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 CORPORATION, et al.,

Defendants.

DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT ON RECOVERY OF RESPONSE COSTS FROM P. H. GLATFELTER CO.

In what remains of this enforcement action under Section 107(a)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(4), the Plaintiffs seek recovery from defendant P. H. Glatfelter Company of more than $33 million in unreimbursed costs (including statutory prejudgment interest) incurred by the Environmental Protection Agency (EPA) in remediating the PCB contamination of the lower Fox River (the Site) through June 30, 2015. Glatfelter, together with other defendants, including NCR Corporation and Georgia Pacific, were previously found jointly and severally liable for the $1.3 billion clean-up that has continued for close to twenty years. *See United States v. P. H. Glatfelter Co.*, 768 F.3d 662 (7th Cir. 2014), and ECF No. 1033. A trial in this action on the amounts that remained owing for the clean-up and on the apportionment of liability among the remaining, non-settling defendants, Appvion, and Georgia Pacific in the related contribution action, *NCR v. Whiting et al*, No. 08-C-0016, was scheduled to commence on May 8, 2017. ECF No. 1152. The trial was removed from

the calendar and all proceedings stayed on January 20, 2017, however, after the Plaintiffs filed a notice of settlement and a proposed consent decree they had entered into with NCR and Appvion, the successor company to Appleton Papers, Inc., which was seeking reimbursement from the other defendants for clean-up costs it had allegedly paid as a volunteer. ECF Nos. 1169, 1183.

Following the required public comment period and further consultation with the parties, the Plaintiffs filed their joint motion for court approval of a revised consent decree on March 29, 2017. Over Glatfelter's objection, the court approved the revised consent decree, which resolved most of the issues that remained for trial, in a decision and order entered on August 23, 2017. That decision is currently on appeal. What remains before the court are the cross motions for summary judgment of the United States and Glatfelter on the United States' claim for unreimbursed past response costs (through September 30, 2015) associated with the Site as a whole or response work in Operable Units 2 through 5 at the Site. Both the United States and the State of Wisconsin also seek a declaration that Glatfelter is liable for any future related response costs. This decision will address those motions. It will also address Glatfelter's motion for reconsideration of the court's January 3, 2017 order granting the government's motion in limine precluding Glatfelter from offering evidence at trial intended to show that the amount of money that was received by the Plaintiffs in previous settlements and allocated to the Natural Resource Damage Assessment and Restoration (NRDAR) fund substantially exceeds the actual damages to natural resources caused by the PCB contamination and the costs of its assessment. ECF No. 1171.

A. Statutory Framework

Under Section 107(a)(4)(A) of CERCLA, responsible parties must pay "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national

contingency plan. 42 U.S.C. § 9607(a)(4)(A). The National Contingency Plan (NCP), promulgated as a regulation pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, prescribes requirements for removal and remedial actions. Consistent with the broad language of the statute and its remedial purpose, "all costs" has been held to include the direct costs of actual clean-up, as well as a broad range of costs, such as investigative costs and enforcement costs. The term has also been held to include as indirect costs administrative and overhead costs incurred in managing the greater Superfund program. *United States v. W. R. Grace & Co.*, 429 F.3d 1224, 1250 (9th Cir. 2005); *United States v. E. I. DuPont De Nemours and Co., Inc.*, 432 F.3d 161, 178 (3d Cir. 2005); *United States v. R. W. Meyer, Inc.*, 889 F.2d 1497, 1499–1508 (6th Cir. 1989). In addition, the statute expressly allows for the recovery of interest. 42 U.S.C. § 9607(a)(4). Once recovered, such funds are deposited with the United States Treasury to replenish the Hazardous Substance Superfund, which is used to finance CERCLA cleanup efforts across the nation. *See* 42 U.S.C. §§ 9601(11), 9604; 26 U.S.C. § 9507; *see also United States v. Bestfoods*, 524 U.S. 51, 55 (1998).

Under Section 107(a)(4)(C), "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release" of hazardous substances are also recoverable from responsible parties. 42 U.S.C. § 9607(a)(4)(C). Liability for natural resource damage (NRD) goes to the United States Government and the State in which the damage occurs. Liability for NRD also extends to any Indian tribe where the damage is to natural resources "belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe, if such resources are subject to a trust restriction on alienation." 42 U.S.C. § 9607(f)(1). Funds recovered for NRD are held in trust by the United States Department of the Interior (DOI)

"for use only to restore, replace, or acquire the equivalent of such natural resources." *Id.* Any determination or assessment of damages to natural resources made in accordance with the applicable regulations has "the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33." 42 U.S.C. § 9607(f)(2)(C).

