

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

Case No. 10-C-910

NCR CORP., et al.,

Defendants.

**DECISION AND ORDER APPROVING CONSENT DECREE WITH
THE CITY OF GREEN BAY, BROWN COUNTY, AND ARMY CORP OF ENGINEERS**

In December 2010 the Plaintiffs lodged a proposed consent decree with the court. The Plaintiffs subsequently moved for court approval of the decree, but the matter was stayed pending the outcome of other proceedings, including an action under the Freedom of Information Act, 5 U.S.C. § 522, in which several interested parties sought additional records relating to the agreement. *See Menasha Corp. v. U.S. Dept. of Justice*, 707 F.3d 846 (7th Cir. 2013). The question is now ripe for decision, however, and for the reasons set forth below the consent decree will be approved.

In reviewing a proposed consent decree, the trial court must defer to the expertise of the agency and to the federal policy encouraging settlement. *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011). The district court “must approve a consent decree if it is reasonable, consistent with CERCLA's goals, and substantively and procedurally fair.” *Id.* At the outset, I note that the settlement between the Army Corps of Engineers and the United States Department of Justice is not a typical arms’ length transaction, given that both are arms of the

executive branch. This, however, is unavoidable, given the nature of environmental enforcement. Any time the enforcement branch seeks to impose liability on another agency, there will be some element of conflict. The relationship does not, on its own, give rise to any kind of procedural unfairness. Some of the objectors note that government counsel has been representing both the Army Corps and the EPA in this action. In other words, the government's enforcement lawyers have been working closely with its defense lawyers, and in some cases they have been indistinguishable. Even so, as discussed further below, the result reached is a reasonable one, and the procedure is in many ways unavoidable. In theory both departments could have retained outside counsel, of course, but that was not required here. The fact is that the government's counsel, throughout a half-decade of this action, have proven themselves to be zealous and vigorous enforcers of the environmental laws. The notion that they would somehow give a "sweetheart deal" to a party merely because the party happens to be in the executive branch is nothing more than unsupported speculation. Moreover, given that courts owe deference to the agency, it would make little sense to treat that same agency with the kind of skepticism the objectors now demand. In other words, if an agency is expert in crafting settlements with other PRPs, there is no reason to believe it would not bring a similar level expertise to bear on a settlement with another government agency.

The proposed consent decree addresses the liability of Brown County, the City of Green Bay, and the United States for navigational dredging-related activities in the Lower Fox River and Green Bay. It also addresses the liability of agencies of the United States for their recycling of PCB-containing paper. These parties would pay a total of \$5.2 million under the proposed settlement: the United States would pay \$4.5 million and Green Bay and Brown County would each pay \$350,000.

As discussed at more length elsewhere, the Army Corps of Engineers, under the direction of Congress, engaged in navigational dredging activities for at least the last century. During much of the PCB period (1954-71), the Corps engaged in maintenance dredging and deposited the dredged material in various parts of the river and in Green Bay. The majority of the dredged material, however, went into confined disposal facilities built adjacent to the river. Moreover, the in-river disposal occurred before NCR paper was at its peak production levels. Thus, although the Corps did redistribute some PCBs, and some PCBs inevitably leaked out of the disposal facilities, it was not a major contributor to the PCB problem. The United States recognizes, however, that roughly a half-million cubic yards of contaminated sediment may have been dumped in Green Bay, which contributed to natural resource damages there. For that reason, the bulk of the settlement amount is based on that activity. On balance, however, the government argues that dredging the navigation channel and placing the sediment in disposal facilities markedly *reduced* the mass of PCBs in the Lower Fox River. Thus, on a net basis, the government's activities actually lessened, rather than exacerbated, the problem. As such, the United States argues that the consent decree is a fair settlement even though \$5 million constitutes less than one percent of the estimated \$700 million cleanup cost.

The government also argues that its recycling activities contributed only minimally to the problem. Recycling in the 1970s was only in its infancy, and the EPA itself was apparently the only governmental agency to recycle its paper in any way relevant to the Lower Fox River. As it turned out, the EPA sent a small number of truckloads to the Bergstrom mill during the 1970s, but that program eventually petered out. The government also did recycle other things, such as maps and waste from the Government Printing Office. The United States argues that GPO waste would not

have contained carbonless copy paper and thus would not be contaminated with significant amounts of PCBs. The recycling aspect of the government's liability here appears to be at truly *de minimis* levels.

In addition, the government encouraged the practice of recycling, even after it was learned that PCBs were dangerous and found within the used office paper that would be subject to recycling. During the 1970s, both the EPA and the FDA recognized that it would not be practical to remove carbonless copy paper from the recyclable inventories because CCP was not easy to identify. Ultimately, however, the government argues that its own recycling and the positions it took on paper recycling added very little to the PCB problem, whose damage had already been done by the 1970s.

Finally, the participation of Green Bay and Brown County in the settlement stems from their involvement in the confined disposal facilities where contaminated sediment was deposited and the fact that the city and county were proponents and beneficiaries of the Corps' dredging program. The Defendants do not meaningfully challenge their settlement terms, except to suggest in conclusory fashion that their mismanagement of the disposal facilities led to additional PCBs being deposited in the river.

The Defendants raise a number of objections to the Army Corps' settlement, but these objections do not carry the day. At the outset, I must note that the notion that the Army Corps of Engineers is a significant disposer or discharger of PCBs simply because it operated dams and moved some sediment around in the river is a premise that has not been explored at any length. The government appears willing to concede its liability under the CERCLA, at least as to its dredging activities, and so the question remains unanswered. *See United States v. Washington State Dept. of Transp.*, 665 F. Supp. 2d 1233 (W.D. Wash. 2009) (appearing to accept premise that Army Corps

dredging could trigger CERCLA liability). But it is at least arguable that parties who did not themselves discharge PCBs into the waterway, but at most moved around the sediment containing the PCBs discharged by the objecting parties, have no liability under CERCLA at all. The argument is even stronger when one considers that the movement of the sediment occurred during the course of efforts by the Corps and local governments to perform work on behalf of the public that was necessary in order to permit the continued commercial use of the waterway and that they may even have lessened the overall cost of the clean-up necessitated by the initial discharges by the objecting Defendants.

