IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

BERNICE SAMPLES, et al.,

Plaintiffs,

vs.

CONOCO, INC.; AGRICO CHEMICAL COMPANY; and ESCAMBIA TREATING COMPANY, INC.,

Defendants.

Case Number 2001 CA 000631

Division: "J"

CLASS CERTIFICATION ORDER

THIS CAUSE is before the Court on the plaintiffs' November 30, 2001, Motion for Class Certification and Memorandum in Support; the defendants' February 28, 2002, Opposition to Plaintiffs' Motion for Class Certification; and the Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Class Certification, filed on May 7, 2002. On July 1, 2002, the parties jointly submitted Stipulations of Fact for the Limited Purpose of Use at the Class Certification Hearing [references to which will made herein as "Joint Stipulation No. #"] and a Joint Agreement on Documentary Evidence by which the parties stipulated to the admissibility of the evidence referenced herein *for the purpose of the certification proceeding*. The Court, after consideration of the pleadings, the exhibits, the case file and the relevant case law, as well as the July 2, 2002, oral arguments and submissions of the parties, finds that the plaintiffs are entitled to class representation, however the actual class geographic boundaries are smaller than those proposed by the plaintiffs.

BACKGROUND

On March 23, 2001, Plaintiffs filed this class-action lawsuit in state court against Conoco, Inc. ("Conoco"), Agrico Chemical Company ("Agrico"), and the Escambia Treating Company ("ETC").[1] Plaintiffs' First Amended Complaint, filed November 30, 2001, alleges trespass, private nuisance, unjust enrichment, strict liability and negligence. Plaintiffs seek to recover damages, including restoration costs, allegedly arising from environmental contamination associated with the industrial facilities owned and operated by each defendant.

Defendants thereafter removed this action to the U.S. District Court for the Northern District of Florida, alleging federal question jurisdiction, original jurisdiction pursuant to the Price-Anderson Act and fraudulent joinder. On August 7, 2002, the District Court, Judge Collier, held that the plaintiffs' claims did not depend on the construction or application of the Constitution or laws of the United States, were not completely preempted by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub.L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. § 9601 *et seq.*), were not based on a federal cause of action created by CERCLA, did not "challenge" consent decrees between the defendants and the Environmental Protection Agency, but sought remedies within the control of state courts which do not conflict with CERCLA, and thus lacked federal question jurisdiction. Judge Collier also determined (a) the All Writs Act did not support removal; (b) the plaintiffs' colorable claim against the Escambia Treating Company, a dissolved Florida corporation, and their intention to obtain a judgment against it precluded a finding of fraudulent joinder and, thus, of federal diversity jurisdiction; and (c) since the

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[1] Escambia Treating Company closed its operation at the subject site in 1982. The corporation was administratively dissolved by the Florida Department of State in 1993. It has not entered an appearance in this litigation.

plaintiffs' claims did not state a cause of action under the Price-Anderson Act, 42 U.S.C. § 2210(n)(2) (pertaining to injuries relating to a nuclear incident), original jurisdiction in federal court under the Act did not exist. Thus, he granted plaintiffs' motion to remand. *Samples et al v. Conoco, Inc., et al.* 165 F. Supp. 2d 1303 (N.D. Fla. 2001).

THE AGRICO SITE

The Agrico Superfund Site ("the Agrico Site") is located at the northwest corner of Fairfield Drive and Interstate 110.[2] Subsidiaries of Defendant Conoco owned and operated the Agrico Site from approximately 1963 until approximately 1972.[3] Defendant Agrico owned the Agrico Site from approximately 1972 until approximately 1977 and operated it until approximately 1975 or 1976 when fertilizer production and manufacturing operations ceased.[4]

Sulfuric acid was produced at the Agrico Site beginning in approximately 1889 and superphosphate fertilizer from approximately 1920 until approximately 1975.[5] The plant produced superphosphate fertilizer, and, beginning in approximately the 1950's, it also (a) produced sodium flourosilicate, (b) manufactured a fertilizer known as monoammonium phosphate from ammonia and superphosphate, and (c) mixed together nitrogen, potassium, and phosphate fertilizers to make commercial grade products.[6] As a result of historical operations at the Agrico Site, fluoride is at least

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[2] Joint Stipulation No. 11.

[3] Joint Stipulation No. 8.

[4] Joint Stipulation No. 9.

[5] Joint Stipulation No. 7.

[6] Joint Stipulation No. 10.

present in the Main Production Zone of the Sand and Gravel groundwater aquifer in an area downgradient of the Agrico Site.[7]

THE ETC SITE

The ETC Superfund Site ("the ETC Site") is located at 3910 North Palafox Street in Pensacola, Florida.[8] The property is located between one-quarter and one-half mile to the northwest of the Agrico Site and is bordered on the north by residential neighborhoods, on the west by Palafox Street, on the east by a railroad switchyard, and on the south by an abandoned concrete plant and small industrial park.[9]

The ETC Site operated as a wood treating facility from approximately 1942 until approximately 1982.[10] During some or all of that time, ETC treated wood products, including utility poles and other lumber, with pentachlorophenol and creosote.[11] As a result of historical site operations at the ETC Site, hydrocarbons related to wood treating operations, including coal tar, creosote, and napthalene, are present at least in the Sand and Gravel aquifer in an area downgradient of the ETC Site.[12]

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[7] Joint Stipulation No. 12.

[8] Joint Stipulation No. 13.

[9] *Samples, et al. v. Conoco, Inc., et al., supra* (fn. 3).

[10] Joint Stipulation No. 14.

[11] Joint Stipulation No. 15.

[12] Joint Stipulation No. 16.

Agrico and Conoco never owned the ETC Site, nor did they own, operate or otherwise participate in the ETC or its operations.[13] ETC never owned the Agrico Site, nor did it own, operate or otherwise participate in Agrico, Conoco, or operations at the Agrico Site.[14]

REMEDIAL HISTORY

The Florida Department of Environmental Protection ("DEP") conducted a groundwater assessment at the Agrico Site in January of 1987. The study concluded that the site contaminants, primarily fluoride and sulfate, had polluted the area groundwater. EPA ROD OU-2 for the Agrico Site, August 18, 1994, page 4, *Declaration*.

The United States Environmental Protection Agency ("EPA") listed the Agrico Site on the Superfund National Priorities List in 1989.[15] Under the Superfund program and the direction of EPA, Conoco and Agrico entered into an Administrative Order on Consent ("AOC") with EPA in 1989 to conduct remedial investigations of environmental conditions at the Agrico Site.[16] As required by the AOC, Conoco and Agrico subsequently submitted to EPA formal investigations and feasibility studies to evaluate potential remedial options for site soil conditions and for groundwater. *Id.* EPA issued a Record of Decision ("9/92- ROD") documenting the selected remedy for on-site soil conditions at the Agrico Site in September, 1992.[17]

On February 15, 1994, the United States, on behalf of the EPA, filed a cost-recovery and cleanup action against Conoco and Agrico pursuant to CERCLA. *See United States v. Agrico Chem.*

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[13] Joint Stipulation No. 17.

[14] Joint Stipulation No. 18.

[15] Joint Stipulation No. 19.

[16] Joint Stipulation No. 20.

[17] Joint Stipulation No. 21.

Co., No. 3:94-cv-30057/LAC, (N.D. Fla.). The federal government sought to recover costs incurred by the EPA and the Department of Justice for response actions taken at the Agrico Site and to implement a remedial action for treatment of the contaminated soils located on it. On May 3, 1994, Agrico and Conoco stipulated with the federal government to the entry of a Consent Decree by the District Court approving the EPA's selected remedial action and retaining jurisdiction over the lawsuit for the purpose of enabling any party to petition for any further relief necessary or appropriate for the construction or modification of the Consent Decree, effectuating or enforcing compliance with its terms, or resolving disputes in accordance with the dispute resolution clause, which was subsequently approved by the United States District Court for the Northern District of Florida.[18] *Id.*

EPA issued a Record of Decision ("8/94-ROD") documenting the selected remedy for groundwater conditions in August 1994.[19] In 1995, Agrico and Conoco entered into another stipulation with the federal government for the District Court to enter a subsequent Consent Decree regarding the groundwater remedy. *United States v. Agrico Chemical Co., supra.* After public hearing and comment, in March, 1997, the District Court approved the amended Consent Decree by which it approved a second remedial action designed to monitor groundwater conditions as natural

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[18] The major components of that remedy included: (1) excavation, solidification, and stabilization of approximately 32,500 cubic yards of contaminated sludge and soils from site sludge ponds, (2) consolidation of all stabilized sludge and soils into one sludge pond, (3) construction of a RCRA cap over the sludge pond, (4) construction of a slurry wall around the RCRA cap, and (5) implementation of institutional controls to include security fencing, access, and site deed restrictions. The contaminated soil is known as Operable Unit One ("OU-1"). *Samples, et al. v. Conoco, Inc., et al.*, 165 F.Supp.2d 1303, 1306 (N.D. Fla. 2001) (fn. 1).

