



State of Wisconsin \ LEGISLATIVE AUDIT BUREAU

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Senator Gary R. George and  
Representative Joseph Leibham, Co-Chairpersons  
Joint Legislative Audit Committee  
State Capitol  
Madison, WI 53702

Dear Senator George and Representative Leibham:

At the request of several legislators including Senator George, who first requested it, we have performed a limited review of the State's settlement with Fort James Corporation for natural resource damages to the Fox River. A legal settlement between the Department of Natural Resources (DNR), the Wisconsin Department of Justice, and Fort James Corporation stipulated that the State will not sue Fort James for natural resource damages arising from the release of polychlorinated biphenyls (PCBs) into the Fox River. In exchange, Fort James has agreed to provide or fund several environmental restoration projects at a cost that has been estimated to be \$7.0 million. The settlement agreement, which was signed November 15, 2000, is subject to acceptance by the United States District Court for the Eastern District of Wisconsin.

Several aspects of the settlement agreement have been controversial, including the confidential nature of the negotiations that preceded the settlement; the use of consultants paid for by Fort James and other paper companies to value the environmental damages for which the State and local governments are to be compensated; the models used to value the environmental losses sustained; and the objections raised by the U.S. Fish and Wildlife Service, whose staff were not included in the negotiations. However, DNR strongly defends its approach as reasonable and effective. Based on our review, we have identified several issues that are contentious, may result in limited opportunities for legislative oversight, or are unresolved at this time.

We appreciate the courtesy and cooperation extended to us by DNR, the Department of Justice, and the Fish and Wildlife Service in conducting this review.

Sincerely,

Janice Mueller  
State Auditor

JM/JZ/bm

## **STATE SETTLEMENT WITH FORT JAMES CORPORATION**

Beginning in the mid-1950s, seven paper companies in Wisconsin legally released polychlorinated biphenyls (PCBs) into the Lower Fox River—which flows north from Lake Winnebago into the waters of Green Bay and Lake Michigan—during the process of producing, de-inking, or recycling carbonless copy paper. PCBs were subsequently found to pose significant health risks to wildlife and humans, and their manufacture was banned by the federal government in 1977.

Production of carbonless paper ceased in 1971, but the material remained in the recycled fiber paper stream for several years thereafter, and PCBs released from the mid-1950s through the mid-1970s remain in soil and water today. PCBs enter the food chain when they are consumed by plankton and other organisms that are eaten by foraging fish, which are in turn consumed by predator fish, birds, humans, and other mammals.

Exposure to PCBs is considered the likely cause of tumors in walleye and of reproductive and other deformities in birds such as bald eagles, terns, and cormorants. In addition, PCBs have been linked to human health concerns including cancer, reproductive disorders, and poor mental development in children. Consequently, both Wisconsin and Michigan have issued consumption advisories on over 20 species of fish taken from the Lower Fox River, Green Bay, and northern Lake Michigan. Wisconsin also issued a consumption advisory for mallard ducks from the Lower Fox River and the inner waters of Green Bay, which has been in effect since 1987.

By the mid-1980s, the Department of Natural Resources (DNR) and several federal agencies began working cooperatively to develop a cleanup plan for the Fox River. In the early 1990s, a separate process was begun to determine the extent of natural resource damages so that the paper companies could be assessed for them. To coordinate their response to the PCB contamination issue, the seven paper companies formed a consortium called the Fox River Group. Its members include Fort James Corporation (which was formerly known as Fort Howard Corporation and has recently been acquired by Georgia-Pacific Corporation); U.S. Paper Mills Corp.; P.H. Glatfelter Company (formally Bergstrom Paper Company); Wisconsin Tissue Mills, Inc. (currently owned by Georgia-Pacific but soon to be sold to Svenska Cellulosa Aktiebolaget, a Swedish company); Appleton Papers, Inc.; NCR Corporation; and Riverside Paper Corporation.

