

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

GEORGE A. WHITING PAPER COMPANY;
GREEN BAY METROPOLITAN SEWERAGE
DISTRICT;
GREEN BAY PACKAGING, INC.;
HEART OF THE VALLEY METROPOLITAN
SEWERAGE DISTRICT;
INTERNATIONAL PAPER CO.;
LAFARGE NORTH AMERICA INC.;
LEICHT TRANSFER & STORAGE CO.;
NEENAH FOUNDRY COMPANY;
THE PROCTER & GAMBLE PAPER PRODUCTS CO.;
UNION PACIFIC RAILROAD COMPANY.; and
WISCONSIN PUBLIC SERVICE CORP.,

Defendants.

Case No. 09-cv-00692-WCG

Hon. William C. Griesbach

CONSENT DECREE

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 from George A. Whiting Paper Company; Green Bay Metropolitan Sewerage District (referred to herein as “GBMSD”); Green Bay Packaging, Inc.; Heart of the Valley Metropolitan Sewerage District; International Paper Co.; Lafarge North America Inc.; Leicht Transfer & Storage Co.; Neenah Foundry Company; The Procter & Gamble Paper Products Co.; Union Pacific Railroad Company; and Wisconsin Public Service Corp. (collectively, the “Settling Defendants”). 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) against the Settling Defendants and the Plaintiffs’ complaint seeks recovery of such damages from the Settling Defendants. This Consent Decree sets forth the terms of a civil settlement among the Plaintiffs, the responsible natural resource trustees, and the Settling Defendants.

B. The United States of America (“United States”) instituted this action and is entering into this Consent Decree on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”) and the Secretaries of the United States Departments of the Interior (“DOI”) and 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 (“NCP”), 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.

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

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

N. In June 2007, the Response Agencies signed and issued a Record of Decision Amendment for Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) at the Site.

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

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

Q. 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; U.S. Paper Mills Corp.; CBC Paper Coating, Inc.; and Georgia-Pacific Consumer Products, LP to implement the remedial action for Operable Units 2, 3, 4, and 5 of the Site, as set forth in the Records of Decision and the Record of Decision Amendment addressing those portions of the Site.

R. 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 George A.

Whiting Paper Company; Green Bay Metropolitan Sewerage District; Green Bay Packaging, Inc.; Heart of the Valley Metropolitan Sewerage District; International Paper Co.; Leicht Transfer & Storage Co.; Neenah Foundry Company; The Procter & Gamble Paper Products Co.; and Wisconsin Public Service Corp., 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.

S. 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 Lafarge North America Inc. and Union Pacific Railroad Company, 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.

T. The Plaintiffs have determined the following:

1. Prompt settlement with each Settling Defendant is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).

2. The payment to be made by the Settling Defendants under this Consent Decree involves only a minor portion of the response costs and damages at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1), based upon the Plaintiffs' estimate that the total Site costs and damages may approach \$1.5 billion, including response costs incurred by the EPA Hazardous Substance Superfund and by other persons at or in connection with the Site; response costs anticipated to be incurred; a premium relating to response costs anticipated to be incurred; and natural resource damages.

3. The amount of hazardous substances contributed to the Site by each Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendant are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A). This is based on Plaintiffs' judgment that: (i) the Settling Defendants other than GBMSD each contributed no more than 100 kg of PCBs to the Site; (ii) GBMSD contributed no more than 500 kg of PCBs to the Site; and (iii) the hazardous substances contributed by each Settling Defendant to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site. Based on the volume and toxicity of the materials contributed by Settling Defendants, as well as relevant equitable considerations, the Plaintiffs have determined that the Settling Defendants other than GBMSD should collectively bear no more than a 0.114% equitable share of the Site costs and damages and that GBMSD should bear no more than a 0.0215% equitable share of the Site costs and damages.

U. 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.

V. The Plaintiffs, 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.

W. In accordance with the NCP, the State was notified of negotiations with potentially responsible parties regarding this potential *de minimis* settlement. The State has been an active participant in such negotiations and is a party to this Consent Decree.

X. Consistent with CERCLA Section 122(j)(1), 42U.S.C. § 9622(j)(1), EPA has notified the Trustees and the State of Michigan, as represented by the Fox River / Green Bay Natural Resource Trustee Council, of negotiations with potentially responsible parties regarding this potential *de minimis* 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.

Y. 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 Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows the Settling Defendants to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to 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 a substantial number of potentially responsible parties from further involvement at the Site; and
 - c. to obtain settlement with the Settling Defendants for their fair share of natural resource damages and response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by other persons, and to provide for full and complete contribution protection for the Settling Defendants with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

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. "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.

e. "DOI" shall mean the United States Department of the Interior and any successor departments, agencies or instrumentalities of the United States.

f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

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

h. "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.

i. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

j. "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.

k. "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.

