# EXHIBIT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V

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| IN THE MATTER OF:<br><br>LOWER FOX RIVER AND GREEN BAY SUPERFUND SITE, GREEN BAY, WI OPERABLE UNITS 2-5<br><br>Appleton Papers Inc.<br>CBC Coating, Inc.<br>(formerly known as Riverside Paper Corporation),<br>Georgia-Pacific Consumer Products, LP<br>(formerly known as Fort James Operating Company),<br>Menasha Corporation,<br>NCR Corporation,<br>P.H. Glatfelter Company,<br>U.S. Paper Mills Corp., and<br>WTM I Company<br>(formerly known as Wisconsin Tissue Mills, Inc.),<br><br>Respondents.<br><br>EPA Facility ID # WI0001954841<br><br>Proceeding Under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9606(a)) | ) | U.S. EPA Docket No. V-W- '08-C-885 |

**ADMINISTRATIVE ORDER**
**FOR REMEDIAL ACTION**

## I. INTRODUCTION AND JURISDICTION

1. This Order directs Respondents to implement the remedial action for Operable Units 2, 3, 4, and 5 of the Lower Fox River and Green Bay Superfund Site (the "Site"), as set forth in the Records of Decision and Record of Decision Amendment addressing those portions of the Site. This Order is issued to Respondents by the United States Environmental Protection Agency ("U.S. EPA") under the authority vested in the President of the United States by Section

106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(a). This authority was delegated to the Administrator of U.S. EPA on January 23, 1987, by Executive Order 12580 (52 Fed. Reg. 2926), and was further delegated to Regional Administrators by EPA Headquarters Delegation No. 14-14-A on April 15, 1994, and by EPA Headquarters Delegation No. 14-14-B on May 11, 1994, and was further delegated by the Regional Administrator of Region 5 to the Director, Superfund Division, by Region 5 Delegation Nos. 14-14-A and 14-14-B, both dated May 2, 1996.

## II. PARTIES BOUND

2. This Order shall apply to and be binding upon each Respondent identified in Paragraph 7 and its successors and assigns, and each Respondent is jointly and severally responsible for carrying out all activities required by this Order, except as specifically provided by this Order. Failure of one or more Respondent(s) to comply with all or any part of this Order shall not in any way excuse or justify noncompliance by any other Respondent(s). No change in the ownership, corporate status, or other control of any Respondent shall alter any Respondent's responsibilities under this Order.

3. Each Respondent shall provide a copy of this Order to any prospective owners or successors before a controlling interest in Respondent's assets, property rights, or stock is transferred to the prospective owner or successor. Respondents shall provide a copy of this Order to each contractor, subcontractor, laboratory, or consultant retained to perform any work under this Order, within five days after the Effective Date of this Order or on the date such services are retained, whichever is later. Respondents shall also provide a copy of this Order to any person acting on behalf of Respondents with respect to the Site or the work and shall ensure that all contracts and subcontracts entered into hereunder require performance under the contract to be in conformity with the terms and work required by this Order. With regard to the activities undertaken pursuant to this Order, each contractor and subcontractor shall be deemed to be related by contract to the Respondents within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Notwithstanding the terms of any contract, each Respondent is responsible for compliance with this Order and for ensuring that its contractors, subcontractors and agents perform all work in accordance with this Order.

4. Not later than 30 days prior to any transfer of any interest in any real property included within the Site, Respondents shall submit a true and correct copy of the transfer documents to U.S. EPA, and shall identify the transferee(s) by name, principal business address and effective date of the transfer.