The State of Wisconsin, acting through DNR and the Department of Justice, is considered by federal law to be the principal natural resource trustee responsible for assessing the environmental damages that resulted from the PCB contamination. Other responsible parties, who are known as the federal trustees, include the federal government, acting through the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration; the Menominee Tribe of Indians of Wisconsin; the Oneida Tribe of Indians of Wisconsin; the Little Traverse Bay Bands of Odawa Indians; and the State of Michigan, acting through the Michigan Attorney General.

Although there is some disagreement among the trustees about their responsibilities, the federal trustees generally are viewed as having some authority over tribal land, federally owned land, Lake Michigan, and the waters of Green Bay up to the first dam of each tributary that feeds into the bay. The State is considered the trustee for all land, water, and wildlife within its boundaries, including portions of the waters of Green Bay and Lake Michigan. Therefore, the State and the federal trustees are considered co-trustees over resources in the waters of Green Bay and Lake Michigan.

### **Terms of the Consent Decree**

The State of Wisconsin reached a legal settlement with one member of the Fox River Group—Fort James Corporation—in a consent decree that addresses damages to state natural resources arising from the release of PCBs into the Lower Fox River and the waters of Green Bay and Lake Michigan. In the settlement document, which was signed by both DNR and the Department of Justice on November 15, 2000, the State has agreed that it will not sue or take administrative action against Fort James. In return for the agreement not to sue, and to compensate the State and local governments for natural resource damages, Fort James has agreed to provide or fund restoration projects at a cost that has been estimated to be \$7.0 million. The State is currently negotiating to settle natural resource damage claims with the six other paper companies.

It is important to note that the consent decree covers only natural resource damages and not the cleanup of PCBs from the Fox River. The natural resource damages include injury to, impairment in value of, or lost use of natural resources arising from the release of PCBs into the river. Cleanup efforts will be jointly determined by DNR and the federal Environmental Protection Agency, and the cost of cleanup will be assessed against all seven paper companies in the Fox River Group. It is anticipated that the costs to remove PCBs from the Lower Fox River will be in the hundreds of millions of dollars. A DNR and Environmental Protection Agency report concerning the cleanup and restoration of the river is expected to be released sometime in 2001.

The restoration projects delineated in the consent decree are in three categories: land acquisition, ecological restoration projects, and human use service restoration projects. Fort James also agreed to provide \$50,000 to reimburse the State for administrative costs incurred in determining and valuing the natural resource damages.

### **Land Acquisition**

The land acquisition project is intended to compensate the State for injuries caused to birds, fish, and mammals. Under the terms of the consent decree, the State will receive approximately 700 acres along the Peshtigo River in Marinette County. DNR officials state that this property has substantial fish and wildlife habitat and will enhance protection of nearby wildlife areas. In addition, DNR officials estimate that the parcel contains approximately 5.5 miles of river frontage, including both sides of the river for about half that

distance. It is expected that the 700 acres will be designated as a State Wildlife Area after a management plan is developed.

The exact legal description of the 700 acres to be acquired has yet to be determined, because Fort James does not currently own the real estate. Instead, Fort James has an option to purchase a larger parcel (between 900 and 1,000 acres) from the current owner, Badger Paper Company. DNR officials indicate they plan to select the most valuable acres from this larger parcel after additional analyses are conducted. There are landfills on the property, and we were told that neither Fort James nor DNR wants to be responsible for any property containing landfills. Thus the exact location of the landfills will need to be determined and excluded from the 700 acres transferred.

DNR officials stated that they do not know the exact price Fort James will have to pay to acquire the parcel, but they believe it to be between \$1,200 and \$1,500 per acre. This would bring the total acquisition cost of the 700 acres to between \$840,000 and \$1,050,000.

DNR officials told us the agency had been approached by Badger Paper in early 2000 with an offer to sell the property directly to the State. According to DNR staff, the agency was interested in the property and asked Fort James to acquire the parcel as part of the pending settlement. Fort James acquired an option to purchase the parcel through a third party that did not identify the purchaser as Fort James. DNR officials told us that the negotiation was carried out in this manner because the seller may have increased the asking price if it knew Fort James was purchasing the property as part of a settlement with the State, and to prevent developers from seeking to purchase the property and thereby inflating the purchase price.