In cases such as this where multiple parties are responsible for the discharge of hazardous substances and the resultant pollution, the general rule is that each party responsible for the discharge is jointly and severally liable for the entirety of the clean-up and damages resulting therefrom, unless that party can establish a reasonable basis for apportionment. *See Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) ("Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists."). Even where joint and several liability obtains, a party that pays more than its fair share can seek contribution from any other party that is liable or might be liable. Finally, and key to the dispute between the parties here, is Section 113(f)(2), which governs settlement. That Section states:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. *Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.*

42 U.S.C. § 9613(f)(2) (italics added).

B. Previous Settlements, Allocation of Payments and Remaining Amounts Due

Over the past two decades, the Plaintiffs have resolved the liability of dozens of parties alleged to have contributed to the PCB contamination of the Site through a number of judicial

consent decrees and administrative orders. Of the hundreds of millions of dollars expended in the cleanup or recovered by the Plaintiffs, the United States claims that roughly $33 million remains of its own costs incurred for the cleanup of the non-OU1 portion of the Site that has not been reimbursed. This amount represents direct and indirect costs incurred by the EPA, together with pre-judgment interest through September 30, 2015. The specific amounts are set forth in an Itemized Cost Summary, which contains a tabular breakdown of the various costs under the headings EPA Payroll and Travel Costs, Contractor Costs, Miscellaneous Costs, Inter-Agency Agreement Costs, Superfund Cooperative Agreement Costs, EPA Indirect Costs, and Prejudgment Interest. ECF Nos. 1132 ¶¶ 5, 7; 1133 at 10. It is this amount that the United States seeks to recover from Glatfelter, the last non-settling defendant.

Glatfelter does not dispute that the EPA incurred the vast majority of these costs in its response to the PCB contamination of the Site. In fact, it appears Glatfelter has no objection to well over $30 million of the total unreimbursed response costs the government claims EPA incurred. The government contends that NCR's objection to an additional $2 million, which Glatfelter has joined, can be readily resolved in favor of the government, leaving the government's right to recover roughly $32 million in unreimbursed response cost clear as a matter of law. With Glatfelter's joint and several liability already established, the government contends that it is entitled to summary judgment for at least this amount, with the remaining portion of its claim to be determined at trial unless the parties are able to reach agreement on the relatively small amount still in dispute.

If that was the end of the matter, the resolution would be clear. Unfortunately, it is not. Glatfelter points out that the Plaintiffs have allocated more than $100 million dollars of the settlement proceeds to the NRDAR Fund maintained by the United States Department of the Interior

for NRD caused by the release of PCBs to the Site. Glatfelter contends that this amount vastly exceeds the actual NRD. In support of this contention, Glatfelter notes that over $60 million of the funds transferred to the NRDAR Fund have not yet been applied to any response costs or NRD. Those funds, Glatfelter contends, "remain unspent in the NRDAR Fund for various as-yet-undetermined future NRD projects at the Fox River site." ECF No. 1157 at 2. Glatfelter has proffered evidence in the form of the opinion of its experts that the NRD injury suffered at the Fox River site already has been more than adequately compensated by the over $40 million spent to date. ECF No. 1106-2. Thus, Glatfelter contends, the more than $60 million remaining in the NRDAR Fund constitutes a windfall. More importantly, Glatfelter contends that by allocating such a large portion of the settlement proceeds to the NRDAR Fund, the Plaintiffs have deprived the non-settling defendants of the benefit of the reduction in liability to which they are statutorily entitled under Section 113(f)(2). Once the full amount of the money already paid in settlement of the claims is properly allocated, Glatfelter contends, the remaining unreimbursed costs the United States is seeking is reduced to zero.

The Plaintiffs dispute Glatfelter's claim that the amount of the settlements allocated to the NRDAR Fund for the Site exceed the actual NRDs. In fact, the Plaintiffs argue that notwithstanding their decision to withdraw their NRD claim after the last series of settlements before the most recent consent decree with NCR and Appvion, the NRDAR Fund trustees' formal damage assessment is for far more than the amount of the settlements allocated to the Fund. Plaintiffs note that the DOI-commissioned study of past and future recreational fishing damages alone were estimated in 1998 dollars at $123 million. ECF No. 1155 at 8. Thus, the Plaintiffs contend, a factual dispute precludes

entry of summary judgment in Glatfelter's favor even if its statement of the law is correct. The Plaintiffs' primary argument, however, is that Glatfelter's statement of the law is wrong.

The difficulty with Glatfelter's position, at least from the perspective of the government, is that the additional $60 million that Glatfelter claims should be used to reduce its liability for the government's remaining unreimbursed response costs is not available for that purpose. Pursuant to a series of consent decrees, that money has been allocated to NRD and transferred to the NRDAR Fund and cannot be used to pay for response costs. As Glatfelter well knows, the money so allocated is held in a separate account under the control of the federal, state and tribal co-trustees and cannot be used to pay for EPA cleanup expenses. Sums recovered by the federal or state government for NRD, pursuant to 42 U.S.C. § 9607(a)(4)(C), are held by the Department of the Interior and can be used only "to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1). Thus, the government argues, these funds cannot be used to reimburse the EPA and replenish the Superfund for the response costs it has incurred that remain outstanding.

In addition to the overpayment to the NRDAR Fund, Glatfelter also notes that the State of Wisconsin holds a surplus of approximately $4 million over the amount of the costs it incurred as of September 30, 2015. This amount, Glatfelter contends, also represents settlement recoveries that have not been applied to reduce the potential liability it faces. Thus, Glatfelter argues, the United States' cost recovery claim must also be reduced by this amount as required by Section 113(f)(2).