The essence of the Defendants' argument is that the Corps' operation of nine dams and its dredging and redispersment of PCBs made the remedy much more expensive than it would have been otherwise. They argue that the Corps never took into account the PCB issue when operating its dams, which had Tainter gates that allowed the sediment to move through from the bottom and encouraged spreading of PCBs. They also suggest that dredging had significant negative effects. Dredging the navigation channel produced a sediment trap and caused the accumulation of PCBs in certain parts of the river. And moving the dredged material around through open-water disposal resuspended PCBs that might otherwise have been more safely buried deep in the sediment. The dredging also expanded the surface area in which PCBs were spread in the river.

These issues have been noted elsewhere, as the Corps' activities rendered the attempt to divide the harm in the river much more difficult. I am not satisfied, however, that the Corps' activities give rise to a significant amount of liability. The point remains that the open-water disposal of sediment ended in 1966, just as NCR's production of carbonless copy paper was dramatically increasing. Most of the sediment was deposited in confined disposal facilities. The

Corps' removal of millions of cubic yards of contaminated sediment from the river at least partially counteracted any exacerbation of the problem due to dredging, and in fact it is not difficult to imagine that the Corps' activities actually had a net ameliorating effect due to the removal of so much contaminated sediment. As the government points out, it removed roughly 16,500 kg of PCBs from the river, which is on par with what the remedial dredging now being undertaken will accomplish. In other words, the Corps' activities already did roughly half of the work, at least as far as mass is concerned. Regardless, it makes sense to view the Corps' activities on a net basis rather than focusing merely on the gross amount of PCBs it might have added or moved through dredging.¹

In addition, the Defendants' apparent belief that the Corps should bear significant liability merely because the federal dams existed does not bear closer scrutiny. The dams have been operational since the 1800's and thus predated all of the PCB pollution by nearly a century. From a causation perspective, it is difficult to conclude that the Corps "caused" any part of the PCB problem merely by operating pre-existing dams in the fashion they were designed to be operated. Few large rivers exist in their "natural" state, and the objectors have not cited any plausible reason to impose significant liability on the Corps merely for doing the job it is tasked by Congress with doing.

The most recent trial on divisibility established that the relationship between PCB masses and the remedy is a complex one, and the Defendants are not able to explain how the Corps'

¹ As discussed at great length elsewhere, mass is a poor lens for viewing impact on remediation efforts and expenses. I am not suggesting that the Corps' dredging made the actual remediation project substantially easier, but simply noting that the Corps' overall effect on the contamination in the river may have been positive.

activities would actually have made the problem demonstrably worse. They rely on experts such as Mr. Fuglevand, who opined that the Corps' dredging activity might have increased the cleanup cost in OU4 by some \$19 million. But the experts' opinions do not take into account the complex relationship between PCB mass and the remedy, and neither do they incorporate the fact that the Corps actually removed massive quantities of PCBs from the river. Moreover, the analysis of NCR's Dr. Hayes, who is relied on elsewhere by Fuglevand, concludes that dredging "did not significantly affect the deposition patterns of PCBs in OU4." (ECF No. 820-6 at 4.) In short, there is no comprehensive and compelling analysis that suggests the Corps' activities played the major role that the objectors now claim. Moreover, the objectors' arguments overlook the deference that is owed under these circumstances. "As long as the measure of comparative fault on which the settlement terms are based is not arbitrary, capricious, and devoid of a rational basis, the district court should uphold it." *United States v. SEPTA*, 235 F.3d 817, 824 (3d Cir. 2000). Here, there is a non-arbitrary and rational basis for concluding that the government's activities contributed only minimally to the PCB problem and its remediation.

The government has set forth a reasonable basis for a settlement that consists of only a small fraction of the total cost of remediating the river. Its method of calculating that cost is thorough and is based, to the extent possible, on data, including known dredge volumes, PCB concentrations, and the likely impact on Green Bay. The objections now raised are based largely on incompletely developed arguments and attribute far too much liability to the Army Corps. Settlements are owed deference, and without a strong reason to conclude otherwise, I find that the proposed consent decree is a fair and reasonable settlement.

The motion to approve the settlement [173] is **GRANTED**. The consent decree [31-1] is approved.

SO ORDERED this 26th day of June, 2013.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

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FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and the
STATE OF WISCONSIN

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v.

NCR CORPORATION, *et al.*,

Defendants.

Civil Action No. 10-C-910

The Honorable William C. Griesbach

**CONSENT DECREE
WITH BROWN COUNTY AND THE CITY OF GREEN BAY**

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	JURISDICTION	6
III.	PARTIES BOUND	7
IV.	STATEMENT OF PURPOSE	7
V.	DEFINITIONS	7
VI.	PAYMENTS	11
VII.	SETTLING DEFENDANTS' FAILURE TO MAKE PAYMENT	14
VIII.	CERTIFICATION OF SETTLING DEFENDANTS	15
IX.	COVENANTS BY PLAINTIFFS AND THE TRIBES	15
X.	RESERVATIONS OF RIGHTS BY PLAINTIFFS AND THE TRIBES	17
XI.	COVENANTS BY THE SETTLING DEFENDANTS AND THE SETTLING FEDERAL AGENCIES	22
XII.	EFFECT OF SETTLEMENT / CONTRIBUTION	23
XIII.	ACCESS TO PROPERTY	25
XIV.	ACCESS TO INFORMATION	26
XV.	RETENTION OF RECORDS	28
XVI.	NOTICES AND SUBMISSIONS	29
XVII.	RETENTION OF JURISDICTION	31
XVIII.	INTEGRATION / APPENDICES	31
XIX.	MODIFICATION	32
XX.	PUBLIC COMMENT	32
XXI.	EFFECTIVE DATE	32
XXII.	SIGNATORIES/SERVICE	33
XXIII.	FINAL JUDGMENT	34

I. BACKGROUND

A. The Plaintiffs have filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9606 and 9607 (“CERCLA”), seeking injunctive relief regarding the cleanup of the Lower Fox River and Green Bay Site (the “Fox River Site” or the “Site,” as defined below) and recovery of certain response costs incurred in connection with releases and threatened releases of hazardous substances at and from the Site. The responsible natural resource trustees also contend that they have claims for recovery of natural resource damages (including for recovery of natural resource damage assessment costs) and the Plaintiffs’ complaint seeks recovery of such damages. This Consent Decree sets forth the terms of a civil settlement among the Plaintiffs, the responsible natural resource trustees, and Brown County and the City of Green Bay (the “Settling Defendants”). This Consent Decree also resolves certain Settling Federal Agencies’ potential liabilities for the Site, as provided herein.