### **Ecological Restoration Projects**

Fort James agreed to fund three ecological restoration projects, which are also intended to compensate the State and local governments for injuries caused to birds, fish, and mammals. The cost of the following projects is \$800,000:

- ***Cat Island Chain, Island 3***—Fort James will give \$300,000 to the State or to Brown County for use in the design and/or construction of an island in Green Bay that is expected to be constructed by the U.S. Army Corps of Engineers. According to the terms of the consent decree, this island will be 30 acres and will provide nesting habitat for terns and other birds, and the potential to reestablish aquatic plant beds and associated habitat for fish and birds.
- ***Spotted Muskellunge Hatchery Expansion***—Fort James will give \$300,000 to the State for expanding the existing Wild Rose State Fish Hatchery near Wautoma to increase its annual production of fingerling and yearling spotted muskellunge from approximately 4,000 to 10,000 fish, and for funding the increased feed costs associated with this expansion for 15 years.

- ***Northern Pike Habitat Preservation and Restoration***—Fort James will give \$200,000 to the State for use in tributaries along the western shore of Green Bay for the purpose of preserving and restoring spawning and rearing habitat for northern pike.

### **Human Use Service Restoration Projects**

In addition, Fort James has agreed to fund or complete 11 projects in Brown County to compensate the State and local governments for recreational fishing losses. Cost information for these projects has not been established. However, various economic models have been used by a consultant to estimate that the value of benefits to be derived from the projects will range from \$16.8 million to \$55.8 million.

In the settlement agreement, the following projects are specified:

- 1) Ashwaubenon Creek Conservancy—a 5,000-foot trail;
- 2) Ashwaubomay Park—a 4,000-foot trail and nature center;
- 3) Barkhausen Waterfowl Preserve and Fort Howard Paper Foundation Wildlife Area—a 20,000-foot trail and two ten-car parking lots to provide access to the trail;
- 4) Bay Beach Parkway—a 3,000-foot trail and a picnic area with ten tables, grills, and trash receptacles;
- 5) Beaver Dam Creek Parkway—an 8,000-foot trail;
- 6) Bylsby Avenue Boat Launch—a double lane boat launch and a ten-car parking lot;
- 7) Deerfield Docks—a multi-use boat dock adjacent to an existing boat launch;
- 8) Joliet Park—a 2,000-foot trail, wooden fishing pier, boat launch, and ten-car parking lot;
- 9) Ken Eaur's Nature Area—a 5,000-foot trail and a picnic area with ten tables, grills, and trash receptacles;
- 10) Metro Boat Launch—a fishing pier and wooden observation deck and a picnic area with tables, grills, and trash receptacles; and
- 11) Village of Howard Recreational Projects—recreational access to Duck Creek and the waters of Green Bay, and/or other recreational enhancements within the Village of Howard. Facilities such as trails, picnic areas, and playgrounds may be developed at locations to be determined with input from the village.

According to DNR, these human use service restoration projects were selected from a master list compiled by the agency, the University of Wisconsin-Green Bay, the Fish and Wildlife

Service, and local municipalities. Fort James selected projects from this master list and met with officials from the municipalities to ensure their interest in the projects.

However, in a letter to DNR dated January 4, 2001, the Director of the Brown County Parks Department indicated that several of the specified projects were from outdated recreation plans. He submitted 12 projects as alternatives to those stipulated in the consent decree. Therefore, the number and types of projects that will eventually be completed is not clear at this time. According to DNR officials, final plans will be submitted to Fort James by the appropriate municipalities, which will then work with Fort James directly to complete the projects. Negotiations between the local governments responsible for overseeing the projects and Fort James are still needed to address such issues as the design and location of trails, docks, and picnic areas and the quality of tables, docks, and other materials to be used in construction.

