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OSB Environmental & Natural Resources Section presents:
Environmental Law, Year in Review

Working with Experts

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Outline

- Expert Needs
  - Where do you need experts?
  - What expertise do you need?
- Identify Technical Experts
- Collaboration with Experts
  - Expectations and Ground Rules
  - Overall objectives
  - Technical analyses
  - Negotiations or Expert Reports
  - Deposition
  - Trial
- Case Studies

Expert Needs

Where do you need experts?

- Litigation
  - State Court
  - Federal Court
  - State and Federal laws applicable
- Non-litigation
  - Administrative hearing process
  - Compliance matters
  - Natural Resource Damages Assessments
  - Negotiations with parties (i.e. CERCLA allocations, real estate transactions)

What expertise do you need?

- What are the technical needs and issues for your case?
  - Water rights
  - Hydrology
  - FEMA flooding modeling guidance
  - Hydrodynamic, sediment transport and chemical fate and transport modeling
  - Cost allocation
  - Dredging
  - Toxicology
  - Reservoir operations

What expertise do you need?

- Preliminary legal strategy – How do you intend to use your expert(s)?
  - Expert reports, deposition, and trial
  - Negotiations with regulators
  - Both
  - Other
- How do you want your expert(s) to interact, if at all?
  - Team
  - Independent
- How do you need your expert(s) to fit within your overall strategy?

Identify Technical Experts

Identify Technical Experts

- Do you need more than one expert?
- Do you need a team of experts?
- Is there one firm that supply all your experts?
  - Can you identify experts that can work well together, if needed?
- Do these experts need to be local? Do you need nationally recognized experts in their field?

Identify Technical Experts

- How do you find them?
  - Colleagues in your firm
  - Network with technical firms you already use
  - Past litigation cases
  - Site specific expertise
  - Academia
  - Word of mouth
- When do you find them?
  - As soon as possible even if you don't need them right away.
  - Be up front about it.

Identify Technical Experts

- What qualifications should you be looking for?
  - Where does their expertise start and end?
  - How relevant is their expertise for your case?
  - Review their Curriculum Vitae
  - Conflicts of interest
  - Past experience at a site, with the chemicals in question or the subject matter.
  - What experience does she or he have as an expert witness?
  - Interview her or him.
  - Ability to communicate to nontechnical audiences
  - Presentation skills
  - Can you work with this person?
  - What is their ability to work with and strategize with legal counsel?

Identify Technical Experts

- What is their availability and the duration of their availability vs. your need?
- Does the expert need team behind them?
  - If so then how will that be managed?
- How well will they work with other experts you have identified?
- Can she or he identify other experts to support you?
- Can this expert meet deadlines?
- Does the expert feel comfortable testifying in deposition and at trial?

Collaboration with Experts

Expectations and Ground Rules

- What the expectations of working with a Technical Expert?
  - Communications
    - Verbal
    - Written/email
  - Schedule
    - time availability
    - duration
  - Budget
  - Flexibility
  - Innovation
  - Independence of experts
  - Interactions with the client, other experts and legal team

Overall Objectives

- Legal strategy
  - How do you intend to use your experts?
  - What do you need from them?
- Is this a legal challenge, a negotiation, both?
- What background do your experts need to understand the strategy and their role?
- How should your experts be prepared for each phase of the strategy?
- Do your experts understand the overall strategy, and outcomes for the end client?

Technical Analyses and Opinions

- Arguments
  - Defensive
  - Affirmative
- Identifying multiple lines of evidence to make your case
  - This is where you really need your technical experts
- What is the lead time to pursue these different lines of evidence to formulate arguments?
  - Need to prioritize with your expert(s)
  - How does this fit with the overall schedule?

Negotiations

- Who are the parties involved in the negotiations?
- What should your expert(s) know to be prepared?
- Are there times when your expert(s) should be present or not present – err on the side of them being present, even if silent.
- Are technical arguments be presented?
- Do the regulators or other parties have their experts present?

Expert Reports

- Be clear on your expectations for the expert report
  - Format
  - Schedule
  - Number of iterations on drafts
    - Marking of drafts
  - Layout of arguments
  - Foundations for arguments
    - Are technical appendices needed?
  - Who is the audience for the Expert Report?
    - What is their skill set(s)?
    - What are their expectations?
- Are there opportunities for addendums and follow on expert reports in response to other parties?

Deposition

- Deposition Strategy
  - Scope
  - Who will be conducting the interview
  - Duration
  - Process and procedure for deposition
- Deposition preparation sessions
- Attendance at other case depositions
- Preparations the day before
  - What materials will be available during the deposition
- Let your expert know what to expect, even if they are experienced at this.

Trial

- Trial Strategy
  - Scope
  - Duration
  - Process and procedure
- Trial preparation sessions
- Let your expert know what to expect, even if they are experienced at this.
- Developing exhibits with your expert
- Roles of expert report
- Assistance with cross examination?
  - Preparation ahead?
  - In the court room?

