Negotiation of Environmental Disputes: A New Role for the Courts?

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Just a decade ago, Judge Harold Leventhal wrote a landmark article entitled "Environmental Decisionmaking and the Role of the Courts,"[1] in which he pointed out that courts no longer formulated and directed the application of pertinent legal rules in the environmental area as they once had. This was true, he said, because "[p]rimary responsibility has been vested in executive officials and independent regulatory agencies" under the new environmental legislation.[2] Despite this displacement, Judge Leventhal continued, the courts still maintained "a role of review . . . of major significance." Through the exercise of review, Judge Leventhal stated, courts have exerted "a pervasive influence over the legislation's implementation."[3]

To fulfill that role, he said, a court was required to "study the record attentively, even the evidence on technical and specialist matters, 'to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion with reasons that do not deviate from or ignore the ascertainable

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1. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974). For an overview of Judge Leventhal's views on the relationship between courts and administrative agencies, see Estreicher, *Pragmatic Justice: The Contrtibutions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894 (1980).

2. Leventhal, *supra* note 1, at 510.

3. *Id.*

legislative intent.' "[4] According to Judge Leventhal, the court needed to insure that the agency had taken a "hard look" at the salient problems and engaged in reasoned decision-making; the decision itself must come "within a zone of reasonableness."[5] The objective of judicial review in environmental cases, he said, was "to provide supervision that emphasizes broad questions of fairness . . . . [and] to combine supervision with restraint, making the court a genuine kind of partner with the agency in the overall administrative process."[6] The courts had assumed a "central role of ensuring the principled integration and balanced assessment of both environmental and nonenvironmental considerations in federal agency decision-making."[7] In sum, Judge Leventhal saw the courts and the Environmental Protection Agency ("EPA") as engaged in a collaborative partnership in wise decision-making. Judge Leventhal's stance was an activist one: his hard look philosophy extended by implication from decision-making of agencies to the scrutiny of the reviewing courts. Although the primary duty of a court was to insure compliance with legislative intent, exploration of all salient facets of the problem and reasoned analysis were the watchwords. Like an exam grader, the court would give a pass or fail mark depending on whether the course material was covered and whether the use made of that material was acceptably intelligent.

To be sure, even a hard look court would not ordinarily raise new issues, no matter how glaring the agency's errors might be. Once issues were presented, however, a court could and often did become actively involved: it might reject the arguments of both sides, suggest compromise positions, or remand cases for the consideration of new solutions. Under Judge Leventhal's vision, a reviewing court's primary loyalty was to the Congress, which gave it the power of independent review. The agency, in turn, perceived the court as a major participant in construing and implementing the statute. An agency's efforts were often directed toward getting the court to agree with a particular interpretation or action, and its internal decisions were often predicated on the likelihood of obtaining that court's approval. The agency might,

4. *Id.* at 511.

5. *Id.* (citing Greater Boston TV Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971)).

6. *Id.* at 554.

7. *Id.* at 555.

at times, actively welcome judicial review to obtain such an endorsement since a court's pronouncements embodied precedental implications for future agency policies and directions that went far beyond the immediate case.

That was Judge Leventhal writing in 1974; this is 1985. In the intervening decade, we have witnessed two phenomena that have significantly altered both the regulatory landscape and the courts' role in agency processes. First, we have seen the emergence of massively complex environmental programs whose success essentially depends on some type of collaborative partnership, not between the courts and the agency, but between the EPA and the parties it regulates. Second, the ability of the legal system to oversee effectively multifaceted environmental regulation has increasingly been cast into doubt. To some extent, this doubt is reflected in the Supreme Court's recent restrictions on the role of appellate review in the implementation of environmental statutes and other agency legislation.[8]

More generally, this skepticism is embodied in the movement among lawyers and commentators away from traditional judicial oversight through the adversary system and in the direction of more collaborative techniques of dispute resolution. As Owen Fiss recently has pointed out, this movement is so strong that it has acquired its own acronym: 'ADR' or Alternative Dispute Resolution.[9] Proponents of ADR argue that application of ADR techniques to environmental disputes will enable us to overcome a purported legal and regulatory malaise and to reinvigorate the business of safeguarding the environment.

Before adopting particular approaches, it might be is helpful to examine ADR from the perspective of an appellate judge.[10] This examination first discusses the latest Supreme Court ruling on the scope of judicial review of agency actions, and then surveys briefly the current impact of ADR techniques on environmental disputes. It goes on to explore the tools presently available to district and appellate courts sympathetic to an expanded use of negotiation and settlement. Finally, it considers in some detail two "hot top-

8. *See* Chevron, U.S.A. v. Natural Resources Defense Council, — U.S. —, 104 S. Ct. 2778 (1984).

9. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

10. For a discussion of environmental ADR from the perspective of an attorney for the federal government see Dinkins, *Shall We Fight or Shall We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10398 (1984).

ics" in what might be called "environmental ADR": the possibilities for encouraging settlements in EPA enforcement actions, and a proposal for negotiated regulations. Both of these topics directly implicate the sometimes conflicting aims of ADR and judicial review. By giving each a "hard look," the discussion raises some pre-nuptial concerns about the proposed marriage between ADR and environmental regulation, concerns that must be attended to if settlement and negotiation are to become mainstays of the agency process.

I. THE CURRENT ROLE OF APPELLATE REVIEW

Before discussing new roles for the courts in environmental decisionmaking, it is important to have a realistic sense of what their currently legitimized role is. During the October 1984 term, in *Chevron v. Natural Resources Defense Council*[11] the Supreme Court laid down what seems to me a quite restricted role for reviewing courts in construing environmental statutes. *Chevron* involved Clean Air Act permits for new or modified stationary sources in "non-attainment" states.[12] At issue was a 1981 EPA regulation which allowed a state to adopt a plantwide or so-called "bubble" definition of "stationary source" and departed from the prior regulation that required each emission source within a plant to be assessed independently. Neither the applicable definitions of "stationary source" in the Clean Air Act[13] nor the legislative history of the Act addressed the issue directly.[14]

The opinion emanating from our court sought to fill this gap by considering the overriding purposes of the Act. It concluded that a more liberal application of the plantwide bubble concept to states that had not yet met EPA air quality standards would run counter to the Act's core purpose of improving air quality.[15] The Supreme Court reversed, however, declaring that the "basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[16] Justice

11. 104 S. Ct. 2778 (1984).
12. 42 U.S.C. § 7411 (1982).
13. 42 U.S.C. § 7411(a)(3) (1982).
14. *See Chevron*, 104 S. Ct. at 2785-87.
15. Natural Resources Defense Council v. Gorsuch, 685 F.2d 718, 725-28 (D.C. Cir. 1982).
16. *Chevron*, 104 S.Ct. at 2793.

Stevens, writing for a unanimous six-justice court, marked in bas relief the present parameters for judicial review of agency interpretations of statutes:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress had directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[17]

This view sounds distinctly different from the collaborative partnership between courts and the EPA Judge Leventhal was talking about. It is true that any comparison of Judge Leventhal's article and Justice Stevens' opinion is complicated by the fact that Judge Leventhal was talking mainly about agency applications of statutory terms, and Justice Stevens was discussing agency constructions of statutory language. But there is no bright line between agency application and agency interpretation of statutory terms for the purposes of judicial review. Indeed, both Judge Leventhal and Justice Stevens used the same sensitive and excruciatingly vague standard of "reasonableness" to judge agency action. And it is difficult to see the logic of allowing judges a freer hand in reviewing the evidence or expertise supporting an agency application than they are permitted in considering an agency's interpretation of the statutory wording itself. Thus, even in light of last years' "Airbags" case,[18] it is impossible for me to conclude that Judge Leventhal and Justice Stevens envisioned the same degree of judicial inquiry or oversight into agency action.

In *Chevron*, the litigants were admonished not to "wag[e] in a judicial forum a specific policy battle which they ultimately lost in the agency . . . ." Such policy arguments, the Court continued, "are more properly addressed to legislators or administrators,

17. *Id.* at 2781-82 (footnotes omitted).

18. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., — U.S. —, 103 S. Ct. 2856 (1983).

not to judges."[19] According to the Court, where a statute has conflicting policy objectives and "Congress intended to accommodate both interests, but did not do so itself on the level of specificity" required to give a clear answer to the statutory question, the agency deserves deference.[20]

> Judges are not experts in the field, and are not part of either political branch of the government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress had delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[21]

It may turn out that the Court will not pursue a role of review as deferential as its language in *Chevron* suggests. I personally conclude, however, that although *Chevron* reflects no fundamental departure from several recent pronouncements on statutory construction,[22] it is a mood piece—and the mood is a rather somber one for proponents of active judicial review of agency decisions.[23] The climate for judicial partnership in environmental decisionmaking, in other words, has cooled considerably since 1974; judges are limited partners at best. Perhaps this narrowing of judicial oversight is a response to the uncertainty and delay that a broad, far-reaching brand of judicial review introduces into the regulatory process. If so, it may well be fueled by the same fire that lights the way toward the application of ADR to environmental disputes.

Despite the reduced role of judicial review which the *Chevron* decision may portend and the growing attempt to divert conflicts

19. *Chevron*, 104 S. Ct. at 2793.

20. *Id.*

21. *Id.*

22. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 118 (1978).

23. *See also* Reed, *Three Strikes and the Umpire is Out: The Supreme Court Throws the D.C. Circuit Out of the Bubble Review Game*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10338 (1984). ("In *Chevron* . . . the Supreme Court set a new tone of judicial restraint in reviewing agency action.").

from judicial resolution through ADR, environmental ADR in the form of consent decrees or negotiated regulations may actually increase rather than decrease judicial influence in environmental decisionaking; at best, ADR could replace the old problems of appellate review with a new set. Before discussing those problems, however, the ways in which courts can help or hinder ADR's growth should be investigated.

II. The Current Status of Environmental ADR

A. *The Present Track Record*

How big a bite out of environmental litigation ADR techniques can take is a matter of some dispute. After studying six environmental cases in which some form of settlement or mediation had been employed, Allan Talbot concluded that, at best, such techniques could be successful only 10% of the time: in those cases where the issues are clearly defined, where there is a balance of power between the parties, and where the parties' precise objectives cannot be achieved (at least without great risk) without negotiation.[24] Timing, Talbot said, is all-important. Some issues not negotiable at the onset of the dispute become negotiable over time.[25] On the other hand, the existence of numerous parties or factions, ideologically based disputes, or non-predictable long term trends militate against successful negotiation of environmental disputes.[26]

Alan Miller echoed many of the same concerns in his recent report of successfully negotiated regulations affecting the steel industry.[27] In March, 1983, the Iron and Steel Institute, NRDC and EPA filed a settlement agreement in the Third Circuit resolving all legal challenges to water pollution effluent guidelines for the steel industry. The settlement avoided protracted litigation and allowed permits to be issued without the threat of subsequent attack and judicial review. All in all, the settlement was just the sort of regulatory action promised by ADR proponents. Although the

24. A. Talbot, Settling Things: Six Case Studies in Environmental Mediation 91 (1983).

25. *Id.* at 91; Harter, *Regulatory Negotiation: The Experience So Far*, Resolve 1 (Winter 1984).

26. Talbot, *supra* note 24, at 91.

27. Miller, *Steel Effluent Limitations: Success at the Negotiating Table*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10094 (1983).

steel negotiations were apparently a remarkable success, Miller, the chief NRDC negotiator, cautioned that:

> negotiation can be successful only in special circumstances. The first requirement is arms' length negotiation with all sides legally and technically well represented. In this case, each party had something to lose through lengthy court proceedings . . . . More frequently, either the bargaining process is one-sided or one party has nothing to gain from negotiation. When former EPA Administrator Anne Burford negotiated modifications to lead standards for the benefit of an oil refinery, no environmentalists were involved and an adversarial response was assured. In the dance of environmental negotiation, it takes three to tango.[28]

In the steel case, only 13 out of hundreds of pollution standards were in dispute so the challengers had much to gain by settling in lieu of an arduous and expensive litigation. The EPA also had a very real incentive to dance since the steel industry was only the first of many industries for which such limitations had to be established.[29] All sides (environmental groups, industry, and the EPA) had highly competent and experienced counsel who had undoubtedly worked together or at least fought together in the past. Both Miller's comments and the Talbot study, then, suggest that successful negotiation may be the exception and not the rule in environmental disputes.

An area that perhaps most dramatically illustrates the gap between the potential for environmental ADR and its current performance is the Superfund law for environmental cleanups.[30] It is obvious to almost everyone that voluntary settlements are the best and perhaps the only hope for Superfund's success.[31] The EPA has a duty to investigate between 18,000 and 22,000 waste disposal sites for possible inclusion on the National Priorities List which establishes sites that are eligible for remedial action under Superfund; currently, there are between five and six hundred such sites on the list, and the estimated clean-up cost is eight to

28. *Id.* at 10095.

29. *Id.* at 10094.

30. Comprehensive Environmental Response, Compensation and Liability Act of 1980 [hereinafter Superfund], 42 U.S.C. § 9601-9657 (1982).

31. *See e.g.*, Atkeson, *Settlement Uncertainty Persists Under Superfund*, Legal Times, July 30, 1984, at 45, col. 3. To the extent that settling contributors pay for the cleanup themselves, Superfund monies are freed up for those sites involving contributors that cannot be found or are unable to pay. *See* Stoll, *Superfund Settlement Memo Needs Clarification*, Legal Times, Dec. 24-31, 1984, at 15, col. 1.

ten million dollars per site.[32] Until a few months ago, however, the EPA did not seek Superfund settlements in any substantial number. Last summer the Administrative Conference of the United States (ACUS) decried what it termed the "slow and expensive implementation of Superfund clean-ups and . . . specifically recommended a far more liberal use of negotiated settlements." According to ACUS, then, the agency currently "puts too little stress on negotiations and has adopted a series of procedural and substantive requirements that unnecessarily constrict the number" of such negotiations.[33]

One commentator suggested that the government did not seek more Superfund settlements because it won so often in court.[34] Courts have held that the liability of the parties who contributed to the sites are joint and several;[35] and the causation standards they have used to assess liability are, according to some, quite liberal.[36] Probably more important, however, was the fact that the government reportedly would not contribute to any settlement where the parties did not themselves agree to pay at least 80% of the clean-up costs, and it was reluctant to grant releases from future governmental actions if the settlement did not accomplish the clean-up satisfactorily.[37]

There was a further problem of what legal principles governed the liability of settlers in later contribution suits brought by nonsettlers against them. At least one commentator has attributed a large part of the general reluctance to settle to the legal uncertainties about such future contribution suits:

> Given the importance all parties ascribe to voluntary Superfund settlements, it is striking that 3½ years after its initial passage, the Superfund law applicable to voluntary settlements is so undeveloped . . . . What is clearly needed at this point is clear

32. *Id.*, citing 75 *Removal Actions Expected this Year at Superfund Sites, EPA OFficial Says,* 15 ENV'T. REP. (BNA) [Current Developments] 374-75 (June 29, 1984)); *see also* Stoll, *supra,* note 31, at 22 n.4.

33. *See Regulatory Roundup: ACUS Calls for More Negotiation in Waste Cases,* Legal Times, July 9, 1984, at 10, col. 1.

34. *See* Atkeson, *supra* note 31.

35. United States v. South Carolina Recycling and Disposal, Inc., 14 ENVTL. L. REP. (ENVTL. L. INST.) 20272 (D.S.C. 1984); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983)

36. Rogers, *Three Years of Superfund,* 13 ENVTL. L. REP. (ENVTL. L. INST.) 10361 (1983).

37. Atkeson, *supra* note 31 (citing *Administrative Conference Keeps Stronger Stance on Superfund Negotiation,* Pesticide and Toxic Chemical News, 31 (July 11, 1984)); *see also* Stoll, *supra* note 31.

