, capricious, and devoid of a rational basis.'" *Id.* at 1459. We affirmed on appeal without discussing the level of deference owed to a state environmental agency, holding that the district court did not abuse its discretion. *See Arizona v. Components Inc.,* 66 F.3d 213, 215 (9th Cir. 1995). The most noteworthy aspect of our decision in *Components* is that we did not do what the majority does here: fault the district court for deferring to ADEQ.

Thus, although we have not specifically addressed the issue, both the First and Third Circuits have accorded at least some deference to state or territorial agencies that entered into CERCLA consent decrees. *City of Bangor,* 532 F.3d at 94; *Esso Standard,* 326 F.3d at 207. The Eighth Circuit has

also suggested that state agencies are entitled to deference when enforcing federal environmental laws. *See Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.,* 138 F.3d 351, 357 (8th Cir. 1998) (according "considerable deference" to administrative enforcement agreement between a state agency and a polluter for violations of the federal Clean Water Act). These decisions conflict with the majority's suggestion that state environmental agencies are entitled to no deference in determining whether an agreement is fair, reasonable, and consistent with CERCLA's objectives.[6]

Moreover, the factors discussed by the First Circuit in *Cannons* support extending significant deference to state environmental agencies. *See* 899 F.2d at 84. Like the EPA, state environmental agencies possess expertise and are charged with protecting the public interest. Although Congress did not give state agencies as large a role in CERCLA enforcement as the EPA, Congress still contemplated extensive state involvement. Moreover, given the scope of the environmental problems we face as a nation, as a practical matter, state involvement is absolutely necessary. Similarly, CERCLA's policy of encouraging settlements is not diminished merely because a state entity

[6] Although the majority indicates that it finds *City of Bangor* "persuasive," in that case, the First Circuit "accord[ed] some deference to [the state agency's] decision to sign onto the Consent Decree." 532 F.3d at 94. The majority proclaims that the district court erred by doing so here.

is involved rather than the federal government. Furthermore, just as EPA-sponsored settlements may result from arms-length agreements reached by sophisticated parties, so may those involving state environmental agencies. Thus, most of the reasons favoring deference to EPA-sponsored settlements also favor deference to state-sponsored settlements.

In any event, the proper level of deference in any given case is not strictly dictated by the identity of the governmental actor involved. As the First Circuit explained in *Cannons,* even in cases involving the EPA, there is no set level of deference. Rather, the level of deference depends upon the "the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances." *Cannons,* 899 F.2d at 84 (citation omitted). Thus, in all cases involving CERCLA consent decrees, there is a spectrum of possible deference that a district court may accord to the decision to settle, depending on the particular circumstances of the case. At its zenith, deference will be highest for well-supported consent decrees involving the EPA. As our sister circuits have acknowledged, however, it does not follow that state agencies are not entitled to deference concerning their decision to sign on to a consent decree. Accordingly, while the degree of deference may vary depending on the circumstances of the particular case, state-sponsored settlements are entitled to deference when a court assesses a settlement's fairness, reasonableness, and benefit to the public.

D

As explained above, judicial deference to the EPA in CERCLA consent decrees evolved from the standards courts use when evaluating consent decrees in general. Instead of focusing on the grounds for deference, the majority seems to treat this case as if it presented a statutory interpretation issue. Statutory interpretation is the focus of cases such as *United States v. Mead Corp.,* 533 U.S. 218 (2001), *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). Similarly, our opinion in *Orthopaedic Hospital v. Belshe,* 103 F.3d 1491, 1495-96 (9th Cir. 1997), stands for the unremarkable proposition that state agency interpretations of federal statutes that the agencies are not charged with enforcing are not entitled to *Chevron* deference. But this case does not turn on a question of statutory interpretation.

Most CERCLA consent decree actions do not present questions about whether the agency's implementation of a particular statutory provision (or filling of a statutory gap) is entitled to deference. *Cf. Mead,* 533 U.S. at 229. Nor do they generally involve an agency regulatory or adjudicatory rulemaking – or even less formal agency policy statements, manuals, or enforcement guidelines – which may have broad implications for third parties and unrelated controversies. *Cf. id.* at 233-34. Instead, most cases involving CERCLA consent decrees focus primarily on whether the agency made a reasonable and fair

assessment in a particular case. This is not a question of statutory interpretation, but rather of the exercise of the authority and discretion lodged with the agency. Considerably more so than judges, state environmental agencies are perfectly capable of making those determinations.

One of the factors that we use when evaluating consent decrees is whether they are "consistent with the purposes that CERCLA is intended to serve." *Montrose,* 50 F.3d at 743 (citation omitted). In some cases – but not here – applying this factor may present questions of statutory interpretation. In those cases, all other things being equal, a state sponsored-consent decree would be entitled to less deference than an EPA-sponsored consent decree. But most often, determining consistency with CERCLA will only require a rote assessment of whether the decree complies with CERCLA's well-pronounced goals and is in the public interest.[7] *Cf. United States v. Charles George Trucking, Inc.,* 34 F.3d 1081, 1086 (1st Cir. 1994) (indicating that the "overarching goals of CERCLA" include "accountability, the desirability of an unsullied environment, and promptness of response activities" (quoting *Cannons,* 899 F.2d at 91)). State agencies are equally capable of undertaking this assessment as is the EPA. Thus, a state agency

[7] Indeed, we, along with our sister circuits, have occasionally formulated this factor as whether the settlement is consistent with "the public interest." *Montrose,* 50 F.3d at 747; *Esso Standard,* 326 F.3d at 206.

like ADEQ is entitled to some deference concerning its determination that a particular agreement is "fair, reasonable, and consistent with CERCLA's objectives."

## III

Applying the proper level of deference owed to a state environmental agency, I would hold that the district court did not abuse its discretion in approving the consent decrees here. The majority's reliance on *Montrose* to reach the opposite conclusion is misplaced. In *Montrose,* 50 F.3d at 743, we vacated the district court's approval of the consent decree and remanded. We explained that the district court had to compare the proportion of projected costs to be paid by the settling defendants with the proportion of liability attributable to them, taking into account "reasonable discounts for litigation risks, time savings, and the like that may be justified." *Id.* at 747 (citing *Charles George Trucking,* 34 F.3d at 1087). The district court had "no evidence at all" upon which to base any assessment of the government's estimates of responsibility and damage, and thus it could not evaluate the reasonableness and fairness of the decree. *Id.* at 746-48. In particular, the district court had largely relied on a special master's assessment of the settlement without independently evaluating the damage estimate. *Id.* at 746. Thus, we found that the district court had neglected its "obligation to independently

'scrutinize' the terms of [the] settlement."[8] *Id.* at 747. We accordingly remanded for the district court to:

> determine the proportional relationship between the [amount] to be paid by the settling defendants and the governments' current estimate of total potential damages. The court should evaluate the fairness of that proportional relationship in light of the degree of liability attributable to settling defendants.

*Id.* at 747 (citing *Charles George Trucking,* 34 F.3d at 1087). Notably, as the Seventh Circuit recognized, *see United States v. George A. Whiting Paper Co.,* 644 F.3d 368, 373 (7th Cir. 2011), *Montrose* remains the only example of a circuit court reversing a district court's approval of a CERCLA consent decree for lack of a factual basis before the majority's decision in this case.

Here, the record before the district court shows that under ADEQ's formula, each settling defendant paid damages directly corresponding to ADEQ's estimated degree of liability. It does not appear that ADEQ provided the settling defendants with any discount for litigation risks or time savings, even though such discounts are permissible under *Montrose,* 50 F.3d at 747. A settlement corresponding precisely to

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[8] The majority repeatedly suggests that the district court here failed to independently scrutinize the agreements, citing this language. Unlike Montrose, where the district court had relied on the special master almost completely, the district court evaluated the agreements itself in this case.

the settling defendant's estimated share of liability is necessarily reasonable. *See Charles George Trucking,* 34 F.3d at 1087 (noting that a settlement was favorable to the government agencies where the payment corresponded to the group's share of responsibility multiplied by the highest estimate of clean-up costs). Moreover, although ADEQ did not specifically set forth the settlement amount and share for each settling defendant, it did provide the district court with a basis for evaluating its estimates by explaining its methodology in detail and setting out the total value of the settlements and anticipated costs. Requiring ADEQ to list the settlement amounts and share of liability for each settling defendant would be pointless when there is no dispute that the estimate and settlement share are the same. *Cf. Cannons,* 899 F.2d at 87 ("The logic behind these concepts dictates that settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done.").

The Intervenors' arguments here resemble arguments that the First Circuit rejected in *Charles George Trucking*. In that case, the First Circuit affirmed a settlement even though the appellants contended that the district court had failed to explain the allocation of responsibility either within or among the classes of defendants. 34 F.3d at 1086-88. The First Circuit observed that it is not always possible to

explain an allocation of liability in minute detail given an incomplete historical record. *Id.* at 1088. Although we did not specifically discuss these arguments, we repeatedly cited *Charles George Trucking* with approval in *Montrose,* 50 F.3d at 746-47.

The question here is whether the PRPs are entitled to know specifically how ADEQ developed its estimate for the shares of liability attributable to each settling defendant. As the First Circuit explained in *Cannons,* however, this is an area where the courts will typically defer to the EPA in light of its expertise. 899 F.2d at 87 ("[W]hat constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to the EPA's expertise."). Indeed, at an early stage in the process, some of the state's allocations are necessarily based on qualitative information and expert experience rather than strict quantitative analysis. Accordingly, the district court properly deferred to ADEQ's choice of measuring comparative fault, which was adequately explained and supported.[9]

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[9] Even the majority concedes that ADEQ may have similar expertise to the EPA. Indeed, among other things, ADEQ is statutorily charged with: protecting the environment; protecting the quality of the air and water; abating air and water pollution; restoring and reclaiming polluted areas; regulating the storage, handling, and transportation of pollutants; ensuring that state environmental laws and regulations are consistent with corresponding federal laws; and approving remediation levels. Ariz. Rev. Stat. § 49-104. More specifically, as it relates to ADEQ's

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Instead of following our precedents, the majority takes the district court to task for failing to "substantively engage with the parties' proposed agreements." The majority requires the district court on remand to wade deep into the abyss of liability allocation and decide not only whether the settlement amounts are fair and reasonable, but also gauge the accuracy of ADEQ's allocation against a 100,000 page record and technical guidelines. As a practical matter, requiring a district court to delve into the details of how an agency allocated responsibility within a category of PRPs based on factual information concerning a variety of measures (e.g., volume, toxicity, etc.) will consume considerable resources and require expertise that most judges do not possess. *See Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 148 508 (1997) (Breyer, J., concurring) (noting that "judges are not scientists and do not have the scientific training that can facilitate

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work on this case, Vargas averred that she has 23 years of experience at ADEQ and was the same engineer who performed the analysis at issue in *Nucor.* Notably, when we affirmed in the district court's decision in *Nucor,* we took no issue with the district court's deference to ADEQ. *See Components,* 66 F.3d at 215.

