CHAPTERS

INTERVENTION BY NON-SETTLING PRPS IN CERCLA ACTIONS

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This Chapter examines the issue of non-settling potentially responsible parties (PRPs) moving to intervene in Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) actions where the government is seeking entry of a consent decree between it and settling PRPs. The Chapter examines one such case in particular, the Ninth Circuit's recent decision in Aerojet General Corp. v. United States*, and with reference to other cases wherein non-settling PRPs sought intervention, focuses in on the most salient issue in these cases—whether the non-settling PRP has a significantly protectable interest sufficient to support intervention under CERCLA Section 113(i) and Rule 24(a)(2) of the Federal Rules of Civil Procedure. The Chapter posits that courts in general have been imprecise in defining the interest posited by non-settling PRPs seeking intervention—an interest in a contribution claim against the settling PRPs, which contribution claim will be extinguished upon entry of the consent decree. The conclusion reached is that a PRP has a significantly protectable interest in a contribution claim only after it has been sued or has settled its liability to the government. This Chapter also examines some of the arguments employed by courts to avoid the significantly protectable interest inquiry entirely and critically evaluates some of the past case law in the area, demonstrating that the*

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collective failure of the courts to identify precisely the interest at stake and to apply properly the principles of intervention law has led to the disparate results in the courts.

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[1] as amended by the Superfund Amendments

[1] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 101–175, 42 U.S.C. §§ 9601–9675 (2006).

and Reauthorization Act of 1986 (SARA),[2] establishes a mechanism for those who remediate sites contaminated by hazardous substances to seek compensation from those who are responsible under CERCLA for the contamination.[3] CERCLA establishes broad categories of potentially responsible parties (PRPs) and provides for assigning liability to those PRPs.[4] The United States Environmental Protection Agency (EPA) is the primary agency in charge of implementing CERCLA for the federal government,[5] but CERCLA also authorizes states, Indian tribes, and even private parties to recover costs expended by them in remediating a site pursuant to CERCLA.[6]

When the federal government settles with a PRP, it must lodge the proposed settlement, in the form of a consent decree, with the appropriate district court, which then reviews the settlement and, if the settlement is fair, reasonable, and consistent with CERCLA, enters the consent decree.[7] A party that has been sued or has settled its liability under CERCLA may seek contribution from other PRPs.[8] However, a party that settles its liability to the government through a consent decree obtains protection from such claims for contribution.[9] The extinguishment of the non-settling PRP's contribution claim could potentially leave that PRP facing millions of dollars in liability without recourse as to the settling PRPs.

Often a PRP that is not a party to a settlement between another PRP and the federal government objects to the terms of the settlement. In these situations, the non-settling PRP may seek to intervene in the litigation filed by the government in which the government and the settling PRPs are seeking entry of a consent decree.[10] Cases such as these have created a rather large body of case law examining when and under what circumstances a non-settling PRP may intervene in such an action. The results have not been consistent. Courts applying the same statutory provisions to similar sets of facts have come to different conclusions.[11]

This Chapter will examine the relevant statutory provisions and the standards that courts have developed to apply those provisions. It will then engage in a broad survey of the case law to date, focusing especially on the recent decision by the Ninth Circuit Court of Appeals in *United States v. Aerojet General Corporation*. After surveying the cases, this Chapter will provide some critical analysis of the decisions in those cases and the

2 Pub. L. No. 99-499, 100 Stat. 1613 (1986).

3 CERCLA Section 107(a), 42 U.S.C. § 9607(a) (2006).

4 *Id.*

5 Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

6 CERCLA Section 107(a)(4)(A)–(B), 42 U.S.C. § 9607(a)(4)(A)–(B) (2006).

7 CERCLA Section 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A) (settlements generally); *Id.* § 122(g)(1), 42 U.S.C. § 9622(g)(1) (settlements with *de minimis* parties).

8 CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1).

9 CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

10 Both CERCLA itself and the Federal Rules of Civil Procedure provide a right to intervene under certain circumstances. CERCLA Section 113(i), 42 U.S.C. § 9613(i); FED. R. CIV. P. 24(a)(2) (Supp. III 2006).

11 *See infra* notes 32–33 and accompanying text.

principles on which those decisions were made. The conclusion that it will reach is that a non-settling PRP's interest in a contribution claim only arises after that PRP has been sued or has settled its liability to the government in a judicially approved consent decree.

A. Rule 24(a)(2), CERCLA Section 113(i), and the Interplay Between Them

Both CERCLA and the Federal Rules of Civil Procedure grant non-parties to litigation a right to intervene in that litigation under certain circumstances. In the Federal Rules of Civil Procedure, that right is found in Rule 24(a)(2). In CERCLA, the right of intervention is found in CERCLA Section 113(i).

Rule 24(a)(2) of the Federal Rules of Civil Procedure (Rule 24(a)(2)) provides:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.[12]

CERCLA Section 113(i) provides:

> Intervention[.] In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.[13]

The similarities in the language are unmistakable. The only material differences between the two statutes are the burden of proof as to the adequacy of representation and the lack of an explicit timeliness requirement in CERCLA Section 113(i). This similarity has led courts to apply the same standards in interpreting both Rule 24(a)(2) and CERCLA Section 113(i) as to all but the adequacy of representation element.[14]

B. Elements Required for Intervention

Taking the two statutes together, they each require the applicant for intervention to prove four separate elements.

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12 FED. R. CIV. P. 24(a)(2).

13 CERCLA Section 113(i), 42 U.S.C. § 9613(i) (2006).

14 *See* United States v. Union Elec. Co., 64 F.3d 1152, 1157–58 (8th Cir. 1995); United States v. Acton Corp., 131 F.R.D. 431, 433 (D.N.J. 1990).

1. Timeliness

Under Rule 24(a)(2), the applicant's motion to intervene must be "timely."[15] While CERCLA Section 113(i) does not include the requirement that the application be "timely," courts analyzing the two sections together seem to miss this fact entirely, assuming that CERCLA Section 113(i) imposes a requirement of timely motion to intervene.[16] It would seem, though, that the mechanics of entering a CERCLA consent decree would impose a de facto timeliness requirement even where there is none in the statute. Once the government and the settling PRPs reach a settlement, the government must lodge the settlement with the court for not less than thirty days before the court may enter the settlement as a consent decree.[17] Often, the consent decree is filed concurrently with the complaint initiating the suit.[18] The non-settling PRP would only have the period between the initiation of the suit and the entry of the consent decree in which to file a motion to intervene. Furthermore, even if the consent decree is not lodged with the complaint, the clock to determine timeliness should not begin to run until the consent decree is lodged with the court rather than at the initiation of the litigation. This is because timeliness is to be judged based on when the applicant for intervention became aware, or should have been aware, that its interests were at stake in the litigation.[19]

2. Significantly Protectable Interest

Both CERCLA Section 113(i) and Rule 24(a)(2) require that the applicant for intervention have "an interest" relating to the subject of the litigation.[20] The interest required under both statutes has been variously characterized by courts as a "legally protectable interest"[21] or a "legally sufficient interest."[22] The United States Supreme Court used the term "significantly protectable interest" and, in a later case, qualified that the

15 FED. R. CIV. P. 24(a)(2).

16 United States v. Albert Inv. Co., 585 F.3d 1386, 1396 (10th Cir. 2009) ("Section 113(i) not only allows intervention, but also requires intervention to be timely."); United States v. Aerojet Gen. Corp., 606 F.3d 1142, 1149 (9th Cir. 2010) ("The two provisions differ *only* in providing a different burden of proof for the fourth part of the test." (emphasis added)).

17 CERCLA Section 122(d), 42 U.S.C. § 9622(d) (2006).

18 *E.g.*, United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 575 (W.D. Wis. 1990); *Aerojet Gen.*, 606 F.3d at 1147; *Acton*, 131 F.R.D. at 432; *Union Elec.*, 64 F.3d at 1155–56.

19 *See* United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1182 (3d Cir. 1994) ("[T]o the extent there is a temporal component to the timeliness inquiry, it should be measured from the point which an applicant knows, or should know, its rights are directly affected by the litigation, not . . . from the time the applicant learns of the litigation."); Nat'l Wildlife Fed'n v. Burford, 878 F.2d 422, 434 (D.C. Cir. 1989) ("[T]he relevant time from which to assess [the applicant's] right of intervention is when [it] knew or should have known that any of its rights would be directly affected by this litigation."), *rev'd on other grounds sub nom.* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

20 CERCLA Section 113(i), 42 U.S.C. § 9613(i) (2006); FED. R. CIV. P. 24(a)(2).

21 *Alcan Aluminum*, 25 F.3d at 1181.