B. The United States of America (“United States”) instituted this action on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”) and the Secretary of the United States Department of the Interior (“DOI”), acting in consultation with the United States Department of Commerce (“Commerce”).

C. Pursuant to Executive Order 12580 and the National Contingency Plan, 40 C.F.R. Part 300, the President has delegated authority to act as Federal Trustees for natural resources at and near the Site to DOI, as represented by the United States Fish and Wildlife Service, and Commerce, as represented by the National Oceanic and Atmospheric Administration.

D. The State of Wisconsin (the “State”) instituted this action at the request of the Governor of Wisconsin on behalf of the Wisconsin Department of Natural Resources

(“WDNR”), and is entering into this Consent Decree on behalf of WDNR.

E. WDNR is a response agency and a State Trustee for natural resources at or near the Site.

F. The Menominee Indian Tribe of Wisconsin and the Oneida Tribe of Indians of Wisconsin (the “Tribes,” as defined below) are Tribal Trustees for natural resources at or near the Site. The Tribes are Parties to this Consent Decree.

G. The Fox River Site is located in the northeastern portion of the State of Wisconsin. Hazardous substances have been released, and are threatened to be released, at and from the Site.

H. As a result of the release or threatened release of hazardous substances, EPA and the State have undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. In performing these response actions, EPA and the State have incurred and will continue to incur response costs at or in connection with the Site. These response actions include, *inter alia*: (a) the performance of a Remedial Investigation and Feasibility Study at the Site; (b) the selection of an overall remedy for the Site that will involve containment and removal of sediment contaminated with polychlorinated biphenyls (“PCBs”) through a combination of capping, dredging, dewatering, and upland landfill disposal, as set forth in two Records of Decision (as amended); (c) oversight of response actions implemented; and (d) various enforcement actions. The Trustees have been involved in various natural resource assessment activities relating to the Site. The Trustees have incurred and will continue to incur assessment costs associated with natural resource damage assessment activities relating to the Site.

I. The Site includes approximately 39 miles of the Lower Fox River (the “Fox

River”) as well as the bay of Green Bay (the “Bay”). The Fox River portion of the Site extends from the outlet of Lake Winnebago and continues downstream to the mouth of the Fox River at the City of Green Bay. The Bay portion of the Site extends from the mouth of the Fox River at the City of Green Bay to the point where the Bay enters Lake Michigan. The Site has been divided into five geographically-defined Operable Units (“OUs”), as described in the Records of Decision: OU 1 - Little Lake Butte des Morts; OU 2 - Appleton to Little Rapids; OU 3 - Little Rapids to DePere; OU 4 - DePere to Green Bay; and OU 5 - the Bay of Green Bay.

J. On July 28, 1998 (63 Fed. Reg. 40247), pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA proposed to place the Site (also called the “Fox River NRDA/PCB Releases Site”) on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B.

K. Pursuant to CERCLA and the National Contingency Plan, a Remedial Investigation and Feasibility Study (“RI/FS”) for the Site was prepared under WDNR’s technical lead, and draft RI/FS reports were released for public comment in March 1999. In October 2001, EPA and WDNR (collectively referred to herein as the “Response Agencies”) issued and sought public comment on a proposed remedial action plan for the Site. Final RI/FS reports for the Site were published in December 2002. The RI/FS estimated that sediment at the Site is contaminated with nearly 100,000 kilograms of PCBs, including nearly 70,000 kilograms of PCBs in the Bay.

L. In December 2002, the Response Agencies signed and issued a Record of Decision for OUs 1 and 2 at the Site.

M. In June 2003, the Response Agencies signed and issued a Record of Decision for OUs 3, 4, and 5 at the Site.

N. In June 2007, the Response Agencies signed and issued a Record of Decision

Amendment for OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth) at the Site.

O. In June 2008, the Response Agencies signed and issued a Record of Decision Amendment for OU 1 at the Site.

P. In February 2010, the Response Agencies signed and issued an Explanation of Significant Differences concerning the selected remedy for OU 2, OU 3, OU 4, and OU 5 (River Mouth) at the Site.

Q. The remedial action for OU 1 is being performed pursuant to a judicially-approved Consent Decree with P.H. Glatfelter Co. (“Glatfelter”) and WTM I Company (“WTM”).

R. On November 13, 2007, EPA issued a Unilateral Administrative Order (“UAO”) pursuant to 42 U.S.C. § 9606(a) which directed Appleton Papers Inc. (“API”), NCR Corp. (“NCR”); WTM; Glatfelter; Menasha Corporation (“Menasha”); U.S. Paper Mills Corp.; CBC Paper Coating, Inc.; and Georgia-Pacific Consumer Products, LP to implement the remedial action for OUs 2, 3, 4, and 5 of the Site, as set forth in the Records of Decision addressing those portions of the Site.

S. In 2008, API and NCR filed suit in *Appleton Papers Inc. v. George A. Whiting Paper Co.*, Case No. 08-C-16 (E.D. Wis.) against a number of parties, including Brown County and the City of Green Bay, seeking contribution under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), and a declaratory judgment allocating equitable shares of the cleanup costs and natural resource damages associated with the Site. One of the defendants in that case – Menasha – subsequently alleged that it was entitled to contribution from the United States in a third-party complaint in the case.