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

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

n. “Parties” shall mean the United States, the State of Wisconsin, the Tribes, and the Settling Defendants.

o. “Plaintiffs” shall mean the United States and the State of Wisconsin.

p. “Response Agencies” shall mean EPA and WDNR collectively.

q. “Response Costs” shall mean all costs of “response” as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

r. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

s. “Settling Defendants” shall mean George A. Whiting Paper Company; Green Bay Metropolitan Sewerage District; Green Bay Packaging, Inc.; Heart of the Valley Metropolitan Sewerage District; International Paper Co.; Lafarge North America Inc.; Leicht Transfer & Storage Co.; Neenah Foundry Company; The Procter & Gamble Paper Products Co.; Union Pacific Railroad Company; and Wisconsin Public Service Corp.

t. “Settling Defendants’ Related Parties” shall mean the Settling Defendants’ respective predecessors, successors, and parent companies, including those entities set forth in Appendix B.

u. “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.

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

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

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

y. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

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

VI. PAYMENT

5. Within 14 days of the date on which the Court enters an order in this case authorizing payments into the Court Registry Account, the Settling Defendants shall pay \$1,875,000 into the interest-bearing Court Registry Account of the United States District Court for the Eastern District of Wisconsin. Each Settling Defendant shall bear joint and several responsibility for ensuring performance of that payment obligation. 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.

5A. Within 14 days of the date on which the Court enters an order in this case authorizing an additional payment into the Court Registry Account, Settling Defendant GBMSD

shall pay an additional \$154,545.45 into the interest-bearing Court Registry Account of the United States District Court for the Eastern District of Wisconsin (beyond the \$170,454.55 share previously deposited by GBMSD pursuant to Paragraph 5 above). Payment shall be made to the Clerk of the Court by an EFT to the account designated by the Clerk of the Court, in accordance with payment instructions to be provided.

6. 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) \$1,582,954.55 (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, to 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; and (ii) \$446,590.90 (plus the corresponding interest on that amount) shall be deposited in a Site-specific sub-account within the NRDAR Fund, to be managed by DOI for the joint benefit and use of the Trustees to pay for natural resource damage restoration projects jointly selected by the Trustees and/or to be applied toward natural resource damage assessment costs incurred by DOI and the State. 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. The Settling Defendants payment includes an amount 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.

8. At the time of payment, 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 90-11-2-1045/7 to:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
DJ No. 90-11-2-1045/7
P.O. Box 7611
Washington, DC 20044-7611

Director, Superfund Division
U.S. Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Office of the Solicitor
Division of Parks and Wildlife
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Department of the Interior
Natural Resource Damage Assessment and Restoration Program
Attn: Restoration Fund Manager
1849 C Street, NW
Mailstop 4449
Washington, DC 20240

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 NOT TO SUE BY THE PLAINTIFFS AND THE TRIBES

11. Covenants by the United States. 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. With respect to present and future liability, this covenant not to sue shall take effect upon the Effective Date of this Consent Decree as set forth in Section XVI (Effective Date). With respect to each Settling Defendant, individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by the Settling Defendant of all obligations under this Consent Decree; and b) the veracity of the information provided to Plaintiffs by the Settling Defendant relating to the Settling Defendant's involvement with the Site.

12. Covenants by the State. 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 State covenants not to sue or to take administrative action against the Settling Defendants pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, or Wisconsin statutory or common 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 as set forth in Section XVI (Effective Date). With respect to each Settling Defendant, individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by the Settling Defendant of all obligations under this Consent Decree; and b) the veracity of the information provided to Plaintiffs by the Settling Defendant relating to the Settling Defendant's involvement with the Site.

13. Covenants by the Tribes. 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 Tribes covenant not to sue the Settling Defendants 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 as set forth in Section XVI (Effective Date). With respect to each Settling Defendant, individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by the Settling Defendant of all obligations under this Consent Decree; and b) the veracity of the information provided to Plaintiffs by the Settling Defendant relating to the Settling Defendant's involvement with the Site.

14. Other Covered Persons. The covenants not to sue in Paragraph 11 (Covenants by the United States), Paragraph 12 (Covenants by the State), and Paragraph 13 (Covenants by the Tribes) extend only to the Settling Defendants and do not extend to any other person; provided, however, that those covenants not to sue (and the reservations thereto) shall also apply to the

Settling Defendants' Related Parties, but only to the extent that the alleged liability of such entity is based solely on the alleged liability of a Settling Defendant.

X. RESERVATIONS OF RIGHTS BY PLAINTIFFS AND THE TRIBES

15. The United States, the State, and the Tribes reserve, and this Consent Decree is without prejudice to, all rights against the Settling Defendants with respect to all matters not expressly included within Paragraph 11 (Covenants by the United States), Paragraph 12 (Covenants by the State), and Paragraph 13 (Covenants by the Tribes). Notwithstanding any other provision of this Consent Decree, the United States, the State, and the Tribes reserve all rights against each Settling Defendant, individually, with respect to:

- a. liability for failure by such Settling Defendant to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. 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 at or in connection with the Site, after signature of this Consent Decree by such Settling Defendant;
- 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.