For recognizing the factual and legal backdrop underlying the district court's decision, the majority accuses me of undertaking a de novo review and usurping the district court's role. Not so. Although I have the benefit of a post hoc perspective that necessarily comes with appellate review (not to mention knowledge of the majority's newly-fashioned legal standards), I have simply evaluated the district court's reasoning in light of the record as a whole, which we are required to do when reviewing a decision for abuse of discretion. *See, e.g., McKinley v. City of Eloy,* 705 F.2d 1110, 1117 (9th Cir. 1983).

the making of such decisions"). A district court should not have to undertake the equivalent of an expert deposition every time it is asked to approve a state-sponsored CERCLA consent decree.[10]

Here, the Intervenors have not suggested that the information in the record points to some other estimate of the settling defendants' liability; they simply claim that the record was inadequate. This is insufficient to carry the "heavy burden" that the Intervenors bear to show that district court's approval of the consent decree was an abuse of discretion. *See Esso Standard,* 326 F.3d at 207. It is obvious that the Intervenors are contesting the consent decrees because they do not like the deals they were offered by ADEQ. As is their right, they refused ADEQ's settlement offers. But they have no right to a settlement offer of their choice. Indeed, the purpose of judicial review is to ensure that proposed settlements further the public interest by holding polluters responsible for the damage that they caused.[11] It is not to guarantee PRPs a good deal.

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[10] To the extent that the majority's opinion merely requires the district court to further explain its findings that are obvious from the record, it is promoting form over substance.

[11] *See United States v. Rohm & Haas Co.,* 721 F.Supp. 666, 680 (D.N.J. 1989) ("The court's core concern in deciding whether to approve this proposed decree is with ensuring that the decree furthers the public interest as expressed in CERCLA."); H.R. Rep. No. 99-253, pt. III, at 19 (1985) (indicating that the primary reason for judicial review was to "protect against improper or 'bad faith' settlements."); H.R. Rep. No. 99-253, pt. I, at 59

(Continued on following page)

The Intervenors' intent appears to be to hold up fair and reasonable consent decrees with settling PRPs in order to create more leverage in their negotiations with ADEQ.[12] Such delay is not in the public interest. *Cf. United States v. Asarco, Inc.,* 430 F.3d 972, 983 (9th Cir. 2005) (noting that the purpose of a consent decree is "to enable parties to avoid the expense and risk of litigation while still obtaining the greater enforceability (compared to an ordinary settlement agreement) that a court judgment provides"). The majority's approach gives polluters more power in their negotiations with the states and is more likely to push the states to bypass judicial approval and opt for administrative settlements (as they are entitled to do under 42 U.S.C. § 9613(f)(2)), denying the judiciary the opportunity to protect the public

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(1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 (stating that judicial review was intended to guard against "[s]weetheart deals" and ensure that agreements were "in the public interest.").

[12] The Intervenors claim that they fear being held jointly and severally liable for the settling parties' shares of liability should those shares exceed the settlement amounts. However, the consent decrees provide that if the settling parties' shares are eventually deemed to be greater than the settlement amount, "the difference shall be deemed an orphan share of liability pursuant to" Arizona Revised Statutes § 49-281(10). Under state law, Arizona is responsible for funding orphan shares. *See* Ariz. Rev. Stat. § 49-282(E)(2)(e). At oral argument, the Intervenors expressed a fear that the law could change. However, the consent decrees provide that the terms "have the meanings assigned to them under WQARF and CERCLA as of the date this Consent Decree becomes final."

interest by ensuring that the states are not cutting sweetheart deals with those polluters.

## IV

The majority's conclusion appears to be founded upon the flawed premise that state environmental agencies entering consent settlements under CERCLA are entitled to no deference concerning their conclusion that a settlement is fair and reasonable. In doing so, the majority fails to appreciate the origins of CERCLA deference. Moreover, the majority vastly and unwisely expands the required level of judicial scrutiny for CERCLA consent decrees. The majority's decision will significantly restrict state agencies' ability to enter into early CERCLA consent decrees to the detriment of the environment, the statutory framework envisioned by Congress, and PRPs seeking to resolve their liability early in the process. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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| STATE OF ARIZONA, et al.,<br>Plaintiffs,<br>vs.<br>ASHTON COMPANY, et al.,<br>Defendants. | No. CIV 10-634-TUC-CKJ<br>**ORDER** |
| CITY OF TUCSON, et al.,<br>Plaintiff-Intervenors,<br>vs.<br>BALDOR ELECTRIC COMPANY, et al.,<br>Defendants in Intervention. | |

Pending before the Court is the State of Arizona's Motion to Approve Consent Judgment (Doc. 109). Defendants Industrial Pipe Fittings LLC, Tucson Foundry & Manufacturing Incorporated, Tucson Dodge Incorporated, Goodyear Tire & Rubber Company Incorporated, Texas Instruments, Incorporated, Ashton Company Incorporated Contractors and Engineers, Warner Propeller & Governor Company LLC have joined in the Motion.

*Procedural History*

On October 22, 2010, Plaintiffs State of Arizona and the State of Arizona ex rel. Benjamin H. Grumbles, Director, Arizona Department of Environmental Quality (collectively, "the State") filed a Complaint in this matter. On November 10, 2010, the State filed an Amended Complaint pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601 et seq., and pursuant to supplemental state law causes of action under the Water Quality Assurance Revolving Fund ("WQARF"), A.R.S. § 49-281 et seq., to recover costs incurred or to be incurred by the State to respond to a release or threat of a release of hazardous substances at and from the Broadway Pantano WQARF Registry Site #100053-00 in Tucson, Pima County, Arizona.

On February 10, 2011, the Court allowed the City of Tucson ("the City") to intervene.[1] On June 29, 2011, the Court allowed the Arizona Board of Regents and University of Arizona, Raytheon Company, Tomkins Industries, Inc., Tucson Airport Authority, Tucson Electric Power Company, and Pima County to intervene in this case.

On March 11, 2011, the State filed a Motion to Approve Consent Judgment (Doc. 109). The State seeks consent decrees based on negotiated settlements

[1] On October 9, 2011, the City's Complaint in Intervention was dismissed at the City's request.

between the State and Ashton Company, Inc., Contractors and Engineers; Baldor Electric Company; Don Mackey Oldsmobile-Cadillac, Inc.; Dunn Edwards Corporation; Durodyne, Inc.; Fersha Corporation; Fluor Enterprises, Inc.; General Dynamics Corporation; The Goodyear Tire and Rubber Company; Lockheed Martin Corporation; Holmes Tuttle Ford, Inc.; Industrial Pipe Fittings, LLC; Tucson Foundry & Manufacturing, Inc.; Rowe Enterprises, Inc.; Pima County Community College; Rollings Corporation; Textron, Inc.; ABB, Inc.; Combustion Engineering, Inc.; Texas Instruments, Inc.; Tucson Dodge; Inc.; and, Warner Propeller and Governor, L.L.C.

On November 4, 2011, after oral argument and as directed by the Court, the State filed a Supplement to its Motion (Doc. 171).[2] Intervenors have filed a Response (Doc. 173) and the State has filed a Reply (Doc. 174).

Additionally, comments on the proposed settlements have been filed on behalf of Pima County (Doc. 79), Tucson Airport Authority ("TAA") (Doc. 85), Raytheon Company ("Raytheon") (Doc. 86), and the

[2] Attached to the Supplement is the affidavit of Ana I. Vargas. Ms. Vargas is a chemical engineer and is currently the Manager of the Legal Support Unit in the Waste Programs Division of the Arizona Department of Environmental Quality ("ADEQ"). The State asserts that "Ms. Vargas performed the document review, analysis and numerical calculations to generate the early settlement offers that were submitted to all potentially responsible parties identified to date in the Broadway Pantano investigation." State Supplement, Doc. 171, pp.3-4.

City (Doc. 96). TAAy also joins in the comments made by Raytheon (Doc. 85).[3] The University of Arizona has filed a Joinder in the Comments regarding the proposed settlements filed by the TAA and Raytheon (Doc. 98).

*Consideration of Consent Decrees*

The inquiry regarding whether to approve the consent decrees is whether the proposed settlements are procedurally and substantively fair, reasonable, in the public interest, and are consistent with the polices of CERCLA. *State of Arizona v. Nucor Corp.,* 825 F.Supp. 1452 (D.Ariz. 1992), *aff'd on other grounds,* 66 F.3d 213 (9th Cir. 1995), *United States v. Montrose Chemical Corp. of Calif.,* 50 F.3d 741 (9th Cir. 1995). In making such a determination, a court is to give deference to the government's evaluation of the proposal. *Nucor,* 825 F. Supp. at 1456, *citing United States v. Cannons Engineering Corp.,* 899 F.2d 79, 84-86 (1st Cir. 1990). However, "[t]he true measure of the deference due depends on the persuasive power of the agency's proposal and rationale." *Montrose,* 50 F.3d at 746, *quoting Cannons,* 899 F.2d at 84. Further, "[t]here is a fundamental difference in the review of the sufficiency of evidence to support a settlement and the situation where there is no evidence

[3] To the extent that Raytheon and TAA discuss whether this matter should be consolidated with 09-MC-00001-RCC, the Court notes that a motion to consolidate has not been filed. *See* L.R.Civ. 42.1.

at all on an important point." *Montrose,* 50 F.3d at 746.

While courts have an obligation to "scrutinize" the settlement process to determine whether the proposed decrees are both procedurally and substantially fair, *Montrose,* 50 F.3d at 747, courts are not to conduct the same in-depth review of the facts and circumstances considered by the State in arriving at a settlement. The reviewing court should "not . . . substitute [its] own judgment for that of the parties . . . rather, it is to determine whether the settlement represents a reasonable compromise . . . bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolutions." *United States v. Rohm & Haas Co.,* 721 F.Supp 666, 680-81 (D.N.J. 1989). Indeed, another district court has determined that, under such principles, federal courts review CERCLA settlements with a "presumption" in favor of approval. *City of New York v. Exxon Corp.,* 687 F.Supp. 677, 692 (S.D.N.Y 1988).

*Procedural Fairness*

To determine procedural fairness, courts "must look to the negotiation process and 'attempt to gauge its candor, openness and bargaining balance.'" *Nucor,* 825 F.Supp. at 1456, *citing Cannons,* 899 F.2d at 84. In considering this, the Court recognizes that, "under CERCLA, the right to draw fine lines, and to structure order and pace of settlement negotiations is an

agency prerogative." *U.S. v. Grand Rapids,* 166 F.Supp.2d 1213, 1221 (W.D. Mich. 2000), *citing Cannons,* 899 F.2d at 93. The State asserts that, at the request of several anticipated adverse parties ("AAPs"), the State prepared early settlement offers for all of the AAPs based on the information in its files at that time.[4] Intervenors point out, however, that the process was not open (e.g., the State has not disclosed demands made to all the parties, has not identified what category each party was placed in, and has failed to show reasonable linkage between factors in its formula and the proportionate share of the potentially responsible parties) and that the settlements were the result of take-it-or-leave-it demands. The State asserts that it is still at least 3 to 5 years away from completing its remedial investigation of the site, its files are incomplete, and any settlement offer considered the uncertainties that exist at this stage of the investigation.