22 *Albert Inv.*, 585 F.3d 1386, 1392 (10th Cir. 2009).

interest must be "legally protectable."[23] Justice O'Connor posited that the "requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection."[24] However, the Supreme Court has given little guidance for the lower courts as to how these broad terms should be interpreted.[25] The majority rule that has emerged in the lower courts is that the interest required by Rule 24(a)(2) is one that is direct, substantial or significant, and legally protectable (DSL Rule).[26]

In what has become a heavily cited case, an en banc panel of the Fifth Circuit in *New Orleans Public Service, Inc. v. United Gas Pipeline Co.* (*NOPSI*)[27] defined the interest as being "direct," "substantial," and "legally protectable," not just a mere economic interest, but rather, "one which the substantive law recognizes as belonging to or being owned by the applicant."[28] *NOPSI* involved a dispute between a power provider and its gas

23 Donaldson v. United States, 400 U.S. 517, 531 (1971). *See also* Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 315 (1985) ("In *Donaldson*, . . . [w]e held that the employee's interest was not legally protectable and affirmed the denial of the employee's motions for intervention.").

24 Diamond v. Charles, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring).

25 *See* Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 203–204 (7th Cir. 1982) (discussing the difficulty of determining the scope of Rule 24(a)(2) and the Supreme Court cases that interpret it).

26 *See* Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996) ("To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a direct, substantial, legally protectable interest in the proceedings." (citations and quotations omitted)); Reich v. ABC/York-Estes Corp., 64 F.3d 316, 322 (7th Cir. 1995) ("We require that the potential intervenor's interest be a direct, significant legally protectable one." (citations and quotations omitted)); Med. Liab. Mut. Ins. Co. v. Alan Curtis, L.L.C., 485 F.3d 1006, 1008 (8th Cir. 2007) ("An interest is cognizable under Rule 24(a)(2) only where it is direct, substantial, and legally protectable." (citations and quotations omitted)); Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1494 (9th Cir. 1995) ("[W]hen, as here, the injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of Fed. R. Civ. P. 24(a)(2); he has a significantly protectable interest that relates to the property or transaction that is the subject of the action."); Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1249 (11th Cir. 2002) ("Under Rule 24(a)(2), a party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable."); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 24.03[2][a] (3d ed. 2011) ("In this context, the term *protectable* means legally protectable. A movant's interest must be 'direct, substantial, and legally protectable' to satisfy the interest requirement of Rule 24(a)(2)."). *But see* San Juan Cnty. v. United States, 503 F.3d 1163, 1193–97 (10th Cir. 2007) (en banc) (criticizing the rigidity of the "DSL" rule).

27 732 F.2d 452 (9th Cir. 1984).

28 *Id.* at 464 (emphasis removed). *NOPSI* has been cited favorably by several other circuits. *E.g.*, Am. Mar. Transp., Inc. v. United States, 870 F.2d 1559, 1562 (Fed. Cir. 1989) (adopting *NOPSI* test); United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 838–39 (8th Cir. 2009) (citing *NOPSI* for proposition that interest must be "legally protectable," not "general economic interest"); Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, 72 F.3d 361, 366 (3d Cir. 1995) (also citing *NOPSI* for proposition that interest must be "legally protectable," not "general economic interest"). *But see* Pub. Serv. Co. v. Patch, 136 F.3d 197, 205 (1st Cir. 1998) (stating disagreement with *NOPSI* as to economic harm not being an interest yet citing *NOPSI* for proposition that an "undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right"). *NOPSI* also figures prominently in many of the CERCLA intervention cases. *See Union Elec.*, 64 F.3d 1152, 1166 n.5

supplier over, *inter alia*, pricing of gas.[29] The applicant in that case sought intervention as a representative of the class of rate-payers who purchased power from NOPSI.[30] The en banc panel of the Fifth Circuit denied the application for intervention on the above standard, stating that the "purely economic interest" of the applicant was insufficient for intervention.[31] The Ninth Circuit employs a similar standard to the Fifth Circuit, requiring that the interest asserted must be protected under some law and there must be a relationship between that legally protected interest and the plaintiff's claims.[32]

It must be noted that some courts do not apply such a rigid and formal test of the significantly protectable interest.[33] This Chapter, though, will examine the element of the significantly protectable interest in terms of the "direct, substantial, and legally protectable" definition, as informed by cases like *NOPSI*. There are several reasons why this Chapter will do so. The first

(8th Cir. 1995) (citing *NOPSI* and noting that interest is recognized by substantive law as belonging to intervening PRPs); *Alcan Aluminum*, 25 F.3d 1174, 1185 (3d Cir. 1994) (distinguishing interest of intervenor in that case from the one in *NOPSI*); *Acton*, 131 F.R.D. 431, 434 (D.N.J. 1990) (distinguishing interest of intervenor in that case from the one in *NOPSI*); United States v. ABC Indus., 153 F.R.D. 603, 607 (W.D. Mich. 1993) (applying *NOPSI* in finding that intervenor does not have a significantly protectable interest); United States v. Vasi, No. 5:90CV1167, 1991 U.S. Dist. LEXIS 21436, *15–16 (N.D. Ohio Mar. 6, 1991) (applying *NOPSI* in finding that intervenor does not have significantly protectable interest); Ariz. v. Motorola, Inc., 139 F.R.D. 141, 146 (D. Ariz. 1991) (applying *NOPSI* in finding that intervenor does not have significantly protectable interest).

29 *NOPSI*, 732 F.2d at 459–60.

30 *Id.* at 460.

31 *Id.* at 466.

32 Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998). Daniel Glickman was named as a plaintiff in his official capacity as Secretary of Agriculture. *Id.* at 405. Prior to serving as Secretary of Agriculture, Daniel Glickman served for eighteen years as the United States Congressman from the Fourth Congressional District of Kansas. *See* Govtrack, Daniel Glickman, http://www.govtrack.us/congress/person.xpd?id=404602 (last visited Jul. 12, 2011). It was during this time that Congress enacted SARA, and then-Congressman Glickman made his statement that has figured so prominently in the analysis of the legislative history of CERCLA Section 113(i). *See infra* note 93 and accompanying text.

33 *See, e.g.*, *San Juan County*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc) ("Rule 24(a)(2), though speaking of intervention 'of right,' is not a mechanical rule. It requires courts to exercise judgment based on the specific circumstances of the case. As a result, one must be careful not to paint with too broad a brush in construing Rule 24(a)(2). The applicant must have an interest that could be adversely affected by the litigation. But practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention. We cannot produce a rigid formula that will produce the 'correct' answer in every case. The law can develop only incrementally, as each opinion, while focusing on the language and purpose of the Rule, addresses the considerations important to resolving the case at hand."); Blount-Hill v. Bd. of Educ., 195 Fed. App'x 482, 485 (6th Cir. 2006) ("[T]he Sixth Circuit subscribes to a rather expansive notion of the interest sufficient to invoke intervention of right." (citations and quotations omitted)); Conservation Law Found., Inc. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992) (The First Circuit "has not clearly adopted either [the restrictive or more liberal] approach[]. Instead, [the First Circuit has] emphasized that there is no precise and authoritative definition of the interest required to sustain a right to intervene, while reiterating that the intervenor's claims must bear a sufficiently close relationship to the dispute between the original litigants and that the interest must be direct, not contingent." (citations and quotations omitted)).

is that a majority of circuits apply the more rigid "direct, substantial, legally protectable" test.[34] The second is that *NOPSI* figures prominently in the previous body of CERCLA intervention jurisprudence.[35] The third, and most practical reason, is that where an interest is found to be a significantly protectable interest under the more rigid, conservative test, it will, *a fortiori*, be a significantly protectable interest under a more liberal test. Therefore, the conclusions of this article will seek to establish boundaries under the "direct, substantial, legally protectable" rule. In circuits that take a more liberal approach, these boundaries will be one-way: an applicant for intervention found to have a significantly protectable interest will have such an interest under a more liberal test, but an applicant found not to have a significantly protectable interest may have one under the more liberal minority approach.

3. Impairment of Interest Absent Intervention

Both CERCLA Section 113(i) and Rule 24(a)(2) require that the applicant's interest be so related to the litigation that the disposition of the litigation "may, as a practical matter, impair or impede" the applicant's ability to protect that interest.[36] Applicants for intervention need not "demonstrate to a certainty that their interests *will* be impaired" in the litigation.[37] Prior to the 1966 amendment of Rule 24(a)(2), this element required that the applicant for intervention be legally bound by the disposition of the case in which intervention was sought, but the 1966 amendment provided the more "flexible and practical criteria" of the current standard.[38]

4. Inadequacy of Representation

The greatest difference between CERCLA Section 113(i) and Rule 24(a)(2) is in their allocation of the burden of proving adequacy or inadequacy of representation by the existing parties. CERCLA Section 113(i) puts the burden on the government to show that the existing parties adequately represent the interests of the applicant.[39] Rule 24(a)(2) puts the

34 MOORE ET AL., *supra* note 26, § 24.03.

35 *See supra* note 28.

36 CERCLA Section 113(i), 42 U.S.C. § 9613(i) (2006); FED. R. CIV. P. 24(a)(2).

37 Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 738 F.2d 82, 84 (8th Cir. 1984) (emphasis in original) (citations omitted).

38 *NOPSI*, 732 F.2d 452, 463 (9th. Cir. 1984).