C. NRD Allocation

1. Statutory right to reduction

The United States contends that Glatfelter's argument that amounts allocated to the NRDAR Fund can be used to reduce its liability for the unreimbursed response costs the EPA incurred in

connection with the cleanup has no basis in the law. Indeed, the United States contends that Glatfelter's argument flies in the face of Section 113(f)(2), the very provision upon which Glatfelter's argument is based. In the view of the United States, "§ 113(f)(2) only allows a reduction of EPA's response cost claim for the 'amount of the settlement' actually earmarked and paid to settle that EPA response cost claim." ECF No. 179 at 2–3. The government notes that "Congress created separate statutory claims for response costs and NRD, to be brought by different claimants, with different statutes of limitations, and with recoveries directed to different funds dedicated to different purposes." *Id.* at 3. The differences between response cost and NRD claims, the government contends, are not merely technical distinctions. *Id.* It argues that neither the statute nor the case law lend any support for Glatfelter's argument that settlement payments on separate claims involving different claimants and separate types of losses can offset each other. *Id.*

I disagree with the government's contention that Glatfelter's argument has no support in the law. To the contrary, Glatfelter's argument is based on a plain reading of Section 113(f)(2). To repeat, that section states that while the government's settlement with one responsible party does not discharge the liability of any other responsible party, it does "reduce[] the potential liability of the others by the amount of the settlement." The government reads this provision as limiting the amount of the reduction in the potential liability of non-settling parties to only that portion of the settlement paid for response costs. But that is not what the statute says. It provides for a dollar for dollar reduction of the liability of the remaining parties by the "amount of the settlement," not that portion of the settlement allocated to response costs.

While it is true that Section 113(f)(1) specifically references "response costs," the same is not true of Section 113(f)(2). The government has offered no reason why the settlement provision

should be construed so as to limit its effect in such a manner. The fact that money received in settlement may be for different claims and is to be allocated to separate funds for different purposes is not a reason to ignore the plain meaning of the statute. More importantly, to adopt the government's construction of the statute would insulate the government's allocation and use of settlement proceeds from any form of judicial review. The government would be able to minimize or even eliminate Section 113(f)(2) reductions by simply allocating all or most of the proceeds to NRDAR funds. For as Glatfelter points out, when the government settles with a responsible party, it in effect controls the terms of the agreement that govern how the payment received in settlement will be allocated between the response cost and NRD claims under the settlement agreement. The settling defendants have no incentive to negotiate the allocation terms as long as both claims are being dismissed. ECF No. 1157 at 17. What the government chooses to do with settlement proceeds should not diminish non-settlors' right to full credit for the settlement. The Plaintiffs should not be able to divert settlement funds to overpay NRD, as Glatfelter claims they have done, and still claim reimbursement for costs covered by the settlement.

2. Motion for reconsideration

This does not end the matter, however. Prior to the scheduled trial in the case, the court granted the Plaintiffs' motion in limine which sought to preclude Glatfelter from introducing evidence at trial to show that the actual NRD were significantly less than the portion of the settlements that had been allocated to the NRDAR Fund. In so ruling, I had accepted the Plaintiffs' argument that such evidence was barred by "*res judicata* principles." ECF No. 1167 at 3. In particular, I noted that Glatfelter had elected not to object to previous consent decrees that expressly provided for the allocations it now claims were improper. Indeed, I noted that Glatfelter had shown by its comments

on the then most recent consent decrees, which allocated an additional $45 million to the NRDAR Fund, that it fully realized the effect this allocation would have. Glatfelter had stated in its response to the Plaintiffs' motion for approval that it "maintains its belief that the payments of NRDs under the consent decrees may very well result in overpayment of NRD recoveries" and that such "overpayment will effectively be lost to the remaining defendants; it will not offset any costs or damages for which those remaining defendants might be liable." ECF No. 938 at 4. Nevertheless, Glatfelter elected not to oppose entry of the consent decree because it expected its fair share of the remaining costs and damages to be "relatively low" and thus its share of the likely overpayment "likely small relative to the likely higher cost of litigating the NRD claim." *Id.* at 4. Given its statements at the time, and in the absence of precedent for Glatfelter's position, I concluded the Plaintiffs' motion should be granted. I now conclude that this was error.

At the outset, I note that principles of res judicata are not applicable because there is no previous action. "[P]rinciples of preclusion are not pertinent until the first lawsuit has been concluded and a second, separate proceeding is underway." *Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*, 341 F.3d 644, 653 (7th Cir. 2003). Under the circumstances here, the correct doctrine to consider is law of the case. *Id.* Even under this doctrine, however, Glatfelter is not bound by the previous allocations because there was no judicial determination of the actual NRD.

The allocation of settlement proceeds that Glatfelter now seeks to challenge resulted from consent decrees entered by the court. Although Glatfelter was a party to the case, it was not a party to the settlements reflected in the consent decrees. While Glatfelter could have objected to the motions seeking approval of the consent decrees, its failure to do so does not constitute a waiver of its right to challenge the allocation later. This is because even if Glatfelter had objected, it would not

have been entitled to a final determination of the issue. A district court's review of a proposed consent decree in a CERCLA action is deferential. The court "must approve a consent decree if it is reasonable, consistent with CERCLA's goals, and substantively and procedurally fair." *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011) (citing *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3d Cir. 2003)). In reviewing a request for approval, "the trial court must defer to the expertise of the agency and to the federal policy encouraging settlement." *Id.* The general rule is that in cases involving judicial approval of consent decrees, "[a]ny findings made as part of the approval process go to the reasonableness of the settlement, not the merits of the dispute." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 18A FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 4443 at 257 (West 2002); *see also* Restatement (Second) of Judgments § 27, cmt. e ("In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.").