The State, citing *United States v. Davis,* 261 F.3d 1, 23 (1st Cir. 2001), *quoting United States v. Comunidades Unidas Contra La Contaminacion,* 204 F.3d 275, 281 (1st Cir. 2000), asserts that "[t]here is no reason to doubt that the consent decrees were the result of 'arms' length, good faith bargaining' between

[4] The State's analysis indicates that, based upon a preliminary estimate of remedial action costs of $75 Million, the range of liability for each settling party extended from 0.01% of the estimated total clean up costs to 0.2%, or as expressed in dollar figures, from $10,000.00 to $150,750.00.

sophisticated parties." The Intervenors dispute this conclusion, however, by asserting that, because the State has agreed to pay Joseph Blankinship's share of the cleanup cost in exchange for his cooperation, the State has an incentive to minimize his liability share. Further, because the State has not informed the parties or the Court how it calculated this "orphan" share, the Court cannot conclude if the settling parties are being allocated a fair and reasonable share of liability.[5] Indeed, Intervenors argue that settlements that serve only to benefit the settling party, to the detriment of the non-settling parties, merit enhanced scrutiny by the court.

However, Intervenors has not shown that the settlements serve only the settling parties to the detriment of the non-settling parties. Rather, because the settlements are being reached before the investigation is complete, the settling parties are each accepting a risk that the settlements will not be to their benefit. Moreover, by agreeing to pay Blankinship's share of cleanup costs in exchange for his cooperation, the State is placing itself in a position that future negotiations with Intervenors will most likely involve scrutiny as to the proportionate share of Blankinship's liability. That, however, does not mean that the State has acted in bad faith or that the Intervenors in the future must accept the allocation conclusions reached by the State. Moreover, it does

[5] Intervenors assert that Blankinship is the single largest actor by far at the site.

not affect the State's ability to participate in arms' length, good faith negotiations with the settling parties.

Additionally, the Court considers that the Intervenors were provided access to the State's public records in conjunction with its Petition to Perpetuate Testimony of Mr. Blankinship pursuant to Fed.R.Civ.P. 27, the Intervenors have received the documentation relied upon by the State for its settlement offers, and the State described facts and methodology in responding to public comments. *See e.g.* State's Brief, Doc. 157, p. 11.

In light of CERCLA and WQARF's encouragement of early settlements, *see e.g. United States v. Montrose Chemical Corp. of California,* 827 F.Supp. 1453, 1458 (C.D.Cal. 1993), the Court finds settlement agreements between the State and the settling parties were the result of procedural fairness.

*Substantive Fairness and Reasonableness*

Substantive fairness "concerns the issues of corrective justice and accountability." *Nucor,* 825 F.Supp. at 1458. Indeed, "a party should bear the costs of the harm for which it is legally responsible." *Cannons,* 899 F.2d at 87. In determining the reasonableness of a settlement, the court should consider the "efficacy of the settlement in compensating the public for actual and anticipated remedial and response costs and the relative strength of the parties' litigating." *Nucor,* 825 F.Supp. at 1464. The settlement terms must be based

on an acceptable measure of comparative fault that apportions liability according to a rational, if necessarily imprecise estimate of how much harm the settling party has caused. *Nucor,* 825 F.Supp. at 1458-59; *Cannons,* 899 F.2d at 87. The State's chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of any rational basis. *Nucor,* 825 F.Supp. at 1459; *Cannons,* 899 F.2d at 87; *see also In re Tutu Water Wells CERCLA Litigation,* 326 F.3d 201. 207 (3rd Cir. 2003).

Intervenors seek to distinguish this case from other cases in which more details were provided to the reviewing court. *See e.g. United States v. Alliedsignal, Inc.,* 62 F.Supp.2d 713 (N.D.N.Y. 1999) (reviewed assumptions used by the EPA regarding costs and liability allocations, determined whether the parties were properly categorized (as generators, arrangers, etc), and considered the contractual obligations of the parties); *Nucor* (negotiations commenced in 1989, resulting in proposed consent decree in 1991). In this case, Intervenors assert that the State simply has not provided sufficient information with which to evaluate the validity of the allocation which is the foundation of the settlement.

However, "requiring the parties to provide precise information about the extent of the total damages and the relative culpability of the various defendants would contravene CERCLA's primary goal of encouraging early settlements." *Montrose,* 827 F.Supp. at 1458. Moreover, contrary to Intervenors' assertion, the State has provided information from which

the Court can evaluate the settlements. The State, through the ADEQ, reviewed interviews of over 800 witnesses and over 100,000 pages of documents, determined where gaps existed in its information to determine those areas where data was unknown and, therefore, where those uncertainties gave rise to risk in early settlements. Further, the States analyzed information about the site to determine those areas about which it had no information and therefore where additional risk of early settlement may be present, and completed a preliminary allocation to determine a rough allocation of share for each potentially responsible party based on its activities as a generator, transporter, owner or operator of the site. Although Intervenors argue that evidence relied upon by the State is not reliable, review of the specific evidence relating to each party would require this Court to conduct an in-depth review of the evidence, second guess the agency, and deny the required deference to ADEQ. The allocation by ADEQ used an established and accepted EPA model for allocations at landfill sites.[6] Additionally:

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[6] The State used an approach substantially similar to the Nonbinding Preliminary Allocations of Responsibility ("NBAR") conducted by the EPA to encourage settlements by potentially responsible parties. State Supplement, Doc. 171, Affidavit, pp. 1-2. "An NBAR is a preliminary allocation of 100% of the 'total response costs at a facility' and allocates responsibility according to volume of waste contributed, as well as other settlement factors. In the case of multiple owners and operators of a particular site, the NBAR may be based on relative length of ownership and/or operation of the property. For generators, EPA states

(Continued on following page)

In determining the estimated total cost of remediation of the Site, ADEQ staff assumed a final remedy operations and maintenance ("O&M") period of 30 years for the Site beginning in 2016 and ending in 2046. For the groundwater operable unit ("GOU"), the final remedy is aggressive and includes the addition of the Eastern Containment System ("ECS") and Far Western Treatment System ("FWTS"), continued operation of existing Western Containment System ("WCS"), and St. Joseph's Hospital wellhead treatment. The estimate includes a contingent wellhead treatment for one City of Tucson water supply well. For the landfill operable unit ("LOU"), the final remedy includes the maintenance of dross site fence/soil cover, and an upgrade of the Broadway North and Broadway South landfills bank protection and surface drainage.

ADEQ staff utilized a variety of sources to conduct the cost estimation. ADEQ utilized the Remedial Action Cost Engineering Requirements computer program ("RACER") to estimate the cost of the ECS. The remaining

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that the NBAR should be based on the volume each generator contributed. For transporters, the NBAR should also be based on volume, taking into account appropriate considerations such as packaging and placement of waste at the site. *Id.* at p. 2, *citations and footnotes omitted.* The Court notes that Intervenors assert that utilization of the NBAR process does not obviate the responsibility of settling parties to provide details prior to court approval of settlements. However, Intervenors have not pointed to any authority that *requires* such detail prior to approval.

> costs were primarily based on past costs (plus an assumed inflation to bring the costs up to 2009), actual costs to ADEQ for several years prior to 2009, and cost estimates obtained from vendors.

State Supplement, Doc. 171, Affidavit, pp. 1-2 at 6-7, *footnote omitted.*

Intervenors assert that CERCLA and EPA policy support disclosure of more details before settlement. *See e.g.* OSWER Directive 9835.12-01a; *see also* 42 U.S.C. § 9622(e).[7] However, Intervenors have not pointed to any authority that requires the ADEQ to follow such procedures in this case. Rather, the issue is whether the Court can determine, based on the information before it, whether the proposed settlements are substantively fair and reasonable. The State has informed the Court of the factual bases (files, interviews, documents) for its conclusions. It has explained the methods (software, past costs, estimates) to reach remediation costs. Although the Court agrees with Intervenors that the State has not provided the Court with specific factual details as to each settling party (e.g., witness N of the 800 witnesses stated that settling party X deposited a

[7] The Court notes that Intervenors object to the State's reliance on some CERCLA and EPA requirements and policies while not following them *in toto.* However, Intervenors have not cited to any controlling authority that requires a state to fully adopt a requirement/policy rather than utilizing a portion of a requirement/policy.

specified tonnage of a specified type of waste), such in-depth review of the facts and circumstances is not appropriate. Indeed, although Intervenors argue that such review is needed, Intevenors have not pointed to any controlling precedent that requires such in-depth review. As previously stated, this Court's task:

> is not to make a finding of fact as to whether the settlement figure is exactly proportionate to the share of liability appropriately attributed to the settling parties; rather, it is to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolutions.

*United States v. Rohm & Haas Co.,* 721 F.Supp 666, 680-81 (D.N.J. 1989), *citing Acushnet River & New Bedford Harbor: Proceeding re Alleged PCB Pollution,* 712 F.Supp. 1019, 1032 (D.Mass. 1989); *cf. Pennwalt Corp. v. Plough, Inc.,* 676 F.2d 77, 80 (3rd Cir.1982).

Intervenors also argue that a settlement based on a party's *de minimis* status would not be fair, reasonable, or consistent with CERCLA if that party is not, in fact, a *de minimis* contributor. The Court agrees with Intervenors that the State has not provided information from which the Court can confirm that the settling parties are *de minimis* contributors (the State has asserted that the range of liability for each settling party ranges from 0.01% of the estimated total clean up costs to 0.2%). However, again,

Intervenors have not presented any controlling authority that such an in-depth analysis is required. To illustrate with random figures, if the ADEQ had determined that a specific settling party had contributed 2 tons out of 100 million tons of a specified type of waste, the Court would necessarily have to substitute its own judgment for the judgment of the ADEQ to confirm whether such a contributor was *de minimis*. This is what the reviewing standard seeks to avoid.

"The ADEQ, the agency charged with acting in the public interest, finds that the public interest is best served through entry of this agreement. [This Court finds] no reason to dispute this belief." *Nucor,* 825 F.Supp. at 1464. Even if the State has underestimated the total cost of clean up and the settling parties' proportional fault, the ADEQ has reached the conclusion that it is appropriate that the State accept some of the costs in the clean up in return for information from the settling polluters.[8] It is not this Court's role to determine whether the settlement

[8] As pointed out by the State, the Arizona Legislature has provided funding for the State to make up for the difference between what the party pays, and the amount for which it may be liable under WQARF. A.R.S. § 49-281(10); A.R.S. § 49-282(E). Additionally, the Court notes that the State may consider the cooperation of a person, i.e., Mr. Blankinship, in determining that person's allocated share. *United States v. Township of Brighton,* 153 F.3d 307 (6th Cir. 1998); *see also United States v. Smith,* 196 F.3d 1034, 1038 (9th Cir. 1999) (not improper for government to make a deal with a witness in exchange for his testimony).

agreement is the best possible settlement that ADEQ could have achieved, but rather whether it is within the reaches of the public interest. *Nucor,* 825 F.Supp. at 1464. Indeed, as stated by the State during the October 17, 2011, hearing, the funds received from the settlements will allow further investigation to proceed; i.e., the State is disadvantaged by limited funds and the settlements are in the best interests of the public. The Court finds it is appropriate for the State to weigh the benefits to the State in foregoing reopeners, waivers, or premiums. The Court concludes the proposed settlements are reasonable and are in the best interest of the public.