39 CERCLA Section 113(i), 42 U.S.C. § 9613(i) (2006). Given that CERCLA Section 113(i) does nothing that Rule 24(a)(2) did not already accomplish *except* to shift the burden of proving inadequacy or adequacy of representation, perhaps Congress intended CERCLA Section 113(i) to counter the presumption applied by some courts that the government adequately represents the interests of its citizens. *See* MOORE ET AL., *supra* note 26, § 24.03[4][a] ("The concept *parens patriae* refers to these situations in which a governmental entity presents itself as a trustee, guardian, or representative of all citizens. In these representative actions, a governmental entity is presumed to represent its citizens adequately."); *see also* Envtl. Def. Fund, Inc. v. Higginson, 631 F.2d 738, 740 (D.C. Cir. 1979) ("An individual seeking intervention ordinarily is required to

burden on the applicant for intervention to show that representation by the existing parties is inadequate to protect the interests of the applicant.[40] The allocation of the burden of proof is seemingly immaterial in the context of non-settling PRPs moving to intervene in cases in which the government and the settling PRPs are seeking entry of a consent decree. The interests of the parties to the litigation will align once they have reached a settlement, and they will jointly support that which the non-settling PRP obviously opposes: entry of the consent decree. Given this dynamic, it would seem unlikely that a court could find on either standard that the interests of a non-settling PRP are represented adequately by the existing parties.

II. INTERVENTION IN CERCLA SETTLEMENTS BETWEEN THE GOVERNMENT AND PRPS

While CERCLA Section 113(i) (on the books since SARA was enacted in 1986)[41] and Rule 24(a)(2) (the current version of which was enacted in 1966)[42] are the same in every jurisdiction, courts have nonetheless come to very different conclusions about their application to situations in which non-settling PRPs moved to intervene in CERCLA cases between the government and settling PRPs seeking entry of a consent decree establishing the extent of liability of the settlers. The earliest trend could perhaps be characterized best as hostile to the non-settling PRP seeking intervention, with the lone outlier being *United States v. Acton Corporation*, where the District Court for the District of New Jersey found that the PRPs had a right to intervene.[43] The *Acton* decision was heavily criticized by district courts that had determined that non-settling PRPs do not have a right to intervene.[44] The first of the Circuit Court of Appeals to examine the issue agreed with those district courts, in dicta, that a non-settling PRP should be denied intervention, while at the same time finding that a PRP that had already settled should be allowed to intervene in a subsequent action.[45] But since

make only a minimal showing that representation of his interest may be inadequate. Under the *parens patriae* concept, however, a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens. Thus, to intervene in a suit in district court in which a state is already a party, a citizen or subdivision of that state must overcome this presumption of adequate representation.").

40 FED. R. CIV. P. 24(a)(2).

41 Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

42 FED. R. CIV. P. 24(a)(2) (advisory committee notes to 1966 amendment).

43 *Acton*, 131 F.R.D. 431, 436 (D.N.J. 1990).

44 *See, e.g.*, *Vasi*, No. 5:90CV1167, 1991 U.S. Dist. LEXIS 21436, at *11 (N.D. Ohio Mar. 6, 1991) ("This court does not find the reasoning of the *Acton* court persuasive and chooses not to follow the holding in *Acton*."); Arizona v. Motorola, Inc., 139 F.R.D. 141, 145 (D. Ariz. 1991) (quoting *Vasi*); United States v. ABC Indus., 153 F.R.D. 603, 608 n.3 (W.D. Mich. 1993) ("Having carefully reviewed [the *Acton* decision], in light of other contrary decisions and the CERCLA statutory scheme, this Court respectfully declines to follow the holding of *Acton Corp.*"); *Union Elec.*, 64 F.3d 1152, 1164 (8th Cir. 1995) ("Against the clamor of [the other courts that denied PRPs' motions to intervene] is heard a lone voice declaring that a different result is proper.").

45 *Alcan Aluminum*, 25 F.3d 1174, 1184 (3d Cir. 1994).

these early victories for the opponents of intervention, the Eighth[46] and Tenth[47] Circuits and a handful of district courts[48] began bucking what had become known as the "majority rule" and found instead that non-settling PRPs should be allowed to intervene. Most recently, the Ninth Circuit entered the discussion and came down solidly on the side of allowing intervention for non-settling PRPs.[49]

What is perhaps most striking about the entire line of cases examining the issue of intervention by non-settling PRPs is the extent to which the reasoning of those cases is divorced from the body of intervention jurisprudence that the courts have developed since the enactment of Rule 24(a)(2). It is the position of this Chapter that this tendency to interpret CERCLA Section 113(i) in a vacuum has helped lead to the divergent results in cases where non-settling PRPs are seeking intervention to prevent the entry of a consent decree between the government and settling PRPs. Some courts have looked entirely to CERCLA-specific issues to determine whether intervention should or should not be allowed. This Chapter will briefly discuss some of those issues that have led courts to do so.

Yet many courts have looked beyond CERCLA's policies and applied the four-part intervention inquiry described above. It is with these courts that this Chapter is primarily concerned. As argued above, the elements of timeliness, impairment of interest, and adequacy of representation will seldom be important issues for consideration by the court.[50] The decisive issue will tend to be a non-settling PRP's significantly protectable interest. To date, the interest that non-settling PRPs have cited to support their applications for intervention has been their interest in future contribution claims against the settlers—the contribution claims that would be barred upon entry of the consent decree by operation of CERCLA Section 113(f)(2).[51] And it is here that courts have failed to identify clearly the interest at issue and, more importantly, when that interest arises in a manner that hardens the interest into a significantly protectable interest sufficient for intervention of right. This failure has kept courts from arriving at a principled manner of distinguishing between non-settling PRPs that do have an interest in contribution that is significantly protectable and those that do not.

This Part will examine the issues relating to intervention by non-settling PRPs through the lens of the Ninth Circuit's recent decision in *United States v. Aerojet General Corp.*. The analysis will begin by briefly touching upon the CERCLA-specific arguments that have caused some courts to avoid entirely the significantly protectable interest inquiry and will explain why the Ninth

46 *Union Elec.*, 64 F.3d at 1170–71.

47 *Albert Inv.*, 585 F.3d 1386, 1390, 1399 (10th Cir. 2009).

48 *Acton*, 131 F.R.D. at 436; United States v. ExxonMobil Corp., 264 F.R.D. 242, 248–49 (N.D. W. Va. 2010).

49 *Aerojet Gen.*, 606 F.3d 1142, 1146, 1153 (9th Cir. 2010).

50 *See supra* Part I(B)(1), (3)–(4).

51 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (2006).

Circuit was correct in dismissing those arguments. It will then turn to the Ninth Circuit's discussion of the significantly protectable interest of the applicants for intervention in *Aerojet General*. Through that analysis of *Aerojet General* and with reference to other cases, a principle will emerge: a PRP that is not a party to a consent decree between other PRPs and the government does not have a significantly protectable interest in a contribution claim at stake in the consent decree and, therefore, may not intervene unless it has been sued or has settled its liability with the government through a prior consent decree. Having reached and supported this conclusion, this part will then turn to other courts that have also failed to recognize this important dividing line among non-settling PRPs—an inquiry that will essentially divide these courts into those that reached the wrong conclusion and those that reached the right conclusion but failed to demonstrate an understanding of when the contribution claim hardens into a significantly protectable interest.

A. The Ninth Circuit's Decision in Aerojet General Corporation

The Court of Appeals for the Ninth Circuit first addressed the issue of intervention by non-settling PRPs in its 2010 decision of *United States v. Aerojet General Corporation*.[52] This is perhaps surprising since it came almost twenty years after two of its lower courts had issued opinions on which many courts subsequently relied in denying non-settling PRPs intervention.[53] In deciding *Aerojet General*, though, the Ninth Circuit thoroughly disavowed the reasoning of its lower courts and instead embraced the reasoning of the Eighth and Tenth Circuits and the district courts that had allowed non-settling PRPs to intervene.

The parties to *Aerojet General* did not dispute the timeliness of the motion to intervene, leaving the Ninth Circuit to wrestle with the remaining three elements required for intervention: 1) whether the applicants had a significantly protectable interest, 2) whether that interest would be impaired or impeded if the applicants were not allowed to intervene, and 3) whether the existing parties adequately represented the interests of the applicants for intervention.[54] The Ninth Circuit also addressed the argument that CERCLA Section 113(i) is ambiguous and that courts should therefore consult policy and legislative history in interpreting the statute.[55]

The following will analyze each of these issues and elements of intervention through the lens of *Aerojet General*, starting with the policy and legislative history arguments that have derailed some courts before they moved on to the elements of intervention. It will then turn to an analysis of the impairment of interests and adequacy of representation elements required for intervention. This Part will then address the most important and

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[52] *Aerojet Gen.*, 606 F.3d at 1146.

[53] *See Motorola*, 139 F.R.D. 141, 146–47 (D. Ariz. 1991); United States v. Acorn Eng'g Co., 221 F.R.D. 530, 531 (C.D. Cal. 2004).

[54] *Aerojet Gen.*, 606 F.3d at 1148–53.

[55] *Id.* at 1151.

difficult element of intervention—the requirement of a significantly protectable interest—and explain that while the Ninth Circuit correctly decided that element in *Aerojet General*, the court's reasoning suffers from the same imprecision that has characterized other courts looking at the issue.