T. NCR also filed a separate suit in *NCR Corp. v. Kimberly-Clark Corp.*, Case No.

08-C-895 (E.D. Wis.) against a number of additional parties, including the United States, seeking contribution under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), and a declaratory judgment allocating equitable shares of the cleanup costs and natural resource damages associated with the Site. On January 7, 2009, the Court consolidated Case No. 08-C-895 with Case No. 08-C-16.

U. The claims against Brown County, the City of Green Bay, and the United States in the above-referenced consolidated contribution cases assert that Brown County, the City of Green Bay, and the United States have liability for the Site under CERCLA due to their association with navigational dredging activities in the Fox River and the Bay and their ownership, operation, and/or use of certain dredged spoil confined disposal facilities. The claims against the United States by Menasha also allege that the United States has liability for the Site due to past recycling of wastepaper that may have contained PCBs by certain agencies of the federal government, including EPA and the General Services Administration.

V. The Settling Defendants do not admit any liability to the Plaintiffs, the Tribes, or any other party arising out of the transactions or occurrences alleged in the complaint in this case or the complaints in the above-referenced consolidated contribution cases. The Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in complaints in the consolidated contribution cases.

W. The United States (including the Settling Federal Agencies), the State, the Tribes, and the Settling Defendants agree that settlement without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action with respect to the Settling Defendants and the Settling Federal Agencies. This Consent Decree requires the Settling Defendants and the Settling Federal Agencies to pay a total of \$5.1 million (plus interest as provided herein). The allocation of that total amount was

separately negotiated among counsel for the Settling Federal Agencies, Brown County, and the City of Green Bay.

X. In accordance with the National Contingency Plan, the State was notified of negotiations with potentially responsible parties regarding this potential settlement. The State has been an active participant in such negotiations and is a party to this Consent Decree.

Y. Consistent with CERCLA Section 122(j)(1), 42 U.S.C. § 9622(j)(1), EPA has notified the Trustees, as represented by the Fox River / Green Bay Natural Resource Trustee Council, of negotiations with potentially responsible parties regarding this settlement as it relates to injuries to natural resources under Federal, State, and Tribal trusteeship at the Site. The Trustees have participated in the negotiation of this Consent Decree and support this Consent Decree.

Z. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation, and that this Consent Decree is procedurally and substantively fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, and DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b), and also has personal jurisdiction over the Settling Defendants. The Settling Defendants consent to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, the State, and the Tribes, and upon the Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status of a Settling Defendant, including but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

IV. STATEMENT OF PURPOSE

3. By entering into this Consent Decree, the mutual objectives of the Parties are:
- a. to reach a final settlement among the Parties with respect to the Site pursuant to CERCLA that allows the Settling Defendants and the Settling Federal Agencies to make a set of cash payments, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for performance of cleanup activities at the Site, for response costs incurred and to be incurred at or in connection with the Site, and for natural resource damages at the Site, thereby reducing litigation relating to the Site;
 - b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating these potentially responsible parties from further involvement at the Site; and
 - c. to provide for full and complete contribution protection for the Settling Defendants and the Settling Federal Agencies with regard to the Site pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. §§ 9613(f)(2).

V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning

assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

a. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. “Commerce” shall mean the United States Department of Commerce and any successor departments, agencies or instrumentalities of the United States.

c. “Consent Decree” or “Decree” shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

d. “Date of Lodging” shall mean the day on which this proposed Consent Decree is lodged with the Court, before commencement of the public comment period described in Section XX.

e. “Day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

f. “DOI” shall mean the United States Department of the Interior and any successor departments, agencies or instrumentalities of the United States.

g. “Effective Date” shall mean the effective date of this Consent Decree as provided by Section XXI (Effective Date).

h. “EPA” shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

i. “EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

j. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

k. “Natural Resource” or “Natural Resources” means land, resident and anadromous fish, resident and migratory wildlife, biota, air, water, ground water, sediments, wetlands, drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, the State, or the Tribes.

l. “Natural Resource Damages” means any damages recoverable by the United States or the State on behalf of the public, or by the Tribes, for injury to, destruction of, or loss or impairment of Natural Resources at the Site as a result of a release of hazardous substances, including but not limited to: (i) the costs of assessing such injury, destruction, or loss or impairment arising from or relating to such a release; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent resources; (iii) the costs of planning such restoration activities; (iv) compensation for injury, destruction, loss, impairment, diminution in value, or loss of use of natural resources; and (v) each of the categories of recoverable damages described in 43 C.F.R. § 11.15 and applicable state and tribal law.

m. “NRDAR Fund” shall mean DOI’s Natural Resource Damage Assessment and Restoration Fund.

n. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

- o. “Parties” shall mean the United States, the State, the Tribes, and the Settling Defendants.
- p. “Plaintiffs” shall mean the United States and the State.
- q. “Records of Decision” shall mean, collectively: (i) the December 2002 Record of Decision for OUs 1 and 2; (ii) the June 2003 Record of Decision for OUs 3-5; (iii) the June 2007 Record of Decision Amendment for OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth); (iv) the June 2008 Record of Decision Amendment for OU 1; and (v) the February 2010 Explanation of Significant Differences for OU 2, OU 3, OU 4, and OU 5 (River Mouth).
- r. “Response Agencies” shall mean EPA and WDNR collectively.
- s. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.
- t. “Settling Defendants” shall mean Brown County and the City of Green Bay.
- u. “Settling Federal Agencies” shall mean the following departments, agencies, and instrumentalities of the United States, which are resolving any claims which have been or could be asserted against them with regard to this Site as provided in this Consent Decree: (i) the Department of the Army (including the Army Corps of Engineers); (ii) the General Services Administration; (iii) the Environmental Protection Agency; (iv) the Internal Revenue Service; and (v) the Government Printing Office; and (vi) any other departments, agencies, and instrumentalities of the United States Government which sold and/or provided scrap and waste paper containing PCBs that was recycled, repulped, or otherwise reprocessed by paper mills that discharged wastewater to the Lower Fox River (either directly or indirectly).