[19] Joint Stipulation No. 22.

attenuation, flushing and dispersion of contaminants from the Agrico Site occur.[20] *Id.* Implementation of the selected Agrico Site soil remedies was completed in April 1997.[21]

The EPA excavated approximately 220,000 cubic yards of contaminated soil between 1991 and 1992 at the ETC Site. The soil was piled up to form a large mound, which is known by many local residents as "Mount Dioxin." The mound is covered by a black tarp and held down with ropes and concrete weights. *Samples, et al. v. Conoco, et al., supra*, at 1306-1307.

In 1994, the ETC Site was placed on the National Priorities List. *See* 40 C.F.R. pt. 300 app. B, at 210 (2000) (designated as "Escambia Wood-Pensacola"); National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 65,206 (Dec. 16, 1994). EPA is conducting the remedial investigation and evaluating potential site remedies. EPA has not yet selected a final cleanup remedy for the ETC Site.[22]

"On February 12, 1997, a record of decision (ROD) was issued for the permanent relocation of 358 households. The [EPA] made a decision to relocate the residences and clean up the properties to levels that are protective for industrial use." Interim Policy on the Use of Permanent Relocations as Part of Superfund Remedial Actions, 64 Fed. Reg. 37,012 (July 8, 1999).

A groundwater plume of contaminants which resulted from the discharge of wastewater at the Agrico Site "is approximately 7,000 feet long and 5,000 feet wide." EPA ROD OU-2 for the

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[20] The contaminated groundwater is known as Operable Unit Two ("OU-2"). The major components of that remedy included: (1) monitoring the groundwater of the Sand-and-Gravel Aquifer, (2) monitoring the surface water of Bayou Texar, (3) conducting door-to-door surveys of irrigation wells, (4) requesting access from private landowners to plug and abandon impacted irrigation wells, (5) implementing an advisory program, and (6) utilizing institutional controls to restrict new wells. The construction of remedial measures associated with OU-2 was completed in July 1999. *Samples, et al., v. Conoco, et al., supra* (fn. 2).

[21] Joint Stipulation No. 24.

[22] Joint Stipulation No. 26.

Agrico Site, August 18, 1994, page 13. The 8/94 ROD also observed that "the plume of inorganic constituents has migrated to the Bayou Texar. . . ;[t]he most highly concentrated area of the plume is in the lower portion of the Sand-And-Gravel aquifer, approximately 2,000 feet downgradient of the site. . . ; and [t]he site groundwater contamination is less pervasive in the shallow zone of the Sand-And-Gravel aquifer." *Id.*, at page 13. The 8/94 ROD identified the contaminants in the Agrico plume as including arsenic, fluoride, manganese, mercury, nickel, nitrate, benzene, 2,4 dinitro-toluene, radium 226, radium 228, copper, dibenzofuran, fluorene and 2methylnaphthalene. *Id,* at pp. 24-25. Additionally, a groundwater plume of contaminants from the ETC Site has entered the Sand-And-Gravel aquifer and is migrating to Bayou Texar.

The Agrico Site and ETC Site plumes have merged. There now is an area of overlap. *See* Larson Depo.,[23] p. 215; and Defendants' Exhibit 5 in Opposition to Class Certification Motion, *Larson Report, Figure 5* (Shaded area depicts defendants' expert's analysis of the area in which the contaminant plumes from these two sources overlap.).

Describing the remedy selected for the soil and groundwater contaminated by the Agrico Site, the 8/94 ROD stated, "The implementation of the first operable unit remedy [which addressed soil and water materials considered to be 'the principle threat'] should eliminate contaminant loading to the ground water at the Agrico Chemical Site. Therefore, the EPA has selected a Limited Action, for the second operable unit [addressing contamination of the groundwater], which will monitor the ground water conditions as *natural attenuation, flushing* and *dispersion* occur." *Id.*, at page 2 (emphasis supplied). The 8/94 ROD for the Agrico Site required no current affirmative measures

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[23] Depositions of the three experts who proffered reports in support of defendants' opposition to certification, to-wit: Deposition of Steven P. Larson, 6/7/02; Deposition of Charles D. Cowan, 6/12/02; Deposition of Thomas O. Jackson, 6/18/02, have been included in the record before this Court.

by Conoco or Agrico to remove groundwater contaminants which have migrated from the Agrico Site, but might require such measures in the future.[24]

The 8/94 ROD's remedial alternative provisions require *monitoring* groundwater and Bayou Texar surface water and a door-to-door irrigation well *survey*. Further, it requires "institutional controls," which it describes as including the placement of *deed restrictions* on private landowners' use of groundwater and requiring Conoco and Agrico to request that private landowners allow the *plugging and abandonment* of impacted irrigation wells. EPA ROD OU-2 Agrico Site, August 18, 1994, page 43. The 8/94 ROD further requires that the Northwest Florida Water Management District (NWFWMD) deny permitting for additional irrigation wells, proposed and in progress, in the area impacted by the defendants' contamination. The NWFWMD imposed a moratorium on the installation of new irrigation wells in the affected area in February of 2001.

In the fall of 2000 Conoco issued correspondence to private landowners, specifically including all well owners within the Agrico plume whom Conoco could locate, consistent with its obligations under the 8/94 ROD. Conoco, following a records search to locate private irrigation wells in the affected area, contacted residents regarding the closure of these wells due to the presence of contaminants in the groundwater. The correspondence to landowners stated:

> As you may know, the United States Environment Protection Agency (USEPA) and the Florida Department of Environmental Protection (FDEP) have identified multiple ground water plumes in southern Escambia County. *Accordingly, the quality of the ground water which is pumped by your irrigation well may be degraded or may become degraded sometime in the future.*
>
> The USEPA has determined that lawn irrigation using ground water impacted by constituents that may have migrated from the Agrico site is an acceptable use.

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[24] Joint Stipulation No. 6.

> However *because of the other groundwater plumes in the area, we caution the use of your water well for any purpose, including irrigation.*
>
> *Our recommendation is that your irrigation water well be abandoned. Enclosed is an Abandonment Scope of Work which further defines the plugging and abandoning well activities we propose be done on your property.* Conoco, Inc. (Conoco) and the Agrico Chemical Company (Agrico) are willing to provide assistance to you in this regard. Also, as part of this proposal, these companies will include an equitable compensation offer for future irrigation water use.

Plaintiffs' Exhibit 9 in Support of Class Certification, *October 5, 2000 Letter from Conoco to residents* (emphasis added).

In 2000, EPA required, and Conoco and Agrico hired, consultants to perform a five-year review of the efficacy of the on-site remedies. Based on Conoco's and Agrico's submissions, EPA subsequently found that the remedies remained protective of human health and the environment.[25]

THE REPRESENTATIVE PLAINTIFFS

Each class representative resides within the proposed class boundaries. Each owns or owned residential or commercial property within the proposed class boundaries.[26] The willingness of each class representative to participate in the discovery and trial process is not questioned by defendants.[27]

Bernice Samples owns and resides at property located at 1009 E. Tunis Street. Ms. Samples purchased that property in 1971. Ms. Samples has an irrigation well on her property.[28]

James T. Baer owns and resides at the property located at 1775 E. Texar Drive. Mr. Baer purchased that property in 1997. Mr. Baer installed an irrigation well on his property in 1997.[29]

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[25] Joint Stipulation No. 25.

[26] Joint Stipulation No. 2.

[27] Joint Stipulation No. 4.

[28] Joint Stipulation No. 27, 28.

[29] Joint Stipulation No. 29, 30.

Etta Mixon owns and resides at the property located at 1005 E. Tunis Drive. Ms. Mixon formerly held a partial ownership interest in property located at 29 East Herman Street and owned properties located at 50 East Pearl Street and 31 E. Herman Street. Ms. Mixon sold the 50 East Pearl Street, 29 East Herman Street, and 31 East Herman Street properties to the Army Corps of Engineers in 1999, 2000, and 2001, respectively, in the context of expropriation proceedings. Ms. Mixon has an irrigation well on her property at 1005 E. Tunis Drive, but not on the other properties in which she had an interest. Ms. Mixon was paid $5,000 by Conoco to allow them to cap her well.[30]

Mark Bonifay owns and resides at property located at 2275 Banquos Court. Mr. Bonifay purchased that property in July 2000. Mr. Bonifay has two irrigation wells on his property and one capped well-point.[31]

Charles Robinson owns and resides at property located at 3811 Menendez Drive. Mr. Robinson purchased that property in 1994. He does not have any wells on his property.[32]

Thomas Staples owns and resides at the property located at 1930 E. Gonzales Street. Mr. Staples purchased the property in 1987 and constructed a new home on it in 1993. Mr. Staples installed an irrigation well on his property in approximately 1993.[33]

Rosa Lee owned and resided at the property located at 19 Pearl Avenue. Ms. Lee purchased the property in 1946. Ms. Lee had irrigation wells on her property.[34]

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[30] Joint Stipulation No. 31, 32.

[31] Joint Stipulation No. 33, 34.

[32] Joint Stipulation No. 35, 36.