16. Additional Reservations.

a. Additional Reservations for PCBs.

(1) Reservation as to Settling Defendants Other Than GBMSD.

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 other than GBMSD in this action or in a new action or to issue an administrative order to any such individual Settling Defendant seeking to compel that Settling Defendant to perform response actions relating to the Site, reimburse the Plaintiffs for additional costs of response, and/or pay additional sums for Natural Resource Damages if information is discovered which indicates that such Settling Defendant, before its signature of this Consent Decree, was responsible for releasing, discharging, or disposing of more than 100 kilograms of PCBs at the Site.

(2) Reservation as to GBMSD. 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 Settling Defendant GBMSD in this action or in a new action or to issue an administrative order to GBMSD seeking to compel that Settling Defendant to perform response actions relating to the Site, reimburse the Plaintiffs for additional costs of response, and/or pay additional

sums for Natural Resource Damages if information is discovered which indicates that such Settling Defendant, before its signature of this Consent Decree, was responsible for releasing, discharging, or disposing of more than 500 kilograms of PCBs at the Site.

b. Additional Reservations for Other Hazardous Substances.

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 individual Settling Defendant seeking to compel that Settling Defendant to perform future response actions relating to the Site, pay future costs of response incurred by Plaintiffs, 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. This reservation shall not be construed to require any Settling Defendant to perform or reimburse costs of the remedial action prescribed by the existing Records of Decision for the Site.

XI. COVENANTS NOT TO SUE BY THE SETTLING DEFENDANTS

17. 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.

Except as provided in Paragraph 19 (Waiver of Claims) and Paragraph 21 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States or the State bring a cause of action or issue an order pursuant to the reservations set forth in Paragraph 15 (c) - (e) or Paragraph 16, but only to the extent that the Settling Defendants' claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

18. 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).

19. 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 PROTECTION

20. Except as provided in Paragraph 19 (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 19 (Waiver of Claims), the Plaintiffs 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.

21. 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 Not to Sue set forth in Section IX.

22. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants and the Settling Defendants' Related Parties are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), 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. With regard to the Settling Defendants' Related Parties, however, "matters addressed" are limited to liabilities based solely on the alleged liability of a Settling Defendant.

XIII. RETENTION OF JURISDICTION

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

XIV. INTEGRATION / APPENDICES

24. 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 appendices are attached and incorporated into this Consent Decree:

"Appendix A" is the map of the Site.

"Appendix B" is the list of Settling Defendants' Related Parties.

XV. PUBLIC COMMENT

25. 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.

XVI. EFFECTIVE DATE

26. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Paragraph 25.

XVII. SIGNATORIES / SERVICE

27. 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.

28. 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.

29. 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.

SO ORDERED.

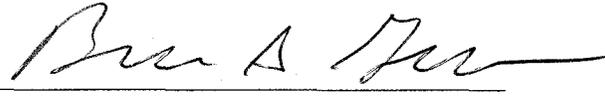
THE COURT'S APPROVAL AND ENTRY OF THIS CONSENT DECREE SHALL BE SIGNIFIED BY ENTRY OF A SEPARATE ORDER IN ACCORDANCE WITH THE COURT'S ELECTRONIC CASE FILING POLICIES AND PROCEDURES MANUAL

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

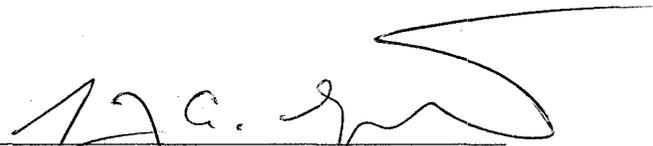
FOR THE UNITED STATES OF AMERICA

Date: October 3, 2009



BRUCE S. GELBER, Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Date: 10/5/09



JEFFREY A. SPECTOR, Trial Attorney
RANDALL M. STONE, Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

MICHELLE L. JACOBS
United States Attorney

MATTHEW V. RICHMOND
Assistant United States Attorney
Eastern District of Wisconsin
U.S. Courthouse and Federal Building - Room 530
517 E. Wisconsin Avenue
Milwaukee, WI 53202

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

Date: 9/9/09


BHARAT MATHUR *for*
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

Date: 9-8-09


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 in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE STATE OF WISCONSIN

Date: September 10, 2009



MATTHEW J. FRANK

Secretary

Wisconsin Department of Natural Resources

101 South Webster Street

Madison, WI 53703

Date: September 24, 2009



CYNTHIA R. HIRSCH

Assistant Attorney General

Wisconsin Department of Justice

123 W. Washington Avenue

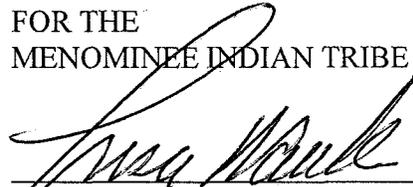
Madison, WI 53702

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

Date:

9-23-09

FOR THE
MENOMINEE INDIAN TRIBE OF WISCONSIN

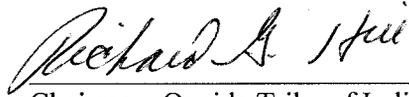


Chairman, Menominee Indian Tribe of Wisconsin
Menominee Tribal Offices
P.O. Box 910
Keshena, WI 54135

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE
ONEIDA TRIBE OF INDIANS OF WISCONSIN

Date: 9-9-09



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

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR GEORGE A. WHITING PAPER COMPANY

Date:

5/11/09

Thomas A. Danz
Signature

Typed Name:

Thomas A. Danz

Title:

President + COO

Address:

P.O. Box 28

Menasha, WI 54952

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

Typed Name: Scott B. Fleming

Title:

Attorney

Address:

Weiss Berzowski Brady LLP

700 N. Water St., Suite 1400

Milwaukee, WI 53202

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR GREEN BAY METROPOLITAN SEWERAGE DISTRICT

Date: 9/4/2009

Thomas W. Sigmund
Signature

Typed Name: Thomas W. Sigmund, P.E.

Title: Executive Director

Address: 2231 N. Quincy Street

P.O. Box 19015

Green Bay, WI 54307-9015

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

Typed Name: _____

Title: _____

Address: _____

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR GREEN BAY PACKAGING, INC.

Date: May 4, 2009


Signature

Typed Name: Scott Wochos

Title: Sr. Vice President & General Counsel

Address: Green Bay Packaging Inc.

P.O. Box 19017

Green Bay, WI 54307-9017

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

Typed Name: William R. West

Title: Attorney

Address: von Briesen & Roper, s.c.

411 E. Wisconsin, Suite 700

Milwaukee, WI 53202-4470

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR HEART OF THE VALLEY METROPOLITAN SEWERAGE DISTRICT

Date: May 1, 2009

Mark D. Surwillo
Signature

Typed Name: Mark D. Surwillo

Title: District Manager

Address: 801 Thilmany Rd

Kaukauna WI 54130

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

Typed Name: Thomas R. Schrimp

Title: Attorney for Heart of the Valley Metropolitan
Sewerage District

Address: Hinshaw & Culbertson LLP

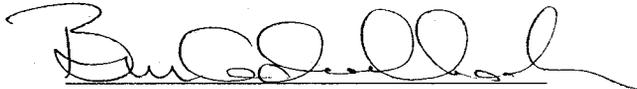
100 East Wisconsin Ave., Suite 2600

Milwaukee, WI 53202

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR INTERNATIONAL PAPER CO.

Date: MAY 28, 2009


Signature

Typed Name: BRIAN CADWALLADER
Title: ASSOCIATE GENERAL COUNSEL
Address: 6400 POPLAR AVE.
MEMPHIS, TN 38197

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

Typed Name: JOHN F. CERMAK, JR.
BAKER + HOSTETLER, LLP
Title: COUNSEL
Address: 12100 WILSHIRE BLVD.
15TH FLOOR
LOS ANGELES, CA 90025-7120

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR LAFARGE NORTH AMERICA INC.

Date: May 19, 2009



Signature

Typed Name: William G. Miller

Title: Vice President & Associate General Counsel

Address: 12950 Worldgate Drive

Suite 500

Herndon, Virginia 20170

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

Typed Name: Peter L. Keeley

Title: General Counsel

Address: 12950 Worldgate Drive

Suite 500

Herndon, Virginia 20170

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR LEICHT TRANSFER & STORAGE CO.

Date: 5/19/09


Signature

Typed Name: Steven R. Evans

Title: President

Address: 1401 State Street

Green Bay, WI 54304

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

Typed Name: Alan Leisgang

Title: Vice President Finance & Accounting

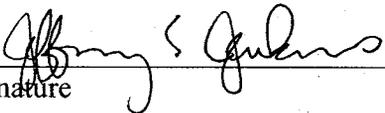
Address: 1401 State Street

Green Bay, WI 54304

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR NEENAH FOUNDRY COMPANY

Date: 05/29/2009


Signature

Typed Name: Jeffery S. Jenkins

Title: Corporate Vice President of Finance

Address: 2121 Brooks Ave

Neenah WI 54956

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

Typed Name: Jeffery S. Jenkins

Title: Corporate Vice President of Finance

Address: 2121 Brooks Ave

Neenah WI 54956

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR THE PROCTER & GAMBLE PAPER PRODUCTS CO.