1. The Relevant Facts of Aerojet General

Aerojet General arose from groundwater contaminated with volatile organic compounds in the San Gabriel Basin in eastern Los Angeles County, California.[56] EPA placed the site on the National Priorities List in 1984 and subsequently divided it into eight separate operable units, among them the South El Monte Operable Unit (SEMOU) that was at the center of *Aerojet General*.[57] EPA sent PRP letters to sixty-seven PRPs pursuant to CERCLA Section 122(e).[58] After some of these PRPs entered into agreements with EPA or made good faith offers of settlement, EPA issued a unilateral administrative order pursuant to CERCLA Section 106(a).[59] Subsequent discovery by EPA of perchlorate contamination caused EPA to revise its remedial plan for SEMOU.[60] Ultimately, the remedial plan formulated by EPA would take thirty years to complete at a cost of $87 million.[61]

In the meantime, the water providers that were responsible for performing much of the remedial work had sued all the PRPs identified by EPA.[62] This meant that those PRPs had gained the right to sue other PRPs for contribution under CERCLA Section 113(f)(1),[63] and those PRPs exercised that right, filing suits and counterclaims against the PRPs that had settled with the water providers as well as the water providers themselves.[64] EPA subsequently settled their claims with ten of the PRPs that had already settled with the water providers and filed suit in the Central District of California, lodging a proposed consent decree with that court.[65] The non-settling PRPs availed themselves of their ability to comment on the proposed consent decree and also sought information from EPA pursuant to the Freedom of Information Act.[66] The non-settling PRPs then sought intervention, under Rule 24(a)(2) and CERCLA Section 113(i), in the action

56 *Id.* at 1146.

57 *Id.*

58 *Id.*; *see* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 122(e), 42 U.S.C. § 9622(e) (2006).

59 *Aerojet Gen.*, 606 F.3d at 1146; *see* CERCLA Section 106(a), 42 U.S.C. § 9606(a) (2006).

60 *Aerojet Gen.*, 606 F.3d at 1146–47.

61 *Id.*

62 *Id.* at 1147.

63 *See* CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (2006) ("Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, [CERCLA Section 107(a),] *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title [CERCLA Section 107(a)]." (emphasis added)).

64 *Aerojet Gen.*, 606 F.3d at 1147.

65 *Id.*

66 *Id.* at 1147–48; Freedom of Information Act, 5 U.S.C. § 552 (2006).

to approve the consent decree.[67] The district court denied their motion and entered the consent decree, and the non-settling PRPs appealed.[68]

2. Policy and Legislative History

a. Is the Statute Ambiguous?

There is a canon of statutory interpretation providing that courts should not look to the legislative history or policy of a statute unless it is necessary to interpret an ambiguity in the statute.[69] While it may seem odd that CERCLA Section 113(i) could be ambiguous even though it uses language so similar to Rule 24(a)(2)—a rule that courts have applied for decades—some courts have come to this conclusion. The court in *United States v. Acorn Engineering Co.*[70] stated that it "is nothing short of absurd" to assert that Section 113(i) is not ambiguous on its face.[71] The provision's limitation of the intervention right to persons who have an interest relating to the litigation—which interest may be impaired or impeded by the disposition of the litigation—was beyond comprehension to that court.[72] On the other hand, the Tenth Circuit in *United States v. Albert Investment Co.*,[73] noted that the parties in that case could not identify what language, exactly, is ambiguous—the government had pointed only to the courts that have found such ambiguity as prima facie evidence that there was, in fact, ambiguity in the statute.[74] It concluded that "[t]he collective failure to identify the ambiguities in Section 113 makes resorting to legislative history problematic."[75] The *Acton* court was even more terse, stating that "the statute's terms are unambiguous" and "give[] the intervention rights to 'any person' who satisfies the section's requirements."[76]

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67 *Aerojet Gen.*, 606 F.3d at 1148.

68 *Id.*

69 *See, e.g.*, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms. The language before us expresses Congress' [sic] intent . . . with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary." (citations omitted) (internal quotation marks omitted)); Caminetti v. United States, 242 U.S. 470, 484–85 (1917) (declining to analyze a statute in terms of its "history and the purposes intended to be accomplished by its enactment" because "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms").

70 *Acorn Eng'g*, 221 F.R.D. 530 (C.D. Cal. 2004).

71 *Id.* at 535–36.

72 *Id.*

73 *Albert Inv.*, 585 F.3d 1386 (10th Cir. 2009).

74 *Id.* at 1394–95.

75 *Id.* at 1395.

76 *Acton*, 131 F.R.D. 431, 433 (D.N.J. 1990).

b. Policy Arguments

Some courts that have found ambiguity in CERCLA Section 113(i) have determined that CERCLA's policies dictate that non-settling PRPs have no right to intervene. In *Arizona v. Motorola, Inc.*,[77] the court relied primarily on policy grounds—citing CERCLA's preference for early settlement and the incentives it gives to PRPs to settle their liability with the government—in rejecting the non-settling PRPs' motion to intervene.[78] The court in *United States v. Vasi*[79] also embraced this theory that CERCLA should punish those PRPs who choose not to enter into a settlement and then seek intervention.[80] Allowing intervention by those PRPs risked "caus[ing] delays in implementation of the clean up of the hazardous waste site . . . effectively thwart[ing] the settlement process."[81]

The Ninth Circuit agreed with the *Acton* and *Albert Investment* courts that there was no ambiguity in the statutes in question and therefore no reason to resort to legislative history and policy.[82] However, the court did indulge in some analysis of the policy underlying CERCLA.[83] Citing CERCLA Section 113(f)(1), the court noted the "countervailing policy arguments in favor of treating all PRPs fairly, an interest that is itself embodied in the statutory scheme."[84] The incentive for PRPs to settle will remain even if intervention by non-settling PRPs is allowed, since entry of the consent decree will still cut off contribution claims, so CERCLA's policy favoring early settlement is still served.[85]

Other courts have interpreted CERCLA's policies as being consistent—or, at least, not inconsistent—with allowing intervention by non-settling PRPs. As noted in *Albert Investment*, the Supreme Court in *Burlington Northern and Santa Fe Railway Co. v. United States* recognized that CERCLA favors both "timely cleanup . . . [and] ensur[ing] that the costs of such cleanup efforts were borne by those responsible for the contamination."[86] The second policy favors allowing intervention by non-settling PRPs in order to give them the opportunity to argue that the settling PRPs are not paying their fair share.[87] The court in *United States v.*

77 *Motorola*, 139 F.R.D. 141 (D. Ariz. 1991).

78 *Id.* at 145–46 ("The Court does not believe that allowing intervention in this matter would be consistent with CERCLA's joint and several liability scheme and its policy favoring early settlements.").

79 *Vasi*, No. 5:90CV1167, 1991 U.S. Dist. LEXIS 21436 (N.D. Ohio Mar. 6, 1991).

80 *Id.* at *11–12.

81 *Id.*

82 *Aerojet Gen.*, 606 F.3d 1142, 1151 (9th Cir. 2010).

83 *Id.*

84 *Id.*; Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (2006) ("In resolving contribution claims, the court may allocate response costs among liable parties using *such equitable factors* as the court determines are appropriate." (emphasis added)).

85 *Aerojet Gen.*, 606 F.3d at 1151.

86 *Albert Inv.*, 585 F.3d 1386, 1397 (10th Cir. 2009) (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874 (2009)).

87 *Albert Inv.*, 585 F.3d at 1397.

ExxonMobil Corp.[88] posited that participation of the non-settling PRPs may "assist, not hinder, the [c]ourt in its obligation to analyze the fairness of the consent decree."[89] The Eighth Circuit found in *United States v. Union Electric Co.*[90] that there is no inherent inconsistency in the fact that CERCLA Section 113(f)(2) provides an incentive to PRPs to settle early by cutting off the contribution rights of the non-settling PRPs granted by Section 113(f)(1), and the intervention right granted by Section 113(i) "provides for intervention to protect that and other interests of persons affected by the litigation."[91]

c. Legislative History

Some courts that have found ambiguity in CERCLA Section 113(i) have resorted to the legislative history of CERCLA in finding that CERCLA Section 113(i) does not allow for intervention by non-settling PRPs. There is some support for this proposition in SARA's legislative history. A House Report described CERCLA Section 113(i) as providing a right to intervene to those who "claim[] a direct public health or environmental interest in the subject of a judicial action allowed under" CERCLA.[92] Courts have also cited Representative Glickman's statements that "[w]hen a motion to intervene is granted under [Section 113(i)], the intervenor shall only be able to raise issues relating to the selected remedy" and that Section 113(i) was not intended "to interfere with the rights of the United States to enter into settlements with [PRPs under CERCLA]."[93] These two statements from the legislative history alone were sufficient to move both the *Vasi* and *Acorn Engineering* courts to conclude that the legislative history supported the proposition that CERCLA Section 113(i) was not intended to allow non-settling PRPs to intervene.[94]

The court in *Albert Investment* examined the legislative history to see if it supported the contention that CERCLA Section 113(i) was intended to exclude PRPs from intervention.[95] While proponents of the legislative history argument point exclusively to the two statements above that support the proposition that Congress intended to exclude PRPs,[96] the *Albert Investment*

88 *ExxonMobil*, 264 F.R.D. 242 (N.D.W. Va. 2010).