[33] Joint Stipulation No. 37, 38.

[34] Joint Stipulation No. 39, 40.

Ralph M. Boyd is the trustee of the S.W. Boyd, Sr. Trust which owned property located at 1261 Stow Avenue. The Trust purchased the property in 1989 and sold it in 2001. An irrigation well was installed at the 1261 Stow Avenue property in 1999 but has never been used.[35]

Blair L. Stephenson owns and resides at property located at 1907 E. Gonzalez Street. Mr. Stephenson purchased the property in 1991. The property at 1907 E. Gonzalez Street has an irrigation well.[36]

Pensacola Village Apartments, L.C., is a Florida limited liability corporation which owns property located at 500 E. Fairfield Drive where it operates an apartment complex. There is no well located on the property at 500 E. Fairfield Drive.[37]

THE PUTATIVE CLASS MEMBERS

Under the proposed class definition offered by the plaintiffs in the First Amended Complaint and the Motion for Class Certification, the following are putative class members:

(a) The Toys-R-Us on the corner of Brent Lane and 9th Avenue;

(b) A tenant of the Pensacola Village Apartments who rented an apartment from 1968 to 1969;

(c) A tenant of the Pensacola Village Apartments who rented an apartment in September 2000 and moved out in January 2001;

(d) A naval officer who owned a home within the geographic boundaries of the putative class area from 1947 until 1950;

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[35] Joint Stipulation No. 41, 42.

[36] Joint Stipulation No. 43, 44.

[37] Joint Stipulation No. 45, 46.

(e) The person to whom the Naval officer listed in (d) sold his home in 1950;

(f) Wiggins Enterprises, Inc., a Florida corporation engaged in the landscaping business, which owns property located 3460 North Alcaniz Street and 3601 North Davis Highway;

(g) An owner of residential property within the class geographic boundaries who sold that property at any time between 1990, when Agrico Site cleanup activities started, and in 1995, when those activities were completed;

(h) The person to whom the S.W. Boyd Trust sold the property at 1261 Stow Avenue in 2001;

(i) The person or persons who rented property at 29 East Herman Street from Ms. Mixon;

(j) The person or persons from whom James T. Bauer purchased his property at 1775 E. Texar Drive in 1997;

(k) The person or persons from whom Mr. Bonifay purchased his property at 2275 Banquos Court in July, 2000

(l) Commercial establishments like fast food stores, gasoline stations, dry cleaners, banks, and grocery stores located, either historically or currently, within the proposed geographic boundaries of the alleged class.[38]

Certain putative members of the class previously brought property damage claims against Conoco and Agrico in litigation styled *Vigodsky et al. v. Agrico Chemical Co., et al.* and settled that litigation.[39] Members of the Pensacola community, including representatives of Citizens Against

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[38] Joint Stipulation No. 47.

[39] Joint Stipulation No. 48.

Toxic Exposure ("CATE"), filed public comments with EPA and with the District Court; some opposing the selected groundwater remedy.[40] *See United States v. Agrico Chemical Co.*, Order at 4-5 (N.D. Fla. Mar. 10, 1997); Declaration of Kenneth A. Lucas in Support of the Motion to Enter the Amended Consent Decree (N.D. Fla. Aug. 22, 1996); Letter to Lois Schiffer, Assistant Attorney General, U.S. Department of Justice, from Arent Fox and Environmental Justice Project Lawyers Committee for Civil Rights Re: Comments to Proposed Amendment to Consent Decree in *United States v. Agrico Chemical Co.* at 1-6 (July 31, 1995). Certain putative members of the proposed class were participating members of CATE during this time.

SCOPE OF THE CLASS

Plaintiffs do not seek to certify a class bringing personal injury claims against the defendants in this action;[41] nor do plaintiffs seek to certify a class bringing medical monitoring claims against defendants in this action;[42] nor do plaintiffs seek in this action to certify a class based on airborne migration of contamination from the Agrico Site, except to the extent that depressed market values stem from such migration or perception thereof.[43]

In *Williams, et al. v. Conoco, Inc., et al.*, Case Number 01-0866-CA-01, Escambia County Circuit Court ("the *Williams* litigation"), the plaintiffs therein have brought a claim for medical monitoring and have alleged exposure to contaminants from the Agrico Site and the ETC Site.[44] Defendants in the *Williams* litigation include Conoco, Inc., Agrico Chemical Company, and the

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[40] Joint Stipulation No. 23.

[41] Joint Stipulation No. 49.

[42] Joint Stipulation No. 50.

[43] Joint Stipulation No. 51.

[44] Joint Stipulation No. 54.

Escambia Treating Company.[45] The Amended Complaint in the *Williams* litigation seeks certification of a class (but no motion for certification has yet been filed) consisting of "any person who resides, works, or attends school, or who at any time subsequent to January 1, 1920 resided, worked, or attended school, within any portion of the following geographic area: the area in the City of Pensacola bordered on the north by Brent Lane/Bayou Boulevard/Summit Boulevard, to the east by Escambia Bay/Pensacola Bay, to the south by Pensacola Bay, and to the west by Palafox Street (Highway 29)."[46] The law firms of Levin, Papantonio and Beggs & Lane, representing the plaintiffs herein, are counsel to the plaintiffs in the *Williams* litigation.[47]

CLASS ACTIONS[48]

The Supreme Court of Florida has explained that "[t]he purpose of the class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court." *Johnson v. Plantation General Hosp. Ltd. Partnership*, 641 So. 2d 58, 60 (Fla. 1994). Florida's class action rule (Rule 1.220, Fla.R.Civ.P) was patterned after the federal class action Rule 23; therefore, federal decisions interpreting the federal rule are persuasive in interpreting the Florida rule. *See Toledo v. Hillsborough County Hosp. Auth.*, 747 So. 2d 958, 960 n.1 (Fla. 2d DCA 1998); *Concerned Class Members v. Sailfish Point, Inc.*, 704 So. 2d 200, 201 (Fla. 4th DCA 1998).

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[45] Joint Stipulation No. 55.

[46] Joint Stipulation No. 51, 52.

[47] Joint Stipulation No. 52.

[48] Acknowledgment is given to the Honorable Hugh Carithers, Jr., Circuit Judge, Fourth Circuit, and Gary Sasso, Esq. for materials distributed at the 2003 Annual Business Meeting of the Florida Conference of Circuit Judges in connection with a presentation entitled, "Class Actions."

A case does not become a class action merely because it bears the legend "class representation." *Policastro v. Selk*, 780 So. 2d 989, 991 (Fla. 5th DCA 2001). Rather, the party seeking class certification has the burden of pleading and proving each and every element required by Rule 1.220 for certification of the class. *See Execu-Tech Business Systems, Inc. v. Appleton Papers, Inc.*, 743 So. 2d 19, 21 (Fla. 4th DCA 1999); *Courtesy Auto Group, Inc. v. Garcia*, 778 So. 2d 1000 (Fla. 5th DCA 2001). Moreover, the burden of proving that a class action is appropriate must be satisfied at the hearing, not at an unspecified later time. *Hoyte v. Stauffer Chem. Co.*, 2002 WL 31892830 (Fla. Cir. Ct. 2002) (citing *Andrews v. AT&T*, 95 F.3d 1014, 1023 (11th Cir. 1996)).

The trial court has the obligation to conduct a "rigorous analysis" to ensure that each provision of Rule 1.220 is met, and there must be a sound basis in fact, not supposition, supporting the findings. *See Baptist Hosp. of Miami, Inc. v. Demario*, 661 So. 2d 319, 321 (Fla. 3d DCA 1995). Determining whether the class action requirements are satisfied is committed to the trial court's discretion. A determination that a class action is appropriate or not appropriate will be reversed only upon a showing of clear abuse of discretion. *Marco Island Civic Ass'n, Inc. v. Mazzini* 805 So. 2d 928, 930 (Fla. 2d DCA 2001); *Colonial Penn Ins. Co. v. Magnetic Imaging Systems I, Ltd.* 694 So. 2d 852, 854 (Fla. 3d DCA 1997).

Historically, the trial court was not entitled to examine the merits in determining the certification question. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). But four years after *Eisen*, the Supreme Court decided *Cooper & Lybrand v. Livesay*, 437 U.S. 463 (1978), in which it stated: "Class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" and "[t]he more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits." Going

beyond the pleadings is necessary to understand the claims, defenses, relevant facts and applicable substantive law. *E.g.*, *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982)("it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question"); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 266 (Fla. 2d DCA 1999); *Stone v. Compuserve Interactive Services, Inc.* 804 So. 2d 383, 387 (Fla. 4th DCA 2001). Judge Easterbrook of the federal Seventh Circuit recently observed that "nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen* prevents the [trial] court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers." *Hoyte*, 2002 WL 31892830 * 39 (citing *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001)).

