



The Lower Fox River Teaching Note

Synopsis

An estimated 90,000 pounds of PCBs contaminate a 39-mile stretch of the Lower Fox River in Wisconsin. A group of seven paper mills are cooperating with the Wisconsin Department of Natural Resources (“WDNR”) to voluntarily clean up and restore the river. But the U.S. Fish & Wildlife Service is also independently conducting its own assessment of the natural resource damage caused by the PCBs. The U.S. EPA (“EPA”), frustrated with the slow pace of the state-lead voluntary investigation and clean up, has recently declared that it will list the Lower Fox River on the National Priorities List, making it more likely that a federal-lead clean up will follow. EPA has sent special notice letters to seven paper mills, requesting that the mills conduct or at least fund a Superfund-style Remedial Investigation/Feasibility Study. The students are asked to determine the approach that a cooperating paper mill should take at this time, and over the long term, given all the circumstances.

Positioning

This case study was developed for use in Law 603, Environmental Law, Policy and Process at Stanford Law School. Law 603, an introductory environmental course, covers regulatory approaches, waste management, toxics regulation, administrative issues, the Federal Clean Air Act, and enforcement. The students discuss this case study towards the middle of the course, after the teacher has lectured on RCRA and CERCLA liability, cost allocation, remediation, natural resource damage actions and assessments, and currently proposed Superfund reforms.

Mary J. Decker prepared this note, under the editorial guidance of Barton H. (“Buzz”) Thompson, Jr., Robert E. Paradise Professor of Natural Resources Law, Stanford Law School, for the sole purpose of aiding classroom instructors in the use of SLS Case No. SLS 98-009. It provides analysis and questions intended to present alternative approaches to meeting the learning objectives of the case and stimulating class discussion. Copyright © 1997 by the Board of Trustees of the Leland Stanford Jr. University.

Learning Objectives

The students will gain substantive knowledge of the federal Superfund statute and natural resource damage actions and assessments. From the perspective of a Potentially Responsible Party (“PRP”), the students will recommend both short term and long term strategies for responding to EPA and for dealing with the existing voluntary agreement with the State of Wisconsin. The students will also analyze past events, and consider whether the PRPs could or should have taken an approach different than they did.

Case Study Exhibits

List of Case Study Exhibits

- A Chronology of Key Events
- B Fox River RI Target Deposit Areas
- C Four Representative Remediation Scenarios
- D Fish Tissue PCB Concentration Endpoints
- E January 31, 1997 Agreement between WI and Companies
- F June 17, 1997 EPA Region V letter to Gov. Thompson
- G July 3, 1997 Gov. Thompson letter to EPA Region V
- H July 11, 1997 Memorandum of Agreement
- I July 11, 1997 Milwaukee Journal Sentinel article
- J July 22, 1997 press statement from PRPs
- K Selected statutory and regulatory provisions

Teaching Plan

Law 603 meets for 65 minutes at a time. Two class periods may be devoted to this case study discussion. The teaching plan assumes that a class guest will participate in at least one class.

Teaching Plan

(1) Opening	1 minute
(2) Student Discussion	40 minutes
(3) Class Guest	20 minutes
(4) Closing	4 minutes
Total Class Time	65 minutes

Discussion:

(1) Opening — 1 minute

Here is one possible opening:

Assume that you are General Counsel to one of the paper companies that EPA has identified as a PRP, e.g., the P.H. Glatfelter Co. You had annual sales of about \$475 million and a net worth of about \$440 million in 1993. It's mid-July, 1997. EPA has sent a letter to the Governor of Wisconsin asking that he concur in EPA's plan to list the Lower Fox River on the NPL. Gov. Thompson has fired back a letter, refusing to concur "at this time." Nevertheless, the State of Wisconsin enters into a Memorandum of Understanding with several federal agencies, including EPA, and local Tribes, agreeing to cooperate in the cleanup of the river, Green Bay and Lake Michigan. At the same time, EPA sends "Special Notice Letters" under §122(e) of CERCLA to the PRPs requesting that they conduct or pay for a comprehensive Remedial Investigation/Feasibility Study. What do you recommend that your company do at this point?

(2) Student Discussion — 40 minutes

Question: What are likely to be your company's overall goals?

- Reduce payouts to the government: remediation costs and natural resource damages
- Shift costs to other PRPs or the government
- Avoid litigation
- Gain some degree of certainty, e.g., a cap on liability
- Delay any expenses
- Avoid bad public relations
- Develop and maintain good governmental relationships
- Ensure a safe and clean environment
- Maintain good relationships with local communities

Question: What specific steps would you take now in order to promote these goals?

The NPL Listing: Is there any way of avoiding the NPL listing? Should NPL listing be avoided? Are there any good arguments for listing the site on the NPL?

The Special Notice Letters: Who will conduct the RI/FS? Who will conduct the health risk assessment? When should the RI/FS be conducted? When should any dredging be done?

Voluntary Agreement with the State: Should the pace of this work be accelerated? Are there any interim protective measures that you recommend be considered, e.g., capping of sediments?

Natural Resource Damages: Do you want to become involved in the ongoing effort to assess, and ultimately, to quantify, natural resource damages?

Insurance: Would availability of insurance coverage make a difference to your company?

PRP Relations: What approach do you recommend with regard to the other PRPs? Should you forge a united front? or try to? Should you try to foist liability onto the other PRPs?

Public Relations: What should be done with regard to your company's public relations? What do you think of the press statement attached as Exhibit J?

(3) Class Guest — 20 minutes

The class guest, in-house environmental counsel with substantial Superfund experience, should use most of their allotted time to respond to whatever analytical points the students raise. The teacher should tell the guest ahead of time to take notes during the student discussion and be prepared to respond to, expand on, critique, or clarify the points the students raise. The class guest should reserve a few minutes for a general question and answer session with the students. An update covering subsequent events, including a status report on EPA's proposed NPL listing and the PRPs' progress in carrying out the voluntary agreement, would be useful.

(4) Closing — 4 minutes

The teacher may close the discussion session by briefly summarizing, and clarifying as needed, the most important points that emerged from the discussion.