> attention to policy; and legal obstacles to voluntary Superfund settlements. This needs to be followed by some simple well drafted legislation on contribution.[38]

Recently, however, the Government has embarked on a more aggressive settlement program. EPA has announced that it will negotiate with contributors even if their contributions will not add up to 80% of clean-up costs so long as their joint contributions will pay a "substantial proportion" of the costs. For the first time, it will consider paying the remainder costs out of Superfund itself. The EPA will now take a more liberal stance in providing releases from future liability to settlers and it may even take steps to protect them from future liability to nonsettling contributors who are sued by the government. De minimis contributors may be allowed to make "cash out" payments and escape litigation altogether. The EPA settlement regulations list ten criteria for evaluating settlements including the volume and toxicity of the waste, strength of case, ability to pay, other inequities or aggravating factors. Settlements may be negotiated for specific phases of the clean-up, i.e., investigation, feasibility study, surface removals, groundwater remedies.[39]

Still, the enormous complexity of the issues that must be resolved before settlements in Superfund cases can be worked out suggests how far we have to go. Moreover, it suggests a dynamic and continuous role for the district judge, even where settlements are actively encouraged. How are all the potential tortfeasors to be identified? Must they be brought into the original government suit for liability? What principles of apportionment will be used? If settlements are to come about, the parties will clearly have to

38. Atkeson, *supra* note 31, at 45.

39. The settlement guidelines were published in the Federal Register in February 1985. *See* 50 Fed. Reg. 5034 (Feb. 5, 1985). All settlement agreements must contain a "reopener" clause to take care of serious but previously unknown conditions that emerge at the site as well as previously unknown scientific information that develops about known conditions. *See* Moore, *New EPA Guidelines May Facilitate Waste Cleanups*, Legal Times, Dec. 10, 1984 at 1, col. 3. The EPA has also taken the position that settling parties are protected from third party liability under common law principles akin to those set out in the Uniform Contribution Among Tortfeasors Act, § 1 (1955), *see* 12 UNIFORM LAWS ANNOTATED 57, 63-64 (1975). Not all courts accept that proposition, however. *See, e.g.*, Donovan v. Dorfman, No. 84-1287, slip op. at 13-20 (7th Cir. Jan. 3, 1985) (declining to adopt a rule insulating settling parties from future contribution liability in approving a settlement of an ERISA action). Accordingly, the EPA says that it will seek legislation specifically applying those common law principles to Superfund settlements; in the interim, it may reduce judgments against nonsettling tortfeasors by an amount sufficient to protect the settlers from third party suits. *See* Moore, *supra*; Stoll, *supra* note 31.

work out some cost allocation formula. Finally, a bill passed by the last Congress might complicate matters even further by requiring public participation through notice and comment in some settlements under the Solid Waste Disposal Act.[40]

The Superfund situation thus illustrates some important uncertainties surrounding environmental ADR. Settlements seem the best way to expeditiously implement the Superfund law, yet legal perplexity about the principles governing the scope of liability and rights of contribution currently impede such settlements. Certainly, from a judicial observer's point of view, even more specific statutory guidance for settlements seems desirable.

So right now, environmental mediation or negotiation is a promising infant with unknown potential and a short track record. But the Superfund example and some other recent studies underscore an important and often overlooked aspect of ADR: negotiation rarely *eliminates* court action altogether. Rather, as will be discussed later, it only changes the *nature* of the subsequent judicial proceeding. In most cases the impetus for negotiation springs from the possibility of full-scale litigation and even those disputes that undergo some aspect of ADR are normally submitted to the courts for initial approval or later modification or enforcement. Accordingly, a sympathetic judicial attitude toward ADR can often be critical in encouraging the use of negotiation and settlement in environmental disputes.

B. *The Current Judicial Role in Promoting Settlements*

The focus of judicial encouragement for environmental negotiation or mediation is primarily in the district courts, where the majority of settlements occur and where consent decrees are normally entered. There is ample authority in the Federal Rules of

40. *See* Hazardous and Solid Waste Disposal Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (to be codified at 42 U.S.C. § 3251 *et seq.*). The amendments recognize, at least implicitly, the role of settlement in superfund litigation. Section 404 provides that whenever the United States or the EPA proposes to settle a suit brought under the Solid Waste Disposal Act, "notice, and an opportunity for a public meeting in the affected area, and a reasonable opportunity to comment on the proposed settlement prior to its final entry shall be afforded to the public." This public participation provision also provides that the government's decision to settle "shall not constitute a final agency action subject to judicial review under this Act or the Administrative Procedure Act." *Id.* The amendments do not address the issue of apportionment. They do however, absolve transporters of hazardous waste of contribution liability if the transporter is no longer involved in the transportation or storage of the waste and if the transportation of the waste was under a simple contractual relationship. *See* Section 491(c).

Civil Procedure for trial judges to encourage settlements in appropriate cases. Recently amended Rule 16 expressly authorizes the court to "direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as . . . . facilitating the settlement of the case".[41] Subsection (c) of that Rule says the participants at any conference may consider and take action with respect to "the possibility of settlement or use of extra-judicial procedures to resolve the dispute."[42] The advisory committee note encourages active judicial pretrial management.

> [E]mpirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the prties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.[43]

The note specifically includes judicially encouraged settlements within that management framework by stating:

> Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.[44]

While Rule 16 in no way authorizes a trial judge to impose settlements or mandate out of court dispute resolution, a strong judicial push in that direction is surely tolerated and must surely have been expected. Some judges, of course, are notorious settlers; others are almost total failures at settlement either because they are reluctant to "get involved" in negotiating or because they lack the training needed to do it well.[45]

Environmental lawyers tell me that the sine qua non of successful negotiation is an assertive judge who actively pushes settlement or out-of-court resolution.[46] Such a judge often keeps the pressure up by insisting that preparation for a trial go on simulta-

41. FED. R. CIV. P. 16.

42. FED. R. CIV. P. 16(c).

43. FED. R. CIV. P. 16 advisory committee note.

44. FED. R. CIV. P. 16 advisory committee note.

45. On the changing role of judges as "case managers", see Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 378 n.14, 379 (1982). ("[J]udges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases wherever possible.")

46. Judge Weinstein's handling of the "Agent Orange" class action suit in the Eastern District of New York appears to exemplify this point. *See* Fried, *Judge Gives Final Approval to*

neously with the settlement negotiations. Rule 16, which requires that a scheduling order be issued in each case within 120 days of filing the complaint, provides the framework for such pressure.[47] The active settler also tries to narrow the issues and help the parties to assess the costs and benefits of settling by making interim legal rulings where possible. He or she will also demand status reports from the parties on their efforts at resolution. The judge may even designate a fellow judge to supervise or mediate the settlement negotiations to avoid the spectre of over-intervention by the judge who must find the facts if a trial eventuates. This delegation technique is specifically mentioned in the note.[48]

There are three other procedural mechanisms that a district court might be able to employ to promote settlements. I say *might* because their status as settlement-promoting tools is very uncertain at the moment. First, there is the controversial Rule 68 which currently allows a defendant to make an offer of settlement anytime up to ten days before trial.[49] If the offeree refuses and eventually fails to obtain a judgment more favorable than the offer, then the offeree must pay all costs incurred after the offer. Proposed amendments to Rule 68 would allow the trial judge broad discretion to impose a variety of sanctions, including attorneys' fees, upon a plaintiff or defendant for "unreasonably" refusing an offer, thereby causing unnecessary delay and increased litigation costs.[50] The current Rule 68, however, has enjoyed lim-

Accord on Agent Orange, N.Y. Times, Jan. 8 1985, at B2, col. 1; Sawyer, *Legal Fees Sets in Vets' Lawsuit*, Washington Post, Jan. 8, 1985, at A1, col. 4.