89 *Id.* at 248–49.

90 *Union Elec.*, 64 F.3d 1152 (8th Cir. 1995).

91 *Id.* at 1165–66.

92 H.R. REP. NO. 99-253, pt. 3, at 24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3047.

93 131 CONG. REC. H11084 (daily ed. Dec. 5, 1985) (statement of Rep. Glickman).

94 *See Acorn Eng'g*, 221 F.R.D. 530, 536 (C.D. Cal. 2004) (after citing both statements, the court concludes that "[t]he legislative history demonstrates that non-settling PRPs seeking intervention in order to undermine the consent decree and protect their contribution interests were specifically intended to be exempted from . . . [s]ection 113(i)"); *Vasi*, No. 5:90CV1167, 1991 U.S. Dist. LEXIS 21436, at *8–9 (N.D. Ohio Mar. 6, 1991) (citing these two statements and finding that CERCLA Section 113(i) was intended only for those who live in close proximity to a facility and not intended to interfere with settlement).

95 *Albert Inv.*, 585 F.3d 1386, 1395 (10th Cir. 2009).

96 *See supra* Part II(A)(2)(c).

court noted that there were "proposed versions of [SARA] which restricted Section 113(i) to persons claiming 'a direct public health or environmental interest'" and that Congress did not pass that bill.[97] This language is the same as that used in the statement from the House Judiciary Report used to support the decision in *Acorn Engineering* and other cases,[98] which may have informed the *ABC Industries* court's statement that "[i]n light of these ambiguities [in the legislative history], . . . the use of the legislative history [is] dubious."[99] At any rate, *Albert Investment* is undoubtedly correct that "[t]he law that Congress passed does not contain the proposed limitation on intervention," which may fairly lead to the conclusion "that Congress intended the broad intervention right that it created."[100] Given that the language of CERCLA Section 113(i) does not reflect the only statements in the legislative history regarding CERCLA Section 113(i) and that Congress rejected a proposal that would have tracked those statements, the legislative history would seem to be a poor source of authority on which to base the conclusion that CERCLA Section 113(i) was intended to exclude non-settling PRPs.

3. Impairment of the PRP's Interests

Once it had found that the non-settling PRPs seeking intervention had significantly protectable interests, it followed quite easily for the Ninth Circuit in *Aerojet General* that those interests would be impaired absent intervention.[101] The parties did not dispute that entry of the consent decree would reduce or even eliminate the value of the non-settling PRPs' contribution claims.[102] The Ninth Circuit noted that the non-settling PRPs could be held jointly and severally liable for the remaining amount of the government's response costs after entry of the consent decree, so entry of the consent decree could "affect the amount the non-settling PRPs ultimately have to pay."[103]

Ninth Circuit precedent also establishes that an interest may not, as a practical matter, be impaired or impeded if the applicant for intervention has "other means" to protect those interests.[104] In *Aerojet General*, the Ninth Circuit found that the non-settling PRPs did not have other means to protect their interests.[105] Participation in the cases brought by the water providers

97 *Albert Inv.*, 585 F.3d at 1395 (quoting H.R. REP. NO. 99-253, pt. 3, at 24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3047).

98 *See supra* Part II(A)(2)(c).

99 *ABC Indus.*, 153 F.R.D. 603, 608 n.4 (W.D. Mich. 1993).

100 *Albert Inv.*, 585 F.3d at 1395.

101 *Aerojet Gen.*, 606 F.3d 1142, 1152 (9th Cir. 2010) ("This requirement need not detain us long" as "[i]t follows from our discussion of Applicants' significant protectable interests that disposition of this action may impair or impede those interests.").

102 *Id.*

103 *Id.*

104 *See* California *ex rel.* Lockyer v. United States, 450 F.3d 436, 442 (9th Cir. 2006) (quoting Unites States v. Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004).

105 *Aerojet Gen.*, 606 F.3d at 1152.

was inadequate because it would not allow the non-settling PRPs to challenge the fairness of the settlement in the instant case.[106] The court also found that while the "[n]otice and comment procedures do provide non-settling PRPs some degree of protection against an unfair consent decree," this protection is insufficient to constitute other means that would preclude a finding of impairment of interests absent intervention.[107] Citing the dynamics of settlement and the attendant convergence of the government's and the settlers' interests once settlement is reached, as well as the unlikelihood that the government would "abandon or substantially modify the proposed consent decree in response to [the non-settling PRPs'] comments at this stage of the process," the court found that commenting alone would not be sufficient protection of the non-settling PRPs' interests.[108]

CERCLA Section 122(d)(2) provides the avenue for anyone, including non-settling PRPs, to submit comments to the government, which must then provide those comments to the court.[109] Some courts have cited this fact as support for both the propositions that notice and comment were intended to be a substitute for intervention by non-settling PRPs and that the PRP's interest in contribution would not, "as a practical matter, [be] impair[ed] or impede[d]" absent intervention.[110] To the court in *Vasi*, Congress's inclusion of this provision for public participation indicated that Congress intended CERCLA Section 122(d)(2) to be the proper avenue for PRPs to voice their objections to a proposed consent decree.[111] The court in *ABC Industries* likewise thought that providing comments on a proposed consent decree adequately protected the interests of a non-settling PRP.[112] This argument was also embraced in *Acorn Engineering*, where the court said that if CERCLA Section 122(d)(2) was not included, it might be a different matter, but the inclusion of 122(d)(2) "render[s] the alleged right to intervention unwarranted and misplaced."[113]

As the *Albert Investment* court noted, though, CERCLA Section 122(d)(2) leaves both the government and the judge free to ignore the comments.[114] The Ninth Circuit echoed this concern in *Aerojet General*.[115] The court in *Albert Investment* noted that intervention, on the other hand, allows the intervenor to appeal the decision of the district court, and the appellate court may review a court's "failure to consider adequately an intervenor's objections."[116] And the conclusion reached in *Albert Investment* and *Aerojet General* as to notice and comment seems to comport best with

106 *Id.*

107 *Id.*

108 *Id.* at 1152–53.

109 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 122(d)(2), 42 U.S.C. § 9622(d)(2) (2006).

110 CERCLA Section 113(i), 42 U.S.C. § 9613(i).

111 *Vasi*, No. 5:90CV1167, 1991 U.S. Dist. LEXIS 21436, at *10 (N.D. Ohio Mar. 6, 1991).

112 *ABC Indus.*, 153 F.R.D. 603, 608 (W.D. Mich. 1993).

113 *Acorn Eng'g*, 221 F.R.D. 530, 539 (C.D. Cal. 2004).

114 *Albert Inv.*, 585 F.3d 1386, 1399 (10th Cir. 2009).

115 *Aerojet Gen.*, 606 F.3d 1142, 1152–53 (9th Cir. 2010).

116 *Albert Inv.*, 585 F.3d at 1399.

notions of fairness. Notice and comment is available to anyone, whether they have an interest in the site or not. Could it fairly be said that a process that weighs the comments of a PRP facing millions of dollars in potential liability the same as a private individual with absolutely no connection to the site adequately protects the interests of the former? While some courts have been willing to answer "yes," fairness and logic seem to be on the side of those courts that answered "no."

4. Adequacy of Representation

Though the parties to the consent decree did not attempt to argue that they adequately represented the interests of the non-settling PRPs, the Ninth Circuit nonetheless engaged in analysis of the issue.[117] The court noted that the burden of proof shifts from the applicant—to prove inadequacy of representation by the existing parties—under Rule 24(a)(2) to the government—to prove the adequacy of representation by the existing parties—under CERCLA Section 113(i).[118] But, citing again to the dynamics of settlement, the court concluded that "[u]nder either standard . . . the interests of the non-settling PRPs are not adequately represented by existing parties."[119]

5. The Significantly Protectable Interest(s)

The Ninth Circuit agreed with its sister circuits, the Eighth and Tenth, that the non-settling PRPs had a significantly protectable interest in their contribution claims against the settling PRPs. The court rejected the argument that the contribution interest is "contingent or speculative," noting that the contribution claim arises during litigation under CERCLA Section 107 and is vested in any "'liable or potentially liable' person."[120] The Ninth Circuit also went beyond its sister circuits—indeed, beyond any court surveyed here—in finding that the non-settling PRPs also had a significantly protectable interest in ensuring that the amount paid by the settling PRPs was as large as possible.

Citing CERCLA Section 122(h)(4),[121] the court found that "because non-settling PRPs may be held liable for the entire amount of response costs minus the amount paid in a settlement, [the non-settling PRPs] have an obvious interest in the amount of any judicially-approved settlement."[122] The Ninth Circuit characterized this interest as an interest "in a fair and

117 *Aerojet Gen.*, 606 F.3d at 1153.

118 *Id.*

119 *Id.*

120 *Id.* at 1150.

121 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 122(h)(4), 42 U.S.C. § 9622(h)(4) (2006) (A settlement of liability "shall not discharge any of the other potentially liable persons . . . but it reduces the potential liability of the others by the amount of the settlement.").

