

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

)
)
UNITED STATES OF AMERICA,)
)

Plaintiff,)

No.: 1:06cv0816

v.)

BELLE TIRE DISTRIBUTORS, INC., *et al.*,)

Judge Paul L. Maloney

Defendants.)
_____)

PARTIAL CONSENT DECREE

(Regarding Defendant Triple M Tire, Inc.)

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I. BACKGROUND

A. On November 14, 2006, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607, seeking recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Carl's Tire Retreading Site in Grawn, Michigan (the "Site").

B. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site. At the request of the Michigan Department of Environmental Quality, EPA conducted a removal action at the Site in 2003. EPA disposed of approximately 4,500 gallons of oil and water, 22,910 gallons of treated water, and 10,479 tons of excavated soil. In addition, EPA treated on site a total of 765 cubic yards of contaminated soil and 467,050 gallons of contaminated water.

C. The defendant that has entered into this Consent Decree ("Settling Defendant") does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

D. The United States has reviewed the Financial Information submitted by Settling Defendant to determine whether Settling Defendant is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, it appears that Settling Defendant Triple M Tire, Inc. has insufficient assets and cash-flow to pay its estimated allocated share of approximately \$75,000. Accordingly, the United States has determined that the Settling Defendant is able to pay only the amount specified in Section VI.

E. The United States and Settling Defendant agrees, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, and DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b), and also has personal jurisdiction over Settling Defendant. Settling Defendant consents to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Defendant, including but not limited to, any transfer of assets or real or personal property shall in no way alter the Settling Defendant's responsibilities under this Consent Decree.

IV. STATEMENT OF PURPOSE

3. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendant to make a cash payment to address its liability for Past Response Costs at the Site as provided in the Covenant Not to Sue by United States in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" or "Decree" shall mean this Partial Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.
- f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- g. "Financial Information" shall mean those financial documents identified in Appendix A.

h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

j. "Parties" shall mean the United States and the Settling Defendant.

k. "Plaintiff" shall mean the United States.

l. "Past Response Costs" shall mean all response costs, as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid or will pay: (1) at or in connection with the Site through December 31, 2007, plus accrued Interest on all such costs; and (2) to recover any response costs related to EPA's removal action in 2003 or any prior response activity at the Site, including all costs to litigate the civil action in which this Consent Decree is entered, regardless of when those costs are incurred; provided that a Settling Defendant that fails to timely comply with Paragraph 5 shall be liable for all costs incurred by the United States in enforcing the terms of this Consent Decree as to such Settling Defendant.

m. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

n. "Settling Defendant" shall mean Triple M Tire, Inc.

o. "Site" shall mean the Carl's Tire Retreading Site, encompassing approximately 4.5 acres, located at 5175 Sawyer Woods Drive in Grawn, Grand Traverse County, Michigan and generally shown on the map attached as Appendix B.

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

VI. PAYMENT

5. Within 90 Days after entry of this Consent Decree, the Settling Defendant shall pay one thousand, five hundred dollars (\$1,500.00) to the EPA.

6. Payment shall be made by certified or cashier's check made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA

Region and Site Spill ID Number A514, DOJ Case Number 90-11-3-09026, and the civil action number 06-cv-0816. Settling Defendant shall send each check to:

Financial Litigation Unit
U.S. Attorney's Office
for the Western District of Michigan
P.O. Box 208
Grand Rapids, MI 49501-0208

7. At the time of payment, the Settling Defendant shall also send notice that its payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions). Such notice shall reference EPA Region 5, Site/Spill Identification Number A514, DOJ case number 90-11-3-09026, and the civil action number 06-cv-0816.

8. The total amount to be paid by the Settling Defendant pursuant to Paragraph 5 shall be deposited by EPA in the EPA Hazardous Substance Superfund.

VII. FAILURE TO MAKE PAYMENT

9. Interest on Late Payments. If the Settling Defendant fails to make any payment under Paragraph 5 by the required due date, Interest shall accrue on the unpaid balance through the date of payment.

10. Stipulated Penalty.

a. If any amounts due under Paragraph 5 are not paid by the required date, the Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 9, \$100 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number A514, DOJ Case Number 90-11-3-09026, and Civil Action No. 06cv0816, and shall be sent to:

Financial Litigation Unit
U.S. Attorney's Office
for the Western District of Michigan
P.O. Box 208
Grand Rapids, MI 49501-0208

c. At the time of each payment, the Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions).

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse the Settling Defendant from payment as required by Section VI or from performance of any other requirements of this Consent Decree.

VIII. COVENANT NOT TO SUE BY UNITED STATES

14. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against the Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), to recover Past Response Costs. With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by the Settling Defendant of its obligations under this Consent Decree. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by the Settling Defendant. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, such Settling Defendant shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 21 shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from such Settling Defendant's false or materially inaccurate information. This covenant not to sue extends only to the Settling Defendant and does not extend to any other person.

IX. RESERVATION OF RIGHTS BY UNITED STATES

15. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 14. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against the Settling Defendant with respect to:

- a. liability for failure of the Settling Defendant to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability based upon the Settling Defendant's ownership or operation of the Site, or upon the Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendant; and
- e. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs.

16. Notwithstanding any other provision of this Consent Decree, EPA reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Settling Defendant, or the financial certification made by Settling Defendant in Paragraph 24, is false or, in a material respect, inaccurate.