It thus follows that Glatfelter is not bound by the allocation of payment for NRD to the NRDAR Fund previously approved by the court. If at trial Glatfelter is able to establish that the amount of the previous settlements allocated to the Fund exceeds the actual NRD, Glatfelter is entitled to a reduction in its own liability to the extent of such excess. Of course, if the Plaintiffs seek to and are allowed to reassert their NRD claim against Glatfelter and prove the NRD exceeds what has been collected, Glatfelter may be liable for even more than the government now seeks in response costs. This is the risk it takes. I also realize that my ruling may mean that the government cannot collect all of its remaining unreimbursed response costs from Glatfelter. Whether the government could collect its shortfall from any overpayment it made to the NRDAR Fund is a question that is not before the court, but it does not alter the effect of section 113(f)(2). In any event, for the reasons

set forth above, I conclude that Glatfelter's motion for reconsideration should be granted. Neither party is entitled to summary judgment on this issue.

D. State Surplus

Glatfelter also seeks to reduce its liability for the EPA's unreimbursed response costs by the roughly $4 million that the State of Wisconsin currently holds and has not expended either for cleanup of the Site or for NRD. There is no dispute that the State holds such a surplus. The $4 million represents part of the settlement proceeds that have been paid by other responsible parties. Based again on the language of § 113(f)(2), Glatfelter contends it is entitled to have its liability reduced by this amount.

The government in response again argues that the EPA's response costs cannot be reduced by money held by a separate government department or agency. But again, that is not what the statute says. Section 113(f)(2) states that the liability of the remaining parties is to be reduced by the amount of the settlement, not by the amount of the settlement allocated to the EPA's costs. If the settlement proceeds exceed that amount that the State incurred as of September 30, 2015, which is how the government has defined its claim, then Glatfelter is entitled to a dollar for dollar reduction in its liability as of that date.

The Plaintiffs note that they are continuing to incur ongoing costs for oversight, monitoring, legal expenses, and expert fees, and thus any surplus is likely to be exhausted in relatively short order. Indeed, it may have been already. For this reason, the amount of the reduction may be significantly lessened, if not eliminated with an amendment of the claim. But based on the record as it now stands, Glatfelter is entitled to a reduction in the government's cost recovery claim by the amount of the surplus on settlement funds held by the State of Wisconsin.

E. Indirect Costs of WDNR Agreement

Glatfelter joined in NCR's objection to $2,254,697 in indirect costs the EPA was seeking for its 2013 Cooperative Superfund Agreement with the Wisconsin Department of Natural Resources (WDNR). The EPA incurs both direct and indirect costs attributable to the Superfund program. The EPA's direct costs are accounted for on a site-specific basis. Indirect costs consist of the administrative and other overhead costs necessary to manage the greater Superfund program and support the functioning of relevant EPA employees and DOJ attorneys. "The process to allocate, or distribute, those indirect costs to Superfund is accomplished through an indirect cost methodology" developed by EPA accountants and financial experts in accordance with the Federal Accounting Standards Advisory Board #4 on cost accounting for the Federal government. ECF No. 1128 at 2–4. Neither NCR, nor Glatfelter challenge the EPA's indirect cost methodology. ECF No. 1133. Indeed, neither challenged the EPA's right to recover the indirect costs attributable to the EPA's 2013 Cooperative Agreement with WDNR. Rather, NCR's expert simply felt it was unfair to apply the indirect rate to EPA's direct costs incurred under the Agreement. ECF No. 1126 ¶¶ 45–47. As NCR views it, the indirect costs arising out of this agreement result from the EPA routing payments received from responsible parties in settlement through the Superfund before transferring them to WDNR for work it preformed at the Site. Given the key admissions by NCR's own expert, however, its objection to the indirect costs arising out of the 2013 Cooperative Agreement with WDNR fails. As the government points out without dispute, the EPA helped fund WDNR's oversight efforts through the Cooperative Agreement because NCR and Glatfelter refused to reimburse WDNR directly. Because the direct costs were paid out of the Superfund, the EPA was entitled to recover

the indirect costs attributable to those payments as well. Accordingly, the government is entitled to summary judgment on this amount.

F. Declaratory Relief

Lastly, the United States and State of Wisconsin claim they are entitled to declaratory relief against Glatfelter for future response costs. As noted, the governments' current cost claims in the case were tallied up through September 30, 2015, for the United States. For the State, the cost claims are for the period ending June 30, 2015. Because both governments have incurred and will continue to incur costs in connection with the cleanup of the site beyond those dates, they seek a declaration that Glatfelter is jointly and severally liable for future costs as well. The governments base their request on Section 113(g) which states: "In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2).

Glatfelter opposes the governments' request for declaratory relief on the ground that the statute limits the requirement for declaratory relief to an "initial action." Glatfelter contends that this is not an initial action since the government filed a previous action against it in 2003, *United States v. P.H. Glatfelter Company, et al.*, No. 2:03-cv-949-LA. (E.D. Wis.), which was ultimately resolved with a consent decree. For these reasons, Glatfelter contends declaratory relief is neither required nor called for.