Case Studies

Lower Fox River, Wisconsin

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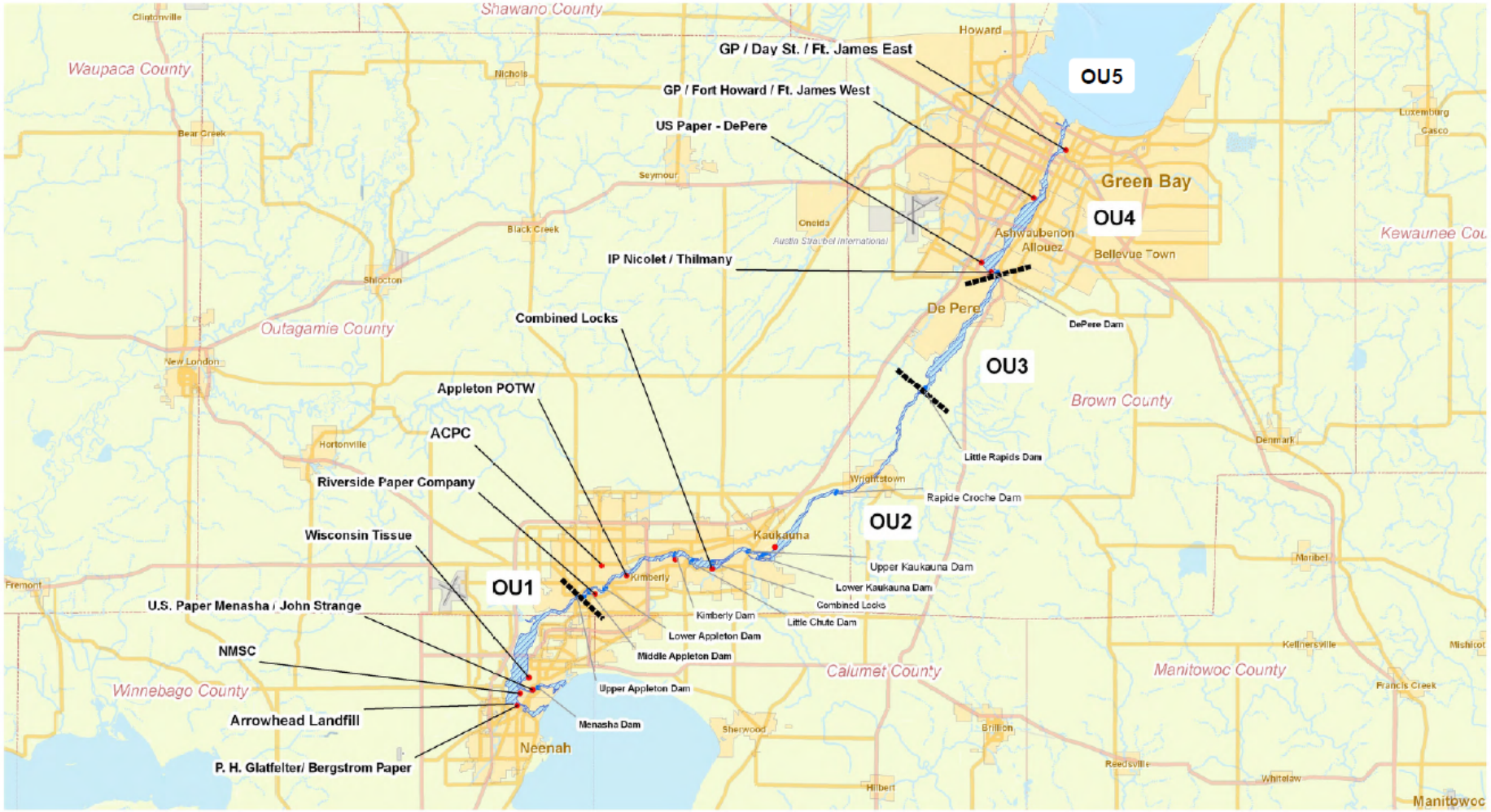