Date: 5/18/09

Mary Lynn Ferguson-McHugh
Signature

Typed Name: Mary Lynn Ferguson-McHugh

Title: President, Global Family Care

Address: The Procter & Gamble Paper Products Company

6083 Center Hill Avenue

Cincinnati, OH 45224

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

Typed Name: Jane C. McGregor

Title: Associate General Counsel

Address: 299 East Sixth Street 9th floor

Cincinnati, OH 45202

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR UNION PACIFIC RAILROAD COMPANY

Date: 5.20.09


Signature

Typed Name: David P. Young

Title: General Solicitor

Address: 1001 McKinney, Suite 900

Houston, TX 77002

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

Typed Name: Tammy Clidienst

Title: Administrative Assistant

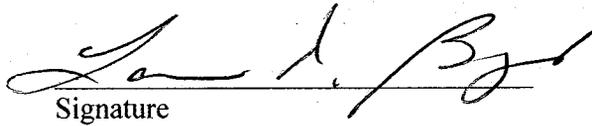
Address: 1001 McKinney, Suite 900

HOUSTON, TX. 77002

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. George A. Whiting Paper Company, et al.*, relating to the Lower Fox River and Green Bay Site:

FOR WISCONSIN PUBLIC SERVICE CORP.

Date: 5/29/09


Signature

Typed Name: Lawrence T. Borgard

Title: President & CEO

Address: 700 N. Adams St.

Green Bay, WI

54301

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

Typed Name: Barth J. Wolf

Title: Vice President - Chief Legal Officer

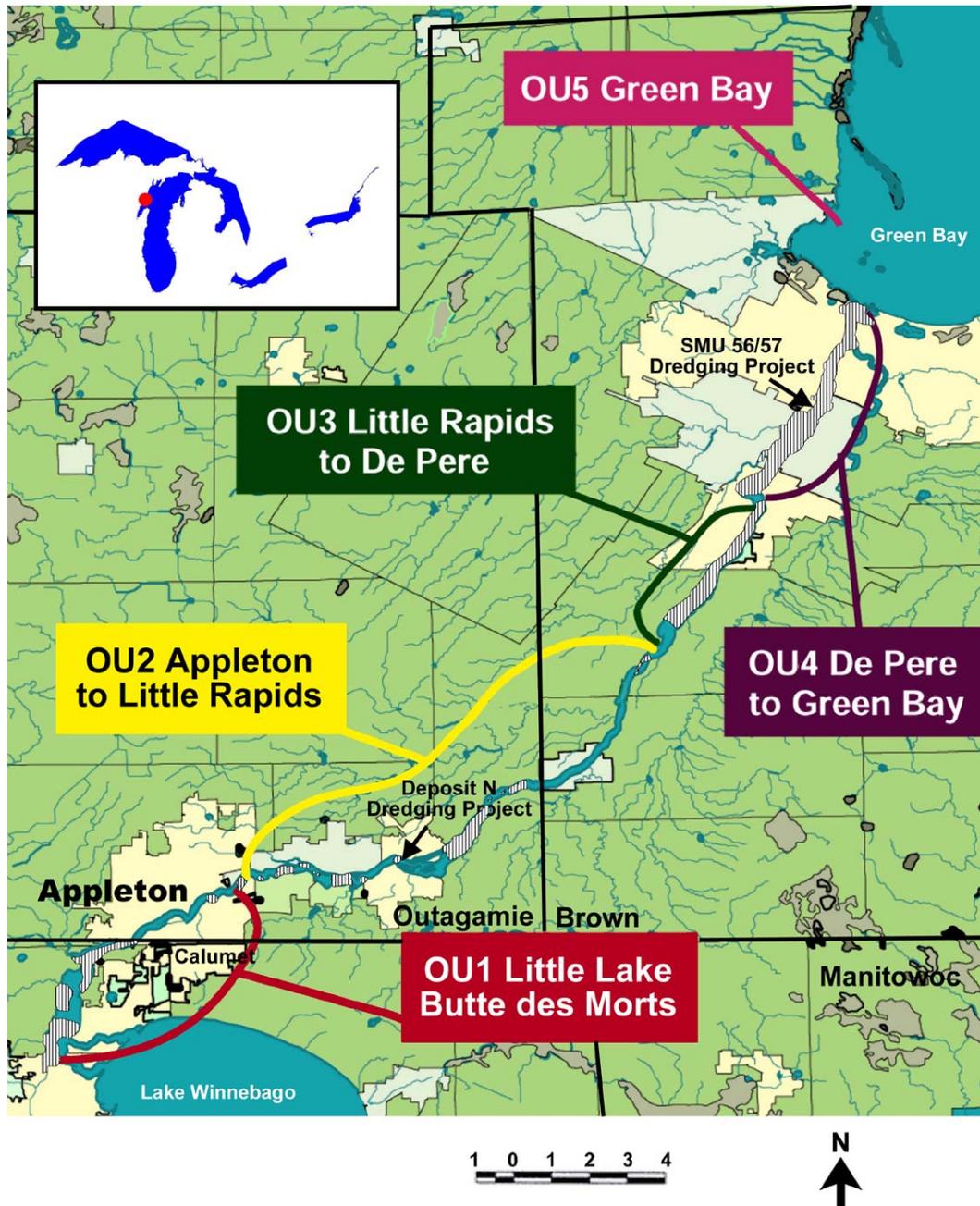
Address: 700 N. Adams St.