FLORIDA RULE OF CIVIL PROCEDURE 1.220

Class certification in Florida is governed by Florida Rule of Civil Procedure 1.220.[49] Rule 1.220 is divided into five separate categories, lettered (a) – (e). The court must comply with the requirements for each category. Rule 1.220(a) enumerates four prerequisites to class actions. Rule 1.220(b) identifies the three possible types of class actions. Rule 1.220(c) speaks to specific pleading requirements in class actions. Rule 1.220(d) addresses notice requirements. Rule 1.220(e) provides for settlement and dismissal after a class has been certified.

RULE 1.220(a) FINDINGS

The four prerequisites to class actions articulated in Rule 1.220(a), each of which must be present before the trial court may consider class certification, are referred to as (1) *numerosity*, (2) *commonality*, (3) *typicality*, and (4) *adequacy*. *See W.S. Badcock Corp. v. Myers*, 696 So. 2d 776 (Fla. 1 st DCA 1996).

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[49] The equivalent federal rule is Federal Rule of Civil Procedure 23.

Numerosity. This requires the Court to find, based upon evidence, that the number of class members is "so numerous that separate joinder is impractical." *See Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 266 (Fla. 5th DCA 2002). Courts have concluded a class as small as twenty-five persons facially satisfies the requirement. *See Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 736, 743 (Fla. 2d DCA 1990).

Some courts have ruled that a component of the numerosity requirement is that the class is "adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001); *Neumont v. Monroe County*, 198 F.R.D. 554, 556 (S.D. Fla. 2000). Others have held that an overbroad class definition is inadequate, either as a component of numerosity or as a separate element of the class certification analysis. *Hoyte*, 2002 WL 31892830 *40; *Rink*, 203 F.R.D. at 648.

In this case the class size may be as few as the number representing "residential owners within the limited area of the documented Agrico plume with wells screened in the Main Production Zone," i.e., approximately 200,[50] ranging to over 10,000,[51] if plaintiffs' proposed geographic class definition is adopted. Consequently, subject to the further findings of the Court, the members of the presumptive class is large enough that it would be impractical to join individual members.

Commonality. This factor requires the Court to conclude that the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class. That is, questions of law or fact raised by the representative plaintiffs' claims must be common with those raised by the claims of all or a

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[50] *See* Defendants' Exhibit 5 in Opposition to Class Certification Motion, *Larson's Report.*

[51] *See* Defendants' Proposed Findings of Fact & Conclusions of Law, *paragraph 31.*

substantial number of the class members. The class action proponent should demonstrate "a common right of recovery based on the same essential facts." *Broin v. Philip Morris Co., Inc.*, 641 So. 2d 888, 890 (Fla. 3d DCA 1994); *State Farm Mutual Automobile Ins. Co. v. Kendrick*, 822 So. 2d 516, 517 (Fla. 3d DCA 2002). The court must look at the commonality of claims and defenses, the result sought to be accomplished, the object of the action, or the question involved in the action. *Broin* at 890; *Imperial Towers Condominium, Inc. v. Brown*, 338 So. 2d 1081, 1084 (Fla. 4th DCA 1976) (quoting *Port Royal, Inc. v. Conboy*, 154 So. 2d 734 (Fla. 2d DCA 1963)). The primary consideration in determining commonality is whether the claims of the representative members arise from the same course of conduct giving rise to the remaining claims and whether the claims are based on the same legal theory. *See Braun*, 827 So. 2d 267 (citation omitted). The commonality threshold is not high. *See W.S. Badcock Corp., supra.*

"Because separate proceedings can, if necessary, be held on individualized issues such as damages or reliance, such individual questions do not ordinarily preclude the use of the class action device." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 817 (3d Cir. 1995), *cert. denied,* 116 S.Ct. 88 (1995), citing, *Eisenberg v. Gagnon,* 766 F.2d 770 (3d Cir. 1985). Any individualized questions regarding the extent of damages will not defeat certification. *In re Lloyd's American Trust Fund Litigation,* 1998 WL 50211 (S.D.N.Y.); *Duprey v. Connecticut Dept. of Motor Vehicles,* 191 F.R.D. 329, 333 (D.Conn. 2000); *Cf.*

In the instant case, the plaintiffs allege damages arising from the spread of groundwater contaminants based on the common acts of the defendants in conducting their businesses at each of the respective Superfund Sites over the years. All of the plaintiffs' claims focus on the impact upon the property interests of the residents in the areas affected by the defendants' release of

contaminants, including fluoride and hydrocarbons, among others, into the groundwater downgradient of each site through their historical manufacturing operations.[52]

Conoco and Agrico have argued that the presence of ETC as a defendant threatens the commonality of issues before this Court. The Federal District Court, Judge Collier, rejected defendants' arguments that ETC was an improper defendant in this action. In his order remanding this case to this Court, he noted that:

> Assuming liability is ultimately established, the Defendants will be able to place Escambia Treating on the verdict form and argue their liability to the jury. *See* FLA. STAT. ANN.§ 768.81 (West Supp. 2001); *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), *overruled on other grounds by wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 2249 (Fla. 1995). Under this authority, a jury may assign a percentage of fault to Escambia Treating.

Samples v. Conoco, et al, 165 F. Supp. 2d at 1320 n.14.

The ETC and Conoco/Agrico plumes have merged and overlap. The issues relating to the plaintiffs' claims and Conoco/Agrico's liability *vis-a-vis* ETC are common to the class and to this case, and a benefit would be achieved by resolution in one forum. *See, Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (finding persuasive a need for combined treatment and a benefit to be derived therefrom). Plaintiffs have sued ETC, Conoco and Agrico pursuant to theories of joint and several liability. *Gouty v. Schnepel,* 795 So.2d 959, 962 (Fla. 2001); *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1257 (Fla. 1996). Given the community of interests present under the circumstances of this case, the commonality prerequisite is met.

Typicality. The Court must find that the claim or defense of the representative party is typical of the claim or defense of each member of the class. This element examines the relationship

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[52] See Joint Stipulation No. 12-16.

between the representative's claims and the class members' claims. Thus, the representative's claims must be typical of those in the class. *See* Fla.R.Civ.P. 1.220(a)(3). Identical claims and remedies sought by the class representative and the class members may satisfy this element even if there are *some* factual differences between the parties. *Broin* at 892; *Colonial Penn* at 854. Even if there are counterclaims or defenses on other issues, resolution of an issue common to all class members can be resolved in a single trial. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39, 41 (Fla. 3d DCA 1996).

Although individual class members may be entitled to different amounts of damages or may have varying individual defenses, this in and of itself is not fatal to a class action. *See Broin*, at 891. Any individualized questions regarding the extent of damages will not defeat certification. *See In re Lloyd's Amer. Trust Fund Litig.*, 1988 WL 50211 *14 (S.D.N.Y. 2/6/98).

The requirements of commonality and typicality are similar. "The 'typicality' criterion considers the relationship of the representatives' claims to the claims of the other members of the class" *Badcock*, 696 So.2d 780. "Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado-Steiman v. Bush*, 221 F 3d 1266, 1278 (11th Cir. 2000). "[A] strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Appleyard*, 754 F2d at 958.

Where claims are based on the same legal theory and all class members seek the same remedy, class treatment is appropriate. *See Badcock*, 696 So.2d at 780. The typicality prerequisite is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure

that the absentees' interests will be fairly represented. *See e.g., Baby Neal for and by Kanter v. Casey,* 43 F.3d 48, 57 (3d Cir. 1994). The prerequisite is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendants' liability. *See id.* at 58; *See Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525 (8th Cir. 1996).

These plaintiffs have alleged wrongful conduct by defendants similarly affecting them and the proposed class members. Plaintiffs' First Amended Complaint, filed November 30, 2001, alleges trespass, private nuisance, unjust enrichment, strict liability and negligence. Plaintiffs seek to recover damages, including restoration costs, allegedly arising from environmental contamination associated with the industrial facilities owned and operated by each defendant. The class representatives have asserted essentially the same claims and legal theories for liability and compensation arising from the alleged acts and omissions of the defendants' industrial operations on behalf of themselves and all of the proposed class members. All of the putative class members herein seek the same type of relief which is based on the same type of conduct: the wrongful release of hazardous substances into the groundwater in and under private property in Escambia County, Florida. Defendants have consistently raised defenses and sought dismissal and summary judgment as to plaintiffs' claims based upon common, and in many cases identical, legal theories throughout the stages of this litigation.

Personal injury claims have not been brought by these plaintiffs and any person within the class desiring to pursue such claims may opt out of these proceedings. Similarly, the *Williams* litigation's medical monitoring claims, which are equitable in nature, are sufficiently distinct from

the claims asserted in this action. *Cook v. Rockwell Intern. Corp.*, 181 F.R.D. 473 (D.Colo. Jul 29, 1998) (NO. CIV. A. 90-K-181) (medical monitoring class decertified, property class remained).