47. FED. R. CIV. P. 16(b).

48. FED. R. CIV. P. 16(c)(7) advisory committee note.

49. FED. R. CIV. P. 68.

50. *See* Proposed Amendments to the Federal Rules of Civil Procedure, 28 (Prelim. draft Sept. 6, 1984), *reprinted in* 590 F. Supp. CXXI, CXLVI (1984). The proposed amendments would allow all parties, including claimants, to make offers of settlement— in contract to the present rule which applies only to defendants. The proposed amendments would also eliminate the current provision requiring the offeror to include the "costs then accrued" in the offer. This provision has created great uncertainty over whether a Rule 68 offer must specifically include attorneys' fees in cases brought under statutes that define "costs" to include attorneys fees. *See* Advisory Committee Note to Proposed Rule 68, 590 F. Supp. CXLVII, CXLVIII (1984). Under the proposed amendments, "acceptance of the offer would amount to a settlement of the entire amount claimed by the offeree, including accrued costs and attorneys fees" in litigation where a prevailing party would otherwise be entitled to a statutory fee award. *Id.* at CXLVIII. The proposed modifications in Rule 68 would thereby encourage the controversial practice of simultaneously negotiating the merits and the fee award. *See infra* text accompanying notes 57-58.

ited—very limited—success.[51] Judges are afraid of its potential for forcing unfair settlements and lawyers are reluctant to invoke it on their opponents lest it someday be invoked against them.

Although Rule 68 clearly seems geared to money suits, its literal language could apply to other actions. The present version sanctions an offer to allow judgment "for the money or property or to the effect specified in [the] offer";[52] the proposed amendment, in turn, speaks of "money, property, or relief specified in the offer." Although I know of few applications of Rule 68 to non-monetary suits, and am frankly wary of the implications of so using it, an adenturous judge might experiment with its use in some such suits which seem especially worthy of settlement.[53] And its use in Superfund suits which often do involve monetary settlements would not involve a strained interpretation at all.

Rule 53 enjoys a similarly uncertain status as an authority for settlement-minded trial judges. The Rule specifically provides for the appointment of masters and the taxation of resulting costs to the parties.[54] The Rule defines a master as a "referee, auditor, examiner, or assessor." Could this include a mediator or a negotiator? In the absence of such an interpretation of Rule 53, courts apparently do not have the authority to tax parties with the costs of a mediator or a negotiator. Rule 54 of the district court Rules and Rule 39 of the Appellate Court Rules generally assess "costs" to the losing party,[55] but is this a legitimate "cost" under the Rules? Moreover, the U.S. Government can be assessed costs only "to the extent supported by law."[56] It is still doubtful then, whether a court has the authority under existing rules to assess or even apportion costs of mediation or negotiation against or among the parties to a settlement. Instead, the parties have to agree ahead of time about who should pay for mediation services.

Finally, there is the crucial matter of attorneys' fees—often critical in environmental disputes as in so many others where public interest representation is likely to be involved. Many environ-

51. *See* Dombroff, *Amended Rule 68 Could Lead to Legal Quagmire*, Legal Times, Aug. 20, 1984, at 9, col. 1.

52. FED. R. CIV. P. 68.

53. *See* Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438 (9th Cir. 1978) (upholding an award of costs to state employment commission after commission offered to enjoin certain investigation practices).

54. FED. R. CIV. P. 53(a).

55. FED. R. CIV. P. 54(d); FED. R. APP. P. 39(a).

56. FED. R. APP. P. 39(a).

mental statutes provide attorneys' fees for prevailing parties. Although those statutes have been interpreted to include settlements within the concept of "prevailing," just who qualifies in a negotiated or mediated settlement is not always clear. Moreover, the prospects of a negotiation can often be affected by the controversial tactic of requesting the waiver or reduction of attorneys' fees as a term of settlement. This happens frequently in jurisdictions which permit the practice of negotiating attorneys' fees simultaneously with the merits of the dispute. Only a few courts so far have outlawed the practice of simultaneous negotiation in cases where a judge must approve an award of attorneys' fees,[57] although we have a similar request pending before us.[58] Here again, if there is no general prohibition, the judge's role in deciding whether to permit simultaous negotiation of both merits and fees may be a critical one in encouraging or discouraging negotiation.

In general, then, the district courts have at their disposal both proven and unexplored techniques for promoting negotiation and settlement. The appellate courts, by contrast, have far fewer such tools. Direct appeals from EPA orders and rules are, of course, most often brought in the circuit court of appeal, not the district courts. But very few courts of appeal, including my own, admit to any responsibility for promoting settlement. I am told the Second Circuit and many state appellate courts have a good track record on settlement in some (chiefly monetary) kinds of cases, but many of the appellate judges I know shrink from the notion that they or even staff counsel should actively engage in case management by pushing settlements, especially in complex cases involving significant policy issues. Although appellate judges occasionally approve a stipulated dismissal, they generally stay far away from the merits of a settlement. This may be a mistake, for we see a number of cases, including appeals from agency actions, that do not belong in the appellate courtroom. There are cases that settle out after a few cogent observations from the

57. *See* Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984) (rejecting the settlement of a class action suit alleging constitutional and statutory violations where the settlement was conditioned upon the plaintiff's waiver of attorneys' fees otherwise available under 42 U.S.C. § 1988); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) (rejecting the settlement of a class action employment discrimination suit that included attorneys' fees where the fees would be available under Title VII).

58. Moore v. National Assoc. Sec. Dealers, 572 F. Supp. 1219 (D.D.C. 1983), *appeal argued*, No. 83-2213 (D.C. Cir. Sept. 29, 1984).

bench, and some that settle as soon as the panel is announced; both types might better have been straightened out beforehand if some court official had taken the zealous counsel into a room and gently bumped heads together.

On the other hand, isolated attempts to introduce settlement conferences in federal appellate courts have not been notably successful.[59] This lack of success is not entirely surprising: appellate courts, particularly those with current dockets, simply do not threaten parties with the dangers of a protracted trial or of an interminable, discovery-related delay that might induce a settlement. By the time an appeal has been filed, the parties involved have already sustained most of the costs associated with litigation. At the appellate level, the brief is filed, the appeal is argued, and that is that.

In the regulatory context, furthermore, there is even less opportunity for an appellate judge to promote settlement. It is true that the party affected by agency action may have an incentive to settle: it may not wish, for example, to have its alleged wrongdoing aired and commented upon by a federal appellate court, or it may realize that even an appellate victory will mean only a remand followed by more agency consideration and subsequent litigation. But such concerns seldom motivate the agencies. An agency will have already articulated and justified its position through the decision below and, unless it committed some egregious fatal flaw, chances are that the agency's position will be affirmed. Indeed, almost 90% of agency decisions appealed to in the D.C. Court of Appeals are affirmed. Unless there are special circumstances, as in the steel regulations discussed earlier,[60] the likelihood of an agency conceding important cases at this stage does not seem great.

Yet, despite reduced incentives and few role models, settlement at the appeals level is still an area for further study and experimentation—for many of our appeals accomplish so little. Inevitably, appeals are concerned with procedural errors, the adequacy of an agency's rationale, or the quantum of evidence in the record. They rarely result in a clean victory for the appellant or even a discussion of the underlying merits of the controversy. Lawyers too often seem the chief beneficiaries of appeals. Whoever profits

59. Bedlin and Nejelski, *Unsettling Issues about Settling Civil Litigation: Examining "Doomsday Machines", "Quick Looks" and Other Modest Proposals*, 68 JUDICATURE 8, 20-21 (1984).

60. *See infra* text accompanying notes 27-29.

from delay may also benefit; but since agency action is very rarely stayed pending appeal, the delay factor is often incidental.

In sum, I see limited opportunity for the courts of appeals to push the negotiation of environmental disputes within the current framework. If settlements, as we are told, are often triggered by sniffs of what lies ahead in the judicial process—"quick looks" and "doomsdays"[61]—then the most propitious time to settle is probably *after*, not before the appellate court has acted, i.e., before the proceeding picks up again on remand. The most we can do before that—through settlement conferences—is to send signals that the issues on appeal may or may not be successful, in order to give impetus to the parties to settle their underlying dispute.

III. Judicial Oversight of Negotiated Regulations and Agency Settlements

Despite their circumscribed role in promoting ADR in environmental controversies, appellate courts are likely to play a more crucial role in reviewing negotiated rules and settlements. As I mentioned earlier, negotiation typically does not eliminate court involvement altogether; instead it changes the nature and scope of the judicial role. Negotiated regulations, for example, are still subject to judicial review, and even settlements of environmental disputes that have been submitted to the courts for approval, enforcement or modification are not infrequently challenged on appeal.