I do not read Section 113(g)(2) as narrowly as Glatfelter does. In my view, the phrase "any such action" is not limited to initial actions, but applies to any CERCLA action for recovery of costs. Even if Glatfelter's reading of the statute were correct, this would simply mean that declaratory relief

was not mandatory, not that it was prohibited. Here, I conclude that declaratory relief is appropriate. "The structure of the subsection [113(g)(2)] indicates that the intent of Congress in including the sentence was to avoid the necessity of relitigating liability questions. It provides for the declaratory judgment as a way to manage the litigation in an efficient manner." *United States v. Navistar Intern. Transp. Corp.*, 152 F.3d 702, 709 (7th Cir. 1998). Here, there is no doubt that the Plaintiffs will continue to incur response costs in the future. Glatfelter's liability has already been determined by the court, and the Plaintiffs should not be forced to incur further costs and delay in attempting to collect future costs. Unlike the other defendants, Glatfelter has not entered into a settlement agreement with the Plaintiffs for the current Site. Under these circumstances, I conclude that the Plaintiffs' request for declaratory relief should be granted.

G. Conclusion

For the reasons set forth above, the United States' motion for partial summary judgment (ECF No. 1125) is granted in part and denied in part. The State of Wisconsin's motion for summary judgment on its claim for declaratory relief (ECF No. 1134) is granted. Glatfelter's motion for partial summary judgment (ECF No. 1141) is granted in part and denied in part, and Glatfelter's motion for reconsideration (ECF No. 1171) is granted. The clerk is directed to set the matter on the court's calendar for a telephone conference with the United States and Glatfelter to address further scheduling.

SO ORDERED at Green Bay, Wisconsin this 5th day of February, 2018.

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

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 CORPORATION, et al.,

Defendants.

DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING MOTION FOR RULE 56(g) FINDINGS

I. Motion for Reconsideration

Plaintiffs United States and the State of Wisconsin have moved for reconsideration of my decision denying their motion for partial summary judgment on their cost recovery claim against Defendant P. H. Glatfelter under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq. Glatfelter, together with other defendants, including NCR Corporation and Georgia Pacific, were previously found jointly and severally liable for the $1.3 billion clean-up of the PCB contamination of the lower Fox River that has continued for close to twenty years. *See United States v. P. H. Glatfelter Co.*, 768 F.3d 662 (7th Cir. 2014); ECF No. 1033. In what remained of this enforcement action, Plaintiffs sought recovery from defendant P. H. Glatfelter Company, the last non-settling defendant, of more than $33 million in unreimbursed costs (including statutory prejudgment interest) incurred by the Environmental Protection Agency (EPA) in remediating the PCB contamination of the lower Fox River (the Site) through September 30, 2015.

Glatfelter did not dispute that the EPA incurred well over $30 million of these unreimbursed costs in its response to the PCB contamination of the Site. Glatfelter nevertheless opposed Plaintiffs' motion on the ground that Plaintiffs had already recovered far in excess of the additional $33 million they were seeking from Glatfelter from the other responsible parties with whom Plaintiffs had settled. Since CERCLA prohibits double recovery by government entities, Glatfelter argued in its cross motion for summary judgment that Plaintiffs' claims against it should be denied. I found that a material factual dispute precluded summary judgment in favor of either side and denied their respective motions. It is that decision that Plaintiffs ask me to reconsider.

As relevant here, CERCLA requires responsible parties to pay, and authorizes the federal and state governments to recover, two different categories of injury or harm flowing from the release of hazardous substances into the environment: (1) response or cleanup costs; and (2) natural resource damages (NRD). As to the first category, under Section 107(a)(4(A), responsible parties are required to pay "all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). The costs of removal or remediation are either paid directly by the responsible parties or incurred by the federal and state governments, which then seek reimbursement from the responsible parties. As to the second category, under Section 107(a)(4)(C), "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release" of hazardous substances are also recoverable from responsible parties. 42 U.S.C. § 9607(a)(4)(C). Amounts collected for NRD go to the United States Government and the State in which the damage occurs. Liability for NRD also extends to any Indian tribe where the damage is to natural resources "belonging to, managed by, controlled by, or

appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe, if such resources are subject to a trust restriction on alienation." 42 U.S.C. § 9607(f)(1). Funds recovered for NRD are held in trust by the United States Department of the Interior (DOI) "for use only to restore, replace, or acquire the equivalent of such natural resources." *Id.*

"Importantly, CERCLA articulates a policy against double recovery." *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1017 (8th Cir. 2007) (citing 42 U.S.C. § 9614(b) (prohibiting duplicate recovery for the same removal costs)). In other words, the government is not allowed to collect more than it costs to remediate the contaminated site and compensate the interested parties for damages to natural resources. Glatfelter argues that Plaintiffs are trying to accomplish just such a double recovery here. Glatfelter's argument rests on Section 113(f)(2) of CERCLA which states:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. *Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.*