Adequacy. This requires a conclusion that the representative party can fairly and adequately protect and represent the interests of each member of the class. *See* Fla.R.Civ.P. 1.220(a)(4). This element has constitutional due process implications because a class judgment will bind absent class members and because a judgment based on inadequate representation is subject to collateral attack. *Hoyte*, 2002 WL 31892830 *41 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940). The adequacy requirement is divided into two components: adequacy of counsel to handle the matter and adequacy of the named representative. Adequate representation is met if the class representatives have enough in common with the proposed class members and, with the experience of their attorneys, can prosecute the class action on behalf of the class. *See Broin*, 641 So. 2d at 892.

a. Adequacy of counsel

While there is little case law on this issue, the threshold is whether counsel will properly prosecute the class action. Counsel should be free from conflicts in representing respective members of the class. The inquiry is whether counsel is qualified, experienced, and able to conduct the litigation. Rule 1.220(a)(1), Fla.R.Civ.P; *See Broin* at 892; *Colonial Penn* at 854; *Weiss v. York Hospital*, 745 F.2d 78, 811 (3d Cir. 1984); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968) *vacated on other grounds*, 714 U.S. 156 (1974).

The experience, qualifications and resources of proposed class counsel are not challenged by these defendants.[53] Further, proposed class counsel have vigorously litigated before this Court on behalf of this class and as such the Court is satisfied of their abilities. Counsel have been deemed

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[53] Joint Stipulation, No. 5.

adequate where they are shown to be qualified, adequately financed, and possessed of sufficient experience in the subject matter of the class actions. *See, Cicero v. Olgiati*, 410 F. Supp. 1080 (S.D.N.Y. 1976). Retained counsel in this matter is experienced in both class action litigation, as well as complex environmental litigation. Additionally, plaintiffs' counsel have adequate resources to thoroughly and effectively litigate plaintiffs' and the putative class members' claims. The law firms of Levin Papantonio, Beggs and Lane, and Allan Kanner and Associates have demonstrated both their commitment to vigorously pursue this matter on behalf of the class as well as their qualifications to do so.

This Court also finds defendants' arguments regarding class counsel's alleged conflicts to be insufficient at this time to preclude counsel from adequately representing the plaintiffs and class members and conducting the litigation. Regarding the allegedly "reckless" and "unsubstantiated" media statements made by some of plaintiffs' counsel and the claims that plaintiffs' counsel has created a conflict by making public statements about the defendants' contamination of the groundwater and about the EPA remedy, this Court will be reserving jurisdiction to determine whether plaintiffs' counsel, or any of them, should be disqualified from the trial of this cause once it appears what role these will play in the trial of this cause. As to the class counsels' representation of the medical monitoring plaintiffs in the *Williams* litigation, at least one of the class counsel firms, Allan Kanner & Associates, is not counsel of record in the *Williams* litigation, and this Court will continue to monitor whether the progress of this litigation along with the Williams litigation will jeopardize any of the class members' rights or claims. Further, to allay defendants' voiced concerns regarding possible conflicts, class counsel will be before this Court and subject to its direct scrutiny. Accordingly, this Court finds the proposed class counsel to be adequate.

b. Adequacy of the named representative(s)

When a class representative fails to assert potentially valuable claims of absent class members, takes actions that are potentially adverse to absent class members' rights, or has an insoluble conflict of interest with certain absent class members, then the representative is inadequate. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (adequacy requirement serves to uncover conflicts of interest between named parties and the class they seek to represent); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (because "basic due process requires that named plaintiffs possess undivided loyalties to absent class members," conflicts of interest between different groups of class members preclude certification); *State Farm Mutual Auto Ins. Co. v. Kendrick*, 822 So. 2d 516, 518 (Fla. 3d DCA 2002)(Significant differences between the class representative and class members negates adequacy of representation.)

The class representatives here have interests which are co-extensive with, and not antagonistic to, those of the class as a whole. The named plaintiffs have assumed the commitment of time and effort required to participate in the discovery and trial processes.[54] The proposed class representatives are fairly distributed throughout the class area. *See* Plaintiffs' Exhibit 29 in Support of Class Certification Motion, *Larson Report, Figure No. 1.*

Defendants' arguments that plaintiffs are inadequate representatives based upon their alleged failure to bring all conceivable claims in this action are unpersuasive and do not warrant the denial of certification. While defendants argue that additional claims should have been brought by these class representatives, defendants do not concede the merits of the claims which they assert are lacking.

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[54] Joint Stipulation, No. 4.

RULE 1.220(b) FINDINGS

The trial court must additionally find and specify at least one of the following three bases in order for a claim or defense to be maintainable as a class: (1) there exists a **risk of inconsistent verdicts** or verdicts which would substantially impair nonparties' interests; (2) the actions of the party opposing the class has made **injunctive or declaratory relief** for the class appropriate; or (3) the claim or defense raises **common questions of law or fact which predominate** over any question of law or fact affecting any individual, and **class representation is superior.**

Risk of Inconsistent Verdicts. A class may be maintained if, under (b)(1)(A), prosecution would result in either inconsistent/varying adjudications that would be impossible for an entity to reconcile, or under (b)(1)(B) an adjudication would be dispositive of or substantially impair the interests of other class members who are not parties to the adjudication.[55]

There does not need to be any evidence of actual, pending claims that could give rise to inconsistent judgments, as the mere possibility that individuals could institute such actions is sufficient for a (b)(1) finding. *See Oce Printing Systems USA, Inc. v. Mailers Data Services, Inc.*, 760 So. 2d 1037, 1043-44 (Fla. 2d DCA 2000).

Injunctive or Declaratory Class Action. This type of class action is appropriate when the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fla.R.Civ.P. 1.220(b)(2). It originally was designed for civil rights cases, although its use has been expanded into other areas. *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001);

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[55] A recurring type of case that satisfies the (b)(1)(B) element is the "limited fund" cases. "Limited fund" cases are instances in which numerous persons can make claims against a fund insufficient to satisfy all claims. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-50 (1999).

Barnes v. American Tobacco Co., 161 F.3d 127, 142 (3d 1998); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983).

Claim or defense raises common issue of law or fact. The (b)(3) provision is generally used where the primary relief sought is damages. To qualify for (b)(3) certification, the class must meet a two-prong test: (a) the **common questions must** predominate over any questions affecting only individual members; and (b) the **class resolution must be** superior to other available methods for the fair and efficient adjudication of the controversy. *See Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 269 (Fla. 5th DCA 2002).

Plaintiffs have sought certification under Rule 1.220(b)(3) which requires analysis of whether the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

A. **Predominance**

In determining whether common issues or individual issues predominate, the court should evaluate how the parties plan to prove and refute the elements of the causes of action and defenses thereto. *See Humana, Inc. v. Castillo*, 728 So. 2d 261, 266 (Fla. 2d DCA 1999). Moreover, the focus should be on liability (including causation), not amount of damages. *See Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.*, 743 So. 2d 19, 22 (Fla. 4th DCA 1999).

The common questions which are presented by this litigation predominate over any individual issues or determinations which might be required. The liability of each defendant herein

will be based upon its acts and omissions which led to the creation, and the persistence of, the groundwater plumes at issue. In this sense, the claims of each class member are based in a single nucleus of operative facts, namely, the alleged negligent and/or conscious contamination of the groundwater in the subject area. Predominance, accordingly, is found. *See, Paladino, D.M.D. v. American Dental Plan, Inc.*, 697 So.2d 897, 899 (Fla. 1st DCA 1997).

"[T]he predominance test really involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis." *E.g., Transamerican Refining Corp. V. Dravo Corp.*, 130 F.R.D. 70, 74 (S.D. Tex. 1990) (citation omitted).

Many, if not all of the legal issues which stem from plaintiffs' alleged claims can and should be resolved on a classwide basis by this Court, through dispositive motion practice, or by a trier of fact. For example, one of defendants' arguments against certification to this Court is based upon the asserted premise that no claim of stigma can be made on behalf of these plaintiffs. Defendants' experts support this proposition. Plaintiffs disagree. Determinations as to credibility and the validity of these experts' assumptions can be made on behalf of the class as a whole. Whether a claim of stigma is available under Florida's jurisprudence and whether, under the particular circumstances of this case, a claim of stigma can be sustained for any part or all of the putative class members is a question capable of classwide resolution.

Additionally, defendants posit that a large number, if not all of the plaintiffs herein, have no claim for damages due to the contamination of the groundwater because plaintiffs lack standing to assert claims relating to the groundwater. Defendants' Opposition, pp. 15, 22. As a threshold matter,

the Court must first determine whether the putative class representatives have standing to bring the representative claim. *See W.S. Badcock Corp. v. Webb*, 699 So. 2d 859 (Fla. 5th DCA 1997). This Court's February 25, 2003, Order indirectly addressed standing by finding that fee simple ownership of real property confers a cognizable right to use of the underlying ground water and the owner does not have to put the ground water to use in order to bring a claim based on impairment of her usufructory right to the ground water. Consequently, at a minimum, representative plaintiffs who possess fee simple ownership of real property situated over the known location of the contaminated ground water or likely path of the contaminated ground water have standing (fee simple property owners on the west side of Bayou Texar). Presumptively, these plaintiffs include Samples, Baer, Mixon, Robinson, Staples, Lee, Boyd, Stephenson & Pensacola Village Apts., LLC (all plaintiffs except for Bonifay). However, Mr. Bonifay may have standing to file a claim on the alternative theory of stigma damages. See *infra*. A resolution of the nature and extent of a property owner's interest in the groundwater beneath his property is a legal issue which should be answered only once and can be applied to all class members.