122 *Aerojet Gen.*, 606 F.3d at 1150.

reasonable allocation of liability" that is "'protected under some law.'"[123] While the Ninth Circuit characterized the interest in a fair allocation of response costs as being a separate interest, that interest and the interest in contribution are perhaps best understood as being two sides of the same coin. The interest in arriving at an equitable allocation of response costs in the consent decree is only a significant interest because the consent decree will cut off the non-settling PRP's ability to seek such an equitable allocation through a subsequent contribution action against the settlers. In essence, the interest in an equitable allocation of costs is really just an interest in ensuring that the settlers pay the fair value of the contribution protection they will receive. To the Ninth Circuit, the PRPs' interests in both their future contribution claim and the equitable allocation of response costs bear a relationship to the claims in the suit in which the PRPs were trying to intervene since the resolution of that suit would directly affect them.[124] Therefore each of these interests is a significantly protectable interest sufficient for intervention under both Rule 24(a)(2) and CERCLA Section 113(i).[125]

a. PRP's Contribution Interest Not So Contingent as Not to Be Significantly Protectable

The court in *Aerojet General* cited two other courts that have found that CERCLA Section 113(f)(1) "creates only a contingent or speculative interest in non-settling PRPs" that "is therefore not significantly protectable."[126] In *Vasi*, the court determined that the moving PRP's "potential right to contribution does not constitute a direct, substantial, legally protectable interest" but rather only "a remote economic interest which has been found insufficient to support intervention under Rule 24(a)(2)."[127] The court went on to explain that since the PRP applying for intervention had not been established to be a responsible party, and since the defendants in the action had also not been established as responsible parties, the moving PRP's "right to contribution is at present a contingency, and is not something which it owns."[128] The court in *Arizona v. Motorola* opined that the non-settling PRPs did not have a significantly protectable interest that would allow intervention, dismissing their interest as "a remote economic" one.[129] That court also found that the interest was not one recognized by substantive law, being "at most a contingency" and "not

123 *Id.* at 1151 (quoting California *ex rel.* Lockyer v. United States, 450 F.3d 436, 440–41 (9th Cir. 2006)).

124 *Id.*

125 *Id.* at 1150.

126 *Id.*

127 *Vasi*, No. 5:90CV1167, 1991 U.S. Dist. LEXIS 21436, at *15–16 (N.D. Ohio Mar. 6, 1991) (citing *NOPSI*, 732 F.2d 452, 464 (5th Cir. 1984)).

128 *Id.* at *16.

129 *Motorola*, 139 F.R.D. 141, 146 (D. Ariz. 1991).

something which [the applicants] own[]."[130] The argument that a non-settling PRP's interest in a contribution claim is "contingent" and "merely economic" rather than one that is direct, significant, and legally protectable draws heavily on the Fifth Circuit's decision in *NOPSI*.[131]

The Ninth Circuit disagreed with the *Vasi* and *Motorola* courts and sided instead with the *Union Electric* court, finding that the interest in a contribution claim is not too "contingent" to be a significantly protectable one.[132] The Ninth Circuit states that "[a]lthough only parties found liable can be made to pay a contribution claim, the statute explicitly provides an interest in such a claim to any 'liable or potentially liable' person."[133] The court goes on to make the critical point that "the statute provides that the interest arises during or following a civil action under [sections] 106 or 107 of CERCLA."[134] Here, the court hinted at what will be shown in this article to be the critical point—that the interest in a contribution claim only becomes a significantly protectable interest once a PRP has been sued or settled its liability with the government.[135] Unfortunately, the Ninth Circuit finishes the thought with the proposition that "under the statute, a non-settling PRP need not have first been found liable in order for the contribution interest to arise."[136] This statement is imprecise. While it is certainly true that a non-settling PRP's contribution claim is not dependent on being found liable, it is dependent on the PRP being sued or settling its liability with the government.

b. PRP's Contribution Interest Is Statutory and Protected by Law

Another argument that draws heavily on *NOPSI* is that a non-settling PRP's interest in a contribution claim is not "something more than an economic interest" and is not "one which the *substantive* law recognizes as belonging to or being owned by the applicant."[137] For instance, the court in *Acorn Engineering* held that "a non-settling PRP's contribution interest is not only *unrecognized* by the substantive law, but is also expressly

130 *Id.* The court in *Acorn Engineering* agreed with *Motorola* that "the contribution interest of a non-settling PRP is indirect and contingent" and also posited that "the interest is 'not one that the *substantive* law recognizes as belonging to or being owned by the applicant.'" *Acorn Eng'g*, 221 F.R.D. 530, 538 (C.D. Cal. 2004) (quoting *NOPSI*, 732 F.2d 452, 464 (5th Cir. 1984)) (emphasis in original).

131 *See supra* Part I(B)(2) (discussing *NOPSI*); *see also supra* notes 121–25 and accompanying text (discussing courts relying on *NOPSI*).

132 *Aerojet Gen.*, 606 F.3d 1142, 1150 (9th Cir. 2010).

133 *Id.* (quoting Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (2006)).

134 *Id.*

135 *See infra* Part II(B).

136 *Aerojet Gen.*, 606 F.3d at 1150 (quoting *Union Elec.*, 64 F.3d 1152, 1167 (8th Cir. 1995) ("[N]o finding of liability is required, nor assessment of excessive liability, before the contribution interest arises.")).

137 *NOPSI*, 732 F.2d 452, 464 (5th Cir. 1984) (emphasis removed).

prohibited by the substantive law, namely, by [S]ection 113(f)(2)."[138] In other words, since CERCLA Section 113(f)(2) cuts off the PRP's contribution claim after entry of the consent decree, that provision means that the PRP's right to a contribution claim is "merely economic, rather than statutory."[139]

The Ninth Circuit rejected this line of reasoning as well, noting that CERCLA itself provides the right to contribution and therefore the right is "protected under some law" as required for intervention.[140] In doing so, the Ninth Circuit joined the courts that have found that CERCLA Section 113(f)(1)'s grant of a right to a contribution claim means that the contribution claim is one that is recognized by law as belonging to the applicant.[141] *Albert Investment* noted that the PRP applying for intervention in that case "seeks to protect a substantive right that currently exists: the statutory right to seek contribution from the settling defendants."[142] *Union Electric* stated what should be obvious, that "[t]he non-settling PRPs' interest [in contribution] was created by provisions of the precise statute under which the litigation was brought" and "is directly related to the subject matter of the litigation, because it may be asserted 'during or following' that litigation, and arises from the liability or potential liability of persons as the result of that litigation."[143]

The *Acorn* court's reasoning also fails to recognize that CERCLA Section 113(f)(2) not only provides *that* a contribution claim will cease to be recognized and protected by the substantive law, but it provides *when* the contribution claim will cease to be recognized and protected by the substantive law. CERCLA Section 113(f)(2) states: "A person who *has resolved* its liability . . . [to the government in a] judicially *approved* settlement shall not be liable for claims for contribution."[144] If the past tense in this provision means anything, it must mean that the contribution claims are cut off *after* the court enters the consent decree, i.e., when the settlement has been "judicially approved." The rationale of the *Acorn* court would seem to suggest that contribution claims are not recognized or protected by the law once the consent decree has been lodged, not when it is entered. As the *Acton* court states, "the fact that [the non-settling PRPs] may later lose their right of contribution against the settling defendants once the consent decree has been approved does not make the right contingent at

138 *Acorn Eng'g*, 221 F.R.D. 530, 538 (C.D. Cal. 2004).

139 *Id.*

140 *Aerojet Gen.*, 606 F.3d at 1150. The Ninth Circuit defines a significantly protectable interest in a manner similar to *NOPSI*: "[a]n applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998).

141 *See, e.g.*, *Acton*, 131 F.R.D. 431, 434 (D.N.J. 1990) (finding that the proposed intervenors "have at this time, and will continue to have pending disposition of the consent decree, a statutory right of contribution").

142 *Albert Inv.*, 585 F.3d 1386, 1397 (10th Cir. 2009).

143 *Union Elec.*, 64 F.3d 1152, 1166 (8th Cir. 1995) (quoting Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (2006)).

144 CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (2006).

present."[145] A good comparison might be statutes of limitation. While a statute of limitation may, in the future, bar a particular claim, that does not mean that that claim is not presently recognized by or protected under the law.