v. “Site” shall mean the Lower Fox River and Green Bay Superfund Site, which encompasses: (i) approximately 39 miles of the Lower Fox River from the outlet of Lake Winnebago downstream to the mouth of the Fox River at the City of Green Bay; and (ii) the bay of Green Bay from the mouth of the Fox River at the City of Green Bay to the point where the bay enters Lake Michigan.

w. “State” shall mean the State of Wisconsin.

x. “Tribes” shall mean the Menominee Indian Tribe of Wisconsin and the Oneida Tribe of Indians of Wisconsin.

y. “Trustees” means DOI, Commerce, WDNR, and the Tribes.

z. “United States” shall mean the United States of America, including all of its departments, agencies, and instrumentalities, which includes without limitation EPA, DOI, Commerce, and the Settling Federal Agencies.

aa. “Waste Materials” shall mean: (i) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (iii) any “solid waste” under Section 1004(27) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(27); and (iv) any “hazardous substance” under Wis. Stat. § 292.01.

bb. “WDNR” shall mean the Wisconsin Department of Natural Resources and any successor departments or agencies of the State of Wisconsin.

VI. PAYMENTS

5. Payments to Court Registry Account. Within 28 Days of the date on which the Court enters an order in this case authorizing payments by Settling Defendants into the Court Registry Account, the Settling Defendants shall pay \$700,000 into the interest-bearing Court

Registry Account of the United States District Court for the Eastern District of Wisconsin. More specifically, based on their own internal negotiation, Brown County and the City of Green Bay each shall pay \$350,000 into that Account. Payment shall be made to the Clerk of the Court by an electronic funds transfer (“EFT”) to the account designated by the Clerk of the Court, in accordance with payment instructions to be provided.

6. Disbursements from Court Registry Account. After entry of this Consent Decree, the funds deposited into the Court Registry Account under this Consent Decree (and all accrued interest) shall be disbursed to the United States pursuant to a separate Withdrawal Order of the Court. Upon receipt of the funds, the United States shall apply the funds as follows:

(i) \$105,000.00 (plus the corresponding interest on that amount) shall be deposited in the Lower Fox River and Green Bay Superfund Site Special Account within the EPA Hazardous Substance Superfund; and (ii) \$595,000.00 (plus the corresponding interest on that amount) shall be deposited in a Site-specific sub-account within the NRDAR Fund. In the event the Plaintiffs withdraw or withhold consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, the funds deposited into the Court Registry Account (and all accrued interest) shall be returned to the Settling Defendants pursuant to a separate Withdrawal Order of the Court.

7. Payments By Settling Federal Agencies.

a. As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States, on behalf of the Settling Federal Agencies, shall:

- (i) pay to a Site-specific account established by WDNR –
in accordance with payment instructions provided by the State –
the principal sum of \$745,000.00 plus Interest on that amount

commencing 28 Days after the date on which the Court enters an order authorizing payments by Settling Defendants into the Court Registry Account; and

- (ii) pay to a Site-specific sub-account within the NRDAR Fund the principal sum of \$3,755,000.00 plus Interest on that amount commencing 28 Days after the date on which the Court enters an order authorizing payments by Settling Defendants into the Court Registry Account.

b. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

8. The payments by the Settling Defendants and the Settling Federal Agencies include amounts for: (i) past response costs incurred at or in connection with the Site; (ii) projected future response costs to be incurred at or in connection with the Site; (iii) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any other person, will exceed current estimates; and (iv) Natural Resource Damages, including assessment costs.

9. Use of Payments.

- a. Payments under this Section to the Lower Fox River and Green Bay

Superfund Site Special Account within the EPA Hazardous Substance Superfund shall be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

b. Payments under this Section to a Site-specific account to be established by WDNR shall be retained and used to conduct or finance response actions at or in connection with the Site. If any funds remain in that Site-specific WDNR account after completion of the response action at the Site, WDNR shall transfer all remaining funds to the EPA Hazardous Substance Superfund.

c. Payments under this Section to a Site-specific sub-account within the NRDAR Fund shall be managed by DOI for the joint benefit and use of the Trustees to pay for natural resource restoration projects jointly selected by the Trustees and/or to be applied toward natural resource damage assessment costs incurred by DOI and the State.

10. At the time payment is made under Paragraph 5, the Settling Defendants shall send notice, including a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter which shall reference the case name and DOJ case number 90-11-2-1045/3 to the persons listed in Section XVI (Notices and Submissions).

VII. SETTling DEFENDANTS' FAILURE TO MAKE PAYMENT

11. If a Settling Defendant fails to make full payment within the time required by Paragraph 5, the Settling Defendant shall pay Interest on the unpaid balance. In addition, if a Settling Defendant fail to make full payment as required by Paragraph 5, the United States may, in addition to any other available remedies or sanctions, bring an action against the Settling Defendant seeking injunctive relief to compel payment and/or seeking civil penalties under

Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), for failure to make timely payment.

VIII. CERTIFICATION OF SETTLING DEFENDANTS

12. By signing this Consent Decree, each Settling Defendant certifies, individually, that, to the best of its knowledge and belief, it:

a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to the Plaintiffs, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has and will comply fully with any and all requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

IX. COVENANTS BY THE PLAINTIFFS AND THE TRIBES

13. Covenants by the United States.

a. In consideration of the payment that will be made by the Settling Defendants under the terms of this Consent Decree, and except as specifically provided by Section X (Reservations of Rights by Plaintiffs and the Tribes), the United States covenants not to sue or take administrative action against the Settling Defendants pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, or Section 311(f) of the Clean Water Act, 33 U.S.C.