A. *The Judicial Role in Negotiated Regulations*

Perhaps the most novel and promising application of negotiation is in the initial formulation of proposed regulations. In its present form, the hybrid rulemaking process often exacerbates the worst aspects of the adversary system. It invites parties to take extreme stances in initial negotiations so that they will be positioned to challenge the rule finally adopted. The agency is often perceived as only going through the motions of considering outsider comments, having already made up its mind when it proposed the rule. Once a rule is adopted, if challenges arise, agency programmers turn its defense over to their legal staff—and the opportunity for genuine negotiation narrows. Against this back-

61. *See generally* Bedlin and Nejelski, *supra* note 59.

drop, ADR proponents have suggested that direct negotiations between the agency and the various affected parties take place *before* a regulation is developed and formally proposed. Such negotiations would involve the affected parties in the regulatory process from its onset. They would presumably soften the adversary posture that animates the current comment process and reduce the inevitability of legal challenges to adopted rules. The direct participation of a wide range of groups in negotiated rulemaking would generate a sense of political legitimacy currently lacking in the talismanic invocations of agency expertise.

The idea of negotiated regulations has been endorsed by ACUS and has been experimented with by EPA and other agencies.[62] A protocol for negotiating regulations has been explored at length by Phillip Harter in a recent article in the Georgetown Law Journal.[63] Harter's ground rules would include publication of the proposed negotiation in the Federal Register, participation by those "materially affected" on submitting an application, publication of those selected for participation, an option to make the negotiations confidential, including a prohibition on the use of offers or data in later court proceedings or in response to Freedom of Information Act requests, and a "consensus" on the rule ultimately noticed for comment under regular APA procedures.[64] When so noticed, the statement of basis and purpose would not have to be as comprehensive it would under ordinary rulemaking; its main claim to legitimacy would rest on the consensus achieved by the parties.[65]

From the perspective of an appellate judge, the most interesting aspect of Harter's protocol is his suggestion concerning the "less stringent" scope of review of negotiated regulations. Harter reasons that "if individuals can boycott the negotiation group and then obtain judicial review under a stringent standard, the regulatory negotiation process could unravel."[66] Moreover, he

62. *See supra* note 33; *see also* 49 Fed. Reg. 17576 (Apr. 24, 1984) (EPA announcement of an Advisory Committee to negotiate issues leading to a rulemaking on nonconformance penalties under Section 206(6)(1) (1982)).

63. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1 (1982).

64. *Id.* at 42-110. More recently, Harter has suggested that in most cases it is probably not worth the price in decreased public confidence to close the meetings of the negotiating group. (Letter to Patricia M. Wald, October 17, 1984). (Available in Columbia Journal of Environmental Law office).

65. Harter, *supra* note 63, at 92-97.

66. *Id.* at 102.

reasons, the negotiation process will itself alter the backdrop to judicial review.[67] A need for confidentiality and the goal of ironing out differences in the negotiation process, for example, will produce a very different record from the kind we now see on appeal. And even though a negotiated rule would be submitted for general public comment after negotiations by the major, interested parties, the formal notice and comment process cannot be expected to reflect the "give and take" of an initial testing ground for regulations. Accordingly, Harter calls for a narrow scope of judicial review for negotiated regulations, one tailored to the negotiating process itself. In essence, he posits that "[a negotiated] rule should be sustained to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties."[68]

Harter's proposal contemplates a bifurcated system of judicial review. The appellate court would first have to determine "jurisdiction"—a multifaceted word—and then make some kind of empirical "real world" determination of whether a consensus had in fact been reached in negotiations among the interested parties. If this threshold was passed, the rule would be upheld. If not, the normal standard of review—the APA's arbitrary and capricious standard or another standard provided by the statute authorizing the agency to promulgate the rule at issue—would govern.

As a rookie/veteran (take your pick) of five and a half years of sitting on these cases, I have some comments and concerns about the proposed changes in the scope of review. Consider, for example, just exactly how judges would go about determining whether negotiated rules are within an agency's jurisdiction. So far as I can tell, courts would still have to ensure that the rule is within the agency's statutory perimeters and does not conflict with specific congressional intent. I do not think Harter is suggesting that the jurisdictional inquiry can be more summary than it is now. An appeals court still has an independent obligation to

67. *Id.* at 103.

68. *Id.* at 103. Harter writes that his present view is that *each* interest that is participating concurs in or at least does not oppose the result. (Letter, *supra* note 64). The Administrative Conference Recommendation provides "Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition." Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4), 1 C.F.R. § 305.82-4 (1984).

insure that the agency is not thwarting Congressional intent, regardless of how many parties agree with the agency's rule.

The second leg of Harter's test—whether a true consensus existed—might be met simply by formal signatures to the negotiated proposal. On the other hand, it could in some cases require a close look at the process by which alleged consensus was reached in those, perhaps rare, cases where a post-negotiation dispute about "consensus" arose. This possibility, in turn, could mean that a careful record must be kept of the negotiation and that courts be allowed access to that record in cases of doubt.

It is vital as well to be clear on what standards an appellate court would use to determine whether a consensus has been reached. To those of us who are veterans of group politics the word consensus has a subjective overtone, *i.e.*, what will be accepted without contest. Unless it is objectively defined (*e.g.*, a vote of 100%, 51% or 2/3 of the participants; on all facets, on most facets, etc.), however, a mere requirement of consensus would invite different courts to evaluate similar negotiations quite differently.[69]

A problem might also arise with respect to whether the appropriate interests were represented in the consensus. This could come up by way of someone trying to appeal the rule who had not participated in the negotiations. Under prevailing law anyone who can show an adverse interest and, for some agencies, who participated in the notice and comment stage of rulemaking can appeal.[70] But Harter seems to suggest that under the new process

69. *See generally* Harter, *supra* note 63, at 102-07. Harter points out that it is also important that the proposal contemplates that someone will make a relatively extensive effort to identify the interests and to contact suitable representatives with respect to the issues and their participation. In that sense, the process has a potential for wider participation than mere notice and comment. But in the case of consumers, for instance, it may be particularly difficult to secure one or even a few representatives to express the diversity of views and interests among that group. If that is the case, he says, negotiating regulations may be inappropriate for such a rule. But he also suggests that no more than fifteen interest groups should participate in a negotiation. In fact, one of his rules for a satisfactory process is that "The interests significantly affected by the subject matter of the regulation should be such that individuals can be selected who will represent those interests adequately." Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 479 (1983).

70. Section 10(a) of the APA, 5 U.S.C. § 702(a), generally provides that any "person aggrieved" by agency action has standing to seek judicial review of that action. Other statutes govern standing to seek judicial review of that actions of particular agencies. Under the Administrative Orders Review (Hobbs) Act, 28 U.S.C. §§ 2341-2352 (1982), for example, appellants must have been actual parties to agency proceedings, including notice

a challenger might have to pass an additional test—*i.e.*, show that his "interest" had not been adequately represented in the negotiations and, if not, that he had himself tried to participate when the proposed negotiation was announced. I have trouble, however, seeing the justice or efficiency of a rule that requires every party potentially affected by a negotiation to either demand personal representation or take his chances on whether the designated interest group representative will truly represent his interests. This sort of standing rule might well encourage unnecessary challenges to the original committee if it became necessary to preserve an opportunity for later, substantive appeals.

Furthermore, only a limited number of interest groups can take part in the negotiation of any regulation. Although Harter points to class action suits and unions as models of interest group representation,[71] neither analogy provides total comfort. A union representative is elected by its members and given statutory authority to represent those members' interests; no such process is at work in negotiated regulations. The class action analogy is somewhat more relevant, since in Rule 23(b) actions all class members are bound regardless of consent.[72] Yet the class representative must be certified by a court, and the class itself is bound only by a ruling, settlement, or dismissal that is judicially imposed or approved.

