

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CLEAN WATER ACTION COUNCIL OF
NORTHEASTERN WISCONSIN, INC.

Plaintiff,

v.

No. 09-C-369

UTICA ENERGY, LLC,

Defendant.

CONSENT DECREE

WHEREAS, Plaintiff Clean Water Action Council of Northeastern Wisconsin, Inc. (“Plaintiff”) is a Wisconsin not for profit corporation; and

WHEREAS, Plaintiff filed this action against Defendant Utica Energy, LLC (“Defendant”) on April 9, 2009, after complying with the notice requirements of 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.2; and

WHEREAS, Defendant owns and operates, and at all times relevant to this action has owned and operated, a corn ethanol production facility located at 4995 State Road 91, Oshkosh, Winnebago County, Wisconsin; and

WHEREAS, this action is a Clean Water Act (“CWA”) citizen suit in which Plaintiff alleges that Defendant has violated, and continues to violate, the terms and conditions of WPDES Permit No. WI-0063649-01-0 (“Permit”), issued to Defendant by the Wisconsin Department of Natural Resources (“WDNR”) with an effective date of July 1, 2008, and therefore that defendant has violated and continues to violate the CWA, 33 U.S.C. § 1251 *et seq.*; and

WHEREAS, Plaintiff commenced this action seeking declaratory judgment, injunctive relief, the imposition of civil penalties, and an award of costs, including attorneys' fees; and

WHEREAS, Defendant denies any and all liability under the CWA for the claims raised by Plaintiff in this action, but wishes to resolve this matter simply in order to avoid the costs of continued litigation; and

WHEREAS, On November 5, 2009, the Winnebago County Circuit Court entered a Judgment approving a Stipulated Agreement between the State of Wisconsin ("State") and Defendant in *State of Wisconsin v. Utica Energy LLC*, Case No. 09-CX-000002, resolving claims asserted by the State for Defendant's alleged violations of the terms and conditions of Defendant's Permit and other laws of the State, in which Defendant agreed to pay the State forfeitures, costs and fees totaling \$280,000; agreed to pay stipulated forfeitures for future violations of its Permit; agreed to either connect to the City of Oshkosh Publicly Owned Treatment Works by September 15, 2010 or come into complete compliance with its Permit by March 15, 2011; and further agreed to an expenditure of at least \$200,000 to connect to the City of Oshkosh Publicly Owned Treatment Works; and

WHEREAS, Plaintiff and Defendant have agreed that settlement of this matter is in the public interest and in the interest of the parties and that entry of this Consent Decree ("Decree") without continued litigation or appeal is the most appropriate means of resolving this action and all claims and issues herein; and

WHEREAS, the undersigned representative for each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Decree and to legally bind the party or parties to it; and

WHEREAS, Plaintiff and Defendant have consented to entry of this Decree without trial or final adjudication and without admission of any fact, allegation, or legal argument contained in Plaintiff's Sixty-Day Notice Letter, the Complaint, or Plaintiff's Motion for Summary Judgment in this action;

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action pursuant to the CWA citizen suit provision, 33 U.S.C. § 1365(a).

2. Venue is appropriate in this judicial district and in this Court pursuant to 33 U.S.C. § 1365(c), in that the alleged violations of the effluent limitations giving rise to the claims in this suit occurred in the Eastern District of Wisconsin.

3. For purposes of this Decree, Defendant agrees not to contest the jurisdiction of the Court to enter and to enforce this Decree.

4. For purposes of this Decree, Defendant consents to the Court's jurisdiction over the Defendant and consents to venue in this judicial district.

5. The Parties agree that this Decree is subject to the notice requirements of 33 U.S.C. § 1365(c)(3) and 40 C.F.R. § 135.5 and shall not be entered until at least forty-five (45) days after the date of lodging with the Court.

APPLICABILITY

6. The provisions of this Decree apply to and are binding upon the Plaintiff and Defendant, and upon any of Plaintiff's and Defendant's respective successors and assigns or other entities or persons otherwise bound by law.

7. This Decree constitutes a full and complete settlement of the claims contained in the Complaint filed in this case and is determined to be in the public interest and an appropriate resolution of the facts and arguments alleged in the Complaint.

8. Defendant will provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree.

9. In any action to enforce this Decree, the Defendant shall not raise as a defense the failure of any of its officers, directors, employees, agents or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

10. It is the express purpose of the Parties entering into this Decree to fully and finally resolve and release all of the claims of Plaintiff acting for itself and as private attorney general for the U.S. EPA in its Complaint (and any amendments thereto) and any other claims which might otherwise arise out of the facts known or alleged therein against Defendant (including its officers, directors, members and employees) for any relief, including but not limited to declaratory judgment, injunctive relief, the imposition of civil penalties, the award of costs, and a demand for attorneys' and experts' fees.

11. Plaintiff agrees that it will not, whether acting on its own behalf or as private attorney general for the U.S. EPA, bring an action against Defendant for any alleged claim or violation that occurs between entry of this order and March 15, 2011, if that alleged claim or violation is resolved in or covered by the aforementioned Winnebago County Circuit Court Judgment. Plaintiff further agrees that prior to filing any future enforcement action against Defendant based on claims or violations alleged to have occurred prior to March 15, 2011, it will: (a) provide Defendant and the Wisconsin Department of Natural Resources ("WDNR")

with 60 days' written notice of the alleged claim or violations forming the basis for Plaintiff's suit; and (b) during that 60 day notice period, provide Defendant the opportunity to demonstrate to Plaintiff and WDNR that Defendant has taken action to come into compliance with its Permit or otherwise resolve or remediate the problem. Plaintiff further agrees that it will not file such enforcement action if the State of Wisconsin has commenced an action or has issued a Notice of Violation for the same or similar claims or violations during the 60 day notice period.