*Contribution Protection*

Under both CERCLA and WQARF, Defendants are entitled to receive contribution protection. 42 U.S.C. § 9613(f)(2); A.R.S. § 49-292(C). Indeed, "[i]n passing the SARA amendments to CERCLA, Congress expressly created a statutory scheme which exposes non-settling parties to the risk of disproportionate liability." *Nucor,* 825 F.Supp. at 1463, *citations omitted*; *see also Davis,* 261 F.3d at 27 ("The practice of encouraging early settlement by providing broad contribution protection is provided in statute."). Moreover, "[w]hile the effect of the judgment on other parties and non-parties is a factor to be considered, the concerns of non-parties to the dispute is not determinative." *Grand Rapids Michigan,* 166 F.Supp.2d at 1219.

The Intervenors' request, therefore, for the Court to order that the State is prohibited from seeking joint and several liability against the non-settling parties, is not consistent with CERCLA and WQARF. Moreover, Intervenors' request contravenes the ripeness requirement that ensures that issues are definite and concrete, not hypothetical or abstract. *Jacobus v. Alaska,* 338 F.3d 1095, 1104 (9th Cir. 2003); *see also Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 684 (1967) (courts generally invoke the ripeness doctrine and refuse to decide matters which would involve "entangling themselves in abstract disagreements . . . "); *see also Watts v. Petrovsky,* 757 F.2d 964 (8th Cir. 1985) (speculative claim was not ripe for review); *West v. Secretary of the DOT,* 206 F.3d 920, 924 (9th Cir. 2000) (courts avoid advisory opinions on abstract propositions of law).

The Court finds the settlement provisions for contribution protection to be appropriate.

*Consistency with CERCLA's Objectives*

The agreements between the State and the settling parties must be consistent with the CERCLA principles of "accountability, the desirability of an unsullied environment, and promptness of response activities." *Nucor,* 825 F.Supp. at 1464; *Cannons,* 899 F.2d at 90-91. "Settlements reduce excessive litigation expenses and transaction costs, thereby preserving scarce resources for CERCLA's real goal: the

expeditious cleanup of hazardous waste sites. *Davis,* 261 F.3d at 26-27. The State points out that the funds obtained from the settlements will be added to the WQARF fund and will assist the State in cleaning up the environment at the site. "Though the Government could likely obtain a judgment against [the settling parties], the costs of litigating and levying against [these parties] would likely outstrip the ultimate recovery. By settling with [these parties] now, the Government insures what little money the settlor has to contribute will be used to clean up the environment rather than pay attorneys." *United States. v. Bay Area Battery,* 895 F. Supp. 1524, 1534 (N.D.Fla. 1995). Indeed, the proposed settlements will streamline any eventual litigation by reducing the number of potential defendants. The Court finds that approval of the proposed settlements will further the central principle of CERCLA. The Court, therefore, will grant the Motion to Approve Consent Decrees, will sign the proposed Consent Decrees, and direct the Clerk of the Court to docket the Consent Decrees.

Accordingly, IT IS ORDERED:

1. The Motion to Approve Consent Judgment (Doc. 109) is GRANTED.

2. The Clerk of the Court shall docket the Consent Decrees.

3. The Clerk of the Court shall enter judgment and shall then close its file in this matter.

DATED this 21st day of February, 2012.

/s/ Cindy K. Jorgenson
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

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| State of Arizona; State of Arizona *ex rel.* Benjamin H, Grumbles, Director, Arizona Department of Environmental Quality,<br><br>Plaintiffs,<br><br>v.<br><br>Texas Instruments Incorporated, a Delaware corporation, successor by merger to Burr-Brown Corporation, a Delaware corporation, formerly known as Burr-Brown Research Corp., an Arizona corporation,<br><br>Defendant. | No. 4:10-CV-00634-CKJ<br><br>**CONSENT DECREE** |

[1] **TABLE OF CONTENTS**

[2] **I. RECITALS**

A. The State of Arizona, on behalf of the Director of the Arizona Department of Environmental Quality ("State"), has filed a complaint against Texas

Instrument Incorporated ("Settlor"), pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq*. ("CERCLA") and the Water Quality Assurance Revolving Fund, A.R.S. § 49-281 *et seq*. ("WQARF"), seeking, among other things, money damages and a declaratory judgment finding Settlor liable for remedial action and response costs incurred and to be incurred by the State and a judgment ordering Settlor to reimburse the State for remedial action and response costs incurred in response to releases and threatened releases of hazardous substances from the Site known as the Broadway Pantano WQARF Registry Site.

B. The State alleges in its Complaint that releases of hazardous substances occurred at the Site, the Site is a facility, as defined by WQARF,, A.R.S. § 49-281, and CERCLA, 42 U.S.C. § 9601(9), and Settlor is a responsible party pursuant to WQARF, A.R.S. § 49-283 and CERCLA, 42 U.S.C. § 9607(a).

C. The Arizona Department of Environmental Quality ("ADEQ") has undertaken remedial actions in an attempt to determine the nature and extent of the releases and threatened releases of hazardous substances at the Site.

D. On June 22, 2009, the Governor of the State of Arizona designated Benjamin H. Grumbles as Director of the ADEQ, and on June 23, 2009 designated Mr. Grumbles as the Natural Resource Trustee for the State of Arizona pursuant to CERCLA, 42

U.S.C. § 9607(1)(2)(B). Director Grumbles is authorized to execute and enter into this Consent Decree and execute releases from liability.

E. The Parties desire to establish certain rights and obligations between themselves with respect to the claims asserted in the State's Complaint in connection [3] with or relating to the known hazardous substance contamination currently existing at the Site.

F. Upon judicial approval of this Consent Decree, Settlor will be entitled to contribution protection pursuant to CERCLA, 42 U.S.C. § 9613(f), and WQARF, A.R.S. § 49-292, to the fullest extent of the law.

G. The Parties agree that settlement of this matter and entry of this Consent Decree is made in good faith in an effort to avoid further expenses of protracted litigation, without any admission of any liability by Settlor for any purpose.

H. The Parties agree, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and at arms' length and that this Consent Decree is fair, reasonable, and in the public interest, and that its implementation will expedite remediation of the Site.

I. The Parties consent to the entry of this Consent Decree and agree to be bound by its terms.

**NOW, THEREFORE, IT IS ORDERED BY THE COURT AND AGREED BY THE PARTIES AS FOLLOWS:**

## II. INCORPORATION OF RECITALS

1. The Recitals are a material part of this Consent Decree and are incorporated herein by reference.

## III. JURISDICTION

2. This Court has federal question jurisdiction over the subject matter of this action under 42 U.S.C. §§ 9607 and 9613(b), and supplemental jurisdiction over State law (WQARF, A.R.S. § 49-292) claims pursuant to 28 U.S.C. §§ 1331, 1367, and 1391. Settlor waives all objections to jurisdiction and venue and all available defenses under Fed.R.Civ.P. Rule 12(b)(1) through (5). The Parties consent to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## [4] IV. DEFINITIONS

*3.* Unless otherwise expressly provided in this Consent Decree, the words and terms used in this Consent Decree have the meanings assigned to them under WQARF and CERCLA as of the date this Consent Decree becomes final. Where conflict exists between the definition of a word or term used under

WQARF and CERCLA, the definition under WQARF shall control.

4. "ADEQ" means the Arizona Department of Environmental Quality.

5. "Business Records" means every document and paper of every kind within Settlor's and its employees, agents, contractors, and appointed and elected officials' possession, custody, or control and wherever located, including, but not limited to, documents kept in the ordinary course of business, documents obtained from third persons, operating records, financial records, and similar documents and information. "Business Records" specifically includes facts, opinions, and other data contained in documents and reports prepared by Settlor's employees, agents, and contractors with respect to environmental conditions at the Site. "Business Records" does not include documents subject to Settlor's attorney-client privilege.

6. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq*. (1995), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat, 1613 (1986), as amended from time to time and all rules, regulations, and guidelines promulgated thereunder.

7. "Consent Decree" means this Consent Decree and all exhibits attached hereto. In the, event of a

conflict between this Consent Decree and any exhibit, the Consent Decree shall control.

8. "Covered Matters" means each civil claim and civil cause of action under WQARF and CERCLA alleged by the State in its Complaint against Senior arising out of known releases or disposals of any hazardous substance at the Site before the [5] effective date of this Consent Decree and the migration of the known hazardous substances beyond the boundaries of the Site. "Covered Matters" shall be strictly construed and does not include:

A. any claim arising out of Settlor's failure to comply with any term of or obligation arising out of this Consent Decree or any access agreement entered into pursuant to this Consent Decree;

B. any liability not expressly included within Covered Matters;

C. any liability for any hazardous substance or other contamination at the Site that is not on the list attached hereto and marked Exhibit 1;

D. any liability arising out of any criminal act;

E. any liability arising under laws other than WQARF and CERCLA or arising out of the violation of any state or federal law, rule, or regulation after the effective date of this Consent Decree;

F. any liability arising out of the release, disposal, generation, treatment, storage, or transportation by Settlor of any hazardous substance or other contaminant at the Site after the effective

date of this Consent Decree or arising out of Settlor's exacerbation of any hazardous substance or other contaminant at the Site after the effective date of this Consent Decree;

G. any liability arising out of the release, disposal, generation, treatment, storage, or transportation by Settlor of any hazardous substance or other contaminant on real property other than the Site at any time or any liability arising out of the exacerbation of any hazardous substance or other contaminant on real property other than the Site at any time;

H. any liability for any personal injuries or property damage arising out of the release or threat of a release of a hazardous substance or other contaminant or Senior's presence at the Site; and

[6] I. damages to, destruction of, and/or loss of the State's natural resources at or related to the Site, including the costs of any natural resource damage assessments.

9. "Day" means a calendar day. In computing any period of time under this Consent Decree, the day of the act from which the designated time period begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday, or legal holiday, in which case the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

10. "Director" means the Director of ADEQ.

11. "Document" means all written materials, papers, audio tapes, video tapes, magnetic tapes, compact discs, computer discs, photographs, reports, electronic data, and similar items that are not subject to Settlor's attorney-client privilege.

12. "Effective date of this Consent Decree" means the date this Consent Decree is signed by the Court and entered in the court's docket by the clerk of the court, regardless whether a subsequent appeal is filed or other challenge is made to this Consent Decree or this Action.

13. "Parties" means the State and the Settlor (each individually referred to as a "Party").

14. "Remedial Action Costs" means all costs incurred or to be incurred by any person, including the State, except those costs classified as nonrecoverable costs by A.R.S. § 49-281(9) in responding to releases or threats of releases of hazardous substances at or from the Site.