Green Bay, WI

54301

Consent Decree Appendix A:

General Depiction of the Lower Fox River and Green Bay Site



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

APPLETON PAPERS, INC. and NCR)	
CORPORATION,)	
)	
Plaintiffs,)	
)	No. 2:08-cv-00016
v.)	
)	
GEORGE A. WHITING PAPER COMPANY,)	CONSOLIDATED WITH CASE NO.
et al.,)	08-C-895
)	
Defendants.)	

**APPENDIX B TO FOX RIVER SUPERFUND SITE DE MINIMIS SETTLEMENT
CONSENT DECREE**

**Fox River Superfund Site De Minimis Settlement List of Settling Defendants' Related
Parties**

Settling Defendant **Green Bay Packaging, Inc.**'s Related Parties: (1) **Green Bay Box Company**; (2) **Green Bay Pulp and Paper Company**; and (3) **M&G Company**

Settling Defendant **International Paper Company**'s Related Parties: (1) **Packaging Dynamics Corporation**; (2) **Thilmany Paper, LLC**; (3) **Philip Morris Industrial Inc.**; (4) **Philip Morris USA Inc.**; (5) **Hammermill Paper Company**; and (6) **Thilmany Pulp and Paper Company**.

Settling Defendant **Leicht Transfer & Storage Co.**'s Related Parties: (1) **RGL Holdings, Inc.** (parent corporation of Leicht Transfer & Storage Co.); and (2) **Leicht Material Handling Co.** (as non-surviving entity merged into Leicht Transfer & Storage Co.)

Settling Defendant **Neenah Foundry Company**'s Related Parties: (1) **NFC Castings, Inc.**; and (2) **Neenah Enterprises, Inc.**

Settling Defendant **Union Pacific Railroad Company**'s Related Party: (1) **Union Pacific Corporation**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

Case No. 09-C-692

GEORGE A. WHITING PAPER COMPANY, et al.,

Defendants.

**DECISION AND ORDER
APPROVING CONSENT DECREE**

Plaintiffs United States of America and the State of Wisconsin have brought this action against the Defendants pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606 and 9607, as amended. Currently pending before the Court is Plaintiffs' Motion to Enter Consent Decree With Eleven *De Minimis* Party Defendants. Having considered the decree itself, as well as the arguments in favor of it and those opposed, I conclude the decree is a fair settlement of the liability of these Defendants.

The United States published notice of the lodging of the proposed Consent Decree in the Federal Register on July 22, 2009, which began a thirty-day public comment period. *See* 74 Fed. Reg. 36254 (July 22, 2009). The United States received comments from Appleton Papers Inc. ("API"), as well as the City of Green Bay and Brown County. In response to those comments, the Plaintiffs revised the proposed Consent Decree to increase the payment to be made by the Green Bay Metropolitan Sewerage District ("GBMSD"), which increased the collective payment by the

settling defendants to \$2,029,545.45. The revised Consent Decree was lodged with this Court on October 6, 2009.

The settling defendants include: George A. Whiting Paper Company; Green Bay Metropolitan Sewerage District; Green Bay Packaging, Inc.; Heart of the Valley Metropolitan Sewerage District; International Paper Company; Lafarge North America Inc.; Leicht Transfer & Storage Company; Neenah Foundry Company; The Proctor & Gamble Paper Products Company; Union Pacific Railroad Company; and Wisconsin Public Service Corporation. As noted, under the proposed consent decree, the collective payment by the settling defendants is to be \$2,029,545.45. This figure was reached after arms' length negotiations between the United States and these Defendants and was raised in response to public comment. It is based on two key assumptions. First, the figure assumes that the total cleanup cost and damages could total some \$1.5 billion. Second, it assumes that the eleven *de minimis* Defendants should bear no more than 0.1355%, collectively, of the total financial responsibility. Within that group, Defendant GBMSD has been assessed a higher percentage of allocation than the other Defendants.

The standard of review is deferential. "In the first place, it is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). Moreover, "[t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance." *Id.* In other words, it is rarely fruitful for a district court to second-guess the agreement reached between adverse

defendants and the plaintiff when the plaintiffs are the very entity charged with enforcing the nation's environmental laws.