42 U.S.C. § 9613(f)(2) (emphasis added).

Over the past two decades, Plaintiffs have resolved the liability of dozens of parties alleged to have contributed to the PCB contamination of the Site through a number of judicial consent decrees and administrative orders. Of the millions of dollars collected by Plaintiffs, more than $100 million of the settlement proceeds has been allocated to the Natural Resource Damage Assessment and Restoration (NRDAR) Fund maintained by the United States Department of the Interior. Glatfelter contends that this amount vastly exceeds the actual damages to natural resources caused by the PCB contamination. In support of this contention, Glatfelter notes that over $60 million of the funds transferred to the NRDAR Fund have not yet been applied to any response

costs or NRD. Those funds, Glatfelter contends, "remain unspent in the NRDAR Fund for various as-yet-undetermined future NRD projects at the Fox River site." ECF No. 1157 at 2. Glatfelter has proffered evidence in the form of the opinion of its expert that the NRD injury suffered at the Fox River site already has been more than adequately compensated by the over $40 million spent to date. ECF No. 1106-2. Thus, Glatfelter contends, the more than $60 million remaining in the NRDAR Fund constitutes a windfall. More importantly, Glatfelter contends that by allocating such a large portion of the settlement proceeds to the NRDAR Fund, Plaintiffs have deprived the non-settling defendants of the benefit of the reduction in liability to which they are statutorily entitled under Section 113(f)(2). Once the full amount of the money already paid in settlement of the claims is properly allocated, Glatfelter contends, the remaining unreimbursed costs the United States is seeking is reduced to zero.

As I noted in my decision denying the parties' cross motions for partial summary judgment, Plaintiffs dispute Glatfelter's contention that the amount of the settlements allocated to the NRDAR Fund for the Site exceed the actual NRD. In fact, Plaintiffs argue that notwithstanding their decision to withdraw their NRD claim after the last series of settlements, the NRDAR Fund trustees' formal damage assessment is for far more than the amount of the settlements allocated to the Fund. Plaintiffs note that the DOI-commissioned study of past and future recreational fishing damages alone were estimated in 1998 dollars at $123 million. ECF No. 1155 at 8. It was this dispute over these facts that led me to conclude that neither party was entitled to judgment as a matter of law and that a trial would be needed.

Plaintiffs argue, however, that the factual dispute over whether the amounts already collected for NRD exceed the damage to the natural resources actually caused by the contamination does not

preclude judgment in their favor. In essence, Plaintiffs argue that the factual dispute between the parties over whether the NRDAR was over-funded is not material to their cost recovery claim. This is because, in Plaintiffs' view, Section 113(f)(2) does not require a reduction in a non-settling party's liability for recovery costs by amounts paid by other potentially liable parties for natural resource damages. Because a claim for NRD is different than a claim for recovery of cleanup costs, Plaintiffs contend that payment by a settling party for NRD does not reduce the liability of a non-settling party for recovery of cleanup costs. Since Glatfelter concedes that Plaintiffs have unreimbursed cleanup costs in excess of $30 million, Plaintiffs argue that the fact that they may have collected $60 million more than the actual damage to natural resources is irrelevant.

I rejected this argument in denying Plaintiffs' motion for summary judgment, noting that the language of Section 113(f)(2) calling for a reduction of the liability of non-settling parties by amounts received from other potentially liable persons in settlement does not distinguish between cleanup costs and NRD. By its plain terms, the statute calls for a reduction of the liability of non-settling parties "*by the amount of the settlement*." This language provides no basis for reducing a responsible party's liability for only response costs and ignoring liability for NRD; it applies to the liability of the non-settling parties in general. And since Glatfelter has been found jointly and severally liable with the other responsible parties, it is entitled to the reduction in liability provided by the statute.

In addition to my reliance on the plain language of the statute, I explained why Plaintiffs' interpretation of the law was unreasonable in my original decision. In essence, I explained that the fact that CERCLA plaintiffs allocate certain portions of settlement proceeds to the NRDAR Fund is not a blank check by which the governments can siphon settlement funds away and make them unavailable for reducing the liability of the non-settling parties for cleanup costs:

> [T]o adopt the government's construction of the statute would insulate the government's allocation and use of settlement proceeds from any form of judicial review. The government would be able to minimize or even eliminate Section 113(f)(2) reductions by simply allocating all or most of the proceeds to NRDAR funds. For as Glatfelter points out, when the government settles with a responsible party, it in effect controls the terms of the agreement that govern how the payment received in settlement will be allocated between the response cost and NRD claims under the settlement agreement. The settling defendants have no incentive to negotiate the allocation terms as long as both claims are being dismissed. ECF No. 1157 at 17. What the government chooses to do with settlement proceeds should not diminish non-settlors' right to full credit for the settlement. The Plaintiffs should not be able to divert settlement funds to overpay NRD, as Glatfelter claims they have done, and still claim reimbursement for costs covered by the settlement.

ECF No. 1217 at 9. True, consent decrees are subject to public comment and judicial approval. But the public is concerned if at all with the amount of money the settlement provides, not its allocation, and as explained in my previous decision, a district court's review of a proposed consent decree in a CERCLA action is highly deferential and goes to the reasonableness of the settlement, not the merits of the dispute. ECF No. 1217 at 11. As a result, I concluded that Glatfelter was not bound by allocations approved in a consent decree to which it was not a party.