In sum, I am somewhat wary of the intrusion of the "interest" test into appellate standing. I worry about individuals being bound by "interest" group surrogates so as to preclude their challenging a rule on appeal when they can show they are adversely affected by the regulation and they participated in the notice and comment phase. At the same time, I do sympathize with Harter's concern that parties whose interests are obviously involved not sit out the negotiations and come forward only after the rule has been hammered out by others. Part of my difficulty, no doubt, is in conceptualizing an "interest" in this context. One may be a consumer or a small businessman but not agree with the compromise made by the consumer or small business advocate in

and comment proceedings, in order to have standing to challenge the actions of six agencies including the Interstate Commerce Commission and the Nuclear Regulatory Commission. *See* 28 U.S.C. § 2344; Simmons v. ICC, 716 F.2d 40, 42-44 (D.C. Cir. 1983); Gage v. AEC, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

71. Harter, *supra* note 63, at 104 nn.558, 559 & 561.

72. FED. R. CIV. P. 23(b).

the negotiation. Even if an objection is made at the committee formation stage, how does the agency decide how many consumers or small businessmen to let in before negotiations even begin? In this sense, negotiatied rulemaking is quite different from a class action, where the complaint at least sets out the goal of the plaintiffs' representatives. Will the announcement of a regulatory committee tell "interest" group members anything about the substantive positions of their designated representatives? To overcome this hurdle, agencies could insist that committee members announce their goals and major positions in advance to discourage parties from claiming non-representation later. At a minimum, then, Congressional action would be necessary to convert our normal individual-oriented APA standing requirements into "interest"-oriented criteria.

Furthermore, I am not sure it is wise for courts, in determining standing under the proposed criteria, to get into questions of whether the challenger's particular "interest" was in fact represented or represented adequately, or whether a major issue was left out of the negotiations that concerned him. We now look only to see if he submitted comments and has made a plausible argument that he is adversely affected by the result.

Let me move now to what I consider to be the substantive core of Harter's judicial review schemata: that consensus is a surrogate for, or functional equivalent of the usual tests of reasonableness or nonarbitrariness that are used to measure compliance with APA standards of judicial review. Consensus among affected parties strongly suggests reasonableness in most situations, particularly if the court has already determined that there is no clear congressional intent on the subject. But courts will have to look beyond consensus, because it "ain't necessarily so" that consensus will serve as a substitute for reasonableness in all cases. The parties could have good reason to want a particular result even if it made little or no sense under a given statute; they could, in short, agree to a result that effectively took the place of a new statute or an amendment to an old one, but their agreed-upon rules might not be a reasonable product of the original statute. The consensus could also be pure political logrolling—I give you this and you give me that—rather than rational decisionmaking. I may be speaking more conceptually than practically, but certainly some inquiry into the reasonableness of a consensus rule will always be required, unless the APA is substantially changed.

And even if the negotiations over a proposed rule have reached a "true" consensus, the agency must surely still provide a convincing rationale and a sufficient factual basis for the final product that emerged from the negotiation. There is, of course, some precedent for reviewing negotiated actions differently. The results of collective bargaining conducted pursuant to the NLRA enjoy immunity from judicial review;[73] judicial review of arbitration awards is also very limited. [74] Judicial review of settlements in litigation has a standard all its own; but in the absence of a statutory charge, all agency rules—no matter how they are promulgated—are subject to the "arbitrary and capricious" standard. While consensus certainly may be an important factor in pursuing the meaning of that standard, it is doubtful that consensus can displace the traditional judicial gloss which has accumulated over the past forty years.

On balance, then, I am not at all sure that courts would become substantially less involved in negotiated regulations under Harter's judicial review standard. Inevitably, each phrase in the proposed new standard of judicial review opens up its own Pandora's box. This is not to deny the value of change, but it does indicate that blending the old with the new will take time and thought.

Harter's proposal for limiting judicial review of negotiated regulations has its roots in a theory of administrative law that rejects both the expertise[75] and non-delegation doctrines[76] as meaningful ways to govern the relationship between agencies and courts. This tradition views the regulatory process in essentially political terms and grounds the legitimacy of agency action, indeed of all government action, on the ability of the government to reconcile conflicting political and practical interests as expressed by interest group representatives.[77] Injecting the interest group conflict into the agency's decision-making process promises to make the

73. National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-169 (1982); *see, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 499 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

74. *See e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-98 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); International Union of Office and Professional Employees, Local 2 v. Washington Metropolitan Area Transit Auth., 724 F.2d 133, 137-39 (1983).

75. *See, e.g.*, *Chevron*, 104 S. Ct. at 2793.

76. *See, e.g.* Hampton v. United States, 276 U.S. 394, (1928); Estreicher, *supra* note 1, at 896-900.

77. *See, e.g.*, R. DAHL, WHO GOVERNS (1961); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

government more responsive to the public interest. If agencies are required to take into account the views of all relevant groups—so the theory goes—their decisions will more closely resemble those made by the people themselves.[78] In such a theory, judicial oversight is both unnecessary and excessive.

Harter's proposal—and the more general attempt to apply ADR to the entire regulatory process—represents the latest outgrowth of this pluralist approach to administrative law. By suggesting that affected parties play a direct role in the development of regulations from day one, it rejects the notion that regulatory dilemmas can be solved through technological rationality or enlightened expertise. By emphasizing the ills of the adversary system, this approach also rejects the hope that agencies can be directed by legislative will as determined by the courts. Perhaps most importantly, however, proponents of environmental ADR see in negotiated rulemaking the political legitimacy currently missing from the regulatory process. As Harter puts it:

> The classic way of establishing public confidence. . . is to have representatives of the people make the policy choices. Thus, an alternative, more direct way to make these inherently political decisions would be to adapt the legislative process itself to the development of regulations. Such a process would enable representatives of the competing interests, including the relevant agency itself, to thrash out a consensus on the policy instead of making a pitch to the umpire.[79]

Historically, however, the attempt to model the regulatory process on the political process has been troubled by three thorny problems. For any particular agency action, interest group pluralists have to determine which interest groups should be represented before the agency, what kind of participation is appropriate, and what sort of procedural rules will govern the ironing out of a consensus among those conflicting group interests.[80] These are essentially the same problems that linger in Harter's proposed standard for judicial review of negotiated regulations.[81] Under Harter's proposal, appellate courts might well

78. For description and criticism of this "pluralist" view, see Frug, *Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1355-61, 1368-73. (1984); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713-22. (1975).

79. Harter, *supra* note 63, at 27-28.

80. *See* Frug, *supra* note 78, at 1368-73.

81. Harter writes that in some negotiations the participants have agreed that interests would not formally ratify any agreement but rather would engage in an informal agree-

be called upon to resolve any or all of these questions in reviewing a negotiated rulemaking: to develop legal standards for identifying relevant interest groups, and for assessing the extent of their participation and the "process" of negotiation. This could be a tall order for judges in many cases. Indeed, there is some question in my mind how much less complex and adversarial judicial review of the negotiating process would be than it is now under the current APA mixture of expertise and non-delegation theories.

B. *The Judicial Role in Agency Settlements*

The role of courts in reviewing settlements in environmental litigation is similarly evolving and somewhat uncertain at the moment. The standards for reviewing settlements involving the EPA are largely derived from the standards that courts have developed for reviewing settlements involving the government more generally. The APA expressly recognizes the power of the court "to supervise and consider offers of settlement. . .where the public interest permits."[82] Settlements in government cases most often eventuate in consent decrees. Consent decrees, which must be approved by the court, have the advantage of a status of final judgment, enforceable by court applied sanctions, even contempt. If the private party does not live up to its obligations, the government need not institute a new proceeding to prove the original violation. The decree is res judicata on the issue.[83]

Judges are not free to reject settlements or consent decrees at will—they are presumed valid unless they contain provisions that are "unreasonable, illegal, unconstitutional, or against public interest."[84] Presumably, a court could deny approval if the settlement looked like a real sellout on the part of the government, or

ment to support the consensus in all appropriate administrative fora and before a court in a subsequent judicial review. Each party recognized that no other party could bind all its members, be they corporate members of a trade association or individual members of a labor union. That would permit anybody who did feel aggrieved to challenge the rule. But the fact that others would be expected to intervene on behalf of the agency would indicate that the challenger is not necessarily representing a widely held view and that the decision-maker needs to focus narrowly on the issues raised, as opposed to painting with a broad brush. "That may, in the end, be all we can ask for." (Letter, *supra* note 64).

