

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

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

NCR CORPORATION, *et al.*,

Defendants.

Civil Action No. 10-C-910

The Honorable William C. Griesbach

**CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION BY PLAINTIFFS
FOR LEAVE TO WITHDRAW THE SIXTH CLAIM FOR RELIEF
(SEEKING NATURAL RESOURCE DAMAGES)
IN THEIR FIRST AMENDED COMPLAINT**

Plaintiffs, the United States and the State of Wisconsin, hereby move for entry of an order that would grant them leave to withdraw their claim under CERCLA for recovery of natural resource damages (“NRD”) due to PCB contamination at the Lower Fox River and Green Bay Superfund Site, as pled in the Sixth Claim for Relief in Plaintiffs’ First Amended Complaint. *See* Dkt. 30 at 31. In briefs seeking approval of three recent Consent Decrees, the Plaintiffs indicated that they would seek leave to withdraw their NRD claim after receipt of approximately \$45.9 million in payments toward NRD under those settlements.¹ The time for appealing the Court’s entry of those Consent Decrees expired with no appeals being filed and the Court entered orders authorizing the Clerk of the Court to disburse the settlement proceeds from a Court Registry Account to the Plaintiffs. Dkt. 968; Dkt. 998. Those disbursements have been made.² The Court should now enter the accompanying proposed order granting Plaintiffs leave to withdraw their claim for recovery of NRD for the reasons explained below.

CERCLA establishes separate but complementary causes of action that governmental plaintiffs can assert for: (1) the cleanup of environmental contamination caused by hazardous substance releases; and (2) NRD for public losses due to hazardous substance releases that result in injury to, destruction of, or loss of natural resources under Federal, State, and Tribal trusteeship. The United States and the State asserted both claim types in this case. The First through Fifth Claims for Relief in their First Amended Complaint seek the continuation of

¹ *See* Dkt. 962 (Consent Decree with Kimberly-Clark Corporation); Dkt. 963 (Consent Decree with NewPage Wisconsin Systems Inc.); Dkt. 984 (Consent Decree with Cashout Settling Defendants and the State of Wisconsin); Dkt. 934 at 14-16 (Plaintiffs’ Brief in Support of Their Motion for an Indicative Ruling on Approval of the Cashout Consent Decree); Dkt. at 945 at 8-9 (Plaintiffs’ Reply Brief).

² As required by the Consent Decrees, the settlement money earmarked as NRD recoveries will be deposited in the U.S. Department of the Interior’s Natural Resource Damage Assessment and Restoration Fund and managed by DOI for the joint benefit and use of the Federal, State, and Tribal Natural Resources Trustees to pay for natural resource restoration projects jointly selected by the Trustees and/or to be applied toward natural resource damage assessment costs incurred by DOI and the State. *See* Dkt. 962 at 15; Dkt. 963 at 9; Dkt. 984 at 18; *see also* 42 U.S.C. § 9607(f)(1) (specifying that CERCLA NRD recoveries shall be used “only to restore, replace, or acquire the equivalent” of the injured natural resources). Decisions about particular expenditures for this Site are made by consensus by the Fox River/Green Bay Natural Resource Trustee Council, which includes representatives from DOI, Wisconsin DNR, the Oneida Tribe of Indians of Wisconsin, and the Menominee Indian Tribe of Wisconsin.

cleanup-related response activities at the Site and the reimbursement of associated response costs that the Plaintiffs have incurred and may incur. The Sixth Claim for Relief seeks recovery of NRD, which includes the economic value of lost recreational fishing opportunities from PCB contamination in the Lower Fox River and Green Bay.

All of the defendants in this case other than NCR Corporation and P.H. Glatfelter Company have now settled their NRD liability for this Site, subject to reservations and reopeners. NCR and Glatfelter also made some payments toward NRD under partial settlements that did not fully resolve their potential NRD liability. Any overpayments by the other settlers can be re-allocated to NCR and Glatfelter through claims for contribution, as confirmed by this Court's rulings and the Seventh Circuit's decision in the *Whiting* case. *See NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d. 682, 708-10 (7th Cir. 2014).

The \$45.9 million in recent settlement payments for NRD brought the Plaintiffs' aggregate NRD recovery to about \$105 million (in 2014 dollars) from settlements for this Site.³ Based on the information known now, the Plaintiffs consider that \$105 million in compensation an appropriate risk-discounted complete recovery for the NRD claim. On one hand, an award on the Plaintiffs' NRD claim could potentially be much larger than \$105 million if it was successfully litigated to judgment.⁴ On the other hand, there would be a risk of loss on at least some issues

³ The aggregate NRD recovery is stated in 2014 dollars because that is when the payments due under the most recent settlements were made and deposited in an interest-bearing Court Registry Account. The NRD recoveries before 2014 included: (1) \$25.54 million under a 2001 Consent Decree and a 2006 Consent Decree Modification and Partial Extension with NCR and Appvion; (2) \$12.41 million under a 2004 Consent Decree with Georgia-Pacific; (3) \$3.3 million under a 2004 Consent Decree with WTM and Glatfelter; (4) more than \$482,000 under 2010 Consent Decrees with 12 *de minimis* settlers; and (5) \$4.35 million under a 2013 Consent Decree with Brown County, the City of Green Bay, and Settling Federal Agencies. If present value adjustments were made to the payments and expenditures under those settlements, the total pre-2014 recovery for NRD was roughly \$59 million in 2014 dollars. \$59 million in pre-2014 NRD recovery plus \$45.9 million in additional NRD recovery paid in 2014 would yield about a \$105 million total NRD recovery in 2014 dollars.