The risk of over-allocating settlement proceeds to NRD is real in light of the nebulous character of NRD and its assessment. As noted above NRD includes "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release" of hazardous substances. 42 U.S.C. § 9607(a)(4)(C). Under Section 107 of CERCLA, sums collected by the United States or state governments as trustees shall be retained by the trustee "for use only to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f). But how does one put a dollar amount on the loss of nature's resources, whether temporary or permanent, or replace natural resources that have been destroyed? As one commentator has observed, "Calculating appropriate

natural resource damages involves not just legal, but economic and philosophical questions." Marissa L. Curran, THE WILDLIFE CARD: NATURAL RESOURCE DAMAGES AND PUTTING A PRICE ON NATURE, 30 NAT. RESOURCES & ENV'T 10 (2015).

Plaintiffs contend that I made a "critical error in finding that 'a plain reading of Section 113(f)(2)' provides all necessary 'support for Glatfelter's argument that settlement payments on separate claims involving different claimants and separate types of losses can offset each other.'" ECF No. 1220 at 3 (quoting ECF No. 1217 at 8). They argue that my construction of the statute violates traditional common law principles of tort law. In fact, however, it is Plaintiffs' construction that violates common law principles of tort law governing the apportionment of liability.

"When persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity." Restatement (Third) of Torts, § 15 (2000). Note that the rule is that persons acting in concert are liable for their assigned share of comparative responsibility in general, not for select items of harm. Plaintiffs' argument is premised on the assumption that the claim for response costs and the claim for NRD are separate and distinct claims that do not involve a common liability for common damages. Under the common law, however, response costs and NRD would be considered simply two separate and distinct kinds of injury or harm for which CERCLA authorizes plaintiffs to seek remedial relief and compensation. In effect, Plaintiffs have sued to recover damages arising from the same concerted activity, namely the PCB contamination of the lower Fox River. "Damages" under the Restatement, means "a sum of money awarded to a person injured by the tort of another," and "'compensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." Restatement (Second) of Torts, §§ 901, 902.

In this action, Plaintiffs seek to recover money both for the cost of remediation of the PCB contamination and for the damage to the natural resources caused by the contamination. Glatfelter, together with a number of co-defendants, have been found jointly and severally liable for the resulting injury and harm caused by the contamination. Glatfelter is therefore entitled to a reduction of its liability in its entirety by the amounts paid in settlement by the other responsible parties. Nothing in either the language of the statute or the cases cited by Plaintiffs support their argument that Glatfelter is bound by Plaintiffs' own assessment of NRD. To the contrary, CERCLA explicitly envisions a judicial determination of NRD when the parties do not agree. 42 U.S.C. § 9607(f)(2)(C).

The Department of the Interior has promulgated regulations setting forth the procedure for determining compensation for injuries to natural resources that are not expected to be addressed by response actions. *See* 43 C.F.R. Part 11. Any determination or assessment of damages to natural resources made in accordance with the applicable regulations has "the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33." 42 U.S.C. § 9607(f)(2)(C). Glatfelter contends that the determination of NRD in this case was not made in accordance with the applicable regulations and thus no presumption applies. Regardless, a factual dispute remains as to the NRD caused by the PCB contamination. And for the reasons set forth in my original decision denying the cross motions for summary judgment, Glatfelter is not bound by the allocation set forth in the prior consent decrees to which it was not a party.

Plaintiffs argue that if Glatfelter is allowed to challenge their allocation of settlement proceeds between response costs and NRD at this point long after consent decrees have been entered and approved, it would "inject uncertainties and frustrate Congressional intent by reducing a

governmental plaintiff's incentive to negotiate partial settlements when multiple CERCLA claims are at stake." ECF No. 1236 at 13. To be sure, the court's ruling, if it stands, may encourage CERCLA plaintiffs to modify their approach to interim allocation of settlement proceeds, but the incentive to settle CERCLA cases will likely remain strong. While Plaintiffs contend that allowing Glatfelter's challenge to the NRD allocation to go forward in this case may place full recovery of the EPA's response costs in jeopardy, the difficulty seems more an accounting problem than one of substance.

In any event, the ability to challenge the allocation does not mean that the allocation will be upset. As I noted in my original decision denying the parties cross motions for summary judgment, Glatfelter is incurring risk in challenging the NRD allocation:

> If at trial Glatfelter is able to establish that the amount of the previous settlements allocated to the Fund exceeds the actual NRD, Glatfelter is entitled to a reduction in its own liability to the extent of such excess. Of course, if the Plaintiffs seek to and are allowed to reassert their NRD claim against Glatfelter and prove the NRD exceeds what has been collected, Glatfelter may be liable for even more than the government now seeks in response costs. This is the risk it takes.

ECF No. 1217 at 11. Given the presumption an NRD assessment made by a Federal or State trustee in accordance with the DOI regulations enjoys in any administrative or judicial proceeding, the risk will in most cases be substantial enough to deter all but the strongest challenges. In this case, Glatfelter has offered evidence that the NRD assessment by the trustees was not in accordance with the applicable regulations and exceeds the actual damages to natural resources by more than $60 million. The trustees' NRD assessment has not been tested in an adversary process or subjected to meaningful judicial review. It was arrived at by Plaintiffs or their designees. To hold that a defendant is bound by a damage determination made by the plaintiff is contrary to the very notion of due process.