X. COVENANT NOT TO SUE BY SETTLING DEFENDANT

17. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Consent Decree, including but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Michigan State Constitution, the

Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

Except as provided in Paragraph 19 (Waiver of Claims) and Paragraph 23 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 15 (c) - (e), but only to the extent that the Settling Defendant's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

18. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

19. Settling Defendant agrees not to assert any CERCLA claims or causes of action that it may have for all matters relating to Past Response Costs, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts a claim or cause of action relating to Past Response Costs against Settling Defendant.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

20. Except as provided in Paragraph 19, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 19, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to Past Response Costs against any person not a Party hereto.

21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, 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 Decree. The "matters addressed" in this Consent Decree are Past Response Costs. The "matters addressed" in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendant coming within the scope of such reservations.

22. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ 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 Decree.

23. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant 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 United States 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 United States set forth in Section VIII.

XII. CERTIFICATION OF SETTLING DEFENDANT

24. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site, and that it has fully complied with any and all EPA requests for information regarding the Site and Settling Defendant's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927; and

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time the Settling Defendant executes this Consent Decree.

XIII. NOTICES AND SUBMISSIONS

25. Whenever, under the terms of this Consent Decree, 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 Decree with respect to the United States, EPA, DOJ and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-3-09026)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

Steven P. Kaiser
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604
(312) 353-3804

and

Brian Kelly
On Scene Coordinator
9311 Groh Road, SE-GI
Grosse Isle, MI 48138
(734) 692-7684

As to Settling Defendant:

As listed on the Signature Page for the Settling Defendant

XIV. RETENTION OF JURISDICTION

26. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XV. INTEGRATION/APPENDICES

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

this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is a list of the financial documents submitted to EPA by Settling Defendant; and

“Appendix B” is the map of the Site.

XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

28. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

29. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any Party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

XVII. SIGNATORIES/SERVICE

30. Each undersigned representative of Settling Defendant to this Consent Decree and the Acting Associate Attorney General of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

31. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

32. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant 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. The Parties agree that Settling Defendant need not respond to discovery or otherwise litigate this action unless or until the Court expressly declines to enter this Consent Decree.

XVIII. FINAL JUDGMENT

33. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 20__.

Hon. Paul L. Maloney
United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Belle Tire Distr., Inc., et al.*, Civil Action No. 06-cv-0816 (W.D. Mich.), relating to the Carl's Tire Retreading Site.

FOR PLAINTIFF THE UNITED STATES OF AMERICA

RONALD J. TENPAS
Assistant Attorney General
Environmental and Natural Resources Division

Date: _____

W. BENJAMIN FISHEROW
Deputy Chief
Environmental Enforcement Section
Environmental and Natural Resources Division

Date: _____

MICHAEL J. ZOELLER
Trial Attorney, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Ben Franklin Station, PO Box 7611
Washington, DC 20044-7611
Tel: (202) 305-1478

CHARLES R. GROSS
United States Attorney

Date: _____

RYAN COBB
Assistant United States Attorney
330 Ionia Avenue, NW, Suite 501
Grand Rapids, MI 49503
Tel: (616) 456-2404

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FOR PLAINTIFF THE UNITED STATES OF AMERICA

RONALD J. TENPAS
Assistant Attorney General
Environmental and Natural Resources Division

Date: _____

W. BENJAMIN FISHEROW
Deputy Chief
Environmental Enforcement Section
Environmental and Natural Resources Division

Date: _____

MICHAEL J. ZOELLER
Trial Attorney, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Ben Franklin Station, PO Box 7611
Washington, DC 20044-7611
Tel: (202) 305-1478

CHARLES R. GROSS
United States Attorney

Date: 9/25/08

RYAN COBB
Assistant United States Attorney
330 Ionia Avenue, NW, Suite 501
Grand Rapids, MI 49503
Tel: (616) 456-2404

Date: 10-2-06

RICHARD C. KARL
Director, Superfund Division
U.S. Environmental Protection Agency-Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3507

Date: 09.17.08

STEVEN P. KAISER
Associate Regional Counsel
U.S. Environmental Protection Agency-Region 5 (C-14)
77 West Jackson Blvd.
Chicago, IL 60604-3507
(312) 353-3804

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FOR DEFENDANT
Triple M Tire, Inc.

Date: _____

Larry Miller
President, Triple M Tire, Inc.
1641 US 27 South
Gaylord, Michigan 49735

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

Douglas A. Donnell, Esq.
Mika Meyers Beckett & Jones PLC
900 Monroe Avenue, NW
Grand Rapids, MI 49503
Counsel for Triple M Tire, Inc.

APPENDIX A

Appendix A to the Consent Decree in the matter of *United States v. Belle Tire Distr., Inc., et al.*, Civil Action No. 06-cv-0816 (W.D. Mich.), relating to the Carl's Tire Retreading Site

List of Financial Information for Settling Defendant Supporting Settlement Amount

Settling Defendant	Financial Information	Settlement Amount
Triple M Tire, Inc.	• Completed and notarized Form OBD-500C, dated April 7, 2008; • Corporate federal tax returns for FY 2005 & 2006; • Statement of Income and Balance Sheet, dated January 31, 2008; and • Declination by insurer describing insurance policy information.	\$1,500.00

APPENDIX B

Appendix B to the Consent Decree in the matter of *United States v. Belle Tire Distr., Inc., et al.*,
Civil Action No. 06-cv-0816 (W.D. Mich.), relating to the Carl's Tire Retreading Site

Map of Carl's Tire Retreading Site 5175 Sawyer Woods Drive in Grawn, Grand Traverse County, Michigan