### **Discussion of Issues**

We have identified several issues related to the settlement with Fort James and the damage assessment process for the Lower Fox River and waters of Green Bay that are contentious, may result in limited opportunities for legislative oversight, or are unresolved at this time.

#### **The Use of Consultants**

Under a January 1997 cooperative agreement between the State and the seven companies responsible for the release of PCBs, the companies agreed to determine the extent of the damages by performing—under the State’s oversight—studies and analyses known as a natural resource damage assessment (NRDA). The objective of the damage assessment process is to compensate the public, through environmental restoration, for losses to natural resources that have been caused by the release of PCBs. However, establishing the value of these losses is complicated.

Accordingly, the paper companies hired environmental consultants to prepare damage assessments and restoration offsets following criteria established in federal regulations. For example, Triangle Economic Research prepared assessments of potential recreational fishing losses and restoration efforts for the Fox River Group. Although DNR did not participate in the selection of any of the consultants hired by the Fox River Group, under the terms of the 1997 cooperative agreement the consultants’ work is directed by DNR staff.

The work of the consultants has been controversial, in part because critics question why the members of the Fox River Group were effectively allowed to conduct their own damage assessment. These critics believe that the paper companies have a bias to minimize their liability and that a process they control ultimately benefits them and not the public. However, DNR counters that the process was not biased because DNR directed the activity of the consultants under the terms of the January 1997 cooperative agreement.

For the purpose of developing its own settlement proposal, Fort James also retained two consultants: Triangle Economic Research to assess recreational fishing losses and restoration efforts, and ARCADIS JSA to assess injuries to fish, birds, and mammals. In addition, because DNR had never prepared an NRDA of the size and scope involved in the Lower Fox River and Green Bay effort, and the regulations and economic models used are very complicated, DNR hired its own environmental consultants to evaluate studies developed by both the Fox River Group's consultants and the Fort James consultants. Two DNR consultants with leading roles were Keith Eastin, a regulatory consultant, and Dwight Duncan, an economics consultant. According to DNR officials, Mr. Eastin has been involved in natural resource damage assessment and valuation for more than 15 years, and Mr. Duncan has experience with the resource valuation models used by both the Fox River Group's consultants and federal trustees' consultants.

Nevertheless, the objectivity of the DNR consultants and the Fort James consultants has been strongly criticized by some environmental groups because these consultants have worked for industrial clients in the past. Mr. Duncan's credentials and experience have also been criticized because he had never before completed an NRDA.

An additional criticism has been the manner in which the DNR consultants have been paid. Under an arrangement made in January 1998, the DNR consultants submit invoices directly to the Fox River Group for payment, and a copy of each invoice is submitted to DNR for approval. Through January 5, 2001, the DNR consultants have invoiced \$798,183 and been paid \$773,703 by the Fox River Group to evaluate studies prepared for all seven paper companies. In addition, the DNR consultants have been paid \$138,442 by Fort James for work directly related to its settlement with the State.

DNR officials maintain that it was necessary for the DNR consultants to be paid by the paper companies because the State could not afford such experts on its own. In addition, the DNR consultants signed agreements that require their working papers to be maintained as confidential and forbid the consultants from contact with paper company representatives without prior approval. DNR and the Department of Justice believe the confidentiality agreements helped to ensure that the consultants worked in the best interest of the State. Nevertheless, it should be noted that PriceWaterhouseCoopers, which had employed Mr. Duncan, Mr. Eastin, and other DNR consultants, has also provided accounting services to Fort James.

### **Methodological Issues**

At the same time the State was working with Fort James on a settlement and working separately with the Fox River Group to develop an NRDA, the federal trustees were independently determining damages relating to all seven companies that had released PCBs into the Lower Fox River. Although the damage assessment for the settlement with Fort James did not fully quantify damages, the preliminary federal NRDA, which was released in October 2000, determined that total damages ranged from \$176.0 million to \$333.0 million. Fort James has been estimated to be responsible for between 15 and 30 percent of these damages.