## III. DEFINITIONS

5. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or its implementing regulations. Whenever terms listed below are used in this Order or in the documents attached to this Order or incorporated by reference into this Order, the following definitions shall apply:

a. "2002 ROD" shall mean the Record of Decision for Operable Unit 1 and Operable Unit 2 at the Site that was signed by U.S. EPA on December 20, 2002, and all attachments thereto; provided, however, that as used herein, the term "2002 ROD" shall only refer to the portions of that Record of Decision that relate to Operable Unit 2 at the Site.

b. "2003 ROD" shall mean the Record of Decision for Operable Unit 3, Operable Unit 4, and Operable Unit 5 at the Site that was signed by U.S. EPA on June 30, 2003, and all attachments thereto.

c. "2007 ROD Amendment" shall mean the Record of Decision Amendment for Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) at the Site that was signed by U.S. EPA on June 27, 2007, and all attachments thereto.

d. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

e. "Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the end of the next working day.

f. "Effective Date," as used herein, shall mean the date specified by Paragraph 92 of this Order.

g. "National Contingency Plan" or "NCP" shall mean the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

h. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

i. "Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations, identified in the RODs and the accompanying Statements of Work, that the remedial action and work required by this Order must attain and maintain.

j. "Phase 2A Work" shall mean the elements of the overall Work that are specified by the Phase 2A SOW that is attached as Appendix 2 to this Order.

k. "Phase 2B Work" shall mean the elements of the overall Work that are specified by the Phase 2B SOW that is attached as Appendix 3 to this Order.

l. "RODs" shall mean the 2002 ROD and the 2003 ROD, as amended and supplemented by the 2007 ROD Amendment.

m. "Response Agencies" shall mean the United States Environmental Protection Agency and the Wisconsin Department of Natural Resources.

n. "Response Costs" shall mean all costs, including direct costs, indirect costs, and interest incurred by the United States to perform or support response actions at the Site, including, but not limited to, contract and enforcement costs.

o. "Section" shall mean a portion of this Order identified by a Roman numeral that includes one or more Paragraphs.

p. "Section 106 Administrative Record" shall mean the Administrative Record which includes all documents considered or relied upon by U.S. EPA in preparation of this Order. The Section 106 Administrative Record includes, but is not limited to, the documents and information upon which the Response Agencies based the selection of the response actions for the Site, as reflected in the Administrative Record referenced in Paragraph 21 of this Order. An index of additional documents included in the Section 106 Administrative Record is attached hereto as Appendix 1.

q. "Site" shall mean the Lower Fox River and Green Bay Superfund Site, which includes approximately 39 miles of the Lower Fox River in northeastern Wisconsin and the bay of Green Bay in Wisconsin and Michigan, as described and depicted in the RODs.

r. "State" shall mean the State of Wisconsin.

s. "Statements of Work" or "SOWs" shall mean the statements of work for implementation Phase 2A and Phase 2B of the remedial action at the Site, as well as operation and maintenance and long-term monitoring activities, as set forth in Appendix 2 and Appendix 3 to this Order. Appendix 2 is the Phase 2A SOW and Appendix 3 is the Phase 2B SOW. Those Statements of Work are incorporated into this Order and are an enforceable part of this Order, as provided by Section VII of this Order.

t. "WDNR" shall mean the Wisconsin Department of Natural Resources.

u. "Work" shall mean all activities Respondents are required to perform under this Order and all attachments hereto, including, but not limited, to remedial action activities, operation and maintenance, and long-term monitoring activities.

## IV. DETERMINATIONS

6. The Lower Fox River and Green Bay Site includes approximately 39 miles of the Lower Fox River (the "Fox River") as well as the bay of Green Bay (the "Bay"). The Fox River portion of the Site extends from the outlet of Lake Winnebago and continues downstream to the mouth of the Fox River at the City of Green Bay. The Bay portion of the Site extends from the mouth of the Fox River at the City of Green Bay to the point where the Green Bay enters Lake Michigan. The Site has been divided into five geographically-defined Operable Units ("OUs"), as described in the RODs: OU 1 - Little Lake Butte des Morts; OU 2 - Appleton to Little Rapids; OU 3 - Little Rapids to De Pere; OU 4 – De Pere to Green Bay; and OU 5 - the Bay of Green Bay. Many paper production facilities have operated for many years along the Fox River. Some facilities adjacent to the river manufactured a special type of carbonless copy paper that contained polychlorinated biphenyls ("PCBs"). Other of the facilities along the river used PCB-containing carbonless copy paper as feedstock for the production of other paper products. By both the production of carbonless copy paper and the reprocessing of carbonless copy paper as feedstock, PCBs were released from paper production mills either directly to the Fox River, or