§ 1321(f), relating to the Site. Except with respect to future liability, this covenant not to sue shall take effect upon the Effective Date of this Consent Decree. With respect to future liability, this covenant shall take effect upon certification of completion of the remedial action by EPA pursuant to 42 U.S.C. § 9622(f)(3). This covenant is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant extends only to the Settling Defendants and does not extend to any other person.

b. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of the Consent Decree, and except as specifically provided by Section X (Reservations of Rights by Plaintiffs and the Tribes), EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607, or Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), relating to the Site. Except as specifically provided by Section X (Reservations of Rights by Plaintiffs and the Tribes), DOI and Commerce covenant not to take administrative action against the Settling Federal Agencies for Natural Resource Damages pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607, or Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), relating to the Site. Except with respect to future liability, EPA's covenant shall take effect upon the Effective Date of this Consent Decree. With respect to future liability, EPA's covenant shall take effect upon certification of completion of the remedial action by EPA pursuant to 42 U.S.C. § 9622(f)(3). These covenants by EPA, DOI, and Commerce are conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. These covenants by EPA, DOI, and Commerce extend only to the Settling Federal Agencies and do not extend to any other person.

14. Covenants by the State. In consideration of the payments that will be made by the Settling Defendants and the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided by Section X (Reservations of Rights by Plaintiffs and the Tribes), the State covenants not to sue or to take administrative action against the Settling

Defendants and the Settling Federal Agencies pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), or Wisconsin statutory or common law, relating to the Site. Except with respect to future liability, this covenant not to sue shall take effect upon the Effective Date of this Consent Decree. With respect to future liability, this covenant shall take effect upon certification of completion of the remedial action by EPA pursuant to 42 U.S.C. § 9622(f)(3). This covenant is conditioned upon the satisfactory performance by Settling Defendants and the Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to the Settling Defendants and the Settling Federal Agencies and does not extend to any other person.

15. Covenants by the Tribes. In consideration of the payments that will be made by the Settling Defendants and the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided by Section X (Reservations of Rights by Plaintiffs and the Tribes), the Tribes covenant not to sue the Settling Defendants or the Settling Federal Agencies for Natural Resource Damages pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, Wisconsin statutory or common law, or tribal law, relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon the Effective Date of this Consent Decree. This covenant is conditioned upon the satisfactory performance by Settling Defendants and the Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to the Settling Defendants and the Settling Federal Agencies and does not extend to any other person.

X. RESERVATIONS OF RIGHTS BY PLAINTIFFS AND THE TRIBES

16. The covenants set forth above do not pertain to any matters other than those expressly specified in Paragraphs 13, 14, and 15. The United States, the State, and the Tribes reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants, and EPA, and the Trustees (including the State) reserve, and this Consent Decree is without

prejudice to, all rights against the Settling Federal Agencies, with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by Settling Defendants or the Settling Federal Agencies to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability based upon a Settling Defendant's or Settling Federal Agency's future transportation, treatment, storage, discharge or disposal, or the arrangement for the transportation, treatment, storage, discharge, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree;
- d. liability based upon the transportation, treatment, storage, discharge or disposal, or the arrangement for the transportation, treatment, storage, discharge, or disposal, of a hazardous substance or a solid waste outside of the Site; and
- e. liability for damages for injury to, destruction of, or loss of natural resources resulting from releases or threatened releases of hazardous substances outside of the Site.

17. Reservations for New Information and Unknown Conditions.

a. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel the Settling Defendants, and EPA and the State reserve the right to issue an administrative order or institute proceedings seeking to compel the Settling Federal Agencies, (1) to perform further response actions relating to the Site or (2) to reimburse the United States and the State for

additional costs of response if, prior to certification of completion of the remedial action at the Site:

- (i) conditions at the Site, previously unknown to EPA, are discovered,
or
- (ii) information, previously unknown to EPA, is received in whole or in part,

and these previously unknown conditions or information together with other relevant information indicate that the remedial action is not protective of human health or the environment.

b. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel the Settling Defendants, and EPA and the State reserve the right to issue an administrative order or institute proceedings seeking to compel the Settling Federal Agencies, (1) to perform further response actions relating to the Site or (2) to reimburse the United States and the State for additional costs of response if, subsequent to certification of completion of the remedial action at the Site:

- (i) conditions at the Site, previously unknown to EPA, are discovered,
or
- (ii) information, previously unknown to EPA, is received in whole or in part,

and these previously unknown conditions or information together with other relevant information indicate that the remedial action is not protective of human health or the environment.

c. For purposes of Subparagraph 17.a, the information and the conditions known to EPA shall include only that information contained in EPA's administrative record for the Site as of the Date of Lodging of this Consent Decree. For purposes of Subparagraph 17.b, the information and the conditions known to EPA shall include only that information contained in EPA's administrative record for the Site as of the date of EPA's certification of completion of the remedial action at the Site.

d. Notwithstanding any other provision of this Consent Decree, the Trustees reserve the right to institute proceedings against the Settling Defendants and the Settling Federal Agencies in this action or in a new action seeking recovery of Natural Resource Damages, based on: (1) conditions with respect to the Site, unknown to the Trustees as of the date of lodging of this Consent Decree, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of Natural Resources ("Unknown NRD Conditions"), or (2) information received by the Trustees after the date of lodging of this Consent Decree which indicates that the releases of hazardous substances at the Site have resulted in injury to, destruction of, or loss of Natural Resources of a type or future persistence that was unknown to the Trustees as of the date of lodging of this Consent Decree ("New NRD Information"). The following shall not be considered Unknown NRD Conditions or New NRD Information for the purpose of this Paragraph: (1) an increase solely in any Trustee's assessment of the magnitude of a known injury to, destruction of, or loss of Natural Resources at the Site; or (2) injury to, destruction of, or loss of Natural Resources at the Site arising from the re-exposure, resuspension, or migration of hazardous substances known to be present in the sediments of the Site. For the purpose of this Paragraph, the information and conditions known to the Trustees shall include any information or

conditions listed or identified in records relating to the Site that were in the possession or under the control of DOI, Commerce, WDNR, or the Tribes as of the Date of Lodging of this Consent Decree.