There are several differences between the preliminary NRDA completed by the federal trustees and the settlement between Fort James and the State:

- The federal trustees' NRDA was based primarily on federal regulations developed by the U.S. Department of Interior, under which dollar values are assigned to environmental losses. In contrast, the State's settlement with Fort James utilizes both Department of Interior and National Oceanic and Atmospheric Administration regulations, under which environmental losses sustained from the release of PCBs and the gains resulting from resource restoration projects are measured, but a monetary value is not placed on them.
- The federal trustees' NRDA measured damages sustained from non-fishing recreational activities such as waterfowl hunting and bird-watching. The Fort James settlement did not assess damages for these activities.
- The federal trustees surveyed anglers in a ten-county area surrounding the Fox River and Green Bay, while the study done for the State's settlement with Fort James surveyed the eastern two-thirds of Wisconsin. The Fish and Wildlife Service believes that the Fort James settlement study may have overstated the preferences of inland anglers, and thereby reduced the type and scope of restoration projects needed to offset damages to recreational fishing.
- The federal trustees' NRDA calculated differing amounts of damages depending on the level of cleanup conducted. The level of cleanup will determine the number of years before the resources are considered recovered. The State's settlement with Fort James did not address this issue.
- The federal trustees held a number of public hearings in the Lower Fox River area before issuing a final NRDA. No hearings were held by the State prior to signing the November 15 consent decree.

Given the numerous differences between the two methods used to determine damages, all the trustees have indicated it may be possible to integrate the federal trustees' NRDA and the study done for the State's settlement with Fort James in order to make use of the strengths of both and derive a more accurate result. The Fish and Wildlife Service has offered to seek opinions on both damage assessments from a group of independent economists selected jointly by DNR and the Fish and Wildlife Service. However, DNR has declined this offer and has indicated it prefers to conduct additional negotiations with the Fish and Wildlife Service.

### **Oversight of Funds in Escrow**

The consent decree requires that Fort James deposit up to \$850,000 in an escrow account for the ecological restoration projects and for the reimbursement of assessment costs. The funding is to be provided in two equal installments, the first within 90 days after entry of the consent decree by the court, and the second within 30 days following the first anniversary of the consent decree.



However, it is not clear at this time how the escrow funds will be budgeted or accounted for by DNR. DNR officials have stated that their attorneys are working on this issue, and it is expected that the 2001-2003 biennial budget will contain language addressing DNR's use of "settlement proceeds" in general, which may include these escrow proceeds. In 1999, the Legislative Audit Bureau expressed concern about the use of a \$500,000 trust fund established by DNR under a court-ordered plea agreement with Menard, Inc., and suggested increased legislative oversight and budgetary control over settlement funds placed in escrow. We have similar concerns regarding the escrow funds to be provided in this consent decree.

It should be noted that the 1999-2001 budget bill enacted by the Legislature included language requiring all state agencies to receive approval from the Joint Committee on Finance before collecting or receiving moneys pursuant to an agreement to settle a civil action. However, in Act 9, Laws of 1999, the Governor vetoed this provision in its entirety.

### **Sixty-Day Comment Period**

A 60-day public comment period on the terms of the consent decree began on December 20, 2000, and will end on February 21, 2001. During this period, written comments will be accepted by DNR, which will meet with any group that is interested although it will not hold public hearings. A press release from the Governors' Office on November 15, 2000, referred to the 60-day public comment period and stated that details of the agreement may be modified after public comment. Likewise, a DNR press release on November 17, 2000, stated that after the 60-day comment period, public comments and concerns would be considered. It should be noted that the Fish and Wildlife Service has requested an extension of the comment period to at least March 21, 2001, in order to give federal officials the opportunity to review the matter fully and provide formal comments.