B. Do Non-Settling PRPs Have a Significantly Protectable Interest?

As discussed above, courts have come to differing conclusions as to whether a non-settling PRP has a significantly protectable interest in a contribution claim at stake in litigation seeking entry of a consent decree between other PRPs and the government. In order to answer the question of whether a non-settling PRP has a significantly protectable interest in a contribution claim, it is important to define that interest properly and to establish precisely when that interest arises. Some courts have failed to do so, and that failure skews their analysis. According to CERCLA Section 113(f)(1), a PRP has a right to a claim for contribution "during or following any civil action under" CERCLA Sections 106 or 107(a).[146] According to CERCLA Section 113(f)(3)(B), a party that has settled its liability with the government "in an administrative or judicially approved settlement" may also seek contribution from other PRPs.[147] So the PRP's right to a contribution claim arises once that PRP has been sued or has entered into a settlement with the government that has received a judicial imprimatur.[148] If the government and other PRPs enter into a settlement that is then approved by a court in a consent decree, then the PRP's contribution claim will be barred by operation of CERCLA Section 113(f)(2).[149] However, if a PRP is forced to incur response costs itself, for instance because EPA has issued to that PRP a unilateral administrative order under CERCLA Section 106(a), then the PRP does not have a contribution claim but rather a remedy that sounds in a CERCLA Section 107(a) cost recovery action.[150] A PRP's CERCLA Section 107 cost recovery action is not barred by CERCLA Section 113(f)(2), and therefore the entry of a consent decree between the government and a settling PRP will not affect that cost recovery action.[151]

Therefore, there are at least three scenarios in which a non-settling PRP may find itself. The first scenario is when the PRP has been sued or has entered into an administrative or judicially approved settlement with the government. The second scenario is that it has complied with an administrative order or otherwise incurred response costs directly. The third scenario is that EPA or a state agency has issued it a notice identifying it as a

145 *Acton*, 131 F.R.D. at 434.

146 CERCLA Section 113(f)(1),42 U.S.C. § 9613(f)(1) (2006).

147 *Id.* § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

148 Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 166 (2004).

149 CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (2006) ("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.").

150 United States v. Atlantic Research Corp., 551 U.S. 128, 131 (2007).

151 *Id.* at 140.

PRP, but no further action against the PRP has been taken, or the PRP otherwise has reason to believe that it may be responsible for contamination at a facility, for instance because it was a former owner or operator of the facility or because it generated or transported hazardous substances found at the facility. Whether or not a non-settling PRP has a significantly protectable interest in the possible entry of a consent decree that would bar future contribution claims would seem to depend on which scenario contains the PRP.

1. The Contribution Interest of a PRP that Has Been Sued Is Significantly Protectable

The first scenario, in which the PRP has been sued for cost recovery under CERCLA Section 107(a) or has settled with the government in an administrative or judicially approved settlement, is the easiest to address—the PRP in that scenario certainly has a significantly protectable interest at stake in the entry of the consent decree. In this situation, the PRP has a currently vested right to a contribution claim, an interest that is protected under the law and has a direct relationship between it and the suit in which the government and the settling PRPs are seeking entry of a consent decree[152] that would eliminate that right of contribution.[153] The interest is "direct," "substantial" and "legally protectable," more than a mere economic interest but rather "one which the substantive law recognizes as belonging to or being owned by the applicant."[154] As the court in *Acton* noted, while the PRP's ability to collect anything from that contribution claim is contingent on many other factors, "none of these 'contingencies' go to the existence of the right itself."[155] Thus, once a PRP has been sued or has settled with the government, it has a significantly protectable interest in a contribution claim.

The courts in *Acton*, *Aerojet*, and *Albert Investment* were all faced with PRPs that had been sued,[156] and each of those courts correctly determined that the non-settling PRPs had a significantly protectable interest in the litigation. In *Arizona v. Motorola*, the non-settling PRPs were also parties in the related suit, yet the court erroneously determined that the non-settling PRPs' currently vested right to contribution claims against the settling PRP was a "remote economic interest that [was] insufficient to support intervention."[157] In *ABC Industries*, the non-settling PRPs seeking intervention not only had a currently vested right to contribution claims, but also were actively pursuing those claims against the settling PRPs.[158] While noting that the non-settling PRPs' contribution claims "do not appear

152 *Donnelly*, 159 F.3d 405, 409 (9th Cir. 1998).
153 CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (2006).
154 *NOPSI*, 732 F.2d 452, 464 (5th Cir. 1984) (emphasis removed).
155 *Acton*, 131 F.R.D. 431, 434 (D.N.J. 1990).
156 *Id.* at 432; *Albert Inv.*, 585 F.3d 1386, 1389 (10th Cir. 2009).
157 Arizona v. Motorola, Inc., 139 F.R.D. 141, 146 (D. Ariz. 1991).
158 *ABC Indus.*, 153 F.R.D. 603, 604–05 (W.D. Mich. 1993).

contingent or speculative," the court nonetheless concluded that they were not significantly protectable.[159] The PRP seeking intervention in *Browning-Ferris*[160] had already settled its liability with the United States through a consent decree in a prior action,[161] so it had a currently vested right to seek contribution under CERCLA Section 113(f)(3)(B).[162] Yet the court in that case found that the PRP seeking intervention did not have a significantly protectable interest in the litigation.[163]

In *Alcan Aluminum*, the Third Circuit addressed a motion to intervene made by the representative of a group of PRPs that had already settled with the government in a previous consent decree (the *Air Products* defendants).[164] The government then sought entry of a consent decree with another group of PRPs as to the same facility (the *Alcan* defendants).[165] The *Air Products* defendants objected to the entry of the consent decree between the *Alcan* defendants and the government because, pursuant to CERCLA Section 113(f)(2), entry of the consent decree would eliminate the *Air Products* defendants' right to seek contribution from the *Alcan* defendants for sums paid by the *Air Products* defendants to the government.[166] The court recognized that the courts in *Motorola* and *Vasi* determined that the proposed intervenors in those cases did not have a significantly protectable legal interest to support intervention but noted that those cases did not deal with PRPs that had already settled.[167] In those cases where the PRP had not already settled, the *Alcan* court opined, "courts have properly found the interest of non-settlor applicants to be merely contingent."[168]

The Third Circuit distinguished the interest of a non-settling PRP from that of a PRP that has already settled. The non-settling PRP's interest is contingent in the sense that the PRP has not already been found liable, "it is unclear what, if any, liability it will have," and "any contribution right it might have depends on the outcome of some future dispute in which the [non-settling PRP] may, or may not, be assigned a portion of liability."[169] In

159 *Id.* at 607.

160 United States v. Browning-Ferris Indus. Chem. Serv., Inc., No. 89-568-A, 1989 U.S. Dist. LEXIS 16596 (M.D. La. Nov. 15, 1989).

161 *Id.* at *2–3.

162 Comprehsive Environmental Response, Compensation, and Liability Act of 1980 Section 113(f)(3)(B); 42 U.S.C. § 9613(f)(3)(B) (2006).

163 *Browning-Ferris Indus. Chem. Serv.*, No. 89-568-A, 1989 U.S. Dist. LEXIS 16596, at *8–9.

164 *Alcan Aluminum*, 25 F.3d 1174, 1178–79 (3d Cir. 1994).

165 *Id.* at 1179.

166 *Id.* Pursuant to their settlement with the government, the *Air Products* defendants had reimbursed the government for costs incurred by the government, but they had also agreed in the settlement to bear the costs of future operations and maintenance costs at the site. *Id.* at 1178. Since the *Air Products* defendants would incur those costs directly, their avenue to recover those direct costs would be through CERCLA Section 107, not CERCLA Section 113, and their CERCLA Section 107 cost recovery action would therefore not be barred by the entry of the consent decree between the government and the *Alcan* defendants. *See supra* notes 142–45 and accompanying text.

167 *Alcan Aluminum*, 25 F.3d at 1183–84.

168 *Id.* at 1184 (emphasis added).

169 *Id.*

contrast, a PRP that has already settled has an interest in contribution that "is contingent only in the sense that it cannot be valued."[170] For the Third Circuit, it is "[t]he act of settling [that] transforms a PRP's contribution right from a contingency to a mature, legally protectable interest."[171] Here, the Third Circuit was correct because "the act of settling" does in fact create a right to contribution under CERCLA Section 113(f)(3)(B),[172] and therefore once a PRP has settled with the government, it has a significantly protectable interest in a contribution claim. However, the Third Circuit's dicta as to earlier cases belies any notion that the Third Circuit fully grasped the precise point at which CERCLA Section 113(f)(1) creates a significantly protectable interest in a contribution claim—being sued "transforms a PRP's contribution right from a contingency to a mature, legally protectable interest" just as surely as does the "act of settling."[173]

This conclusion is further buttressed by the irrebuttable presumption of consistency with the National Contingency Plan (NCP) that arises upon entry of a consent decree between the federal government and settling PRPs. CERCLA Section 107(a)(4)(A) provides that a PRP may be liable to the federal government for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan."[174] To state the negative, a PRP is not liable for costs incurred by the federal government that are inconsistent with the NCP. Therefore, since the PRP would not be liable for costs incurred that were inconsistent with the NCP, the resolution of the issue of whether the response costs incurred by the government were consistent with the NCP could have a potentially significant effect on the amount that a PRP may later be forced to pay the federal government. According to a regulation promulgated by EPA and incorporated into the NCP, "[a]ny response action carried out in compliance with the terms of . . . a consent decree entered into pursuant to [S]ection 122 of CERCLA[] will be considered 'consistent with the NCP.'"[175] In other words, once a court has entered a consent decree between the federal government and a PRP, the response action embodied in that consent decree is presumptively consistent with the NCP. According to courts that have applied this regulation, the regulation creates "an irrebuttable presumption that actions taken pursuant to the terms of an EPA consent decree are consistent with the [NCP]."[176] This means that the *only* opportunity that a non-settling PRP will ever have to challenge the remedial plan's consistency with the NCP is when the district court considers the consent decree between the federal government and the settling PRPs. It is

170 *Id.*

171 *Id.*

172 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (2006).