15. "Settlor" means Texas Instruments Incorporated, a Delaware corporation, successor by merger to Burr-Brown Corporation, a Delaware corporation, formerly known as Burr-Brown Research Corp., an Arizona corporation.

16. "Site" means the Broadway Pantano WQARF Registry Site, Site Code #100053-00, located in East-central Tucson, Pima County, Arizona and is approximately bounded by Speedway Boulevard to the north, Pantano Wash to the east, [7] Calle Madero

to the south (south of Broadway Boulevard), and Van Buren Avenue to the west (west of Wilmot Road), or Kolb Avenue for the portion of the Site to the south of Broadway Boulevard. As used herein, Site means and includes all areas when hazardous substances, pollutants, or contaminants originally disposed at the Broadway Pantano WQARF Registry Site have come to be located, including but not limited to the full geographical areal extent of contamination as depicted on the map attached hereto as Exhibit 2.

17. "State" means the State of Arizona and the ADEQ.

18. "WQARF" means the Water Quality Assurance Revolving Fund, A.R.S §§ 49-281 *et seq.,* as amended, and all rules, regulations, and guidelines promulgates thereunder.

## V. SETTLEMENT AMOUNT

19. Settlor shall pay to the State the amount of Sixteen Thousand, Five Hundred Dollars ($16,500) (the "Settlement Amount"). The Settlement Amount shall be paid in the form of one (1) cashier's check, certified check, or money order made payable to the "State of Arizona". Settlor shall mail or hand-deliver the check or money order and an accompanying cover letter within ten (10) days after the effective date of this Consent Decree to:

If mailed, send to:

Mike Clark, Chief Financial Officer
Attn: Accounts Receivable
Arizona Department of Environmental Quality
P.O. Box 18228
Phoenix, Arizona 85007

If hand-delivered, send to:

Mike Clark, Chief Financial Officer
Attn: Accounts Receivable
Arizona Department of Environmental Quality
1110 W. Washington
Phoenix, Arizona 85007

[8] 20. The Settlement Amount shall reference this Consent Decree and Settlors WQARF facility identification number, 100053-00. Copies of the Settlement Amount and all written communications with ADEQ related to this Consent Decree and this Action shall be delivered to:

Arizona Department of Environmental Quality
Attn: Remedial Projects Section Manager
1110 W. Washington
Phoenix, Arizona 85007

21. The Parties agree that ADEQ will determine that portion of the Settlement Amount that will reimburse the State for its past costs and that portion which be used for future costs of Remedial Actions at the Site. That portion which represents past costs shall be deposited into the WQARF fund authorized under A.R.S, § 49-282 and used in any manner authorized by law. That portion which represents the future costs of Remedial Actions shall be deposited

into a site specific account to be used for future Remedial actions pursuant to A.R.S, § 49-294. The parties expressly agree that a primary goal and material provision of this Agreement is to provide the State with funds to cover future Remedial Actions at the Site.

22. Settlor shall advance all filing fees and other costs payable to the "Clerk of the Court" in this action.

## VI. NO ADMISSION OF LIABILITY

23. The payment of the Settlement Amount and the assumption of other obligations by Settlor in this Decree are not to be construed as an admission of liability for any purposes by Settlor, by whom liability is expressly denied. This Consent Decree shall not be offered into evidence or otherwise deemed as an admission of liability by Settlor in any judicial or administrative proceeding as to the fact or extent of its alleged liability with respect to Covered Matters.

## [9] VII. COVENANT NOT TO SUE

24. Settlor's assumption of the obligations under this Consent Decree by payment of the Settlement Amount constitutes adequate consideration for the covenant not to sue and contribution protection granted to Settlor.

25. Except as specifically provided in Section IX ("Reservation of Rights"); the State covenants not to

sue Settlor under WQARF or CERCLA based upon any claim or cause of action arising out of the Covered Matters except, as provided in A.R.S. § 49-292(B), this covenant not to sue shall not prevent the director from suing the Settlor concerning future liability from the release or threatened release that is the subject of this covenant if the liability arises out of conditions that are unknown to the director at the time the director enters into this covenant.

26. Settlor covenants not to sue the State, its agencies, department officials, employees, contractors or agents under WQARF or CERCLA based upon any claim or cause of action arising out of Covered Matters.

27. Nothing in this Consent Decree shall be construed as granting a covenant not to sue, contribution protection, or release of any kind to any person who is not a party to this Consent Decree. This Consent Decree applies only to the State and Settlor and does not release or affect in any way the liability of any other person, including Settlor's insurers and sureties, if any. Except as otherwise provided in this Consent Decree, the Parties reserve the right to bring an action against any person who is not a party to this Consent Decree.

## VIII. CONTRIBUTION PROTECTION

28. The entry of this Consent Decree shall constitute a judicially approved settlement that resolves Settlor's liability as to Covered Matters as

well as provides contribution protection pursuant to A.R.S. § 49-292 and CERCLA, 42 U.S.C. § 9613, to the fullest extent of the law.

[10] **IX. RESERVATION OF RIGHTS**

29. The covenant not to sue and contribution protection granted to Settlor are valid only as to Covered Matters. The State expressly reserves all rights of action against Settlor with respect to matters not covered by this Consent Decree.

30. Except as otherwise provided in this Consent Decree, Settlor reserves all rights and defenses to liabilities that it has under CERCLA, WQARF, and the Common Law.

**X. ALLOCATION OF LIABILITY**

31. The remedial investigation and feasibility study conducted by the State may establish facts which cause the Director to determine that cost recovery is appropriate and that Settlor should be assigned a proportionate share of liability pursuant to A.R.S. § 49-287.04(C) in order to achieve the 100% cost recovery allocation required by A.R.S. § 49-287.05. Settlor waives all right to challenge the Director's determination of Settlor's proportionate share of liability and the Director's assignment of its allocated share of remedial action costs, whether such right is by way of participation in settlement discussions, mediation or settlement conferences, an

allocation hearing conducted pursuant to A.R.S. § 49-287.06, or the filing of a judicial appeal as provided in A.R.S. § 49-287.07.

32. If Settlor's allocated share is determined by the Director or an allocator, whichever occurs later, to be greater than the Settlement Amount, the difference shall be deemed an orphan share of liability pursuant to A.R.S. § 49-281(10),

33. If Settlor's allocated share is determined by the Director or an allocator, whichever occurs later, to be less than the Settlement Amount, Settlor shall have no recourse against the State nor any right of any reimbursement or credit of any kind from the State or WQARF for all or part of the amount paid in excess of the allocated share.

## XI. DISMISSAL OF CLAIMS

34. Settlor shall not initiate any claim relating to Covered Matters against allegedly liable parties, including any other seniors, persons, or entities, in this action or [11] otherwise, either directly or by assignment, except in the event the contributor protection conferred on Settlor in this Consent Decree fails, Nothing in this section shall bar Settlor from initiating any claim against its insuror, guarantor, or surety.

## XII. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT DECREE

35. In the event the Settlement Amount is not received when due, interest' and late fees shall accrue on the unpaid balance from the date due through the date of payment at the rate specified in A.R.S. § 49-113 (8), provided, however, that all amounts paid pursuant to this Consent Decree shall be deposited pursuant to the provisions of Section V ("Settlement Amount").

36. If the Settlement Amount is not paid by the due date, Settlor shall pay late charges in addition to the interest required by thus Section, of $1,000.00 per day that such payment is late. Late charges are due and payable thirty (30) days from the date of the demand for payment by the State. All payments to the State shall be made by certified or cashiers check made payable to the "State of Arizona" in accordance with the terms of Section V (Settlement Amount) of this Consent Decree for deposit into a special WQARF account. All late payments shall be deposited into the State General Fund.

37. Late charges shall accrue regardless of whether the State has notified Settlor of the violation or made a demand for payment. Late charges shall begin to accrue on the day after payment is due and shall continue to accrue until payment in full is received by ADEQ.

38. Late charges and interest shall be in addition to any other remedies available to the State by

virtue of Settlor's failure to comply with this Consent Decree.

39. If the State brings an action to enforce this Consent Decree, Settlor shall reimburse the State for all costs of such action, including but not limited to reasonable attorneys' fees and costs.

[12] **XIII. WITHDRAWING AND VOIDING THIS CONSENT DECREE**

40. If this consent decree is reversed or modified on appeal, either the State or Settlor may withdraw from this Consent Decree, The State shall retain the Settlement Amount, if previously paid, and Settlor shall receive no benefit under this Consent Decree, except a credit equal to the Settlement Amount against any WQARF or CERCLA liability Settlor may have to the State.

41. If Settlor fails to satisfy any obligation under this Consent Decree, the State may void this Consent Decree. If this Consent Decree is voided, the State shall retain the Settlement Amount and Settlor shall receive no benefit under this Consent Decree, except a credit equal to the Settlement Amount against any WQARF or CERCLA liability the Settlor may have to the State with respect to the Site.

**XIV. COMPLETE AGREEMENT**

42. This Consent Decree and its exhibits constitute the complete settlement agreement between the

State and Settlor as to Covered Maters, and supersedes all previous agreements or understandings, whether oral or written. Except as provided in Section XVI ("Modifications") of this Consent Decree, no modification shall be made to this Consent Decree without written notification to and written approval of the State and Settlor. Nothing in this Section shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

## XV. BINDING EFFECT

43. This Consent Decree shall apply to and be binding upon the Parties, their successors and assigns. No change in ownership or corporate status of a Party, including, any transfer of assets or real or personal property, shall in any way alter Settlor's obligations under this Consent Decree, Settlor shall provide a copy of this Consent Decree to each successor and assign.

[13] ## XVI. MODIFICATIONS

44. If the Court modifies or fails to approve this Consent Decree as lodged, either the State or Settlor may withdraw from this Consent Decree. Neither Party shall appeal the Court's decision.

45. Except as otherwise provided in this Consent Decree, neither the State nor Settlor may withdraw from or modify this Consent Decree after it has been signed by the Parties and lodged with the Court.

After this Consent Decree is signed, but prior to its being lodged with the Court, the Parties may modify this Consent Decree only if the modification is in writing, signed by the Parties, and lodged with the Court.

## XVII. COOPERATION AND ACCESS TO INFORMATION

46. Settlor shall cooperate with the State and grant the State and its representatives, authorized agents, attorneys, investigators, consultants, advisors, and contractors prompt access to Settlor's non-privileged Business Records, Documents, and such other information relating to the release, disposal, generation, treatment, storage, or transportation of any hazardous substance or other contaminant at the Site. Settlor's cooperation shall include, but not be limited to:

a. making all non privileged records, Business Records, Documents and other information available to ADEQ in the State of Arizona;

b. providing the State and its representatives, authorized agents, attorneys, investigators, consultants, advisors, and contractors prompt access to Settlor's non-privileged Business Records, Documents, and other information for the purposes of inspection and copying;

c. making Settlor's current and future employees, agents, contractors, officers, directors, and appointed and elected officials who may have knowledge of relevant facts reasonably available

for personal interviews by representatives, authorized agents, attorneys, investigators, consultants, advisors, and contractors of the State,

[14] d. identifying and attempting to locate Settlor's former employees, agents, contractors, officers, directors, and appointed and elected officials who may have knowledge of facts related to the release, disposal, generation, treatment, storage, or transportation of any hazardous substance or other contaminant at the Site,

e. cooperating with and providing reasonable assistance to the State in connection with any investigation related to the release, disposal, generation, treatment, storage or transportation of any hazardous substance or other contaminant at the Site and in preparing for any hearing, allocation, or other proceeding related to the Site, and,

f. waiving any objection, privilege, and right of confidentiality and granting the State the right to communicate with and interview Settlor's former, current, and future employees, agents, contractors, officers, directors, and appointed and elected officials regarding any knowledge of facts, opinions, and conclusions they may have related to the release, disposal, generation, treatment, storage, or transportation of any hazardous substance or other contaminant at the Site.