82. Administrative Procedure Act, 5 U.S.C. § 554(c)(1) (1982).

83. United States v. City of Miami, Fla., 664 F.2d 435, 439-40 (5th Cir. 1981).

84. *Id.* at 440 (citing U.S. v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980)); *see also* Donovan v. Dorfman, *supra* note 39.

perhaps even if the terms of a settlement for one violator were remarkably disproportionate to the terms offered another of like culpability. Ensuring that settlements do not violate the public interest or a third party's interest is not difficult for courts. Although civil enforcement suits brought by the government indirectly involve the interests of third parties and the public, courts usually presume that the government is a surrogate for public interests and that a fairness hearing before the judge can ferret out any special private ones.

The Supreme Court itself has said that a court's refusal to approve a consent decree containing permanent injunctive relief in a Title VII case is an appealable order, in part because settlements support one of the key policies supporting Title VII—voluntary compliance.[85] At the same time, however, settlement approval is not supposed to be a "perfunctory" matter. In Professor Moore's words, "the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication."[86] At least one court has pointed out that a consent decree requires substantially more scrutiny than a settlement of a monetary claim:

> [T]he consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect. . . . Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.[87]

Appellate courts, we are told, should overrule a trial court's approval of a settlement only for a clear abuse of discretion,[88] espe-

85. Carson v. American Brands, 446 F. Supp. 780 (E.D. Va. 1977), *aff'd*, 606 F.2d 420 (4th Cir. 1979), *rev'd*, 450 U.S. 79, 86-88 (1980); *see also Dorfman*, *supra* note 39, slip op. at 2-10 (holding that a court's refusal to approve a consent decree containing injunctive relief should be treated like a denial of a preliminary injunction and is therefore appealable upon a showing of irreparable harm).

86. 1B MOORE'S FEDERAL PRACTICE ¶ 0.409[5] at 1030 (2d Ed. 1980).

87. Williams v. City of New Orleans, 543 F. Supp. 662, 671 (E.D. La. 1982) (citing *Miami*, 664 F.2d at 441).

88. Patterson v. Newspaper & Mail Deliverers Union, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); In a comprehensive discussion of the judicial role in reviewing agency settlements, the Seventh Circuit has recently held that the abuse of discre-

cially where the trial judge held fairness hearings on it. And appellate courts cannot ordinarily modify the terms of a consent decree, as they may sometimes do with judicially imposed decrees.[89]

Settlements that come directly to the appellate court from an agency, although in a somewhat different posture, receive basically the same deferential treatment. Such settlements most often occur in ratemaking cases. In *United Municipal Distributors Group v. FERC*,[90] a settlement was negotiated between the pipeline, the Federal Energy Regulatory Commission staff, state utility commissions and the pipeline's customers excepting the municipalities. The Commission approved the settlement as to all parties except the "munies." The Commission then set only the munies' part of the rate package down for trial. The munies appealed, arguing that a valid settlement which failed to include them could not be implemented. We approved the Commission's action as preserving a settlement for the vast majority of noncontesting parties, allowing them to have "the benefit of a settlement determined by the Commission to be fair and reasonable and in the public interest" while the contesting party has full due process rights to a hearing.[91] The court also found that the formal approval of a rate settlement was equivalent to the determination of a just and reasonable rate, and was therefore reviewable.[92] In other cases, we have upheld settlements that apply to only some of the customers at issue in a rate dispute— even when the nonsettling customers are similarly situated and eventually receive different rates.[93]

To be sure, this judicial willingness—indeed eagerness—to approve agency settlements should encourage an increase in negotiated dispute resolution at the agency level. And in my view, a limited judicial role in this area rarely entails any abdication of our duty to ensure that agency action promotes the public interest as determined by Congress. Lately, however, courts are hear-

tion standard should also govern appellate review when a district judge disapproves a consent decree. *See Dorfman, supra* note 39, slip op. at 12. The *Dorfman* court noted, however, that a district court must "justify any departure from . . . the principle . . . that settlements are favored and ordinarily should be approved." *Id.*

89. *See, e.g.*, Dunlop v. Pan Am. World Airways, 672 F.2d 1044 (2d Cir. 1982).

90. 732 F.2d 202 (D.C. Cir. 1984).

91. *Municipal Distributors*, 732 F.2d at 209.

92. *Id.* at 206.

93. *See, e.g.*, City of Bethany v. FERC, 727 F.2d 1131, 1138-40 (D.C. Cir. 1984).

ing cases involving the settlement of citizen suits brought against the agency, and these cases involve a very special set of settlement-related problems.

Several of the environmental laws have citizen suit provisions which encourage private groups to bring suit when the Administrator is not enforcing the law.[94] These suits were surely envisioned as a supplementary means to enforce the law. Some difficulties involved in settling private enforcement actions surfaced but were not entirely resolved, in a case decided over a year ago in the District of Columbia Court of Appeals and recently denied certiorari by the Supreme Court, *Citizens for a Better Environment v. Gorsuch*.[95] Simply put, the issue is whether and to what degree a consent decree can bind the agency to do something other than that commanded by law, *i.e.*, to administer the law in a certain way that by implication means the agency cannot do it some other permissible way.

In *Better Environment*, a consortium of environmental organizations (Natural Resources Defense Council, Environmental Defense Fund, Audubon Society, Citizens for a Better Environment) sued the EPA for nonenforcement of the Clean Water Act.[96] The parties negotiated an agreement over the objections of the chemical manufacturers who intervened. The district court held open hearings on the proposed agreement and received comments from interested parties including the industry intervenors. No appeal was taken from the decree itself. The agreement required the agency to undertake a detailed program for developing regulations for the discharge of 65 toxic pollutants on an industry-by-industry basis.[97] The EPA also committed itself to a research program based on specific criteria for determining which other pollutants should be regulated.[98] The resulting regulations themselves would be subjected to notice and comment—and no substantive constraints were placed on them. The decree was subsequently modified by the district court to extend deadlines

94. *E.g.*, Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365 (1982); Clean Air Act, 42 U.S.C. § 7604 (1982); *see generally*, Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 677 n.2 (collecting additional statutory provisions).

95. 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, —U.S.—, 104 S. Ct. 2668 (1984).

96. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 (1982).

97. *Better Environment*, 718 F.2d at 1120-21.

98. *Id.*

for those regulations.[99] The issue of whether the original decree constituted an impermissible usurpation of the Administrators' discretion was raised by the court, *sua sponte*, when the modifications were appealed.[100] The case was remanded for the district court to decide that issue.

On remand, the chemical manufacturers argued that the decree's criteria for deciding whether a pollutant would be regulated, although not inconsistent with those laid down in the statute, impermissably circumscribed the Administrators' discretion.[101] Nonetheless, the district court held that the decree did not illegitimately interfere with the Administrators' discretion because the decree was "process oriented" rather than outcome determinative.[102] The court also emphasized that all interested parties had an opportunity to comment on the decree, and that, in the 1977 Clean Water Act Amendments, Congress had expressly referred to the settlement and had acted in such a way as to implement it.[103] A split panel of our court upheld the decree, relying on EPA's own consent to the decree, the need for government agencies to be free to settle cases, the underlying allegations of unlawful action by the agency in not enforcing the law, and the consistency of the decree with the statute.[104] Implicit in the opinion, however, was a recognition that such settlements might not be permissible if they tied the Administrator's hands too tightly and of the potential danger of "sweetheart deals" between an agency and a preselected "opponent."[105]

In dissent, Judge Wilkey argued that the decree was an impermissible invasion of the agency's discretionary powers under the statute. He saw no real difference between the procedural and substantive requirements in the decree, concluding that the decree bound the Administrator on important choices as to methods, priorities, and allocations of resources.[106] Permitting such

99. Natural Resources Defense Council v. Costle, 12 ENV'T REP. CAS. (BNA) 1833 (D.D.C. 1979).

100. Environmental Defense Fund v. Costle, 636 F.2d 1229, 1258-59 (D.C. Cir. 1980).

101. *See Better Environment*, 718 F.2d at 1121.