indirectly, after passing through publicly-owned wastewater treatment plants. PCBs that were discharged to the Fox River contaminated sediments in the Fox River and the Bay.

7. The Respondents to this Order comprise the following parties:

a. NCR Corporation and Appleton Papers Inc.

i. NCR Corporation ("NCR") is a party that is liable for payment of response costs and performance of response activities at the Site because NCR is: (1) a successor to at least two corporate predecessors that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (2) a successor to at least two corporate predecessors that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Appleton Papers Inc. ("API") is a party that is liable for payment of response costs and performance of response activities at the Site because API is: (1) a successor to one or more corporate predecessors that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (2) a successor to one or more corporate predecessors that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

iii. NCR and API and their corporate predecessors have owned and/or operated two paper production facilities in the Fox River Valley: one located at 825 E. Wisconsin Avenue in Appleton, Wisconsin (the "Appleton Facility") and another located at 540 Prospect Street in Combined Locks, Wisconsin (the "Combined Locks Facility").

iv. In 1953, Appleton Coated Paper Company ("ACPC") began working with The National Cash Register Company (which later changed its name to NCR Corporation) on the development and production of carbonless copy paper. In 1954, NCR began marketing its NCR PAPER brand of carbonless copy paper, which ACPC manufactured at the Appleton Facility. Between at least 1954 and 1971, that NCR PAPER was made with an emulsion containing PCBs.

v. In 1969, NCR acquired Combined Paper Mills, Inc., and that company became a wholly-owned subsidiary of NCR. Both before and after that acquisition, Combined Paper Mills, Inc. owned and/or operated the Combined Locks Facility. PCB-containing NCR PAPER was produced at the Combined Locks Mill between at least 1969 and 1971. In 1970, NCR acquired ACPC, and ACPC became a wholly-owned subsidiary of NCR. In 1971, ACPC was merged into Combined Paper Mills, Inc., which changed its name to Appleton Papers, Inc., and remained a wholly-owned subsidiary of NCR. In 1973, Appleton Papers, Inc. merged into NCR and became known as the Appleton Papers Division of NCR.

vi. In 1978, Appleton Papers Inc. – a subsidiary of Germaine Monteil Cosmetiques Corp. ("GMCC") and its GMCC's parent corporation B.A.T. Industries, p.l.c. ("BAT") – acquired the assets of the Appleton Papers Division from NCR, and Appleton Papers Inc. and BAT assumed certain liabilities in connection with the asset purchase. BATUS, Inc. was then formed as a holding company for BAT's United States subsidiaries, including Appleton Papers Inc. and its immediate parent GMCC. In 1981, Appleton Papers Inc. and certain other GMCC subsidiaries were merged into GMCC, and GMCC's name was changed to Appleton Papers Inc.

vii. In 1990, API, together with The Wiggins Teape Group Ltd., was separated from BAT and the two companies were merged to form Wiggins Teape Appleton p.l.c. Later that year, Wiggins Teape Appleton merged with Arjomari Prioux SA. Shortly after the merger, the group changed its name to Arjo Wiggins Appleton p.l.c. API operated as a wholly-owned subsidiary of Arjo Wiggins Appleton p.l.c. until 2001. In 2001, the employees of API acquired ownership of the company from Arjo Wiggins Appleton p.l.c. through the use of an employee stock ownership plan. API retained ownership of the Appleton Facility, but ownership of the Combined Locks Facility was transferred to Appleton Coated, LLC, another entity owned by Arjo Wiggins Appleton p.l.c. .

