Back Substitute

IN THE CIRCUIT COURT FOR THE ELEVENTH CIRCUIT
MCLEAN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois,

Plaintiff,

v.

J. McDANIEL TRANSPORTATION, INC.,

Defendant.

McLEAN COUNTY
FILED
FEB 16 2007
CIRCUIT CLERK

DEPARTMENT OF NATURAL RESOURCES
FEB 23 2007
RECEIVED

No. 06-AR-575

RECEIVED
FEB 23 2007
Dept. of Natural Resources
OFFICE OF LEGAL COUNSEL

CONSENT ORDER

Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, the Illinois Environmental Protection Agency, the Illinois Department of Natural Resources, and Defendant, J. McDaniel Transportation, Inc., have agreed to the making of this Consent Order and submit it to this Court for approval. The parties stipulate that the statement of facts is offered by the Plaintiff for the purpose of Court evaluation of the adequacy of this settlement only and that neither the fact that a party has entered into this Consent Order, nor any of the facts set forth herein, shall be introduced into evidence in any other proceeding regarding the claims asserted in the Complaint except as otherwise provided herein. If this Court approves and enters this Consent Order, Plaintiff and Defendant agree to be bound by the Consent Order and Defendant agrees not to contest its validity in any subsequent proceeding to implement or enforce its terms.

A. Lisa Madigan, Attorney General of the State of Illinois, on behalf of the People of the State of Illinois, the Illinois Environmental Protection Agency, and the Illinois Department of Natural Resources, filed a complaint in this action pursuant to Section 10 of the Oil Spill Responders Liability Act, 740 ILCS 113/10 (2004) ("OSRLA"), and the Oil Pollution Act of 1990, 33 U.S.C. 2701 ("OPA").

B. The State's complaint alleged that the defendant, J. McDaniel Transportation, Inc. ("McDaniel"), is liable under OSRLA and OPA for removal actions and removal costs and natural resource damages and violations of the State Act relating to a spill of gasoline from a tanker truck owned and operated by McDaniel on April 3, 2001, near McLean, McLean County, Illinois. The spilled gasoline entered into a drainageway that carried it to Sugar Creek where it caused the death of fish and other aquatic life in a reach that extended four miles.

C. The Illinois Environmental Protection Agency ("IEPA") and the Illinois Department of Natural Resources ("IDNR") have been delegated authority to act as State Trustees for natural resources impacted by the release of hazardous substance at the Site. The State of Illinois (the "State") – by and through the Attorney General of Illinois, on behalf of the People of the State of Illinois, and at the request of IEPA and IDNR – is the plaintiff in this case and a party to this Consent Order.

D. The State Trustees contend that they have claims for recovery of natural resource damages (including for recovery of natural resource damage assessment costs) against McDaniel.

E. By entry into this Consent Order, McDaniel does not admit any liability to the State for damages for injury to, destruction of, or loss of natural resources, or for the costs of any natural resource damages assessments.

F. The Parties to this Consent Order recognize, and the Court by entering this Consent Order finds, that this Consent Order: (i) has been negotiated by the Parties in good faith; (ii) will avoid prolonged and complicated litigation among the Parties; (iii) will expedite natural resource restoration actions to be performed by the Trustees; and (iv) is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered and Adjudged as follows:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to Section 10 of OSRLA, 740 ILCS 113/10, and Section 1017(c) of OPA, 33 U.S.C. § 2717(c). The Court also has personal jurisdiction over McDaniel. Solely for the purposes of this Consent Order and the underlying complaint, McDaniel waives all objections and defenses that it may have to the jurisdiction of or venue in this Court. McDaniel shall not challenge the terms of this Consent Order or this Court's jurisdiction to enter and enforce this Consent Order.

II. PARTIES BOUND

2. This Consent Order applies to and is binding upon the State and upon McDaniel and its successors and assigns. Any change in ownership or corporate status of McDaniel including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such McDaniel's responsibilities under this Consent Order.

III. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in OSRCA or OPA shall have the meaning assigned to them in OSRLA or OPA. Whenever terms listed below are used in this Consent Order or in the appendix attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Consent Order" means this Consent Order and the appendix attached hereto (listed in Section XIII (Appendix). In the event of conflict between this Consent Order and the appendix, this Consent Order shall control.

b. "Day" means a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or State holiday. In computing any period of time under this Consent Order, where the last day would fall on a Saturday, Sunday, or State holiday, the period shall run until the close of business of the next working day.

c. "Effective Date" means the effective date of this Consent Order as provided by Section XIV of this Consent Order (Effective Date and Retention of Jurisdiction).

d. "IEPA" means the Illinois Environmental Protection Agency and any successor departments or agencies of the State of Illinois.

e. "Interest," shall mean interest at the rate specified in Section 2-1303 of the Code of Civil Procedure, 735 ILCS 5/2-1303 (2004).

f. "IDNR" means the Illinois Department of Natural Resources and any successor departments or agencies of the State of Illinois.

g. "McDaniel" means J. McDaniel Transportation, Inc.

h. "Natural Resource" or "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the the State.

i. "Natural Resource Damages" means any damages recoverable by the State on behalf of the public, for injury to, destruction of, loss of, loss of use of, or impairment of Natural Resources at the Site as a result of a release of hazardous substances, including, but not limited to: (i) the costs of assessing such injury, destruction, or loss or impairment arising from

or relating to such a release; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent resources; (iii) the costs of planning such restoration activities; (iv) compensation for injury, destruction, loss, loss of use, or impairment of natural resources; and (v) each of the categories of recoverable damages described in 43 C.F.R. § 11.15.

j. "NRR Trust Fund" means IDNR's Natural Resource Restoration Trust Fund.

k. "Paragraph" means a portion of this Consent Order identified by an arabic numeral or an upper case letter.

l. "Parties" means the State and McDaniel.

m. "Section" means a portion of this Consent Order identified by a roman numeral.

n. "Site" means the drainageway tributary to Sugar Creek and Sugar Creek impacted by the release of gasoline from the McDaniel's tanker and depicted generally on the map attached as Appendix A.

o. "State" means the State of Illinois as represented by the Attorney General, IEPA and IDNR.

p. "Subparagraph" means a portion of this Consent Order identified by a lower case letter or an arabic numeral in parentheses.

q. "Trustees" means IEPA and IDNR.

IV. STATEMENT OF PURPOSE

4. The mutual objectives of the Parties in entering into this Consent Order are: (i) to contribute to the restoration, replacement, or acquisition of the equivalent of the natural resources

allegedly injured, destroyed, or lost as a result of the gasoline release at the Site; (ii) to reimburse natural resource damage assessment costs incurred by IEPA, and IDNR; (iii) to resolve McDaniel's liability for Natural Resource Damages as provided herein; (iv) to resolve McDaniel's liability for past removal costs related to the gasoline release; and (v) to avoid potentially costly and time-consuming litigation.

V. PAYMENTS BY MCDANIEL

5. Payments for Assessment Costs and for Trustee-Sponsored Natural Resource Restoration and Educational Projects.

a. Payment for Assessment Costs Incurred by the State and for Trustee-Sponsored Natural Resource Restoration Projects.

(1) Within 30 days after the Effective Date, McDaniel shall pay a total of $25,000 to the State, to be applied toward natural resource damage assessment costs incurred by IEPA and IDNR and Trustee-sponsored natural resource restoration and natural resource educational projects. That payment to IDNR shall be made by certified check made payable to the "Natural Resource Restoration Trust Fund" and sent to:

Illinois Department of Natural Resources
Office of Fiscal Management,
One Natural Resource Way,
Springfield, IL 62702-1271

(2) Of the total amount to be paid by McDaniel pursuant to this Subparagraph 5.a:

(a) $15,000 shall be deposited in a segregated sub-account within the NRR Trust Fund, to be managed by IDNR for the joint benefit and use of the

Trustees to pay for Trustee-sponsored natural resource restoration projects in accordance with Section VII

(b) $8,000 shall be deposited in a segregated sub-account within the NRR Trust Fund, to be applied toward natural resource damage assessment costs incurred by IDNR.

(c) $2,000 shall be deposited in a segregated sub-account within the NRR Trust Fund, to be applied toward Trustee-sponsored natural resource education projects in accordance with Section VII.