47. Settlor represents and warrants that as of June 18, 2010, neither Settlor nor any person affiliated with Settlor has or will alter, mutilate, discard, destroy, or otherwise dispose of any Business Record, Document, or other information relating to the release,

disposal, generation, treatment, storage, or transportation of any hazardous substance or other contaminant at the Site. For ten (10) years after the date of entry of this Consent Decree, Settlor shall retain and, upon request, grant the State and its authorized agents, attorneys, investigators, and contractors prompt access to all such Business Records, Documents, or other information for inspection and copying in Arizona. Settlor shall maintain and preserve all such Business Records, Documents, or other information where such Business Records are normally kept. In the event ADEQ requests to inspect the Business Records, Documents, or other information, Settlor shall [15] make them available to ADEQ in the State of Arizona, If Settlor intends to destroy or otherwise dispose of any such Business Records, Documents, or other information at any time after expiration of the ten-year retention period, Settlor shall deliver written notice of such destruction or disposal to the State at least thirty (30) days prior to the date of such destruction or disposal and the State shall have the right to take immediate possession of and title to all such Business Records, Documents, or other information free of charge,

48. By signing this Consent Decree, Settlor certifies that it will fully comply with any and all ADEQ requests for information regarding the Site pursuant to A.R.S. § 49-288.

## XVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

49. Before this Consent Decree can be approved or entered by the Court, the public must be given notice of this settlement and an opportunity to review the terms of this Consent Decree and file written comments with the Court. Therefore, within fifteen (15) days of filing a copy of this Consent Decree with the Court, Settlor shall, at its own expense, publish notice of this settlement at least one (1) time in a newspaper of general circulation in the county in which the Site is located and provide notice to any other interested person identified by the State to Settlor prior to the lodging of this Consent Decree. The notice shall state the material terms of this Consent Decree and that the entire Consent Decree is available for review and comment. Settlor shall deliver a copy of the notice to the State at least five (5) days before it is published and ADEQ may furnish the notice to any person it deems appropriate and may post it on ADEQ's web site. Settlor bears the risk that the publication is defective or otherwise insufficient.

50. The public comment period shall run for thirty (30) days from the date the notice of this settlement is last published. All comments shall be submitted to the Court and to the parties. The State may withdraw from this settlement and Consent Decree after considering the public comments, if any. After the public comment period expires, [16] the State may determine that this settlement is in the

public interest, lodge this Consent Decree with the Court, and petition the Court for its entry.

## XIX. NOTIFICATION

51. Whenever notice is required to be given under this Consent Decree, it shall be in writing and delivered to the persons at the addresses identified below. If the notice is hand-delivered, it is deemed given and effective on the date it is received. If the notice is sent by certified mail, it is deemed given and effective on the date the return receipt is signed. If the return receipt is either not signed or signed but not dated, the notice is deemed given and effective ten (10) days after the date the notice is postmarked by the United States Postal Service.

52. Notices and other written communications between the Parties related to this Consent Decree shall be delivered to the following persons at the following addresses:

To the State:

Arizona Department of Environmental Quality
Attn: Remedial Projects Section Manager
1110 W. Washington
Phoenix, Arizona 85007

To Settlor:

Texas Instruments Incorporated
Attn: David Thomas, Vice-President
13542 North Central Expressway, MS 396
Dallas, Texas 75243

with a copy to:

Jonathan Weisberg
Texas Instruments Incorporated
Senior Counsel
7839 Churchill Way, MS 3999
Dallas, Texas 75256

Copies of all such notices and other communications shall be simultaneously sent by regular first class mail, postage prepaid, to:

[17] Arizona Department of Environmental Quality

Ana I. Vargas, Manager
Legal Support Unit
Arizona Department. of
Environmental Quality
1110 W. Washington
Phoenix, Arizona 85007

Attorney for Plaintiff

Jeffrey D. Cantrell
Assistant Attorney General
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Attorney for Settlor

Christopher D. Thomas
Squire, Sanders & Dempsey, LLP
1 East Washington, Suite 2700
Phoenix, AZ 85004

If either Party changes its address, written notice of the change shall be delivered to the other Party.

## XX. NO PREVAILING PARTY

53. Neither the State nor Settlor is the prevailing party in this Action, Except is otherwise provided herein, neither Party shall assert any claim against the other Party for attorneys' fees, expert witness fees, or any other cost or expense incurred in connection with this settlement, Action, or Consent Decree.

## XXI. GOVERNING LAW

54. This Consent Decree shall be governed, interpreted, and enforced according to the laws of the State of Arizona.

## XXII. AUTHORIZATION

55. The undersigned represent and warrant that they are expressly authorized to execute and enter into this Consent Decree and the Access Agreement and to legally bind the Parties thereunder,

[18] **This Consent Decree is agreed to and approved as to form and content by: The State Of Arizona and Arizona Department of Environmental Quality**

By: /s/ Veronica Ciarier Date: 9/27/10
[for] Amanda E. Stone,
Director Waste
Program Division

**To Texas Instruments Incorporated**

By: /s/ David Thomas Date: 8/25/2010
Amanda E. Stone

Its Vice President

Dated this 21st day of February, 2010~~2~~.

/s/ Cindy K. Jorgenson
The Honorable
Cindy K. Jorgenson
United States District Court

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**EXHIBIT 1**

**List of Existing Contamination**

| **Contaminant** | **Reference** |
|---|---|
| 1,1,1,2-Tetrachloroethane | 4 |
| 1,1,1-Trichloroethane (1,1,1-TCA) | 1,2 |
| 1,1,2-Trichloroethane | 4 |
| 1,1,2-Trichlorotrifluoroethane | 4 |
| 1,1-Dichloroethane | 1 |
| 1,1-Dichloroethene | 1 |
| 1,2,4-Trimethylbenzene (Pseudocumene) | 1, 2 |
| 1,2-Dibromoethane (EDB) | 4 |
| 1,2-Dichlorobenzene | 4 |
| 1,2-Dichloroothane | 4 |
| 1,2-Dichloropropane | 2 |
| 1,3,5-Trimethylbenzene (Mesitylene) | 1, 2 |
| 1,3-Dichlorobenzene | 4 |
| 1,4-Dichlorobenzene | 1, 2 |
| 2-Propanol | 2 |
| 4,4'-DDD | 3 |

| Contaminant | Reference |
|---|---|
| 4,4'-DDE | 3 |
| 4,4'-DDT | 3 |
| 4-Ethyltoluene | 2 |
| Acetone | 2 |
| alpha-Chlordane | 3 |
| Aroclor 1242 | 3 |
| Arocior 1254 | 3 |
| Arocior 1260 | 3 |
| Arsenic | 3 |
| Barium | 3 |
| Benzene | 1, 2 |
| Benzyl Chloride | 2 |
| Bis(2-ethylhexyl)phthalate | 3 |
| Cadmium | 3 |
| Carbon Disulfide | 2 |
| Carbon Tetrachloride | 5 |
| Chlorobenzene | 1 |
| Chloroethane | 4 |
| Chloroform | 1, 2 |
| Chloromethane (Methyl chloride) | 1, 2 |
| Chromium | 3 |
| cis-1,2-Dichloroethene | 1 |
| Cyclohexane | 2 |
| Dichlorodifluoromethane (Freon 12) | 1, 2 |
| Dieldrin | 3 |
| Endosulfan II | 3 |
| Endrin aldehyde | 3 |
| Endrine ketone | 3 |
| Ethylbenzene | 1, 2 |
| Freon 114 (1,2-Dichlorotetrafluoroethane) | 1, 2 |
| gamma-Chlordane | 3 |
| Heptachlor epoxide | 3 |
| Heptane | 2 |
| Lead | 3 |

| Contaminant | Reference |
|---|---|
| Mercury | 3 |
| Methoxychlor | 3 |
| Methyl Butyl Ketone | 2 |
| Methyl Ethyl Ketone | 2 |
| Methylene chloride (Dichioromethane) | 1, 2 |
| Naphthalene | 2 |
| n-Hexane | 2 |
| Silver | 3 |
| Styrene | 1, 2 |
| Tetrachloroethene (PCE) | 1, 2 |
| Toluene | 1, 2 |
| trans-1,3-Dichloropropene | 2 |
| Trichloroethene (ICE) | 1, 2 |
| Trichlorofluoromethane (Freon 11) | 1, 2 |
| Vinyl Chloride | 1 |
| Xylenes, Total | 1, 2 |

Please note potential contaminants from the disposal of waste into the Broadway North Landfill (BNL) may not be listed if analyses for the contaminants were not performed or if the distribution of sample locations representative of the contaminant population was incomplete.

References

1. Technical Memorandum. *Summary of the Soil Gas Surface Flux Chamber Testing Conducted at the Closed Broadway North Landfill, Broadway-Pantano WQARF Site, Tucson, Arizona.* SECOR International Incorporated. August 6, 2007.