173 *Alcan Aluminum*, 25 F.3d at 1184.

174 CERCLA Section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (2006).

175 40 C.F.R. § 300.700(c)(3)(ii) (2010).

176 Browning-Ferris Indus. of Ill., Inc., v. Ter Maat, 13 F.Supp.2d 756, 769 (N.D. Ill. 1998). *See also* Bancamerica Commercial Corp. v. Trinity Indus., Inc., 900 F.Supp. 1427, 1452 (D. Kan. 1995) (applying the irrebuttable presumption and surveying other cases that have done the same).

striking that not one of the cases surveyed herein addresses the irrebuttable presumption of consistency with the NCP and its effects on the non-settling PRP.

2. A PRP that Has Incurred Response Costs Does Not Have a Significantly Protectable Interest

The second scenario, where the PRP has incurred response costs and therefore has a right to pursue cost recovery under CERCLA Section 107(a), is also easily addressed—the PRP does not have a significantly protectable interest in a contribution claim at stake in the litigation in which the government and settling PRPs are seeking entry of a consent decree. In this scenario, the PRP still has a legally protectable interest—the statutory right to seek cost recovery from the settling PRPs. This interest, though, is not related to the outcome of the litigation between the government and the settling PRPs in any meaningful way, and even if it were so related, the non-settling PRP's interest will not be impaired or impeded by the entry of the consent decree. The PRP that has incurred response costs will have a remedy that sounds in a CERCLA Section 107(a) cost recovery action. The entry of a consent decree between the government and the settling PRPs cuts off only a PRP's right to a contribution claim under CERCLA Section 113(f)(1) or 113(f)(3)(B).[177] The entry of the consent decree will not eliminate or otherwise affect the rights of a PRP that has incurred costs and thereafter seeks cost recovery, and that PRP does not have a significantly protectable interest in the litigation.

The non-settling PRP seeking intervention in *City of Glen Cove*[178] expended millions of dollars in response costs pursuant to a unilateral administrative order issued by EPA.[179] However, the case occurred at a time when *all* Circuits of the federal court system were operating under the erroneous belief that a PRP's claim, whether for contribution or cost recovery, would sound in CERCLA Section 113(f)(1) and therefore would be cut off by entry of the consent decree pursuant to CERCLA Section 113(f)(2).[180] Given this assumption, the court found in *Glen Cove* that the non-settling PRP had a significantly protectable interest,[181] but the proper outcome in the post *Cooper* / *Atlantic Research* world would be to find that the non-settling PRP did not have a significantly protectable interest in a contribution claim, since its CERCLA Section 107(a) claims against the settling PRPs would be unaffected by entry of the consent decree.

177 CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (2006).
178 United States v. City of Glen Cove, 221 F.R.D. 370 (E.D.N.Y. 2004).
179 *Id.* at 372.
180 *See Atlantic Research*, 551 U.S. 128, 140 (2007).
181 *City of Glen Cove*, 221 F.R.D. at 373.

3. A PRP that Has Not Incurred Response Costs or Been Sued Has No Significantly Protectable Interest

The final scenario—where the PRP has not been sued, has not settled with the government, and has not incurred response costs recoverable under CERCLA Section 107(a)—is a more difficult question. The PRP in this scenario has no currently vested contribution right under CERCLA Section 113(f)(1).[182] Whatever interest the PRP may have in a future contribution claim is not one that "the substantive law recognizes as belonging to or being owned by the applicant."[183] So the PRP in this scenario does not have a significantly protectable interest in a contribution claim, and therefore may not intervene of right under CERCLA Section 113(i) or Rule 24(a)(2). This was the situation in which the non-settling PRPs in *Union Electric* found themselves. They were among 735 PRPs identified by EPA, but EPA had not yet filed suit against them.[184] In *United States v. ExxonMobil Corporation*, the non-settling PRPs had likewise not been sued or entered into a settlement.[185] Both the *Union Electric* and the *ExxonMobil* courts determined incorrectly that the PRPs seeking intervention had a significantly protectable interest despite the fact that the PRPs had not been sued and therefore had no vested right to a contribution claim.

4. Significantly Protectable Interests: Questions from Conclusions

The preceding sought to answer the question of whether and when a PRP has a significantly protectable interest in litigation between the government and settling PRPs where a consent decree is sought. The answer at which it arrived was that a PRP only has a significantly protectable interest in a contribution claim after the PRP has been sued or has settled its liability to the government. But is this answer satisfactory? Are the courts to say to a deep-pocketed PRP that has made a major contribution to the contamination at a site that it has no significantly protectable interest, even though that PRP in all likelihood will eventually be sued by someone? Meanwhile, should the *de minimis* PRP that has already settled have carte blanche to intervene in any future action between the government and settling PRPs? Should the courts really determine whether a PRP has a significantly protectable interest based solely on whether the government or another PRP chooses to sue that PRP the day before or the day after a consent decree is entered? It would seem, then, that a universal rule, while satisfyingly easy to apply, will be incapable of equitably addressing the widely varying fact patterns in which it will be applied in individual cases.

United States v. ExxonMobil Corporation presents a good example of when the rules stated above would work injustice on the non-settling PRPs. In that case, EPA identified three parties potentially responsible for

182 CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (2006).

183 *NOPSI*, 732 F.2d 452, 464 (5th Cir. 1984) (emphasis removed).

184 *Union Elec.*, 64 F.3d 1152, 1155–56 (8th Cir. 1995).

185 *ExxonMobil*, 264 F.R.D. 242, 243 (N.D.W. Va. 2010).

contamination at a site straddling a river, with ExxonMobil being the owner of the site on one side of the river and the two other PRPs being identified as a generator of hazardous substances at and the owner of the property on the other side.[186] EPA entered into a settlement with ExxonMobil whereby ExxonMobil would contribute $3 million of the approximately $24 million in response costs.[187] EPA then sued ExxonMobil and lodged the consent decree, but did not sue the other two PRPs that it had identified and that would likely have to shoulder the remaining $21 million in response costs.[188] The PRPs sought intervention to oppose the consent decree on the grounds that it "unreasonably underestimates Exxon's liability."[189] The court granted the PRPs' motions to intervene "for the limited purpose of challenging the proposed consent decree."[190]

Since the PRPs seeking intervention in *ExxonMobil* had not been sued, they did not have a significantly protectable interest in a contribution claim. But given that there were only three PRPs identified for the site and that EPA was settling one of them out and leaving $21 million on the table, could there really be any doubt that at some point the remaining two PRPs would be sued? And once those PRPs were sued, they would have no recourse against ExxonMobil.[191] Furthermore, the irrebuttable presumption of consistency with the NCP would operate to deny those parties from defending themselves on the ground that the costs incurred were inconsistent with the NCP. Would denying the motion to intervene of the remaining PRPs have been just? Perhaps this is what the *ExxonMobil* court was getting at when it said that "[t]he arguments [of the non-settling PRPs] . . . will assist, not hinder, the [c]ourt in its obligation to analyze the fairness of the consent decree."[192]

III. CONCLUSION

This Chapter has examined the existing case law regarding the specific issue of non-settling PRPs intervening in litigation to oppose entry of consent decrees between the government and settling PRPs, focusing on whether a non-settling PRP has a significantly protectable interest in a contribution claim. It arrived at the conclusion that under the "direct, substantial, and legally protectable" formulation of the significantly protectable interest, an interest in a contribution claim is only significantly

186 *Id.* at 243–44.

187 *Id.*

188 *See id.* at 244 (noting that the terms of the consent decree would have barred the other two PRPs from seeking contribution from Exxon).

189 *Id.* at 243–44.

190 *Id.* at 249.

191 Those PRPs would be wise to request that EPA issue an administrative order or else to perform the remediation voluntarily, allowing the PRPs to incur response costs that they could then try to recover from ExxonMobil under CERCLA Section 107(a), rather than allowing EPA to get a judgment against the remaining PRPs, leaving them only with the contribution claims precluded as to ExxonMobil.

192 *ExxonMobil*, 264 F.R.D. at 249.

protectable when the PRP applying for intervention has been sued or has settled its liability to the government. While there clearly are equitable arguments to be made that at least some non-settling PRPs—like those in *ExxonMobil*—should be allowed to intervene, an applicant for intervention of right under Rule 24(a)(2) and CERCLA 113(i) does not have a significantly protectable interest sufficient for intervention of right until its contribution claim becomes something that the law recognizes as belonging to the PRP. CERCLA does not supplant the Federal Rules of Civil Procedure. To the extent that it would be unfair to exclude certain non-settling PRPs from consideration of a consent decree, fairness could be served by allowing permissive intervention under Rule 24(b)(2) or participation as an amicus curiae. The primary purpose of this Chapter has been to identify a principled manner of defining a PRP's interest in a contribution claim and determining whether it is a significantly protectable one sufficient for intervention of right. The hope is that this analysis may help guide courts to more consistent outcomes in future cases.