While my review is deferential, it is of course not merely *pro forma*. In assessing the proposed settlement, I first note that no one has challenged the assumption that the total cleanup and damage bill could total some \$1.5 billion, and indeed that seems to be (at this stage, at least) a fair outside estimate and includes a significant premium for uncertainties. One of the principal contentions pertains to the government's assumption that none of the *de minimis* Defendants discharged more than 100 kg of PCBs into the Fox River (out of an estimated 230,000 kg). Appleton Papers Inc. ("API") argued that Defendant GBMSD had discharged more than 300 kg of PCBs, and the government and the Defendants adjusted their totals accordingly to account for the possibility that GBMSD had in fact discharged more than the other settling Defendants. All of the contributions reflect an uncertainty premium to account for the simple fact that we do not know exactly how many PCBs each actually discharged so many decades ago.

These are fair and reasonable estimates, and given the exceedingly minor contribution these Defendants made to the overall PCB problem, the settlement hammered out by the parties is also quite reasonable. For the reasons given more fully in today's Decision and Order granting summary judgment to the other Defendants in companion action No. 08-C-16, the Defendants who processed wastewater and recycled NCR paper are far less culpable for the PCB problem than NCR Corporation and API, who created carbonless copy paper and the PCB-laden emulsion. This is especially true with respect to the *de minimis* Defendants, some of whose discharges were the result of random accidental spills or the treatment of wastewater from other entities. Their involvement is extremely attenuated when compared to the involvement of the parties who created and sold NCR paper and sold their waste product for recycling. Accordingly, I find the total payment, as well as

the allocation of that payment, to be a reasonable and equitable approach to settling the liability of these Defendants.

Having concluded that the total cost and total discharge estimates are reasonable, I must also address another of API's and NCR's objections, which is that a small but significant amount of PCBs released into the river were not Aroclor 1242, the trade name of the particular PCB product, made by the Monsanto Corporation, that was used in NCR paper emulsion. API and NCR believe that other companies must have discharged these PCBs into the river, and they should be held to account. API and NCR assert that their research shows that anywhere between 13 and 26% of the PCBs found in river sediment samples are PCBs from Aroclors other than Aroclor 1242. (Other kinds of Aroclor are Aroclor 1254 or 1260, for example. All contain PCBs.) They assert that the government – both the United States EPA as well as the Wisconsin DNR – developed a “truncated” approach to analyzing PCBs in the Fox River that focused primarily on Aroclor 1242 while downplaying other kinds of PCBs present in the river. This approach led to undercounting the presence of these other PCBs, and because some of these Aroclors are even more toxic than Aroclor 1242, the Defendants who released them are essentially getting off too easy under the proposed consent decree.

The United States and the State of Wisconsin reject this objection strenuously. Describing the objection as being based on “pseudo-scientific assumptions,” the Plaintiffs argue that the PCBs found in river sediment samples are not so easily identified, or “fingerprinted.” Moreover, they note, even if they could be reliably identified as different kinds of Aroclors, there is no basis for distinguishing between the different kinds of PCBs because they are all toxic. The EPA and DNR note that the Aroclor products were complex substances comprising a variety of congeners (related chemicals), and that once exposed to the environment – whether at the bottom of a river or in the

fatty tissue of a fish – they become very difficult to identify with any specificity. As such, government agencies have warned against trying to place too much weight on identification of “weathered” samples, and thus instead of trying to identify specific kinds of Aroclors they focus on the total PCBs. (And even if NCR’s and API’s approach were used, the Plaintiffs note that a peer-reviewed study conducted in 2002 showed that 95% of the PCBs in the river came from Aroclor 1242. (Spector Decl., Ex. 9.))

I am satisfied that the objections to the proposed settlement do not overcome the settlement’s presumption of validity and the deference owed to the reasoned decisions of sophisticated parties who are represented by counsel. A similar objection was rejected by the district court in *Kalamazoo River Group v. Rockwell International*:

Plaintiff nevertheless relies on evidence that more highly chlorinated PCB mixtures (those with higher molecular weights) are more carcinogenic than lower chlorinated PCB mixtures. Moreover, higher molecular weight PCBs bioaccumulate in fish in quantitatively higher levels than lower molecular weight PCBs. Given exposure to equal amounts of Aroclors 1242 and 1254, fish bioaccumulate three to four times more of Aroclor 1254 than Aroclor 1242. PCB levels in fish are one of the driving forces in determining the need for environmental responses in the Kalamazoo River and other aquatic PCB sites. This is because PCBs may be introduced into the food chain when fish are consumed by animals, and, potentially, by humans. Plaintiff contends that because Aroclor 1254 is more toxic than 1242, a smaller contribution of Aroclor 1254 should be weighted more heavily than an equal contribution of Aroclor 1242.

On the other hand, there is also evidence in the record that Aroclor 1242 contains a particularly toxic congener, known as Congener 77. That congener makes up a greater percentage of 1242 than it does of 1254 (in which it is also found, but in smaller amounts).

