

Environmental Law Blog

Ninth Circuit Grants Non-Settling PRPS a Right to Intervene to Protect Interests in Contribution and in the Fairness of Proposed Consent Decree

Posted by [David Chapman, Esq.](#) in [CERCLA](#), [Environmental Litigation](#) on September 24, 2010

In *United States, et al. v. Aerojet General Corp, et al.* (606 F.3d 1142; 2010 U.S. App. LEXIS 11131), the United States Court of Appeals for the Ninth Circuit held that non-settling Potentially Responsible Parties (“PRPs”) (referred to by the court as “Applicants”) have a right to intervene under Federal Rule of Civil Procedure 24(a)(2) and § 113(i) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) (42 U.S.C.S. § 9613(i)) in a lawsuit brought by the United States Environmental Protection Agency (“EPA”) for the purpose of obtaining court approval of the lawsuit’s settlement.

In October 2007, the EPA filed a suit in the Central District of California seeking approval of a proposed consent decree incorporating two prior agreements regarding remediation of a reservoir, in part to protect settling PRPs named in the consent decree from contribution claims by non-settling PRPs. Prior to seeking intervention, Applicants objected to the proposed consent decree, complaining that: (1) the EPA failed to provide sufficient information regarding the proposed consent decree’s allocation of cleanup costs; and (2) they were unaware whether the EPA had prepared a Non-Binding Preliminary Allocation of Responsibility. If approved, the consent decree would bar contribution claims against the settling PRPs under § 113(f) of CERCLA (42 U.S.C.S. § 9613(f)(2)). In March 2008, Applicants moved to intervene as of right in the EPA’s suit under Rule 24(a)(2) and § 113(i) of CERCLA, 42 U.S.C. § 9613(i). The district court denied intervention and entered the consent decree the next day. The Applicants timely appealed, contending that the district court erred in denying their motion to intervene.

In reaching its decision, the Ninth Circuit discussed its requirement that applicants for intervention as of right satisfy a four-part test: (1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action. The court noted that Rule 24(a)(2) differs from §113(i) of CERCLA only in providing a different burden of proof for the fourth part of the test. Under Rule 24(a)(2), the burden of showing inadequate representation is on the applicant; under § 113(i), to avoid intervention, the government must show that the applicant’s interests are adequately represented. The court concluded that under either standard, in the matter before it, the interests of the Applicants were not adequately represented by the government or the settling PRPs.

Accordingly, the Ninth Circuit joined the Eighth and Tenth Circuits in holding that non-settling PRPs have a significant protectable interest in litigation between the government and would-be settling PRPs. The court acknowledged that the non-settling PRPs are potentially liable for response costs under § 107(a) of CERCLA, and under CERCLA § 113(f)(2), consent decree approval cuts off their contribution rights against settling PRPs under § 113(f)(1). The existing parties would not adequately represent the applicants’ interests because the interests of the settling PRP’s were directly opposed to the applicants’ interests. The court recognized that the proposed consent decree threatened to directly affect Applicants’ interest in maintaining their right to contribution, and further reasoned that because non-settling PRPs may be held liable for the entire amount of response costs minus the amount paid in a settlement, Applicants have an obvious interest in the amount of any judicially-approved settlement. The larger the settlement amount, the smaller the remaining amount for which the non-settling PRPs may be liable. Thus, the Ninth Circuit held that the applicants were entitled to intervene as a matter of right to protect their interests in contribution and to ensure that the consent decree embodied a fair and reasonable allocation of liability. The Ninth Circuit disagreed with other courts that relied on the existence of CERCLA’s notice and comment procedure to justify a conclusion that intervention as of right is not available in these circumstances.

The Ninth Circuit reversed the district court’s decision denying intervention and remanded the case for further proceedings on the claims.

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