viii. AT&T bought NCR in 1991 and renamed the company AT&T Global Information Solutions Company. In 1996, the company changed its name back to NCR Corporation and NCR was spun off to AT&T's shareholders as a separate, publicly-traded company.

ix. Corporate predecessors of NCR and API generated substantial amounts of PCB-containing wastepaper "broke" during production of NCR PAPER between at least 1954 and 1971. That PCB-containing wastepaper broke was sold to other companies and then reprocessed at other paper production facilities that discharged PCB-contaminated wastewater to the Lower Fox River.

x. As owners and/or operators of the Combined Locks Facility, certain corporate predecessors of API and NCR also discharged wastewater containing PCBs directly to the Lower Fox River in connection with: (1) the Combined Locks Facility's reprocessing of PCB-containing wastepaper between at least 1954 and 1966; and (2) production of PCB-containing carbonless paper at the Combined Locks Facility between at least 1969 and 1971.

xi. In connection with the production of PCB-containing carbonless paper at the Appleton Facility between at least 1954 and 1971, corporate predecessors of NCR and API discharged wastewater containing PCBs to the City of Appleton's wastewater collection systems and publicly-owned treatments works, and the City of Appleton in turn discharged the Appleton Facility's partially-treated wastewater to the Lower Fox River.

b. P.H. Glatfelter Company

i. P.H. Glatfelter Company ("Glatfelter") is a party that is liable for payment of response costs and performance of response activities at the Site because Glatfelter is: (1) the owner and/or operator of a facility from which there has been a release of hazardous substances to the Site; (2) a party – and a successor to at least one corporate predecessor – that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (3) a party – and a successor to at least one corporate predecessor – that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Since at least 1954, Glatfelter and one of its corporate predecessors owned and/or operated a paper production facility located at 225 W. Wisconsin Avenue in Neenah, Wisconsin. In connection with its reprocessing of PCB-containing wastepaper during

that time period, that Glatfelter facility discharged wastewater containing PCBs directly to the Lower Fox River.

iii. Between at least 1954 and 1979, the paper production facility located at 225 W. Wisconsin Avenue in Neenah was owned and/or operated by Bergstrom Paper Company. In 1979, Bergstrom Paper Company was merged into P.H. Glatfelter Company.

c. WTM I Company

i. WTM I Company ("WTM I") is a party that is liable for payment of response costs and performance of response activities at the Site because WTM I is: (1) a party that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (2) a party that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Between at least 1954 and 1999, WTM I (formerly known as Wisconsin Tissue Mills, Inc.) owned and/or operated a paper production facility located at 190 Tayco Street in Neenah, Wisconsin. In connection with its reprocessing of PCB-containing wastepaper during that time period, that WTM I facility discharged wastewater containing PCBs to the Neenah-Menasha Sewerage District's wastewater collection systems and publicly-owned treatment works, and the Neenah-Menasha Sewerage District in turn discharged WTM I's partially-treated wastewater to the Lower Fox River. Beginning in 1976, the WTM I facility discharged its wastewater directly to the Lower Fox River. In 1999, WTM I transferred ownership of the Neenah Mill to Georgia-Pacific Tissue, LLC.

d. Menasha Corporation

i. Menasha Corporation ("Menasha") is a party that is liable for payment of response costs and performance of response activities at the Site because Menasha is: (1) a party – and a successor to at least one corporate predecessor – that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (2) a party – and a successor to at least one corporate predecessor – that by contract,

agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Between at least 1954 and 1983, Menasha and one of its corporate predecessors owned and/or operated a paper production facility located at 69 Washington Street in Menasha, Wisconsin. In connection with its reprocessing of PCB-containing wastepaper during that time period, that Menasha facility discharged wastewater containing PCBs to the Neenah-Menasha Sewerage District's wastewater collection system and publicly-owned treatment works, and the Neenah-Menasha Sewerage District in turn discharged WTM's partially-treated wastewater to the Lower Fox River. During that time period, that Menasha facility also discharged a portion of its wastewater directly to the Lower Fox River.