⁴ For example, even setting aside other categories of NRD, a DOI-commissioned study of recreational fishing damages for this Site estimated the past and future losses due to fish consumption advisories at \$123 million (in 2000 dollars). *See* <http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/recfish.pdf>. When updated to 2014 dollars, that could equate to a conceivable claim for at least \$186 million in current-dollar recreational fishing damages.

surrounding the claim and the litigation of the NRD claim would undoubtedly be very time consuming and resource intensive. Plaintiffs' proposal to withdraw their NRD claim would streamline and simplify this case greatly, as outlined in the Plaintiffs' briefs describing the benefits of the most recent settlements.

A plaintiff's voluntary withdrawal of one or more claims while continuing the pursuit of some others is treated as an amendment to the complaint under Fed. R. Civ. P. 15(a) rather than a dismissal with or without prejudice under Fed. R. Civ. P. 41(a).⁵ Rule 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." An adjustment to the complaint should be allowed unless there are particular reasons for denying the request, such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). There is no reason for denying Plaintiffs' current request. As noted in the Court's original Case Management Order in this case, the parties all "agreed that this case should proceed in phases, with the first being devoted to the Plaintiffs' fifth claim for relief" seeking enforcement of EPA's Unilateral Administrative Order for cleanup. Dkt. 322 at 1. Active litigation of the Plaintiffs' Sixth Claim for Relief seeking NRD has not even commenced. The settlement recoveries that prompted this motion were only recently received. There has been no undue delay and there would be no prejudice in granting this motion.

The Plaintiffs respectfully request that the Court enter the accompanying proposed order allowing and confirming the withdrawal of their Sixth Claim for Relief for recovery of NRD.

⁵ See *Berthold Types Ltd. v. Adobe Sys., Inc.* 242 F.3d 772, 777 (7th Cir. 2001) ("Rule 41(a)(1)(i) does not speak of dismissing one claim in a suit; it speaks of dismissing 'an action' – which is to say, the whole case"); *UJoints LLC v. Dana Holding Corp.*, No. 13-c-1008, 2014 WL 4443276, at *2-3 (E.D. Wis. Sept. 9, 2014); *Remien v. EMC Corp.*, No. 04 C 3727, 2004 WL 2381876, at *1 (N.D. Ill. Oct. 19, 2004) ("As Plaintiffs want to eliminate only a single count, the proper procedural vehicle and analytic framework for their request is found in Rule 15(a).").

Respectfully submitted,

For the United States of America

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

Dated: May 6, 2015

s/ Randall M. Stone
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
Telephone: 202-514-1308
Facsimile: 202-616-6584
E-Mail: randall.stone@usdoj.gov

JAMES L. SANTELLE
United States Attorney

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

For the State of Wisconsin

Dated: May 6, 2015

s/ Cynthia R. Hirsch
CYNTHIA R. HIRSCH
Assistant Attorney General
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, WI 53707-7857

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this day, the foregoing Motion was filed electronically with the Clerk of the Court using the Court's Electronic Case Filing System, which sent notification of such filing to all counsel of record through the ECF notification system.

Dated: May 6, 2015

s/ Randall M. Stone

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

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Case No. 10-C-910

NCR CORPORATION, *et al.*,

Defendants.

**ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO WITHDRAW THE
SIXTH CLAIM FOR RELIEF IN THEIR FIRST AMENDED COMPLAINT**

In light of recoveries that the Plaintiffs have obtained through settlements in this case and several related cases, the Plaintiffs have now moved pursuant to Fed. R. Civ. P. 15(a) for leave to voluntarily withdraw the Sixth Claim for Relief (seeking natural resource damages) in their First Amended Complaint (Dkt. 30). Rule 15(a) provides that leave to amend a complaint “shall be freely given when justice so requires.” The parties agreed that this case should proceed in phases with the first phase being devoted to the Fifth Claim for Relief seeking enforcement of EPA’s Unilateral Administrative Order for cleanup, so active litigation of the Plaintiffs’ Sixth Claim for Relief seeking natural resource damages has not even commenced. There has been no undue delay by Plaintiffs and there would be no prejudice in granting their Motion.

NOW, THEREFORE, in light of the Plaintiffs' Motion, and good cause appearing,

IT IS HEREBY ORDERED:

The Plaintiffs' Motion is GRANTED. The Plaintiffs' Sixth Claim for Relief (seeking natural resource damages) in their First Amended Complaint shall hereby be deemed withdrawn at Plaintiffs' request.

SO ORDERED this _____ day of _____, 2015.

WILLIAM C. GRIESBACH, Chief Judge
United States District Court – WIED