In sum, when tortfeasers act in concert, they are jointly and severally liable to the plaintiff for all of the damages caused by their conduct. But the plaintiff is only entitled to a single recovery. A plaintiff has no right to recover more than what is reasonably necessary to compensate him for the actual loss or injury. He cannot allocate a settling defendant's payments to over-compensate one category of damages in order to preserve a claim for another category of damages flowing from the same conduct and thereby obtain a windfall. That is what Glatfelter contends Plaintiffs have done here.

Finally, Glatfelter also noted that the State of Wisconsin was holding a surplus of roughly $4 million in settlement funds that it had not expended as of June 30, 2015. Thus, even aside from the excess payment for NRD, Glatfelter argued that Plaintiffs' claim for unreimbursed cleanup costs incurred as of that date must be reduced by at least the amount of the State's surplus. Though the State argued that the surplus was likely to disappear as the State continued to incur ongoing costs for oversight, monitoring, legal expenses, and expert fees, I concluded that based on the record as it then stood, Glatfelter was entitled to the reduction in Plaintiffs' cost recovery claim. Plaintiffs contend this was error and seek reconsideration of this finding as well. Plaintiffs argue that Wisconsin's response cost recovery cannot offset or reduce the United States' claim for EPA's unreimbursed response costs since they are separate and distinct claims held by separate and distinct entities.

Plaintiffs' argument ignores the fact that they brought this action jointly seeking recovery of the costs of cleaning up the same contamination. They decided how they would divide the work required to oversee and monitor the cleanup of the site and how the funds received in settlement from other responsible parties would be allocated between them. If, as all parties appear to concede,

the State of Wisconsin was holding a $4 million surplus on funds intended for payment of response cost incurred as of June 30, 2015, then Glatfelter was entitled to a reduction in its liability for that claim in the amount of the surplus. As I stated in my original decision, however, the surplus as of June 30, 2015, may become partly or fully offset from the State's ongoing oversight and monitoring responsibilities, in which case we are presented with little more than an accounting problem that should be easily resolved by the time of trial. To the extent the State's surplus is used to pay ongoing oversight and monitoring responsibilities, it will not be available to reduce the EPA's unreimbursed response costs. Glatfelter disputes whether the entire amount of the surplus will be needed for such purposes. I concluded that on the record as it then stood, Glatfelter was entitled to the reduction on Plaintiffs' claim for unreimbursed cleanup costs. On reconsideration, I conclude that a factual dispute precludes a finding that Glatfelter is entitled to a reduction at this point based on the surplus the State was holding as of June 30, 2015. With this qualification, Plaintiffs' motion for reconsideration is denied.

II. Motion for Rule 56(g) Findings

Plaintiffs have also moved for an order identifying facts not genuinely in dispute pursuant to Rule 56(g) of the Federal Rules of Civil Procedure. Rule 56(g) states that if the court does not grant all the relief requested by a motion for summary judgment, "it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case." Plaintiffs request that the court make the following findings of undisputed material facts:

- Through September 30, 2015, EPA had incurred at least $32,748,629.76 in unreimbursed non-OU1 response costs, including prejudgment interest, as shown in Alternative Calculation C in the declaration of Wiley Wright (Dkt.

No. 1127-5). Those EPA costs incurred through September 30, 2015, are not inconsistent with the National Contingency Plan.

- As of June 30, 2015, the State of Wisconsin had a positive balance of no more than $4,631,817 from State response cost settlement recoveries and reimbursements, computed as the difference between such recoveries and reimbursements through that date ($43,336,579) and the uncontested response costs that the State had incurred through that date ($38,704,762). The uncontested response costs that the State of Wisconsin had incurred through June 30, 2015, are not inconsistent with the National Contingency Plan.

ECF No. 1235 at 2. Plaintiffs' motion to identify these undisputed facts will be granted. Glatfelter does not contest the amount of EPA's unreimbursed response costs or that they were not inconsistent with the National Contingency Plan. Glatfelter has objected to the second finding concerning the State's balance from settlement response cost recoveries, but its objection is waived and without merit in any event.

Glatfelter contends that the costs incurred by the State for oversight of work done to implement the remedy in Operable Units 2-5 (OU 2-5) is inconsistent with the National Contingency Plan because as the lead agency on the site, EPA was required to perform the oversight. Glatfelter's objection, which is based on the opinion of its expert, is not timely. The time for expert disclosure is long past, and it is too late to offer revisions of expert reports to support new opinions. Glatfelter also failed to offer this argument in response to Plaintiffs' motion for partial summary judgment. The objection is therefore waived. More importantly, the objection is without merit since there is nothing in the National Contingency Plan that suggests that EPA cannot use a state agency to meet its oversight responsibilities. Accordingly, both of the proposed findings requested by Plaintiffs are adopted in full.

In conclusion and for the reasons set forth above, Plaintiffs' motion for reconsideration (ECF No. 1219) is **DENIED** and their motion for an order identifying material facts not in dispute (ECF No. 1221) is **GRANTED**. Glatfelter is directed to file a response to Plaintiffs' motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on or before August 15, 2018, with Plaintiffs' reply due fifteen days thereafter.

SO ORDERED at Green Bay, Wisconsin this 12th day of July, 2018.

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