Further, defendants argue that plaintiffs' claims are barred by the doctrine of primary jurisdiction, citing to the administrative proceedings pursuant to CERCLA as well as to the Federal Court's entry of the Consent Decree discussed *supra*. Defendants' Opposition, pp. 18-19. Plaintiffs, of course, disagree and cite Judge Collier's comments on this issue in his ruling remanding this action to this Court:

> Plaintiffs' lawsuit does not constitute a "challenge" to the consent decree as that term is used in section 113(h) of CERCLA, 42 U.S.C. § 9613(h). The lawsuit is not an action designed to review or contest the remedy selected by the EPA, prior to implementation; it is not an action designed to obtain a court order directing the EPA to select a different remedy; it is not an action designed to delay, enjoin,

> or prevent the implementation of a remedy selected by the EPA; and it is not a citizen suit brought pursuant to 42 U.S.C. § 9659.
>
> The Defendants appear to take the extreme position that any request for relief, even a request for "such further relief as the court deems proper," constitutes a challenge to the consent decree. The Defendants also cite 42 U.S.C. § 9622(e)(6)in further support. This argument is without merit. Plaintiffs' lawsuit is not an action designed to force the Defendants to undertake a remedial action at the Agrico Chemical Site or the Escambia Treating Site. Plaintiffs merely seek damages for injuries to their property.
>
> ... Clearly, under the law as it exists today, Plaintiffs seek remedies that are within the control of Florida state courts which do not conflict with CERCLA. *Cf. Beck v. Atl. Richfield Co.*, 62 F3d 1240, 1243 (9th Cir. 1995) (stating "resolution of the damages claim would not involve altering the terms of the cleanup order").

Samples et al v. Conoco, Inc. et al. 165 F. Supp. 2d at 1315-1318 (N.D. Fla. 2001).

Plaintiffs take issue with defendants' acts and omissions relating to their operations as well as their efforts to address, or not address, the contamination which came from their facilities. *See,* Plaintiffs' Reply, at pp. 1-10. For example, plaintiffs have alleged facts, which they argue will convince a trier of fact that Conoco/Agrico knew of the adverse impacts its operations were having upon the neighboring community and yet elected to take measures to avoid liability and withhold this information and that defendants elected to shape the Remedial Investigation and Feasibility Study process to reach a cost-driven result by deceptively minimizing the impact of the groundwater contamination and supporting the least costly remedy. A determination of the legal ramifications of defendants' acts and omissions as presented to a trier of fact should occur only once; to proceed otherwise would be inefficient and unfair to both plaintiffs and defendants.

This common course of conduct by defendants, the common issues of defendants' liability therefor, the common questions of environmental science in determining affected areas, and the

common questions of how those areas are, in fact, impacted, make class treatment appropriate. *See e.g., Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 55 (S.D.N.Y. 1993). Common questions of liability, causation, and remedies not only predominate but overwhelm any individualized issues under these circumstances.

> If these claims were tried separately, the amount of repetition would be manifestly unjustified. To the extent that each claim of each plaintiff depends upon proof concerning the history of the operations at the plant, the nature, timing, extent and cause of [contamination], the kinds of remedies, if any, appropriate to address future potential [contamination] . . . [and] the generalized impact on real property values, that proof would be virtually identical in each case. It would be neither efficient or fair to anyone, including defendants, to force multiple trials to hear the same issues. Clearly, a Rule 23(b)(3) class could properly be certified under these circumstances. *Boggs v. Divested Atomic Corp.* 141 F.R.D. 58, 67 (S.D. Ohio 1992) (class certification appropriate in action brought by residents living within six miles of a radioactive materials plant). "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases."

Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 472-73 (5th Cir. 1986).

B. Superiority

The class action must be the "superior" means by which the action is to be tried, which requires an evaluation of the manageability of the case at trial as a class action and an evaluation of the resources and limits of the court system. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41-42 (Fla. 3d DCA 1996).

"Numerous . . . courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a *single . . . course of conduct. . .* [where] the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next." *Sterling v. Velsicol Co.*, 855 F.2d 1188, 1196 (6th Cir. 1988) (emphasis

added). An analysis of "[t]he factual and legal issues specific to the particular litigation . . . to determine if certification . . . offers a superior method for the fair and efficient adjudication of the controversy" supports certification in this instance. *Sala v. Nat'l R.R. Passenger Corp.*, 120 F.R.D. 494, 496 (E.D. Pa. 1988). The economy to all parties as well as to the judicial system of resolving the contested issues in this matter outweighs any value of allowing individual actions to be instituted.

The purpose of the procedural device of a class action is to conserve the resources of both the courts and the parties. *See Broin,* 641 So.2d at 888, *supra*; *See also, In re Orthopedic Bone Screw Products Liability Litigation,* 176 F.R.D. 158 (E.D.Pa. 1997). Class certification is the only realistic procedural vehicle for many of these plaintiffs to seek justice. "Unless the claims of the members of these classes can be litigated on a class basis, they cannot be feasibly litigated at all. While the total alleged injury to the class is large, many individual class members may not have a large enough stake to justify litigating their individual claims." *In re Ampicillin Antitrust Litigation,* 55 F.R.D. 269, 276 (D.D.C. 1972). As evidenced by the expenses incurred by the defendants in connection with the expert reports proffered at the certification stage of the litigation, pursuit of plaintiffs' claims (including the retention of experts to counter the merits of defendants' positions) would likely be prohibitively costly. Two of defendants' experts, Drs. Larson and Cowan, testified that each had billed over $100,000 at the time of their depositions in connection with certification. *See* Plaintiffs' Exhibit 40 in Support of Class Certification Motion, *Larson Depo.*, p. 221, *See* Plaintiffs' Exhibit 41 in Support of Class Certification Motion, *Cowan Depo.*, pp. 9-10. A third, Dr. Jackson, with a billing rate of $220 per hour, had worked for over a year but was unable to provide an aggregate figure. *See* Plaintiffs' Exhibit 42 in Support of Class Certification Motion, *Jackson*

Depo., p. 147.[56] An individual plaintiff with a typical residence in one of the affected neighborhoods would likely not be able to afford to pursue a claim for damages based upon the contaminant plume, considering the enormous costs and energy being directed at the defense of this litigation by the defendants. As such, the policy supporting class treatment is particularly appropriate here, where members lack the means to prosecute individual actions. *See, e.g., Rosenblatt v. Omega Equities Corp.*, 50 F.R.D. 61, 64 (D.N.Y. 1970).

By concentrating this litigation in a single forum and certifying the class, both individual class members and defendants will benefit. Defendants will benefit from the ability to litigate this matter once and for all, with *res judicata* effect as to all class members, rather than face the prospect of numerous individual suits. Defendants will also benefit as they would not have to respond to multiple plaintiffs' discovery requests and propound substantially similar requests of their own in many forums against many individual plaintiffs. The individual putative class members would benefit as they will obtain a cost efficient and legally efficient adjudication of their claims against defendants. Moreover, with this Court as the only trier of fact, inconsistent or varying adjudications with the potential to create incompatible standards of conduct for defendants are avoided.

The defendants point the Court to the relatively recent opinion of the Third District Court of Appeal, Judge Gersten writing for the court, in *Liggett Group, Inc. v. Engle*, 2003 WL 21180319 (Fla. 3d DCA May 21, 2003), in which the district court of appeal decertified a class consisting of cigarette smokers in their suit against tobacco companies seeking damages for injuries allegedly caused by smoking. This Court does not dispute the statements of law by Judge Gersten and

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[56] The actual price tag for these expenses is likely much greater than reflected by these figures given defendants' unique familiarity and superior position, vis a vis the putative class members, with respect to information regarding the groundwater conditions created by the Agrico Site.

acknowledges his observation that "virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper." *Id.*, at *3. However, the case before this Court compels a different conclusion, because it does not contain "significant individual issues" or "factual determinations unique to each plaintiff." *Cf. Id.*, at *4 In contradistinction to the *Liggett* litigation, this case has significant common, not individualized, issues of liability, affirmative defenses, and damages and does satisfy the "predominance" and "superiority" requirements imposed by Florida's class action rules. *Cf. Id.*, at *4.

Plaintiffs' Proposed Class Definition

Plaintiffs have proposed a class definition based upon the location of real property in the vicinity of the Agrico and Escambia sites. The class definition proposed by plaintiffs in the First Amended Complaint and Motion for Class Certification includes over ten thousand (10,000) residential and commercial properties.[57] The class includes all:

> former and current owners, possessors, and leaseholders of real property located 1) at, on, or adjacent to the Conoco/Agrico Facility or the Escambia Treating Facility; 2) in the area north, east and south of the Conoco/Agrico Facility and the Escambia Treating Facility bordered by Brent Lane/Bayou Boulevard/Summit Boulevard to the north, Escambia/Pensacola Bay to the east, Pensacola Bay to the south, and Palafox Street (Highway 29) to the west. Excluded from the class are the defendants in this action, any entity in which the defendants have a controlling interest, any employees, officers, or directors of defendant, and the legal representatives, heirs, successors, and assigns of defendants.