6. Notice of Payment. Upon making any payment under Paragraphs 5 or 6, McDaniel shall send written notice that payment has been made to:

For the State:

James L. Morgan
Senior Assistant Attorney General
Environmental Bureau South
500 South Second Street
Springfield, IL 62706

Stan Yonkauski
Legal Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, IL 62702-1271

7. Non-Compliance with Payment Obligations.

a. Interest. In the event any payment required by Paragraph 5 is not made when due, McDaniel shall pay Interest on the unpaid balance commencing on the payment due date and accruing through the date of full payment.

b. Payment of Interest. Any Interest payments under Paragraphs 5 or 6 shall be paid in the same manner as the overdue principal amount, and shall be directed to the same fund or account as the overdue principal amount.

VI. TRUSTEE-SPONSORED NATURAL RESOURCE RESTORATION AND NATURAL RESOURCE EDUCATIONAL PROJECTS

8. Management and Application of Natural Resource Restoration Funds. All funds deposited in a segregated sub-account within the NRR Trust Fund under Subparagraph 5.a.(2)(a) shall be managed by IDNR for the joint benefit and use of the Trustees to pay for Trustee-sponsored natural resource restoration efforts in accordance with this Consent Order. All such funds shall be applied toward the costs of restoration, rehabilitation, or replacement of injured natural resources, and/or acquisition of equivalent resources, including but not limited to any administrative costs and expenses necessary for, and incidental to, restoration, rehabilitation, replacement, and/or acquisition of equivalent resources planning, and any restoration, rehabilitation, replacement, and/or acquisition of equivalent resources undertaken.

9. Restoration Planning. The Trustees intend to prepare a separate Restoration Plan describing how the funds dedicated for Trustee-sponsored natural resource restoration efforts under this Section will be used. As provided by 43 C.F.R. § 11.93, the Plan will identify how funds will be used for restoration, rehabilitation, replacement, or acquisition of equivalent resources. The Plan may also identify how funds will be used to address services lost to the public until restoration, rehabilitation, replacement, and/or acquisition of equivalent resources is completed.

10. Management and Application of Natural Resource Educational Projects Funds. All funds deposited in a segregated sub-account within the NRDAR Fund under Subparagraph

5.a.(2)(c) shall be managed by IDNR for the joint benefit and use of the Trustees to pay for Trustee-sponsored natural resource educational efforts in accordance with this Consent Order.

11. Use and Expenditure of Funds. Decisions regarding any use or expenditure of funds under this Section shall be made by the Trustees, acting through a Trustee Council. McDaniel shall not be entitled to dispute, in any other forum or proceeding, any decision relating to use of funds or restoration efforts under this Section.

VII. COVENANT NOT TO SUE BY THE STATE

12. Covenant by the State. Except as specifically provided by Paragraph 13 (General Reservations) and Paragraph 14 (Special Reservations Regarding Natural Resource Damages), the State covenants not to sue McDaniel for past removal costs or Natural Resource Damages pursuant to OSRLA or OPA alleged in the Complaint in this cause. This covenant not to sue shall take effect upon receipt of McDaniel's payment pursuant to Paragraph 5 of this Consent Order. This covenant not to sue is conditioned upon the satisfactory performance by McDaniel of its obligations under this Consent Order.

VIII. RESERVATION OF RIGHTS BY THE STATE

13. General Reservations.

The State reserves, and this Consent Order is without prejudice to, all rights against McDaniel and with respect to all matters not expressly included within Paragraph 12 (Covenant by the State). Notwithstanding any other provisions of this Consent Order, the State reserves all rights against McDaniel with respect to:

(1) claims based on a failure by McDaniel to meet a requirement of this Consent Order;

(2) claims alleged in the case of *People of the State of Illinois v. J. McDaniel, Inc.*, PCB 05-110;

(3) liability for any other costs incurred or to be incurred by the State that are not within the definition of Natural Resource Damages;

(4) liability for damages for injury to, destruction of, or loss of natural resources resulting from releases or threatened releases of hazardous substances outside of the Site;

(5) liability arising from any release of oil at the Site by McDaniel after the lodging of this Consent Order; and

(6) criminal liability.

14. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Order, the State reserves the right to institute proceedings against McDaniel in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damages assessment, based on: (i) conditions with respect to the Site, unknown to the Trustees as of the date of lodging of this Consent Order, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of Natural Resources; or (ii) information received by the Trustees after the date of lodging of this Consent Order which indicates that releases of hazardous substances at the Site have resulted in injury to, destruction of, or loss of Natural Resources of a type or future persistence that was unknown to the Trustees as of the date of lodging of this Consent Order.

IX. COVENANT BY MCDANIEL

15. Covenant by McDaniel. McDaniel covenants not to sue and agrees not to assert any claims or causes of action against the State, or their contractors or employees, with respect to

Natural Resource Damages, the payments made under Paragraph 5, or this Consent Order, including but not limited to:

a. any direct or indirect claim for reimbursement of any payment for Natural Resource Damages from the Oil Spill Response Fund; and

b. any claim against the State pursuant to OSRCLA or OPA relating to Natural Resource Damages.

16. Nothing in this Consent Order shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 1013 of OPA, 33 U.S.C. § 2713.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

17. Nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Order. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

18. The Parties agree, and by entering this Consent Order this Court finds, that McDaniel is entitled, as of the Effective Date of this Consent Order, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are Natural Resource Damages and past removal costs.

19. McDaniel also agree that, with respect to any suit or claim for contribution brought against McDaniel for matters related to this Consent Order, McDaniel will notify the persons identified in Section XII (Notices and Submissions) in writing within 10 days of service

of the complaint or claim upon it. In addition, McDaniel shall notify the persons identified in Section XII (Notices and Submissions) within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Order.

20. In any subsequent administrative or judicial proceeding initiated by the State for injunctive relief, recovery of response costs or Natural Resource Damages, or other relief relating to the Site, McDaniel shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not To Sue by the State set forth in Section VIII.

XI. NOTICES

21. Whenever, under the terms of this Consent Order, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Order with respect to the State and McDaniel, respectively.

As to the State:

James L. Morgan
Senior Assistant Attorney General
Environmental Bureau South
500 South Second Street
Springfield, IL 62706

Stan Yonkauski
Legal Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, IL 62702-1271

James Day
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

As to McDaniel:

Jacqueline A. Musacchia, Esq.
Vice President & General Counsel
Kenan Advantage Group, Inc.
4895 Dressler Road, #100
Canton, OH 44718

XII. APPENDIX

22. The following appendix is attached to and incorporated into this Consent Order: "Appendix A" is a map of the Site.

XIII. EFFECTIVE DATE AND RETENTION OF JURISDICTION

23. This Consent Order shall take effect upon entry by the Court.

24. The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Order and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Order.

XIV. CONSENT ORDER MODIFICATIONS

25. Any material modification of this Consent Order shall be made by agreement of the Parties to this Consent Order and in writing, and shall not take effect unless approved by the Court. Any non-material modification of this Consent Order shall be made by agreement of the Parties to this Consent Order and in writing, and shall not take effect until filed with the Court. Nothing in this Consent Order shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Order.

26. The provisions of this Consent Order are not severable. The Parties' consent hereto is conditioned upon the entry of the Consent Order in its entirety without modification, addition, or deletion except as agreed to by the Parties.

27. Economic hardship or changed financial circumstances of McDaniel shall not serve as a basis for modifications of this Consent Order.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

28. This Consent Order shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The State reserves the right to withdraw or withhold its consent if comments regarding the Consent Order disclose facts or considerations which indicate that this Consent Order is inappropriate, improper, or inadequate. McDaniel consents to the entry of this Consent Order without further notice. If for any reason the Court should decline to approve this Consent Order in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between or against the Parties.