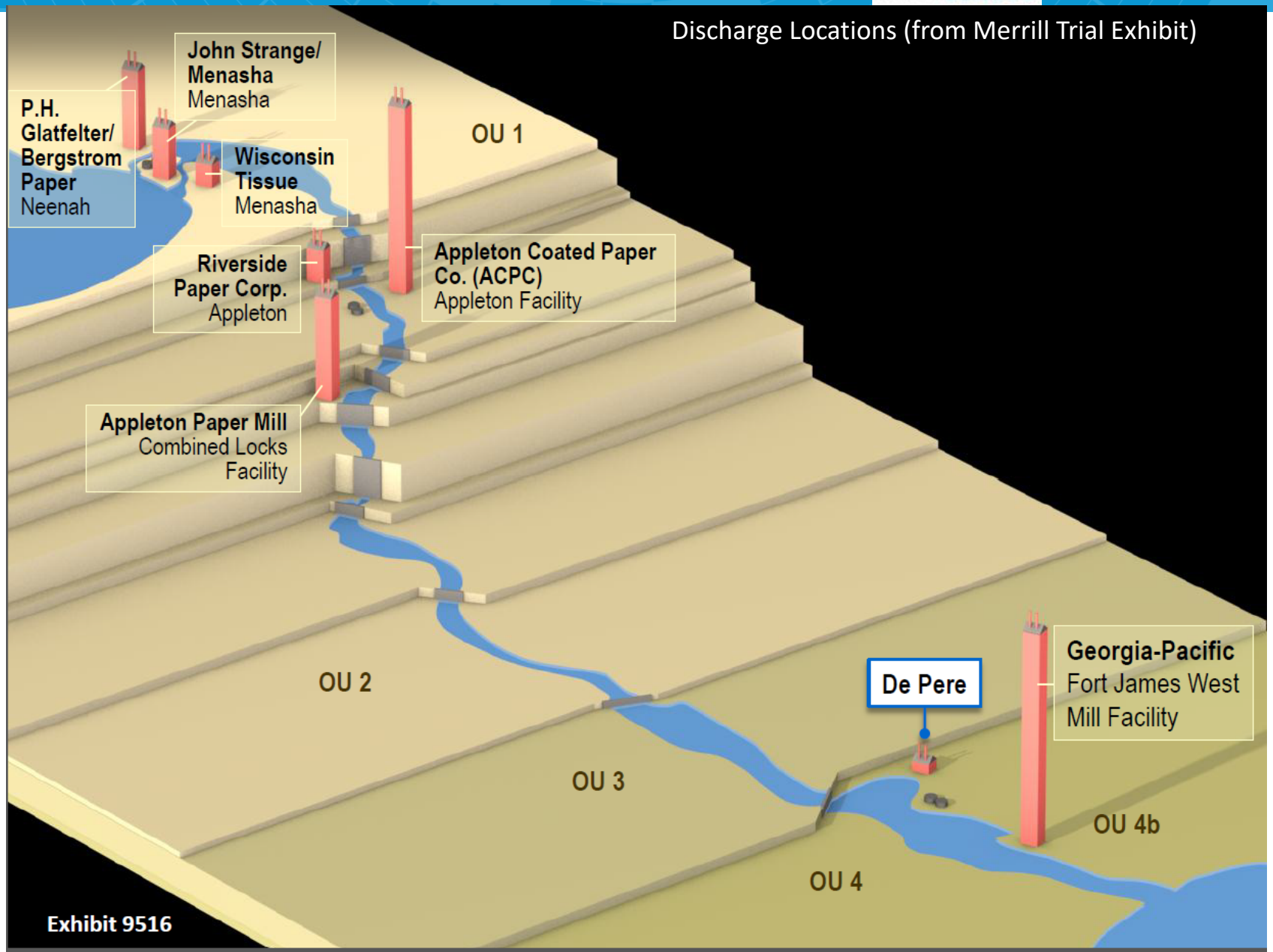
Figure 2-2: Study Area and Major PRPs
Operable Units 1 through 5

Lower Fox River, Wisconsin
September 26, 2012

From ATS Report 9/28/2012

Site and Background

Discharge Locations (from Merrill Trial Exhibit)



Site Costs

- 2009 estimates
  - Governments estimated clean up cost at $700 million
  - Defendants claim clean up costs as high as $1.5 billion
- 2012 estimates
  - Cost of the project is estimated at more than $1 billion.
  - 2009 to 2011, the Lower Fox River Remediation LLC, a special-purpose company set up by NCR and Appleton Papers Inc. for the cleanup, had spent $315 million.

History

- 1992 Original fate and transport model
- 1992-1997 Additional modeling work
- 1997 Sediment remediation strategies evaluated
- 2000 Independent model review of 1997 models
- 2000 Model reports released
- Dec - 2002 Final model report released
- Jun - 2003 ROD issued
- 2003 – 2010 Additional data collection
- 2007 ROD amendment issued
- December 2012, Trial
- May, 2013 ruling by Judge Griesbach
- September 2014, Seventh Circuit Court ruling
- May 15, 2015 ruling by Judge Griesbach
- 2015 – 2017 Next round of cost allocation
- Client settled out of court in 2017

Clackamas River Water Providers Permit Extension Case

- First Permit Extensions to Apply Fish Persistence Review under ORS 537.230
- History
  - 2007: OWRD issued Proposed Final Orders on the Permit Extensions
  - 2008: Water Watch Filed Protests to the PFOs
  - 2010: Contested Case Hearing
  - 2011: OWRD issued Final Orders; Water Watch filed Appealed
  - 2012: Appellate Briefing
  - 2013: Oral Argument
  - 2014: Court of Appeals Issued Order
  - 2016: Remand Contested Case Hearings
  - 2018: OWRD Issues Final Orders on Remand
  - 2018: Water Watch Appealed
  - 2019: Appellate Briefing to commence this Fall

Use of Experts

Water Providers:

- Rob Annear (water supply planning, flow predictions)
- Leslie Williams (fish biology)
- Steve Cramer (fish biology)

Water Watch

- Jonathan Rhodes (flow predictions)
- Charles Huntington (fish biology)
- John Davis (water supply planning)
- Christopher Frissell (fish biology)
- Ted Labbe (fish passage)

Thank you

Questions?

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