iii. Between at least 1954 and 1969, the paper production facility located at 69 Washington Street in Menasha, Wisconsin was owned and/or operated by John Strange Paper Company. In 1969, Menasha acquired full ownership of the John Strange Paper Company and the John Strange Paper Company was merged into Menasha Corporation in 1971. In 1983, Menasha sold the former John Strange Paper Company facility to U.S. Paper Mills Corp.

e. CBC Coating, Inc. (formerly known as Riverside Paper Corp.)

i. Riverside Paper Corp. (now known as CBC Coating, Inc.) (but referred to herein as "Riverside") is a party that is liable for payment of response costs and performance of response activities at the Site because Riverside is: (1) the owner and/or operator of a facility from which there has been a release of hazardous substances to the Site; (2) a party – and/or a successor to one or more corporate predecessors – that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (3) a party – and/or a successor to one or more corporate predecessors – that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Since at least 1954, Riverside (through its Kerwin Paper Co. Division) has owned and/or operated a paper production facility located at 800 S. Lawe Street in Appleton, Wisconsin. In connection with its reprocessing of PCB-containing wastepaper during that time period, that Riverside facility discharged wastewater containing PCBs to the City of Appleton's wastewater collection system and publicly-owned treatments works, and the City of Appleton in turn discharged Riverside's partially-treated wastewater to the Lower Fox River.

iii. U.S. EPA is informed and believes that Riverside Paper Corp. sold certain of its assets to Pacon Corporation in June 2007 and changed its name to CBC Coating, Inc.

f. U.S. Paper Mills Corp.

i. U.S. Paper Mills Corp. ("U.S. Paper") is a party that is liable for payment of response costs and performance of response activities at the Site because U.S. Paper is: (1) the owner and/or operator of a facility from which there has been a release of hazardous substances to the Site; (2) a party – and/or a successor to one or more corporate predecessors – that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (3) a party – and/or a successor to one or more corporate predecessors – that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Since at least 1954, U.S. Paper (and/or one or more of its corporate predecessors) has owned and/or operated a paper production facility located at 824 Fort Howard Avenue in De Pere, Wisconsin. In connection with its reprocessing of PCB-containing wastepaper during that time period, that U.S. Paper facility discharged wastewater containing PCBs directly to the Lower Fox River. Since at least 1970, that U.S. Paper facility discharged its wastewater to the City of De Pere's wastewater collection system and publicly-owned treatment works, and the City of De Pere in turn discharged U.S. Paper's partially-treated wastewater to the Lower Fox River.

iii. In 1983, U.S. Paper purchased the former John Strange Paper Company facility located at 69 Washington Street in Menasha, Wisconsin and assumed certain

liabilities in connection with that asset purchase. U.S. Paper has owned and/or operated the former John Strange Paper Company facility since 1983. Since 1983, wastewater generated by that facility has been discharged to the Neenah-Menasha Sewerage District's wastewater collection system and publicly-owned treatment works, and the Neenah-Menasha Sewerage District in turn discharged that facility's partially-treated wastewater to the Lower Fox River.

iv. In 2001, Sonoco Products Company acquired the stock of U.S. Paper Mills Corp. and U.S. Paper was renamed Sonoco-U.S. Mills, Inc. The company's name has recently been changed back to U.S. Paper Mills Corp.

g. Georgia-Pacific Consumer Products LP
(formerly known as Fort James Operating Company)

i. Georgia-Pacific Consumer Products LP ("Georgia-Pacific") is a party that is liable for payment of response costs and performance of response activities at the Site because Georgia-Pacific is: (1) the owner and/or operator of a facility from which there has been a release of hazardous substances to the Site; (2) a party – and a successor to at least one corporate predecessor – that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (3) a party – and a successor to at least one corporate predecessor – that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the Site.