First Amended Complaint, para. 84; *See* Plaintiffs' Exhibit 10 in Support of Class Certification, *Map depicting proposed class boundaries*.

As requested by the Court at the class certification hearing, the plaintiffs have submitted an alternative, more narrow, class definition, which encompasses:

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[57] Joint Stipulation No. 1.

> former and current owners, of real property either commercial or residential at any time between 1957 and present which is located in the area bordered by Hickory St./Hyatt St./Portion of I-110/Woodland Dr./Berkley Ave./Ellison Dr. to the north, Bayou Blvd./Portion of Hyde Park Rd./Foullis Dr./Pickens Ave. to the east, E. Mallory St./Bayou Texar at Pensacola Bay to the south, and 18th Ave./Palafox Street (Highway 29) to the west. Excluded from the class are the defendants in this action, any entity in which the defendants have a controlling interest, any employees, officers, or directors of defendant, and the legal representatives, heirs, successors, and assigns of defendants.

See Plaintiffs' Exhibit 43 in Support of Class Certification Motion, *Revised Class (depicting revised class boundaries).*

While not conceding the propriety of a class action, the defendants submitted an alternative class definition in response to the Court's instructions which is much more limited than either of the plaintiffs' proposals. The defendants' definition follows:

> All those persons who own or, at any time since March 23, 1997, have owned single family residential property within the following boundaries:
>
> (1) The beginning point for the class description is the intersection of the eastern edge of the CSX railroad property/right-of-way and the centerline of East Texar Drive.
>
> (2) From the beginning point, proceed east on Texar Drive to 6th Avenue. Proceed south on 6th Avenue to Baars Street. Proceed east on Baars Street to18th Avenue. Proceed north on 18th Avenue and then generally along an extension of the centerline of 18th Avenue to the western mean high water line of Bayou Texar.
>
> (3) Follow the western shoreline of Bayou Texar (the mean high water line) in a northwesterly direction to a point where it intersects the property boundary between 4130 Menendez Drive and 4140 Menendez Drive. Proceed westerly along this property line to Menendez Drive, and then westerly along Driftwood Drive to North 12th Avenue. Go east on North 12th Avenue to East Fairfield Drive. Proceed westerly on E. Fairfield Drive to East Fairfax Drive. Proceed westerly on a line that connects the intersection of East Fairfield Drive/East Fairfax Drive to the northeastern most point of the Agrico Superfund Site.

(4) Proceed westerly along the northern property boundary of the Agrico Superfund Site until this line intersects the eastern edge of the CSX railroad property/right-of-way. Proceed southerly along the eastern edge of the CSX railroad property right-of-way to its intersection with the beginning point.

(A) For any designated street boundary, properties immediately bordering the street on either side shall be deemed to be within the class.

(B) Excluded from this class are the defendants in this action, any entity in which any defendant has a controlling interest, any employees, officers, or directors of any defendant, and the legal representatives, heirs, successors, and assigns of any defendant.

See, Defendants' proposed Order Denying Plaintiffs' Motion to Certify Class, Granting Certification of Provisional Alternative Class, and Assigning Class Counsel; Defendants' Exhibit 37 in Opposition to Class Certification Motion, *Map of Proposed Area of Alternative Class*.

As compared to the plaintiffs' original proposed class boundaries the plaintiffs' revised boundaries "have been adjusted to more closely track the spread of contamination as depicted in the materials before the Court". *See* Plaintiff's Proposed Order Granting Motion for Class Certification, p.33. Furthermore, the plaintiffs allege that the revised class boundaries also include a buffer zone inclusive of both the class area disputed by the defendants and residents "within a short distance from Bayou Texar given plaintiffs' claims as to the degradation of this waterway due to defendants' actions and the resulting stigma to properties on its shore." *See Id.*, p.33. The plaintiffs' assert that the revised class area is consistent with the confirmed spread of contaminated ground water and the associated stigma; consistent with the distribution of the correspondence by Conoco; and consistent with the confirmed locations of irrigation wells within the Agrico plume.

Second, with regard with the property interests of the putative plaintiffs, the plaintiffs' revised class definition excludes owners of real property in the geographic class area prior to 1957, all owners of leasehold interests; and owners of any real property other than commercial or

residential. The plaintiffs explain their reasoning for this narrowing of the class definition to be that 1957 is the earliest point that they can show the Defendants' knowledge of contamination outside the boundaries of the facilities; their asserted claims are based only upon theories of liability recoverable by fee simple owners; and the inclusion of industrial property owners as plaintiffs would raise the specter of comparative negligence claims.

The defendants' proposed class boundaries encompass a much more limited geographic area. The defendants argue that this limited area is warranted, if any at all, due to the lack of evidence presented by the plaintiffs demonstrating that even a substantial portion of the proposed class area has been impacted by either the Agrico or ETC contamination plume. See Defendants' Proposed Findings, p.18. The defendants point to their expert's report[58] which delineates both the extent and nature of the Agrico and ETC ground water plumes and concludes that (1) the groundwater traveling under the Agrico and ETC sites flows in an east-southeast direction and discharges into Bayou Texar; (2) as a result of the groundwater flow, it is impossible for the Agrico and ETC plumes to travel east of Bayou Texar and to the areas in the northern and southern portions of the plaintiffs' proposed class area; (3) unless a putative class member owns a well on her property located above the Agrico or ETC plume and is in excess of 100' below the ground surface, there can be no surficial impact from the groundwater; (4) the natural groundwater discharge point for ground water passing under the Agrico site is narrow and defined; 5) Bayou Texar has not been adversely impacted by contamination that originated at the Agrico site; and 6) concentrations of contaminants vary with time and the potential impact is not permanent. *See* Defendants' Proposed Findings, p.19-21.

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[58] Defendants Exhibit 4 in Opposition to Class Certification Motion, *Larson Report.*

Moreover, the defendants' assert that their other experts' reports[59] also warrant a much smaller, if any, class area. Dr. Cowan's report concludes that based on actual sales of single family residential properties between the years 1960 and 2001, on average a home within the proposed class area sold for $5,167 more than comparable homes outside the proposed class area, thus disproving plaintiffs' claimed stigma damages allegedly resulting from the contaminant plumes. *See* Defendants' Proposed Findings, p.22. In addition, Dr. Jackson reports that other characteristics unique to the properties in the proposed class area will affect whether or not or to what extent environmental conditions may impact property value, thereby making any proof of a linkage between the contaminant plumes and property values difficult to discern or speculative, at best. *See* Defendants Proposed Findings, p.24.

The defendants' argue that the class should be limited to include residential real property owners within the past four years. The defendants asserts the 1997 date is warranted as the plaintiffs will be in a better position to present proof of their stigma damages and evidence as to the current extent of the Agrico ground water plume. *See* Defendants' Proposed Findings, p.35.

Based upon the record before this Court, the Court hereby exercises its discretion to certify a more limited class. Fla. R. Civ. P., Rule 1.220(d)(1). Specifically, this Court finds a rational basis to support certification of a class described as follows:

a) The northern boundary begins at the intersection of North Palafox St. and Hickory St.; continue east on Hickory St. to Hyatt St., as if Hickory St. and Hyatt St. were connected, to I-110; south on I-110 until reaching Woodland Dr.; proceed east on Woodland Dr. until reaching Berkley Dr.; proceed north and east on Berkley Dr. until

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[59] Defendants' Exhibit 11 in Opposition to Class Certification Motion, *Cowan Report*; and Defendants' Exhibit 10 in Opposition to Class Certification Motion, *Jackson Report.*

reaching North 9th Ave.; proceed east until reaching Ellison Dr. and proceed south and east on Ellison Dr. until reaching North 12th Ave.; proceed south on North 12th Ave. until reaching the eastern shoreline of Bayou Texar.

b) The eastern boundary is the property fronting the eastern shoreline of Bayou Texar from 12th Ave. to Pensacola Bay.

c) The western boundary begins at the intersection of North Palafox St. and Hickory St. and proceeds south on North Palafox St. to the point where East Cross St. would intersect.

d) The southern boundary begins at the point where East Cross St. and North Palafox St. would intersect and continues east on East Cross St. until reaching I-110; proceed east as if East Cross St. continues through North Alcaniz St. and North Davis St. / North Davis Hwy. until once again reaching East Cross St.; proceed east on East Cross St. until it ends at Osceola Blvd.; proceed east as if East Cross St. intersects the western shoreline of Bayou Texar, and proceed southerly along the shoreline, including the property fronting the western shoreline of Bayou Texar, until reaching Pensacola Bay.

e) Specifically included within the certified class is all real property fronting both the eastern and western shoreline of Bayou Texar.