The MDEQ [Michigan Department of Environmental Quality] establishes regulatory criteria and fish advisories based upon the presence of total PCBs. It does not distinguish between Aroclors, such as Aroclor 1242, Aroclor 1254, and Aroclor 1260. The regulatory bodies have apparently decided that because toxic congeners are found in each of the Aroclors, there was no basis for distinguishing among the Aroclors. No evidence was presented on the relative toxicity between the higher weight 1254 and the concerns associated with Congener 77 which are

more prevalent in Aroclor 1242, leaving this Court without the ability to weigh these two competing toxicity factors. Accordingly, this Court will follow the regulatory bodies, and will treat all PCBs on an equal basis. The Court will not weigh any particular Aroclors higher than others.

107 F. Supp.2d 817, 836 (W. D. Mich. 2000), aff'd 274 F.3d 1043, 1051 (6th Cir. 2001) (emphasis added).

That court noted that it was debatable whether different kinds of Aroclors like 1254 were more toxic than 1242, and in fact there was some evidence that 1242 was actually more toxic. (The Plaintiffs' reply brief ably sets forth the scientific conclusion that toxicity is not easily measured.) Regardless of that scientific debate, however, the more important takeaway is that this is the governments' case, and the governments are entitled, absent extraordinary circumstances, to determine how they want to measure the toxins they regulate. The Fox River cleanup is being undertaken pursuant to government orders, and the executive branch agencies – the Wisconsin DNR and the United States EPA – are acting in their role as law enforcement agencies. If these agencies want to focus on a particular environmental toxin or use a particular methodology for measuring that toxin, they may generally do so without interference from third parties who might prefer some alternative method. After all, this is the governments' settlement with other potentially responsible parties. Though it clearly has the potential to impact NCR and API, their own parochial objections are not enough for this Court to throw out the reasoned settlement approach taken by the governments and the settling defendants.

Finally, NCR and API suggest that a settlement would be premature given that we do not yet know the exact makeup of the PCBs in the Fox River. To accept the notion that a settlement is “premature” would defeat the entire purpose of settlement and ignore years of precedent encouraging *early* settlements – even when all of the facts are not yet known. API and NCR would

have the parties be subjected to a multi-year, multi-million-dollar undertaking to determine their liability with more exactitude, but the cost of such an effort would almost certainly exceed the parties' liability – even if API and NCR were proven *correct*. The policy encouraging early settlements would be upended if parties could use the threat of costly, protracted litigation as a bludgeon to extract more favorable terms.

The settling defendants have maintained throughout this litigation that the evidence linking them to the Rose Site is extremely tenuous. Consequently, if the decree is overturned, the parties will no doubt engage in a protracted legal battle over liability and the appropriate remedy for the Site. In enacting the 1986 amendments to CERCLA, however, Congress sought to “expedite effective remedial actions and minimize litigation.” 42 U.S.C. § 9622(a).

United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991).

In sum, none of the settling defendants had any more than a fleeting or incidental relationship with the release of toxic PCBs into the Fox River. The objections to settlement now raised by the parties who created much of the PCB problem are not sufficient to overcome the strong deference that is due to the independent judgments of the parties and the governments involved.

Accordingly, the motion to approve the consent decree is **GRANTED**. The consent decree is hereby approved and entered. The Clerk of the Court shall immediately disburse \$2,029,545.45 (and all accrued interest on that deposit) to the Plaintiffs as provided by Consent Decree Paragraph 6. More specifically, pursuant to Consent Decree Paragraph 6 and this Order for withdrawal:

(i) \$1,582,954.55 (plus corresponding interest on that amount) shall be paid to the United States to be deposited in the Lower Fox River and Green Bay Superfund Site Special Account within the United States Environmental Protection Agency's Hazardous Substance Superfund, to 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's Hazardous Substance Superfund; and

(ii) \$446,590.90 (plus corresponding interest on that amount) shall be paid to the United States to be deposited in a Site-specific sub-account within the United States Department of the Interior's Natural Resource Damage Assessment and Restoration Fund, to be managed by DOI for the joint benefit and use of the Fox River/Green Bay Natural Resource Trustees to pay for the natural resource damage restoration projects jointly selected by the Trustees and/or to be applied toward natural resource damage assessment costs incurred by DOI and the State.

Further, the disbursements to the United States shall be made in accordance with payment instructions to be provided to the Clerk of the Court by the Financial Litigation Unit of the Office of the United States Attorney for the Eastern District of Wisconsin. Pursuant to 28 U.S.C. § 1914(b) and the Judicial Conference Schedule of Fees, no fees shall be charged for services rendered on behalf of the United States in conjunction with this deposit of funds into the Court Registry Account.

SO ORDERED this 16th day of December, 2009.

s/ William C. Griesbach
William C. Griesbach
United States District Judge