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.
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> 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).
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> 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