XVI. SIGNATORIES/SERVICE

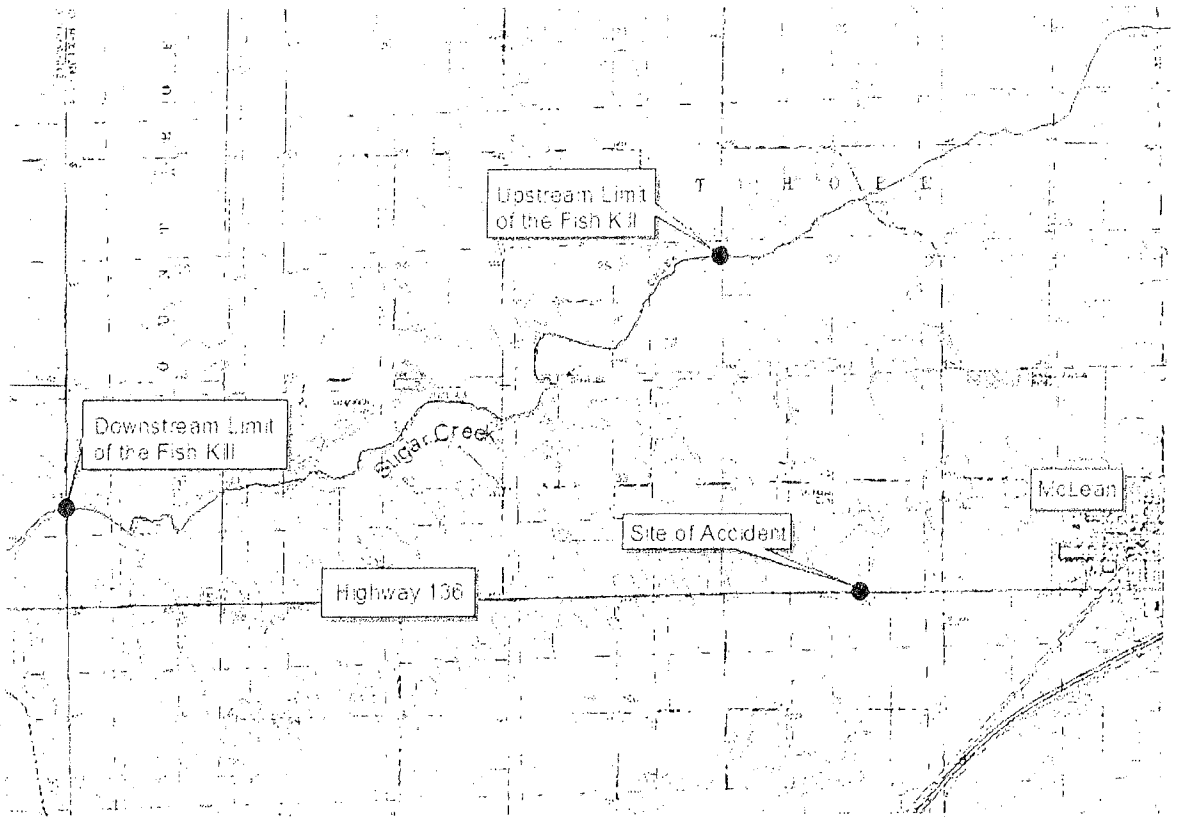
29. The undersigned representatives of McDaniel and the State each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind such Party to this document. This Consent Order may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

30. McDaniel hereby agrees not to oppose entry of this Consent Order by this Court or to challenge any provision of this Consent Order unless the State has notified McDaniel in writing that it no longer supports entry of the Consent Order.

31. McDaniel shall identify, on the attached signature pages, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of McDaniel with respect to all matters arising under or relating to this Consent Order. McDaniel hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons.

XVII. FINAL JUDGMENT

32. This Consent Order and its appendices constitute the final, complete, and exclusive understanding among the Parties with respect to the settlement embodied in the Consent Order. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Order.



PEOPLE OF THE STATE OF ILLINOIS
V.
J. McDANIEL TRANSPORTATION, INC.

APPENDIX A

33. Upon approval and entry of this Consent Order by the Court, this Consent Order shall constitute a final judgment between and among the State and McDaniel.

SO ORDERED THIS 16th DAY OF February 2007.

JUDGE

FOR THE PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos Litigation Division

Date: 2/09/07

THOMAS E. DAVIS, Chief
Environmental Bureau
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Date: 2/6/07

ROBERT A. MESSINA
Chief Legal Counsel

FOR THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES

Date: 2/8/2007

WILLIAM K. RICHARDSON
Chief General Counsel

FOR J. MCDANIEL TRANSPORTATION, INC.

Date: 12-11-06

Signature

Typed Name: Jacqueline A. Musacchia

Title: VP & General Counsel

Address: 4895 Dressler Road, NW
Canton, OH 44718

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Jacqueline A. Musacchia

Title: VP & General Counsel

Address: 4895 Dressler Road, NW
Canton, OH 44718