2. Technical Memorandum. *Summary of Shallow Probe Soil Gas Testing Conducted at the Closed*

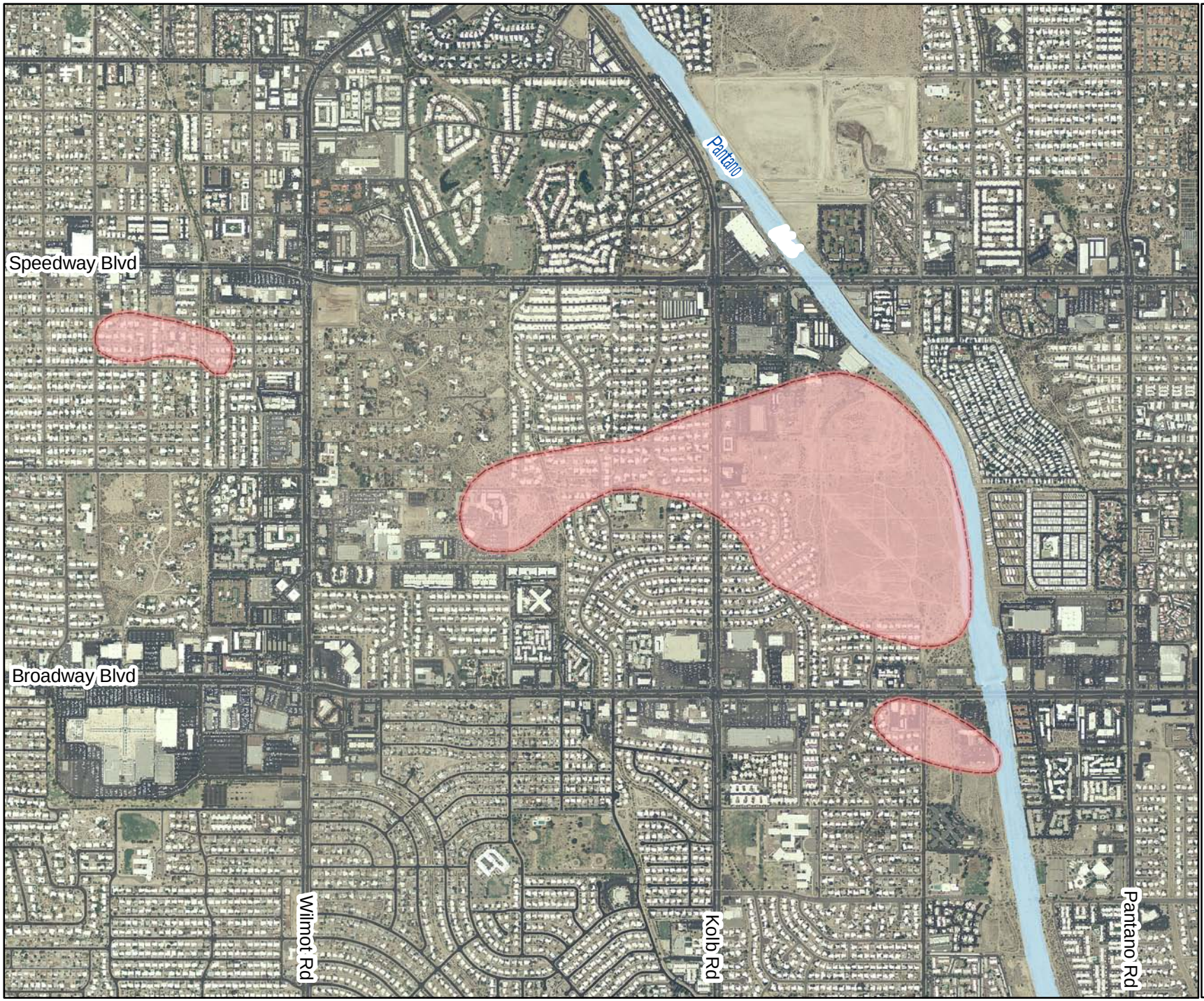
*Broadway North Landfill, Broadway-Pantano WQARF Site, Tucson, Arizona.* SECOR International Incorporated. July 3, 2006.

3. Technical Memorandum. *Summary of Surface Soil Sampling Conducted at the Closed Broadway North Landfill, Broadway-Pantano WQARF Site, Tucson, Arizona.* SECOR International Incorporated. October 5, 2004.

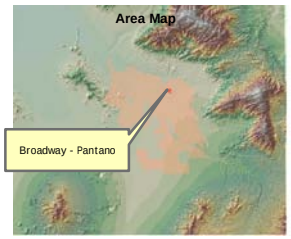
4. Summary Report. *Fourth Rebound Test Report, Broadway North Landfill Operable Unit, Soil Vapor Extraction and Air Injection System, Broadway-Pantano WQARF Site.* SECOR International Incorporated. September 11, 2006.

5. Progress Report. *SVE/AI Progress and Performance Report, October 1, 2000, through November 7, 2000, Broadway North Landfill.* Hydro Geo Chem, Inc. December 27, 2000.

# EXHIBIT 2
## Broadway – Pantano WQARF Site




ADEQ Arizona Department of Environmental Quality





*Legend*

Estimated Plume Boundary

N

2,000

Feet

**Tucson, Arizona**
**January, 2009**

**WASTE PROGRAMS DIVISION**
**GIS and Data Management Unit**

**Map produced by Arizona Department of Environmental Quality (ADEQ), GIS and Data Management Unit, TS Summers**

**D:\superfund\Tucson\2009\broadway_pantano\projects09\BroadwayPan2009.mxd.**

**Data Sources: Arizona Department of Environmental Quality, Arizona Land Resources Information System, Arizona Department of Transportation. Image: Statewide, 2004 Projection: UTM, Nad 83, Meters**

*"Site boundaries depicted on the site map represent ADEQ's interpretation of data available at the time the map was constructed. The map is intended to provide the public with basic information as to the estimated geographic extent of known contamination as of the date of map production. The actual extent of contamination may be different. Therefore, the geographic boundaires for this site may change in the future as new information becomes available."*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

| | | |
|---|---|---|
| State of Arizona, et al<br>Plaintiffs,<br>v.<br>Ashton Company, Inc., et al<br>Defendants | ) | **JUDGMENT IN A CIVIL CASE**<br>CV 10-634-TUC-CKJ |

___ **Jury Verdict.** This action came before the Court for a Trial by jury. The issues have been tried and the jury has rendered its verdict.

**XX** **Decision by Court.** This action case for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order of February 22, 2012, the Motion to Approve Consent Judgment (Doc. 109) is GRANTED. Judgment is entered and the filed closed in this matter.

February 22, 2012
Date

BRIAN D. KARTH
District Court Executive/Clerk

s/ K. Hughes
By K. Hughes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| STATE OF ARIZONA, et al.,<br>Plaintiffs,<br>vs.<br>ASHTON COMPANY, et al.,<br>Defendants. | No. CIV 10-634-TUC-CKJ<br>**ORDER** |
| CITY OF TUCSON, et al.,<br>Plaintiff-Intervenors,<br>vs.<br>BALDOR ELECTRIC COMPANY, et al.,<br>Defendants in Intervention. | |

Pending before the Court is the issue of whether the filing of Answers to the Complaints in Intervention and discovery is appropriate before consideration of the Motion to Enter Consent Decrees (Doc. 109). The parties were provided an opportunity to file briefs regarding the issues. Oral argument was presented to the Court on October 17, 2011.

Plaintiff State of Arizona ("the State") and Defendant Tucson Foundry & Manufacturing, Inc., and

Industrial Pipe Fittings, LLC (collectively, "TF/IPF") have filed briefs asserting that neither answers nor discovery is appropriate prior to resolution of the Motion to Enter Consent Decrees. Intervenors Tucson Airport Authority, Arizona Board of Regents, University of Arizona, Raytheon Company, Tomkins Industries, Inc., Tucson Electric Power Company, and Pima County ("Intervenors") have submitted a brief asserting that further information is needed for the Court to adequately determine whether the Consent Decrees should be entered.

The parties all appear to agree that the proper inquiry regarding the Motion to Enter Consent Decrees is whether the settlements are procedurally and substantively fair, reasonable, in the public interest, and are consistent with the polices of CERCLA. *State of Arizona v. Nucor Corp.*, 825 F. Supp. 1452 (D.Ariz. 1992), *aff'd on other grounds*, 66 F.3d 213 (9th Cir. 1995), *United States v. Montrose Chemical Corp. of Calif.*, 50 F.3d 741 (9th Cir. 1995).

Intervenors assert that answers and discovery are permissible and necessary. Intervenors assert that, under Fed.R.Civ.P. 12(a), there is no controversy before the Court and, under Fed.R.Civ.P. Rule 26(b)(1), they are entitled to discovery regarding nonprivileged facts relevant to their claim that the proposed consent decrees are not substantively or procedurally fair, reasonable, or consistent with the objectives of WQARF and CERCLA. Intervenors assert that inquiries into the information relied on by the State in developing the estimated remediation cost of $75

million and each settling party's allocated share would simply enable this Court and Intervenors to assess whether the consent decrees are substantively fair, an exercise which the Court must conduct. Additionally, the Intervenors disagree with the Court's assertion in the June 29, 2011, Order that discovery may not be appropriate and attempts to distinguish the cases cited in that Order.[1] However, Intervenors do not cite to any authority that found discovery to be appropriate in similar circumstances to the case at bar.

The State argues that, because the City of Tucson intervenors and Board of Regents, et al., intervenors, do not have a right to contribution, no purpose would be served by allowing discovery. The State asserts that, under CERCLA, parties are permitted to recover costs of recovery under 42 U.S.C. § 9607(a) and contribution under 42 U.S.C. § 9613(f). *United States v. Atlantic Research Corporation*, 551 U.S. 128, 131 (2007). The State points out that none of the Intervenors have asserted any current or potential claim for cost recovery under 42 U.S.C. § 9607(a).

As to claims for contribution, the State asserts that claims for contribution are controlled by 42 U.S.C. § 9613(f) which states, in part, that any "person may

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[1] For example, Intervenors point out that the court in *United States v. Wastecontrol of Fla., Inc.*, 730 F. Supp. 401, 404 (M.D. Fla. 1989), was in possession of the administrative record to consider in its review. However, the court did not state that all such information was needed in its consideration.

seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title during or following any civil action under 9606 of this title or under section 9607(a) of this title." The State points out that, in *Cooper Industries, Inc, v. Aviall Services, Inc.*, 543 US 157 (2004), the Supreme Court specifically addressed whether a private party that voluntarily incurred response costs but had not been sued under CERCLA could obtain contribution from other liable parties under 42 U.S.C. § 9613(f) and held that "contribution may only be sought subject to the specific conditions, namely 'during or following' a specific civil action." *Aviall* at 166. "Section 113 (f)(1) . . . authorizes contribution claims only 'during or following' a civil action under § 106 or 107(a) and it is undisputed that Aviall has never been subject to such an action. Aviall therefore has no §113(f)(1) claim." *Aviall* at 168. The State asserts that, because neither the City of Tucson nor the Board of Regents, *et al.*, have ever been the subject of a civil suit as required in 42 U.S.C. § 9613(f), they do not have a viable contribution claim. Indeed, the State points out that the "result of non-settlors possibly bearing a disproportionate liability for the open-ended costs of remediation is therefore consistent with the Statute's paradigm, which encourages the finality of early settlements." *United States v. Davis*, 261 F.3d 1, 28 (1st Cir. 2001). The State appears to agree that Pima County could have a contribution claim, but such a claim would breach the 2002 Consent Decree entered in CIV 00-574. State Brief, Doc. 157, Attachment.

The Court finds Intervenors' reliance on *Aerojet* to be misplaced. In relying on *Aerojet*, Intervenors appear to be equating the discussion of whether intervention is appropriate as to why discovery is appropriate. During argument, the Court discussed with counsel that, following the *Aerojet* remand, the district court did not permit discovery by the intervenors. *See United States v. Andruss Family Trust*, 2011 WL 1334391 (C.D.Cal. 2011). That court discussed that discovery as to why decisions were made would not strengthen an argument that a consent decree is unfair. The court also pointed out that disclosure had been made – further discovery would raise privilege issues and only shed minimal light on the issues. Counsel for Tucson Airport Authority distinguished *Andruss Family Trust* on the basis that more disclosure had been made in the *Andruss Family Trust* case. However, the State indicated that they have conducted interviews of more than 800 people and have disclosed more than 100,000 pages of documents to Intervenors. This is not disputed, but Intervenors complain that the material is disorganized and only includes memoranda regarding the interviews rather than the interviews themselves. As in *Andruss Family Trust*, it appears that additional disclosure would offer minimal additional information regarding the interviews and the investigation that has already been conducted.