However, an agreement separate from the consent decree, which is entitled "Agreement Between the State of Wisconsin and Fort James Corporation" and was also executed by DNR, the Department of Justice, and Fort James on November 15, 2000, provides that the consent decree executed between the parties on the same date "...will be filed with the appropriate federal district court at the soonest possible time consistent with applicable law." Thus, the State has committed in writing to filing the consent decree as executed between the parties on November 15, 2000, with the United States District Court for the Eastern District of Wisconsin. Both the consent decree and the separate agreement are silent regarding modifications to the consent decree following the comment period. Thus, despite DNR officials' contention that the final consent decree filed with the court may be modified, the agreement has been executed by the parties and does not appear to contemplate any modifications.

### **Peshtigo River Acquisition**

The acquisition of 700 acres along the Peshtigo River appears to be within DNR's statutory authority under s. 23.09, Wis. Stats. However, s. 23.14, Wis. Stats., requires the Governor's

approval, and s. NR 1.41, Wis. Adm. Code, requires Natural Resources Board approval for such an acquisition. It appears the Legislature has no role in approving or modifying this land acquisition once it is approved by the Governor and the Board. This contrasts with the State's Stewardship Program, which requires DNR to notify the Joint Finance Committee of any stewardship project with costs over \$250,000.

### **Intergovernmental Cooperation**

Typically all natural resource trustees work together to complete a single NRDA. However, in this case the State acted on its own. DNR asserts that when it invited the federal trustees to join in its NRDA with the Fox River Group and the settlement with Fort James, they declined. DNR has also said that it considered joining in the federal trustees' NRDA, but the Fish and Wildlife Service would not turn over data and analysis it used to determine damage figures or allow DNR to participate prior to release of the documents. Officials from the Fish and Wildlife Service deny that the agency has failed to turn over information, pointing out that it puts all its data and information on the Internet and has sent DNR paper copies of all of its information.

Both DNR and Fish and Wildlife officials have provided a number of other reasons for why they have not been able to work together on an NRDA. First, Fish and Wildlife officials have sought to settle with all seven paper companies in one agreement, while DNR is willing to settle separately with each of the companies.

Second, DNR is concerned primarily with cleanup of the Fox River, while the Fish and Wildlife Service is concerned primarily with restoration of lost resources. This is, in part, a difference in agency mission. DNR has the dual mission of river cleanup and restoration of lost resources, while the Fish and Wildlife Service's mission is limited to restoration of lost resources. At the federal level, the cleanup of PCBs from the river is the responsibility of the Environmental Protection Agency.

Third, there are instances of distrust and disagreement between the principals. For example, the former DNR Secretary made comments to the media charging that the Fish and Wildlife Service is misleading the public and being irresponsible by citing a damage assessment of as much \$332.0 million. DNR officials have noted that the Fish and Wildlife Service often settles for less than proposed in similar cases. For example, in one often-cited case in California, the Fish and Wildlife Service sought damages of \$700.0 million but settled the claim for approximately \$70.0 million after ten years of litigation.

In another example of distrust, correspondence between the former DNR Secretary and Fish and Wildlife officials indicate differences over the State's lack of participation in the federal trustees' NRDA and over the sharing of information. The letters also reveal a disagreement over DNR's acceptance of a number of the studies prepared by the federal trustees, which the Fish and Wildlife Service believed DNR had committed to using. Likewise, the letters highlight DNR's disappointment over what it believed was the federal trustees' lack of use of studies prepared by the Fox River Group's consultants under the direction of DNR.

## **Potential Legal Issue**

In a letter dated October 11, 2000, the U.S. Department of Justice indicated to the Wisconsin Department of Justice that it is the opinion of the United States that the State of Wisconsin cannot file the consent decree in federal court until after the federal government publishes a record of decision regarding the cleanup of the Fox River. This means that the consent decree may be challenged by the U.S. Department of Justice if it is filed before publication of the record of decision, which is expected to be released sometime in 2001. A record of decision is a report by the Environmental Protection Agency concerning its decisions regarding the cleanup of the river.

It is the opinion of the Wisconsin Department of Justice that the consent decree may be filed before issuance of the record of decision. Nevertheless, Wisconsin Department of Justice officials have said they will try to resolve this issue with the U.S. Department of Justice before filing the consent decree. This issue is currently unresolved.

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