18. Additional Reservations for Hazardous Substances Other than PCBs.

a. Notwithstanding any other provision in this Consent Decree, the United States, the State, and the Tribes reserve, and this Consent Decree is without prejudice to, the right to institute proceedings against any individual Settling Defendant in this action or in a new action or to issue an administrative order to any such party seeking to compel that party to perform future response actions relating to the Site, pay future costs of response incurred by EPA or WDNR, and/or pay additional sums for Natural Resource Damages to the extent such response actions, response costs, or Natural Resource Damages relate to a hazardous substance (or hazardous substances) other than PCBs and their breakdown products.

b. Notwithstanding any other provision in this Consent Decree, EPA and the Trustees reserve, and this Consent Decree is without prejudice to, the right to institute proceedings against the Settling Federal Agencies in this action or in a new action or to issue an administrative order seeking to compel the Settling Federal Agencies to perform future response actions relating to the Site, pay future costs of response incurred by EPA or WDNR, and/or pay additional sums for Natural Resource Damages to the extent such response actions, response costs, or Natural Resource Damages relate to a hazardous substance (or hazardous substances) other than PCBs and their breakdown products.

c. The reservations in Subparagraphs 18.a and 18.b shall not be construed to require any Settling Defendant or any Settling Federal Agency to perform or reimburse costs of

the remedial action prescribed by the existing Records of Decision for the Site.

**XI. COVENANTS BY THE SETTLING DEFENDANTS AND
THE SETTLING FEDERAL AGENCIES**

19. Covenant Not to Sue by Settling Defendants. The Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, the State, or the Tribes, or their contractors or employees, with respect to the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State of Wisconsin, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States, the State, or the Tribes pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

20. Covenant by Settling Federal Agencies. The Settling Federal Agencies other than EPA hereby agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the Site or this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under the National Contingency Plan (40 C.F.R. Part 300). Nothing in this

Paragraph shall be construed to prohibit any payments or disbursements from the EPA Hazardous Substance Superfund to a Settling Federal Agency pursuant to an Interagency Agreement, a Memorandum of Agreement, or a Memorandum of Understanding between EPA and that Settling Federal Agency.

21. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

22. Except as provided in Paragraph 23 (Waiver of Claims), the covenants in this Section shall not apply if the United States, the State, or either of the Tribes brings a cause of action or issue an order pursuant to the reservations set forth in Paragraph 17 or Paragraph 18, but only to the extent that a Settling Defendant's claims arise from the same response action, response costs, or damages that the United States, the State, or the Tribe seeks pursuant to the applicable reservation.

23. Waiver of Claims. The Settling Defendants agree not to assert any claims or causes of action (including claims for contribution under CERCLA) that they may have for all matters relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against such Settling Defendant.

XII. EFFECT OF SETTLEMENT / CONTRIBUTION

24. Except as provided in Paragraph 23 (Waiver of Claims), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a

Party to this Consent Decree. Except as provided in Paragraph 23 (Waiver of Claims), the Plaintiffs, the Tribes, and the Settling Defendants each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

25. Waiver of Claim-Splitting Defenses. In any subsequent administrative or judicial proceeding initiated by the United States, the State, or the Tribes for injunctive relief, recovery of response costs or Natural Resource Damages, or other relief relating to the Site, the Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by the Plaintiffs and the Tribes set forth in Section IX.

26. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that each Settling Defendant and each Settling Federal Agency is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are Natural Resource Damages and all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States, the State, or any other person; provided, however, that if the United States, the State, or either of the Tribes exercises

rights against a Settling Defendant (or if EPA, the State or either of the Tribes assert rights against a Settling Federal Agency) under the reservations in Subparagraph 16.c, Paragraph 17, or Paragraph 18, the “matters addressed” in this Consent Decree will no longer include those response costs or response actions or natural resource damages that are within the scope of the exercised reservation.

XIII. ACCESS TO PROPERTY

27. If any property where access is needed to implement response activities at the Site is owned or controlled by a Settling Defendant, the Settling Defendant shall:

a. commencing on the Date of Lodging of this Consent Decree, provide the United States, the State, and their representatives and designates, including EPA and WDNR and their contractors, with access at all reasonable times to such property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

- (1) Monitoring, investigation, removal, remedial, or other activities at the Site;
- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations regarding contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing response actions at or near the Site;

(6) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by the Settling Defendant or its agents, consistent with Section XIV (Access to Information)

(7) Assessing the Settling Defendant's compliance with the Consent Decree; and

(8) Determining whether the Site or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Consent Decree;

b. commencing on the Date of Lodging, the Settling Defendants shall not use any such real property in any manner that EPA or WDNR determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Materials or interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed at the Site.

28. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA and any other applicable statute or regulations.

XIV. ACCESS TO INFORMATION

29. Each Settling Defendant shall provide to Plaintiffs, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or

other documents or information related to response activities at the Site. Each Settling Defendant shall also make available to Plaintiffs, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of response activities at the Site.

30. Business Confidential and Privileged Documents.

a. A Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified the Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendant.

b. A Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege in lieu of providing documents, the Settling Defendant shall provide the Plaintiffs with the following: (i) the title of the document, record, or information; (ii) the date of the document, record, or information; (iii) the name and title of the author of the document, record, or information; (iv) the name and title of each addressee and recipient; (v) a description of the contents of the document, record, or information; and (vi) the privilege asserted by the Settling Defendant.

31. No claim of confidentiality or privilege shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XV. RETENTION OF RECORDS

32. The United States acknowledges that each Settling Federal Agency is subject to all applicable Federal record retention laws, regulations, and policies.

33. Until ten years after the Effective Date, each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of response activities at the Site or the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

34. At the conclusion of this document retention period, each Settling Defendant shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States or the State, the Settling Defendant shall deliver any such records or documents to EPA or WDNR. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, they shall provide the Plaintiffs with the following: (i) the title of the document, record, or information; (ii) the date of the document, record, or information; (iii) the name and title of the author of the document, record, or information; (iv) the name and title of each addressee and recipient; (v) a description of the subject of the document, record, or information;

and (vi) the privilege asserted by Settling Defendant. However, no documents, reports, or other information created or generated pursuant to the requirements of this Consent Decree or any other settlement with the Plaintiffs shall be withheld on the grounds that they are privileged.

