



LEGAL ISSUES
RELATING TO COUNTY GOVERNMENT

“FREE” MONEY?

Monsanto Class Action Suit Settlement Fund Restrictions

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Several Wisconsin counties have received settlement checks from a class action suit, the City of Long Beach et. al v. Monsanto Company, involving damages arising out of Monsanto’s design and manufacture of PCBs. Other counties may be receiving funds at a future date¹ and some counties have the option of applying for additional funds. Receiving Monsanto settlement funds raises questions surrounding potential spending constraints and reporting requirements. This article explains the constraints and restrictions, existing and potential, associated with these settlement funds.

► Background: litigation and settlement

Polychlorinated biphenyls, or PCBs, are a group of man-made organic chemicals known as “chlorinated hydrocarbons.”² While no longer domestically manufactured, PCBs may still be present in many products and materials produced before 1979. PCBs easily migrate or “leak” out of the source material into the surrounding surfaces, air, water, soil and other materials and cause the

release of PCBs into our environment so long as these products are used. Studies have linked PCB contamination to several health issues in humans, animals, aquatic species and aquatic wildlife, including increased risk of liver cancer, breast cancer, melanoma, and non-Hodgkin’s lymphoma; lowered immune responses; and deficits in neurological development, visual recognition, and short-term memory loss.

► Monsanto litigation

The original plaintiffs consisted of counties and municipalities that operated, owned and/or managed various stormwater systems that are contaminated with PCBs or discharged PCB-contaminated water into an “impaired” water body. The plaintiffs have (or will) incur costs to test, monitor, remediate and/or remove the levels of PCBs in those discharges as required in permits by the National Pollutant Discharge Elimination System, pursuant to the Clean Water Act.³

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should be liable for the ongoing harm to both people and property due to the long-term impacts of PCBs. After the filing of the original action, the matter was certified as a class action. The parties then agreed to settle prior to trial. While not admitting any wrongdoing, Monsanto agreed to pay up to \$550 million to four different “settlement funds.” The settlement funds vary based on the amount of damage sustained from Monsanto PCBs, with each fund having a specific formula for calculating payments.

1. Monitoring Fund: The Monitoring Fund totals nearly \$43 million and provides a minimum payment to all class members, thereby securing a release of future claims through payment of some compensation.⁴ The purpose of the Monitoring Fund is to pay for PCB sampling or any other mitigation efforts. The recipient has sole discretion on how to use the funds, so long as the activities comply with applicable law.

The payments are broken down into four levels based on population and whether the governmental entity has a Phase I or Phase II permit under the National Pollutant Discharge Elimination System. Two categories include Wisconsin counties:

- \$27,024.47 for Phase II permittees with a population equal to or greater than 100,000, and Phase II independent port districts. There are 11 Wisconsin counties⁵ in this classification.
- \$17,024.47 for Phase II permittees with a population of less than 100,000. There are six Wisconsin counties⁶ in this classification.

2. TMDL Fund: A “TMDL” (total maximum daily load) is a calculation of the maximum amount of pollutant that an impaired water body can receive on a daily basis and

still meet water quality standards. The Clean Water Act requires all states⁷ to identify “impaired” water bodies that are not able to meet the state’s water quality standards. A TMDL must be developed for each impaired body of water. Compliance with TMDL requirements occurs through the Wisconsin Pollutant Discharge Elimination System permit process for discharge from point sources.

The TMDL Fund totals \$250 million and provides payment to class members that had a TMDL, TMDL Alternative, or TMDL Direct-to-Implementation regulation promulgated or updated after Jan. 1, 2010, but before June 24, 2020, wherein a PCB is a named constituent. Four Wisconsin counties are eligible for payments from the TMDL Fund: Kenosha, Milwaukee, Racine and Sheboygan counties.

TMDL funds are intended to compensate recipients for restitution and remediation, including mitigation of contaminated property, stormwater and/or stormwater systems, and compliance with a TMDL. The allocation is determined by a specific algorithm developed to measure the impact of damage.⁸

The TMDL Fund does not have any specific oversight provisions or restrictions on the use of the funds beyond the note that the funds are intended to “compensate Settlement Class Members for restitution and remediation including mitigation of contaminated property, stormwater, and/or stormwater systems, including compliance with a TMDL.”

3. Sediment Sites Fund: The Sediment Sites Fund pays settlement class members that are impacted by PCB-contaminated sediments due to stormwater contribution and runoff. There are no Wisconsin counties eligible to receive payment from the Sediment Sites Fund.

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4. Special Needs Fund: The Special Needs Fund totals more than \$107 million and is separated into two parts: (1) Special Needs Fund Part A, which compensates the original Monsanto case plaintiffs’ damages and fees; and (2) Special Needs Fund Part B totals \$50 million, which is available to all settlement class members who apply and meet the required criteria. Applicants must show that a “significant” benefit or cost is not otherwise encompassed within any other part of the allocation.⁹ As such, a county may request funding for special circumstances that have not otherwise been contemplated or addressed in the settlement agreement or with settlement funds. A requestor must comply with the application requirements, which may be found after registering online at pcbclassaction.com/special-needs-funds-part-b.php, and must submit the application by April 28, 2024.

► Options for settlement funds

The Monitoring Fund and TMDL Fund do not set forth any oversight mechanisms, approval of spending processes, or reporting requirements once the funds are spent. The settlement agreement does not include language giving a state oversight authority over the use of funds.

So, how may the settlement funds be used? The settlement agreement specifically states that the Monitoring Fund may be used to pay for “PCB sampling and/or any other mitigation efforts in the Settlement Class Member’s sole discretion, as part of compliance with applicable law.”¹⁰ This is a broad grant of power for counties to use the Monitoring Funds they receive so long as that use is consistent with a mitigation effort under Wisconsin or other applicable law.

Unlike the Monitoring Fund recipients, TMDL Fund recipients do not have “sole discretion” to use the funds for any sampling or mitigation efforts. However, no specific guidance is provided and TMDL Fund recipients appear to have broad discretion when using the funds.

At this time, there is no further guidance or known restrictions on the use of the Monitoring Funds and the TMDL Funds.

► Conclusion

Wisconsin counties have faced increased costs due to environmental contamination for many years. The Monsanto case intends to compensate for some of those costs, and for future costs, of remediating the long-term impacts of PCBs. ■

Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.

1. See endnotes 5 and 6 for a list of recipient counties.
2. See <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls#what>.
3. The Wisconsin Department of Natural Resources acts as the United States Environmental Protection Agency’s agent in the permit process.
4. Only by ensuring payment to all class members could Monsanto secure waivers of all future claims from plaintiffs and class members.
5. Brown County, Dane County, Eau Claire County, Fond du Lac County, La Crosse County, Marathon County, Outagamie County, Rock County, Washington County, Waukesha County, and Winnebago County.
6. Calumet County, Chippewa County, Douglas County, Jefferson County, Ozaukee County, and St. Croix County.
7. 33 U.S.C. § 1251(a) collectively defines states, territories and authorized tribes as “states.”
8. Paragraph 78(b) of the settlement agreement sets forth the algorithm:

$$\left(\frac{\text{Class member's impervious TMDL land area}^9}{\sum \text{Impervious TMDL land area of all TMDL fund class members}} \right) \times (\text{Total TMDL fund} - \sum \text{population bonus})$$

9. See id. at ¶80(h).
10. See id. at ¶77.