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Third Assessment Plan Addendum: Lower Fox River/Green Bay NRDA

1. Introduction and Objectives

The Department of the Interior (Department) acting through the U.S. Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce, the Menominee Indian Tribe of Wisconsin (MITW), and the Oneida Tribe of Indians of Wisconsin (OTIW) (collectively, the federal/tribal partners) are conducting an assessment of damages based on natural resource injuries that have resulted from releases of hazardous substances to the Lower Fox River, Green Bay, and Lake Michigan and other areas containing natural resources potentially injured by those hazardous substance releases (collectively known as the assessment area). Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [42 U.S.C. § 9607], Section 311 of the Federal Water Pollution Control Act (CWA) [33 U.S.C. § 1321], and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) [40 C.F.R. Part 300] provide authority to the federal/tribal partners to seek such damages.

Toward that end, in August 1996, the federal/tribal partners issued an Assessment Plan for conducting a natural resource damage assessment for the Lower Fox River/Green Bay environment (federal/tribal NRDA), as noticed in the Federal Register (61 Fed. Reg. 43,558), and Assessment Plan Addenda dated October 1997 and September 1998 (62 Fed. Reg. 67,888 and 63 Fed. Reg. 50,254, respectively). The August 1996 Assessment Plan addressed the federal/tribal partners' overall assessment approach and included:

- background information on the natural resources and the assessment area
- Trustee authority
- coordination and previous actions of Trustees
- decision to perform Type B assessment
- confirmation of exposure
- recovery period
- injury assessment approaches
- damage determination approaches
- quality assurance project plan

The October 1997 Assessment Plan Addendum described several planned assessment activities in addition to those in the August 1996 Assessment Plan. The September 1998 Assessment Plan Addendum set forth the initial Restoration and Compensation Determination Plan (RCDP). The Assessment Plan and Assessment Plan Addenda have been prepared in accordance with NRDA regulations promulgated by the Department at 43 C.F.R. Part 11 (NRDA regulations).

The State of Wisconsin, Department of Natural Resources (State) has also commenced an NRDA to assess damages to state resources on and associated with the Fox River. The state NRDA is being performed under

CERCLA and the NRDA regulations and should be complete within the next several months. (The federal/tribal partners and the State are referred to collectively as the governmental partners).

Each of the governmental partners hereto asserts that it is a trustee of the natural resources associated with the Fox River/Green Bay environment and has the authority to conduct the activities described in this Addendum which has been prepared in accordance with the NRDA regulations.

The governmental partners share the mutual goals of protecting and restoring the natural resources of the Lower Fox River and Green Bay environment that have been injured by PCB releases. The governmental partners acknowledge that wildlife, fisheries and other natural resources do not respect political boundaries. They therefore share a responsibility as stewards to manage the natural resources in the Fox River, Green Bay and Great Lakes in general, and to ensure the return to baseline of the ecologic and public services provided by the injured natural resources. The recognition of their common interests and responsibilities, as well as the complexity posed by this difficult task, has led them to collaborate among themselves and with others in many areas of fish and wildlife management. It is in this interest of achieving the shared goal of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources in the Lower Fox River/Green Bay environment that the governmental partners wish to work together to implement the provisions set forth in this Addendum.

The objectives of this Addendum are to initiate a process through which the governmental partners will attempt to arrive at a single coordinated RCDP that integrates the ongoing state and federal/tribal NRDA's and to notify the public regarding this process. Many of the components of the ongoing state and federal/tribal NRDA's have been completed, and the remaining components are nearing completion. Therefore, the NRDA work, as well as the ongoing efforts of the U.S. Environmental Protection Agency (EPA) and the State to determine the appropriate remedy in response to the releases of hazardous substances to the Fox River/Green Bay environment, have reached a point that make this an opportune time for the governmental partners to collaborate in the development of a joint RCDP that may lead to a single and unified restoration plan. At the time this objective is achieved, the governmental partners will consider entering into a Memorandum of Agreement (MOA), establishing a Trustee Council to oversee jointly the recovery of damages and the implementation of a single restoration plan and designating the State as the Lead Authorized Official (LAO) pursuant to 43 C.F.R. Section 11.32(a) (1)(ii).

The governmental partners anticipate that collaborating closely will promote cost-effective and efficient decision-making. A joint RCDP leading to a single, unified restoration plan is likely to better incorporate shared party expertise and more effectively address and reflect public input. The joint effort to arrive at a single plan should also help the governmental partners and EPA to more effectively promote a "global" settlement for the remedy and restoration, and maximize the extent to which remediation and restoration can be accomplished in a simultaneous and complementary manner. The governmental partners anticipate that this should reduce the time to the completion of restoration, as well as the overall cost. Finally, a joint RCDP leading to a single and unified restoration plan may enable the governmental partners to better work with potentially responsible parties and all stakeholders to achieve both comprehensive cleanup and restoration.

This Addendum is implemented in accordance with the terms and the spirit of the 1997 Memorandum Of Agreement Regarding the Restoration of the Lower Fox River, Green Bay and Lake Michigan Environment (Governmental Partners MOA) and it is intended to promote the objectives set forth therein. The governmental partners agree to supply and commit the necessary personnel and resources to implement this Addendum. The governmental partners understand that each party may continue their respective NRDA efforts while implementing this Addendum.