35. Each Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

XVI. NOTICES AND SUBMISSIONS

36. Whenever, under the terms of this Consent Decree, written notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, the State, and the Settling Defendant, respectively.

As to WDNR:

Bruce Baker
Administrator, Division of Water
Wisconsin Department of Natural Resources

P.O. Box 7921
Madison, WI 53707-7921

101 S. Webster St.
Madison, WI 53703

As to the Settling Defendants:

As to the City of Green Bay:

Ted A. Warpinski
Friebert, Finerty & St. John, S.C.
Two Plaza East - Suite 1250
330 East Kilbourne Avenue
Milwaukee, WI 53202

As to Brown County:

David A. Crass
Michael Best & Friedrich LLP
One South Pinckney Street, Suite 700
Madison, WI 53701-1806

XVII. RETENTION OF JURISDICTION

37. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XVIII. INTEGRATION / APPENDICES

38. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendix is attached and incorporated into this Consent Decree:

“Appendix A” is the map of the Site.

XIX. MODIFICATION

39. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by the pertinent Parties, including both of the Plaintiffs. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

XX. PUBLIC COMMENT

40. The Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States shall file with the Court any written comments received and the United States’ response thereto. The Plaintiffs and the Tribes reserve the right to withdraw or withhold their consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate. The Settling Defendants consent to entry of this Consent Decree without further notice, and the United States reserves the right to oppose an attempt by any person to intervene in this civil action.

XXI. EFFECTIVE DATE

41. The effective date of this Consent Decree shall be the date upon which it is entered by the Court , provided, however, that the Settling Defendants hereby agree that they shall be bound upon the Date of Lodging to comply with obligations of the Settling Defendants specified in this Consent Decree that arise before the date upon which this Consent Decree is entered by the Court. In the event the Plaintiffs withdraw or withhold consent to the Consent Decree before

entry, or the Court declines to enter the Consent Decree, then the preceding requirement to comply with requirements of the Consent Decree upon the Date of Lodging shall terminate.

XXII. SIGNATORIES / SERVICE

42. The undersigned representatives of the Settling Defendants, the United States, the State, and the Tribes each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

43. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

44. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. The Settling Defendants hereby agree to accept service including, but not limited to, service of a summons, in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court. The Parties agree that the Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXIII. FINAL JUDGMENT

45. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State, and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED.

*THE COURT'S APPROVAL AND ENTRY OF THIS CONSENT DECREE
SHALL BE SIGNIFIED BY ENTRY OF A SEPARATE ORDER IN
ACCORDANCE WITH THE COURT'S ELECTRONIC CASE FILING
POLICIES AND PROCEDURES MANUAL*

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE UNITED STATES OF AMERICA

Date: 11/3/10



IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Date: 11/30/10



RANDALL M. STONE, Senior Attorney
JEFFREY A. SPECTOR, Trial Attorney
IVA ZIZA, Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Telephone: 202-514-1308
Facsimile: 202-616-6584
E-Mail: randall.stone@usdoj.gov

Date: 11/30/10



JOSHUA M. LEVIN, Senior Trial Attorney
MATTHEW R. OAKES, Trial Attorney
PERRY M. ROSEN, Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

JAMES L. SANTELLE
United States Attorney

SUSAN M. KNEPEL
Assistant United States Attorney
Office of the United States Attorney
517 E. Wisconsin Avenue, Room 530
Milwaukee, WI 53202

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

Date: 11-1-10



RICHARD C. KARL
Superfund Division Director
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

Date: 10/25/10

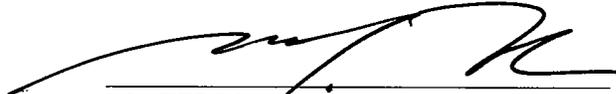


RICHARD MURAWSKI
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE STATE OF WISCONSIN

Date: 10-28-10

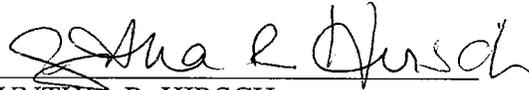


MATTHEW J. FRANK

Secretary

Wisconsin Department of Natural Resources
101 South Webster Street
Madison, WI 53703

Date: 11-8-2010



CYNTHIA R. HIRSCH

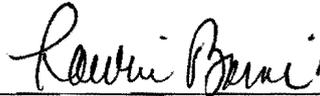
Assistant Attorney General

Wisconsin Department of Justice
123 W. Washington Avenue
Madison, WI 53702

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE
MENOMINEE INDIAN TRIBE OF WISCONSIN

Date: 10/21/2010

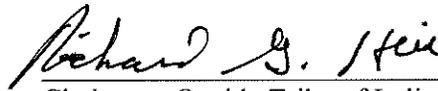


Chairman, Menominee Indian Tribe of Wisconsin
Menominee Tribal Offices
P.O. Box 910
Keshena, WI 54135

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE
ONEIDA TRIBE OF INDIANS OF WISCONSIN

Date: 11/12/10



Chairman, Oneida Tribe of Indians of Wisconsin
P.O. Box 365
Oneida, WI 54155

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR BROWN COUNTY

Date: 10/21/10


Signature

Typed Name: Thomas J. Hinz

Title: County Executive

Address: 305 E. Walnut St.

P.O. Box 23600

Green Bay, WI 54305

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Darlene Marcelle

Title: County Clerk

Address: 305 E. Walnut St.

P.O. Box 23600

Green Bay, WI 54305

THE UNDERSIGNED PARTIES enter into this Consent Decree with Brown County and the City of Green Bay in the matter of *United States and the State of Wisconsin v. NCR Corporation, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE CITY OF GREEN BAY

Date: 10/4/2010


Signature

Typed Name: Allison C. Swanson

Title: City Attorney

Address: 100 N. Jefferson, Room 200

Green Bay, WI 54301

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Ted A. Warpinski, Esq.

Title: Attorney

Address: Friebert, Finerty & St. John, S.C.

Two Plaza East, Suite 1250, 330 E. Kilbourn Ave.

Milwaukee, WI 53202

Appendix A: Map of the Lower Fox River and Green Bay Site