Intervenors assert that basic information is needed to evaluate the reasonableness and fairness of the settlements in the Consent Decree and, therefore,

answers to the Intervenor Complaints and discovery prior to consideration of the Motion to Enter Consent Decrees are needed. Intervenors assert that the State has not provided sufficient information for the Court to meaningfully apply the standards. Specifically, Intervenors point out that the State simply identifies a list of categories of costs that would comprise the remedy and states that it utilized "a generally accepted EPA methodology for assigning liability." Doc. 109, p.7, ln. 4-11; Exh. C, p. C-1. This does not provide the amount of the estimated cost for each category, much less the required reasonable underlying basis for each such estimate. Furthermore, the State does not offer an explanation of the basis for the allocation percentages or even provide the allocation percentage as to each potentially responsible party. Further, Intervenors assert that the State's reliance on Mr. Ernest Joseph Blankinship's deposition testimony violates the Hon. Raner C. Collin's order that, if Mr. Blankinship becomes unavailable, his "deposition shall not be admissible for any purpose . . . in any pending or subsequent federal or State judicial or administrative proceeding." MC 09-001-TUC-RCC, Doc. 134, pp. 8-9.

The State asserts, however, that all Intervenors were given access to the State's public records in conjunction with the State's Petition to Perpetuate Testimony of Mr. Blankinship and that, other than privileged documents, Intervenors have already received all documentation that the State relied upon for its settlement offers. Additionally, the State

asserts that the investigation will take an additional three to five years to complete. Counsel for Pima County argues that, because the deposition of Mr. Blankinship is expected to be completed this year, an additional three to five years of investigation is not likely. However, the State points out that, for budgetary reasons, the projection is reasonable. In other words, even if the Court were to permit additional discovery, in light of the projected time for completion of the discovery and the State's assertion that it has disclosed all non-privileged documents, it appears only minimal additional information would be available within a reasonable time.

The Motion to Enter Consent Decrees summarily describes the methodology and provides some basis for the remediation costs:

> ADEQ reviewed the information in its files including interviews of over 800 witnesses and over 100,000 pages of documents. ADEQ then compiled that information and determined where gaps existed in its information to determine those areas where data was unknown and therefore where those uncertainties gave rise to risk in early settlements. Additionally, ADEQ analyzed the information about the Site to determine those areas about which it had no information and therefore where additional risk of early settlement may be present. Finally, a preliminary early allocation was performed in which a rough allocation of share was determined for each potentially responsible

> party based on its activities as a generator, transporter, owner or operator of the Site. This allocation used an established and accepted EPA model for allocations at landfill sites.

Doc. 109, p.12.

> Each Defendant's estimated share of the projected total cost of the remedy was calculated using the information from the files of ADEQ (containing interviews of over 800 witnesses and over 100,000 pages of documents) and using a generally accepted EPA methodology for assigning liability. Based upon a preliminary estimate of remedial action costs of $75 Million, the range of liability for the Defendants extended from 0.01% of the estimated total clean up costs to 0.2%, or as expressed in dollar figures, from $10,000.00 to $150,750.00.

*Id*. at p. 7. The Motion's Ex. C includes some details for the basis of the remediation costs. Indeed, TF/IPF asserts that the State has provided the Court and parties with a description of the analysis it performed in assessing proportionate shares of liability to be attributed to the settling parties based on its estimates and available information and that deference to the State's reasoned determination is required by law. *See, e.g., United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011); *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (emphasizing the need for "deference to the judgment of the government agency which has negotiated and

submitted the proposed judgment"). If the State and the settling parties are incorrect, that is the risk taken by settling early (including the State's risk of absorbing orphan shares). TF/IPF asserts that additional discovery will not change this. Although Intervenors cite to *Montrose* for the assertion that a court may abuse its discretion in approving a consent decree without adequate evidence, the *Montrose* court discussed how the trial court was not even provided with the government's estimate of damages – there was no discussion that supporting documentation for those estimates were needed to determine fairness and reasonableness. Here, the government has provided some information that has provided the basis for the damages and has indicated that it has used an EPA approved methodology. The parties have not provided any authority to the Court that intervenors or non-settling parties are entitled to disclosure of the specific methodology.

Additionally, the Court also considers that, as argued by TF/IPF, there is a strong public policy in favor of early settlements. *See e.g. United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 373 (7th Cir. 2011) (once state has explained the basis for its estimations, court must defer to expertise of agency and federal policy encouraging settlement). Additionally, TF/IPF makes an argument under A.R.S. 49-285(H) similar to the argument made by the State that reallocation is not available in this case.

TF/IPF also argues that, because the State has asserted that it can only impose proportional, several-only liability on any defendant, the State should be

bound by that assertion and, therefore, there is no need for contribution claims or discovery.[2] The State has not disputed this assertion and indeed, appears to agree with it. The Court notes that the Ninth Circuit Court of Appeals has recognized that statements by other government officials may be admissible as a statement by a party opponent. *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989); *see also, United States v. Kattar*, 840 F.2d 118, 130-31 (1st Cir. 1988)*, citing United States v. Powers*, 467 F.2d 1089, 1097 (7th Cir. 1972) (Steven, J., dissenting) (government manifested belief in substance of documents by submitting them to other federal courts); *Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986).

When the Court considers the ongoing nature of the investigation by the State (including the minimal information that would be subject to discovery), the information already disclosed to Intervenors, including remediation costs and general methodology information (compared to *Montrose*), the statements by the State that any orphan shares will be borne by the taxpayers, and the public policy reasons for encouraging early settlements, the Court finds it is not appropriate to permit discovery by Intervenors. In light of this conclusion, the Court also finds that directing answers to the Intervenor Complaints to be

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[2] TF/IPF also asserts that the Intervenor Complaints should be dismissed – in effect, under Fed.R.Civ.P. 12(b)(6). The Court finds that determination of this issue would more appropriately be considered if/when answers or other response were ordered.

filed will only result in unnecessary delay. The Court, therefore, declines to order answer to be filed and declines to order discovery.

In reaching this conclusion, the Court recognizes that Intervenors have argued that this Court has insufficient information before her to adequately consider the Motion to Enter Consent Decrees. Although the Court has found that Intervenors are not entitled to conduct discovery, the Court acknowledges that she must have sufficient information before her to determine whether the settlements are procedurally and substantively fair, reasonable, in the public interest, and are consistent with the polices of CERCLA. *Nucor Corp.*, 825 F.Supp. at 1456; *Montrose*, 50 F.3d at 746. While the Court recognizes the government is entitled to deference, *see e.g., Montrose*, 50 F.3d at 746, and environmental agency formulas should be upheld if there is a plausible explanation for it, *Davis*, 261 F.3d at 24, the Motion to Enter Consent Decrees filed in this case does not provide any details of the EPA formula used in this case and has not provided any explanation as to how this EPA formula was used in calculating appropriate settlement amounts. The Court finds it appropriate, therefore, to direct the State to supplement its Motion to Enter Consent Decrees with additional information regarding the

EPA formula/methodology used to calculate settlement amounts.[3]

Further, the Court does find it appropriate for Intervenors to have an opportunity to respond to the Motion to Enter Consent Decrees although the response time has passed. Additionally, the Court finds it appropriate to provide Intervenors, including the City of Tucson who has already filed a response to the Motion to Enter Consent Decrees, an opportunity to respond to the State's supplemental filing.

The Court, therefore, will set a briefing schedule. The Court notes that the City of Tucson has requested oral argument. The Court declines to schedule oral argument at this time, but advises the parties and Intervenors that, if any other party or Intervenor seeks oral argument, they shall notify the Court.

Accordingly, IT IS ORDERED:

1. Answers to the Intervenor Complaints need not be filed.

2. The Court declines to permit discovery by Intervenors.

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[3] The Court declines to specify what additional information regarding the methodology the State should provide (e.g., affidavit, policy statement describing EPA formula, calculation), but advises the State that the Court cannot grant the Motion to Enter Consent Decrees if inadequate information is presented to permit the Court to determine whether the settlements are procedurally and substantively fair, reasonable, in the public interest, and are consistent with the polices of CERCLA.

3. The State shall file a supplemental to its Motion to Enter Consent Decrees that provides additional information to the Court regarding the methodology used by the State to calculate the settling parties' shares on or before November 7, 2012.

4. Intervenors shall file any response to the Motion to Enter Consent Decrees and supplemental filing on or before November 25, 2012.

5. The State shall file any reply on or before December 5, 2012.

DATED this 20th day of October, 2011.

/s/ Cindy K. Jorgenson
Cindy K. Jorgenson
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| STATE OF ARIZONA,<br>Plaintiff-Appellee,<br>v.<br>CITY OF TUCSON,<br>Intervenor-Plaintiff-Appellee,<br>V.<br>ASHTON COMPANY INCORPORATED CONTRACTORS AND ENGINEERS; et al.,<br>Defendants-Appellees,<br>V.<br>RAYTHEON COMPANY; et al.,<br>Intervenors-Appellants,<br>UNIVERSITY OF ARIZONA; et al.,<br>Intervenor-Defendants-Appellants. | No. 12-15691<br>D.C. No. 4:10-cv-00634-CKJ<br>District of Arizona, Tucson<br>ORDER<br>(Filed Nov. 10, 2014) |

Before: CALLAHAN and M. SMITH, Circuit Judges, and KORMAN, Senior District Judge.*

Judge Callahan has voted to grant the petition for rehearing en banc. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judge Korman so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Defendants-Appellees' petition for rehearing en banc, filed September 2, 2014, is DENIED.

* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| STATE OF ARIZONA,<br>Plaintiff-Appellee,<br>v.<br>CITY OF TUCSON,<br>Intervenor-Plaintiff-Appellee,<br>V.<br>ASHTON COMPANY INCORPORATED CONTRACTORS AND ENGINEERS; et al.,<br>Defendants-Appellees,<br>V.<br>RAYTHEON COMPANY; et al.,<br>Intervenors-Appellants,<br>UNIVERSITY OF ARIZONA; et al.,<br>Intervenor-Defendants-Appellants. | No. 12-15691<br>D.C. No. 4:10-cv-00634-CKJ District of Arizona, Tucson<br>ORDER<br>(Filed Nov. 17, 2014) |

Before: CALLAHAN and M. SMITH, Circuit Judges, and KORMAN, Senior District Judge.*

Intervenors-Appellants' and Intervenors-Defendants-Appellants' jointly filed motion for clarification of the Court's Order filed on November 10, 2014, is granted. Plaintiff-Appellee State of Arizona's petition for rehearing en banc, filed on September 2, 2014, is denied. Judge Callahan voted to grant the petitions for rehearing en banc.

* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.