102. Natural Resources Defense Council v. Gorsuch, 16 ENV'T REP. CAS. (BNA) 2084, 2088 (D.D.C. 1982).

103. *Id.* at 2089 (citing 123 CONG. REC. S. 19647-48 (daily ed. Dec. 15, 1977)).

104. *Better Environment*, 718 F.2d at 1117.

105. *See generally id.* at 1127-1130, (concluding that the consent decree "does not infringe on the Administrator's statutory discretion").

106. *Id.* at 1131-32.

settlements, he thought, would "weaken . . . democratic control over agency policy [and strengthen the powers of] those special interests who are party to the decree."[107] He also argued that judicial approval of such decrees amounted to an abandonment of the court's role in reviewing agency actions.[108]

Although the Supreme Court denied certiorari in *Better Environment*, the debate is not likely to go away. In fact, another panel of our court composed of Judges Wilkey, Ginsburg and McGowan, in *Womens Equity Action League v. Bell*,[109] recently remanded a district court injunction based on *Adams v. Richardson*,[110] which was originally brought to enforce various agency obligations under the civil rights provisions in the higher education arena. The government now seeks to vacate the underlying consent decree on the ground that the decree impermissibly intruded on the government's statutory and constitutional authority to manage and supervise the agency's enforcement of civil rights laws.[111] The government argued that the consent decree establishes the district court as the "perpetual supervisor" of the appellants, altering the normal relations between agency and court.[112] The government looks for further support from the recent Supreme Court opinion in *Allen v. Wright*, which emphasized that courts have limited powers to hear "suits challenging not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits . . . are rarely, if ever appropriate for federal court adjudication."[113]

Tough questions remain about the limits on negotiated settlements between a government agency and private industry or even quasi-private, public interest groups suing for enforcement. The settlement effected in *Better Environment* seems appropriate; but what if, for example, the EPA agreed to enforce Superfund by cleaning up ten dumpsites a year?

And where is the logical stopping point in allowing agencies to agree to complex enforcement decrees as long as they concern

107. *Id.* at 1136.
108. *Id.* at 1136-37.
109. 743 F.2d 42 (D.C. Cir. 1984).
110. 480 F.2d 1159 (D.C. Cir. 1973).
111. *Women's Equity Action League*, 743 F.2d at 42-43.
112. *Id.* at 43.
113. Allen v. Wright, — U.S. —, 104 S. Ct. 3315, 3329 (1984).

"procedure" rather than "substance"? Can an Administrator, for example, commit him or herself—and more importantly successors— to administering the law in a particular way unless the successor can convince a court to later modify the decree? Such a negotiated commitment would bind successors more tightly than would procedural rules, which can be changed at the agency's initiative after notice and comment. Judicial review of rule changes in enforcement procedures, furthermore, is confined to arbitrary and capricious oversight. But where enforcement procedures are incorporated in a consent decree, changes can only result from a modification hearing. In that context, the court—not the agency—becomes the central decisionmaker. By what standards then should the judge decide if modifications are appropriate? Does deference have any role? At what point does the decree runout? How does a court handle a settlement in which an agency and the challenging party agree, but intervenors with important interests do not? What kind of hearings should the judge hold on far-reaching decrees—should they be like mini-rulemaking proceedings? Should he or she feel free to rewrite the decree—subject to the parties consent or not—or to send them back to the bargaining table with instructions on certain topics, or with the requirement that other parties participate in the negotiations?

What kind of changed circumstances warrant modification—would a change in administration and regulatory philosophy suffice? Traditionally, the parties' expectations are given paramount consideration in deciding upon a request for modification of a settlement agreement, but one might look at consent decrees in citizen suit enforcement actions a bit differently. If the case had been litigated, won by the challengers, and mandatory and injunctive relief had been granted, how broad or limited would the courts' powers be so as to provide relief but not unnecessarily usurp the administrator's duties? Obviously there is no bright-line answer. Comparing negotiation with litigation for this purpose might, however, lead a judge to assess the original or continued validity of a settlement differently than if he or she compared it with ordinary agency policy-making.

These problems may sound familiar. They are quite similar to the debate that has been going on in the human services area for the past decade. Have courts overreached themselves in laying down structural decrees for prison and mental hospital administrators that are too detailed? Having found violations of constitu-

tional rights, how far into the day-to-day workings of the asylum can courts legitimately go to make their correction? Judges approving settlements in major environmental enforcement suits will have to consider at what point they are intruding too deeply into policy choices and questions reserved for the administrator when they seek to provide some effective insurance that the law will be implemented as Congress wished it to be. There are difficult line drawings ahead. Without subscribing to the view that the court can go no further than tell the administrator to obey the law in the future, it should be evident that courts are not naturally equipped to monitor for years infinitely detailed programs or implementation of a complex law in constantly changing circumstances. This is an area that I expect will require real sensitivity on the part of judges and litigators if we are to preserve the efficacy of citizens' suits and settlements.

Another nettlesome issue is when the judge should approve a settlement when the challenging party and the agency agree, but intervenors with important interests at stake, e.g., the industrial intervenors in *Better Environment* do not. Almost all environmental disputes are tri-cornered. How does a court handle a settlement in which only two out of three of the parties agree? The intervenors can, of course, present their concerns to the judge; but that puts her in the position of deciding whether they are vital enough to support a finding of no public interest. When a third party attacks a settlement in a fairness hearing, what are the extent of that party's rights, for example, to present evidence or to take discovery?

Finally, one may question whether settlements should reflect or be consistent with established policies of the agency, or if they can depart markedly from those policies. Could the EPA, for the first time in a settlement (rather than in rule-making or adjudication) implement a new definition or application of the "bubble" concept that represented a departure from existing policy or practice? Because settlements usually involve no articulated explanation, would they therefore constitute violations of the judicial rule that agency departures from existing policies must be satisfactorily explained to a court?

These are open questions. What they suggest is that the judicial role in negotiating settlements will not and should not be passive in important, complex cases with significant policy implications for implementation of environmental laws. The

partnership will continue. But the partners will play different, in some ways even more taxing roles than Judge Leventhal envisioned ten years ago.

In closing, I want to note a fact of which ADR proponents are well aware: that the push for settlements is not a universally applauded one. In a provocative article, Owen Fiss argues that settlements are not generally preferable to full-scale litigation, and should not be institutionalized on any wholesale or indiscriminate basis.[114] Analogizing the settlement to plea bargaining, he finds it a "highly problematical technique for streamlining dockets" and a capitulation of the ideal of justice to the demands of a mass society[115] Fiss' objections to settlements are threefold: consent is too often coerced by imbalances in the bargaining strength of the parties; the bargain may be struck by someone without the authority of a judge; and the absence of any trial or judgment renders subsequent judicial involvement troublesome.[116] Fiss worries about limits on the power of judges, as well as their desire to enforce complex, controversial and expensive decrees when the going gets rough; and he cites some experiences to prove his point.[117] Fiss places great emphasis on the courts as "value articulators." On a philosophical plane, he believes that settlements reduce the social function of a lawsuit to one of resolving private disputes, rather than one of declaring public values.[118]

I am not against settlements. They have always been and will continue to be the only way the system can work, particularly in making room for those cases which must be litigated to the end. But the amputation of meaningful judicial review from settlements or negotiated regulations in the environmental field would make these ADR techniques far less attractive to some of the parties as instruments of justice. And if settlements are to embody the nearest approximation of the ideals of justice to which Fiss gives expression (and which he assumes emerge from litigation, though I am not so sure), we must exercise restraint and forethought about what they contain and how we want judges to treat them.

114. Fiss, *Against Settlement*, 93 YALE L.J. at 1073 (1984).
115. *Id.* at 1075.
116. *Id.* at 1076-85.
117. *Id.* at 1084.
118. *Id.* at 1085.