- For any designated street boundary, properties immediately bordering the street on either side shall be deemed to be within the class.
- Excluded from this class are the defendants in this action, any entity in which any defendant has a controlling interest, any employees, officers, or directors of any

defendant, and the legal representatives, heirs, successors, and assigns of any defendant.

This revised definition utilizes geographic boundaries as did the definition initially proposed and the revised definition subsequently proposed by plaintiffs' counsel. It differs in several minor respects. Initially, the geographic boundaries have been adjusted to more closely track the spread of contamination as depicted in the materials before this Court, most prominently the boundaries of the OU-2 area of interest for the Agrico site. The class boundary includes those residents with property fronting on Bayou Texar in consideration of the migration of the contaminant plumes to this waterway and the plaintiffs' claims as to the degradation of this waterway due to defendants' actions and the resulting stigma to properties on its shore. Most of the proposed class representatives remain within the revised class. The Court reserves ruling on which representative plaintiffs do not reside within the geographic class definition and what action should be taken regarding that plaintiff. In addition to the altered geographic boundaries of the putative class, the revised definition, for the reasons plaintiffs stated does not include:

a. Leaseholders;

b. Real property types other than commercial and residential; or

c. Real property owners prior to 1957.

As with the initial definition, this revised class definition is objective and putative class members may readily identify whether they are included within the class without regard to the fact of injury. As such, due process has been satisfied.

The use of geographical boundaries is both practical and logical in an environmental contamination case such as this one. *See e.g., Petrovic v. Amoco Oil Co.*, 200 F. 3d 1140 (8th Cir

1999); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 60-62 (S.D.Ohio 1991) (certifying class defined as persons within six miles of boundaries of plant that released hazardous materials); *Olden v. La Farge Corp.*, 203 F.R.D. 254, 268 (E.D. Mich. 2001) (certifying class of owners of single family residences in described geographic area in suit for damage from toxic pollutants and air contaminants emitted during course of cement manufacturing operations); *Johnson v. Orleans Parish School Bd.*, 790 So. 2d 734, 749 (La App. 2001), *writ den.* 801 So. 2d 378 (La. Sup. 2001) (class defined by geographical boundaries certified in action involving claims for damages from exposure to toxic substances in landfill area); *Yslava v. Hughes Aircraft Co.*, 845 F.Supp. 705, 712 (D.Ariz.1993) (certifying class based on geographic areas in which plaintiffs lived and went to school where defendant supplied contaminated drinking water); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382 (D.Col.1993) (certifying class defined by geographic boundaries based on dose or exposure contours of radioactive and non-radioactive materials); *Coastal Corp. v. Garza*, 979 S.W. 2d 318, 319 (Tx. Sup. 1998) (certifying two classes defined by specific geographical boundaries in suit against chemical manufacturer for property damage alleged from long term emission of contaminants).

The revised class definition is consistent with the confirmed spread of contaminated groundwater plumes and the stigma alleged to be associated therewith. *See* Plaintiffs' Exhibit 13 in Support of Class Certification Motion, *Figure 1 "Site Location Map, Ground Water and Surface Water Sampling Location*, Five-Year Review Agrico Site Pensacola, Florida, US Environmental Protection Agency, Region IV, prepared for Williams and Conoco by URS Greiner Woodward Clyde, Feb. 2000). Similarly, the class area tracks the distribution area of the correspondence by

Conoco pursuant with the 8/94 ROD. The area is consistent with that identified in a map of irrigation well locations within the Agrico plume[60] and an accompanying list of wells.

The revised class definition extends beyond the confirmed boundaries of the plumes and their projected paths to include properties within a limited radius which are contiguous to properties over the plume and may reasonably be expected to be affected by damages, if any, to the values of those properties resulting from the contaminant plumes. The plume of groundwater contamination has spread to Bayou Texar, where it currently discharges. As such, the properties fronting the Bayou, downstream of the discharge, have been retained within the class.

The initial class definition as proposed by plaintiffs did not include a temporal limitation. As discussed *infra,* plaintiffs have proffered evidence which substantiates a limitation in time no earlier than 1957. *See* Plaintiffs' Exhibit 35. This, as presented by plaintiffs, is the earliest point at which defendants' knowledge of the spread of their contamination outside the boundaries of their facility can be shown. Leaseholders, initially included in plaintiffs' proposed definition, have similarly been excluded. Plaintiffs' asserted claims are based only upon theories of liability towards owners of real property. Also, none of the class representatives are leaseholders and as such, this segment of the community is not represented herein. *See,* Joint Stipulation, Nos., 27, 29, 31, 33, 35, 37, 39, 41, 43, 45 (all class representatives are or have been owners of real property within the class area). Likewise, only commercial and residential properties have been included given that the class representatives own only such property types. *Id.* Further, defendants' arguments that the industrial properties in the Pensacola area may raise sufficient issues of comparative negligence warrants exclusion of such property owners from this class.

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[60] Plaintiffs' Exhibit 14 in Support of Class Certification Motion, *Irrigation Wells Located Within the Agrico Plume.*

Accordingly, this Court has revised the proposed class definition in order to ensure the commonality of issues and conform the definition to the proofs available. Acceptance of the proofs as adduced at this stage does not equate to a finding that any party has satisfied its burden of proof on the merits. *Eisen v. Carlisle Jacqueline* 417 U.S. 156, 178 (1974). Should the trier of fact or this Court, based on a dispositive ruling, subsequently find that any portion of this proposed class is not legally entitled to recover pursuant to the theories alleged by plaintiffs, or if this Court subsequently determines evidence exists that the boundaries of the contaminant plume extend beyond the geographic boundaries of the revised class definition, the class definition can be further revised as anticipated by Fla. R. Civ. P., Rule 1.220 (d)(1).

This Court, having found the requirements of Rule 1.220(a) and (b)(3) to be satisfied, hereby ORDERS that this matter proceed on behalf of a class as defined above.

Accordingly: IT IS ORDERED that

(1) Plaintiffs' Motion to certify the class defined in the First Amended Complaint is denied, and the Plaintiffs' Motion to Certify a 1.220 Class is granted as set forth below.

(2) The following class, depicted in the attached map, is provisionally certified pursuant to Fla. R. Civ. P. 1.220(b)(3) with respect to the claims brought against defendants in this case:

a) The northern boundary begins at the intersection of North Palafox St. and Hickory St.; continue east on Hickory St. to Hyatt St., as if Hickory St. and Hyatt St. were connected, to I-110; south on I-110 until reaching Woodland Dr.; proceed east on Woodland Dr. until reaching Berkley Dr.; proceed north

and east on Berkley Dr. until reaching North 9th Ave.; proceed east until reaching Ellison Dr. and proceed south and east on Ellison Dr. until reaching North 12th Ave.; proceed south on North 12th Ave. until reaching the eastern shoreline of Bayou Texar.

b) The eastern boundary is the property fronting the eastern shoreline of Bayou Texar from 12th Ave. to Pensacola Bay.

c) The western boundary begins at the intersection of North Palafox St. and Hickory St. and proceeds south on North Palafox St. to the point where East Cross St. would intersect.

d) The southern boundary begins at the point where East Cross St. and North Palafox St. would intersect and continues east on East Cross St. until reaching I-110; proceed east as if East Cross St. continues through North Alcaniz St. and North Davis St. / North Davis Hwy. until once again reaching East Cross St.; proceed east on East Cross St. until it ends at Osceola Blvd.; proceed east as if East Cross St. intersects the western shoreline of Bayou Texar, and proceed southerly along the shoreline, including the property fronting the western shoreline of Bayou Texar, until reaching Pensacola Bay.

e) Specifically included within the certified class is all real property fronting both the eastern and western shoreline of Bayou Texar.

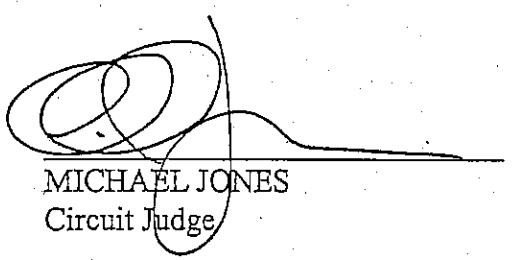
- For any designated street boundary, properties immediately bordering the street on either side shall be deemed to be within the class.

- Excluded from this class are the defendants in this action, any entity in which any defendant has a controlling interest, any employees, officers, or directors of any defendant, and the legal representatives, heirs, successors, and assigns of any defendant.

3) Pursuant to Fla. R. Civ. P. 1.220(d)(2), plaintiffs shall provide notice "to each member of the class who can be identified and located through reasonable effort and shall be given to the other members of the class in the manner determined by the court to be most practicable under the circumstances."

Accordingly, within 30 days of this order, the plaintiffs shall submit (i) a proposal for what steps must be undertaken to attempt to identify and locate class members; (ii) the proposed form of the notice to be given to class members that can be identified and located; and (iii) a brief regarding the form of notice that must be given to class members that cannot be identified or located. Defendants shall submit a response to such notice proposal within 21 days thereafter.

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida on this 28th day of August, 2003.



MICHAEL JONES
Circuit Judge

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