CIVIL PENALTIES

12. No later than fifteen (15) days after the entry of this Decree, the Defendant shall pay a total sum of ten thousand dollars (\$10,000) in civil penalties to the United States Treasury by bank check mailed to:

Sandra Doyle
Debt Collection Specialist
Environment & Natural Resources Division
Executive Office
PO Box 7754
Washington, DC 20044-7754

13. Proof of the payment of such sums shall be provided to Plaintiff's counsel at the same time such sums are paid.

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

14. Defendant agrees to pay the amount of fifty thousand dollars (\$50,000) for two Supplemental Environmental Projects ("SEPs") designed to remediate, improve and protect the water quality of Sawyer Creek, in Oshkosh, Wisconsin. These SEP payments shall be used as described in Appendix A to this Decree. Payment for these SEPs shall be made as follows:

- (a) The amount of twenty-five thousand dollars (\$25,000) shall be paid no later than June 30, 2010 by certified bank check payable to the City of Oshkosh and mailed to:

Oshkosh Department of Public Works
ATTN: Sawyer Creek SEP
215 Church Ave.
PO Box 1130
Oshkosh, WI 54903-1130

- (b) The amount of twenty-five thousand dollars (\$25,000) shall be paid no later than September 1, 2010 by certified bank check payable to Winnebago County and mailed to:

Winnebago County Land and Water Conservation Department
ATTN: Sawyer Creek SEP
625 East County Road Y, Suite 100
Oshkosh, Wisconsin 54901

15. Proof of the SEP payments described in paragraph 14 of this Decree shall be provided to Plaintiff's counsel at the same time such sums are paid.

ATTORNEYS' FEES AND COSTS

16. The Parties agree that an award of Plaintiff's costs of litigation, including reasonable attorneys' fees, is appropriate in this case and consistent with the CWA citizen suit provision, 33 U.S.C. § 1365(d).

17. Defendant agrees to pay Plaintiff's reasonable attorneys' fees and costs of litigation relating to this action in the amount of fifty thousand dollars (\$50,000). This amount shall be paid in full no later than fifteen (15) days following entry of this Decree by certified bank check payable to Midwest Environmental Advocates, Inc. and mailed to:

Midwest Environmental Advocates, Inc.
551 W. Main Street, Suite 200
Madison, WI 53703

FORCE MAJEURE

18. For the purpose of this Decree, a Force Majeure is defined as any event or occurrence arising from causes beyond the control of Defendant including, but not limited to, an act of God, fire, flood, riot, strike, or other circumstances beyond the control of Defendant and which delays or prevents the performance of Defendant's obligations under the Decree. If any event occurs which causes or may cause delays in the achievement of any provision of this Decree, Defendant shall notify Plaintiff's counsel of the delay or anticipated delay in writing within ten (10) business days after such occurrence. The notice shall describe the anticipated length of time the delay may persist, precise cause or causes of the delay, the measures taken or to be taken by Defendant to prevent or minimize the delay, and the timetable by which Defendant will implement those measures. Defendant shall adopt all reasonable measures to avoid or minimize such delay. Failure by Defendant without just cause to comply with the notice requirements of this paragraph shall render this Force Majeure provision void and of no effect as to the particular incident involved.

19. If the Parties agree that the delay has been or will be caused by circumstances beyond the control of Defendant, and that Defendant could not have reasonably foreseen and prevented such delay, the Parties will jointly request the Court to extend the time for performance of such requirement. In the event the Parties are unable to agree, the matter may be submitted by either Party to the Court for resolution. If the events causing such delay are not found to be beyond the control of Defendant, failure to comply with the

provisions of this Decree shall not be excused as herein provided and shall constitute a breach of the Decree's requirements.

20. The burden of proving that any delay is caused by circumstances beyond the control of Defendant and the length of such delay attributable to those circumstances shall rest with Defendant.

21. Economic hardship or increases in the costs or expenses incurred in fulfilling the requirements contained herein shall not be basis for an extension of time.

GENERAL PROVISIONS

22. The undersigned representative for each Party certifies that he or she is fully authorized by the Party whom he or she represents to enter into the terms and conditions of this Decree and to execute and bind them legally to this Decree.

23. Neither this Decree, nor the releases it contains, nor any payment pursuant to this Decree, shall be considered or construed as an admission of any facts or liability for any purpose whatsoever, such liability and facts alleged to create liability being continuously expressly denied by Defendant.

24. The Court shall retain jurisdiction of this matter for the purpose of enabling the Parties to this Decree to apply to the Court for any further order that may be necessary to construe, carry out or enforce the terms of this Decree.

25. This Decree shall terminate automatically without further order of the Court at such time as Plaintiff has received each of the following:

- (a) Proof of payment of civil penalties under paragraph 13 of this Decree;
- (b) Proof of the SEP payments under paragraph 15 of this Decree; and

(c) Payment of attorneys' fees and costs under paragraph 17 of this Decree.

26. The material terms of this Decree shall not be changed, revised or modified except by a written instrument signed by the Parties to this Decree and shall not take effect until approved by the Court. Any non-material modification of this Decree shall be in writing and signed by the Parties.

For Plaintiff CLEAN WATER ACTION
COUNCIL OF NORTHEASTERN
WISCONSIN, INC.:

/s/ James N. Saul

James N. Saul
Wis. Bar No. 1067236

MIDWEST ENVIRONMENTAL
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/s/ Stephen N. Kravit

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Attorneys for Defendant Utica Energy
LLC

**APPROVED AND ENTERED as an Order of this Court, this 3rd day of
February, 2010.**

s/ William C. Griesbach
WILLIAM C. GRIESBACH
UNITED STATES DISTRICT JUDGE