2. Natural Resource Damage Assessment Coordination with Cleanup Process

The governmental partners acknowledge that implementing a protective remedy is of primary importance for protection and restoration of natural resources. They will therefore continue their coordination in the remedial investigation feasibility study (RI/FS) process, as described in the September 1998 initial RCDP. The governmental partners further acknowledge that, based on current information, remediation alone will not achieve restoration of injured natural resources and the services provided by those resources. Therefore, the amount of restoration required will be dependent, to a degree, on the remedy selected. While the governmental partners expect to continue the process of screening potential restoration alternatives, the restoration alternatives will be re-evaluated once EPA selects the remedy. Because the remedy will affect the extent and duration of continuing injuries to natural resources, the governmental partners will need to re-evaluate which restoration alternative will best restore the injured natural resources to baseline. In general, a less protective remedy results in greater residual injury to natural resources and a consequent need for more extensive restoration to return the resources to their pre-release condition as well as greater compensation to make the public whole for the additional services it has lost.

3. Joint Evaluation Process To Develop a Restoration and Compensation Determination Plan

In accordance with the joint evaluation process set forth below, the governmental partners will attempt to incorporate the separate state and federal/tribal injury and damage assessments into a single, unified RCDP. The RCDP will describe the proposed restoration alternative, as well as the methodologies to estimate the costs of that alternative, and the methodologies used to determine compensable value damages. The RCDP will rely upon the results of the injury assessment and damage determination studies as input.

Generally, the NRDA regulations indicate that an RCDP shall be prepared that lists a reasonable number of alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources; selects the alternative; gives the rationale for selecting that alternative; and identifies methodologies to be used to determine the cost of the selected alternative and the compensable value of services lost to the public [43 C.F.R. § 11.81 (a)(1)]. The governmental partners will attempt to prepare a final, joint RCDP that evaluates the restoration alternatives and selects one. Based on that final RCDP, the governmental partners will proceed to calculate the costs of implementing the selected alternative and will calculate compensable values. These elements (together with the governmental partners' assessment costs) will comprise the claim for natural resource damages. Following recovery of damages, the

governmental partners will attempt to prepare a final restoration plan that describes in detail the use of the recovered damages.

In accordance with the NRDA regulations, the RCDP is dependent on the results of injury assessment and damage determination studies conducted by natural resource trustees. For example, the type and magnitude of restoration action(s) selected are in part dependent on the type and magnitude of injuries to natural resources that have occurred. Similarly, the compensable value of resource related opportunities lost to the public is dependent on the results of studies conducted by natural resource trustees to determine the value the public places on the services it has lost. The process by which the governmental partners will analyze the separate assessment components and consider a joint RCDP for the Lower Fox River and Green Bay environment is as follows:

1) Components that have been completed and for which reports have been released to the public at the time of this Addendum may be incorporated into the joint RCDP. The governmental partners will conduct a review of the completed components with the intent of attempting to carry those components forward into the joint RCDP. The NRDA components that are completed include the following:

- a. Lower Fox River/Green Bay NRDA, Initial Restoration and Compensation Determination Plan (September 14, 1998).
- b. Fish Consumption Advisories in the Lower Fox River/Green Bay Assessment Area (November 24, 1998).
- c. Association Between PCBs, Liver Lesions, and Biomarker Responses in Adult Walleye (*Stizostedion vitreum vitreum*) Collected From Green Bay, Wisconsin (April 13, 1999).
- d. Injuries to Avian Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment (May 7, 1999).
- e. PCB Pathway Determination for the Lower Fox River/Green Bay Natural Resource Damage Assessment (August 30, 1999).
- f. Recreational Fishing Damages from Fish Consumption Advisories in the Waters of Green Bay (November 1, 1999).
- g. Injuries to Surface Water Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment (November 8, 1999).
- h. Injuries to Fishery Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment (November 8, 1999).

2) For assessment work that is ongoing and the conclusions of which have not yet been released to the public, the governmental partners will conduct a joint review of each other's work with the intent of identifying components that may be carried forward to the RCDP. Some components of the ongoing assessment work overlap with the work already conducted or being conducted by the other governmental partners. In these instances, the governmental partners will attempt to avoid duplication of effort and will seek to minimize conflicts with those components of the assessment already completed. For any assessment components not being duplicated by other governmental partners (eg., injury to mink being assessed solely by the State), those components may be carried forward directly to the RCDP, following review by the other governmental partners and upon agreement on the component's use in the RCDP.

3) At the conclusion of the review process, the governmental partners will re-evaluate whether the process to arrive at a single joint RCDP is possible and if not, how adjustments to the process could be made to achieve this goal. If the governmental partners determine that attempts to arrive at a single joint RCDP are not likely to be fruitful, they may opt to withdraw from the process upon written notification to the other governmental partners.

4) If, at the conclusion of the review process, the governmental partners have agreed upon all of the existing and ongoing assessment components that could be integrated into a single joint RCDP, they will attempt to finalize the RCDP in accordance with an agreed upon schedule and will attempt to formulate an MOA to establish a process to conclude, implement and oversee a final restoration plan.

4. Additional Provisions

The governmental partners acknowledge that before the NRDA materials contemplated herein are ready for release, there is a continuing need for confidentiality among the governmental partners and therefore, the provisions of the Governmental Partners MOA (Section VIII) shall govern their work in carrying out this Addendum and the process described above. Furthermore, the governmental partners recognize that it is desirable to keep the public informed and that public involvement will aid in the development of an appropriate and successful RCDP that will lead to an effective restoration plan. Therefore, consistent with the governmental partners' confidentiality obligations stated above, the governmental partners contemplate developing a joint schedule for making the work associated with this Addendum available to the public in accordance with the NRDA regulations at 43 C.F.R. Part 11. Finally, while the governmental partners hope to achieve a single and unified restoration plan, this process is not intended to waive, surrender, cede, or recognize any of the governmental partners' respective or shared jurisdiction or trusteeship over natural resources, or the rights of any of the governmental partners under federal, state, or tribal law, or under any other agreements they may have with respect to their respective NRDA's and the Lower Fox River/Green Bay environment, nor do the governmental partners waive whatever rights they have to assert claims with respect to their separate NRDA's.

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