ii. Since at least 1954, Georgia-Pacific and at least one of its corporate predecessors have owned and/or operated a paper production facility located at 1919 South Broadway in Green Bay, Wisconsin. In connection with its reprocessing of PCB-containing wastepaper during that time period, that Georgia-Pacific facility discharged wastewater containing PCBs directly to the Lower Fox River. U.S. EPA also is informed and believes that, at certain times during that period, a corporate predecessor of Georgia-Pacific sold wastepaper containing PCBs to at least one other paper production facility that discharged its PCB-contaminated wastewater to the Lower Fox River (i.e., the U.S. Paper Mills De Pere facility).

iii. Between at least 1954 and 1997, the paper production facility located at 1919 South Broadway in Green Bay was owned and/or operated by Fort Howard Corporation. In 1997, Fort Howard Corporation was merged into Fort James Operating Company, a wholly-owned subsidiary of Fort James Corporation. The stock of Fort James Corporation was acquired by Georgia-Pacific Corporation in 2000. In 2005, Koch Industries, Inc. acquired ownership of Georgia-Pacific Corporation (and it's wholly owned subsidiaries Fort James Corporation and Fort James Operating Company).

iv. In December 2006, Fort James Operating Company converted from a Virginia corporation to a Delaware corporation, and that Delaware corporation was in turn converted to a Delaware limited partnership named Georgia-Pacific Consumer Products LP. Under Delaware law, the entity that results from any such conversion is deemed to be the same entity as the original entity that was converted.

8. Between 1996 and 1998, the United States Fish and Wildlife Service, under the authority of Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), issued the Respondents and other parties information requests relating to the Site. Each Respondent submitted written responses to those information requests.

9. On July 28, 1998 (63 Fed. Reg. 40247), pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, U.S. EPA proposed to place the Lower Fox River and Green Bay Superfund Site (also called the "Fox River NRDA/PCB Releases Site") on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B.

10. On May 26, 2000, U.S. EPA, Fort James Corporation and Fort James Operating Company entered into an Administrative Order on Consent providing for the performance of removal activities in connection with a portion of the Site known as Sediment Management Unit 56/57.

11. Pursuant to CERCLA and the National Contingency Plan, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site was prepared under WDNR's technical lead, and draft RI/FS reports were released for public comment in March 1999. In October 2001, U.S. EPA and WDNR issued and sought public comment on a proposed remedial action plan for the Site. Final RI/FS reports for the Site were published in December 2002.

12. In December 2002, the Response Agencies signed and issued a Record of Decision for Operable Units 1 and 2 at the Site.

13. In June 2003, the Response Agencies signed and issued a Record of Decision for Operable Units 3, 4 and 5 at the Site.

14. On July 1, 2003, the Response Agencies and WTM I Company entered into an Administrative Order on Consent providing for the performance of the remedial design for Operable Unit 1 at the Site.

15. The United States, the State of Wisconsin, P.H. Glatfelter Company and WTM I Company entered into a consent decree providing for the performance of the remedial action at Operable Unit 1 of the Site, and the court approved and entered that Consent Decree on April 12, 2004.

16. On March 5, 2004, the Response Agencies entered into an Administrative Order on Consent with NCR Corporation and Fort James Operating Company that provided for the performance of the remedial design for Operable Units 2 through 5 at the Site.

17. The United States and the State of Wisconsin entered into a Consent Decree with NCR Corporation and U.S. Paper (then called Sonoco-U.S. Mills, Inc.) that provided for performance of an initial phase of the remedial action in Operable Unit 4 at the Site, and the court approved and entered that Consent Decree on November 3, 2006.

18. On February 23, 2007, the Response Agencies issued each Respondent a notice letter captioned "General Notice of Potential Liability and Request to Participate in Remedial Action Implementation Negotiations Relating to Operable Units 2-5."

19. In June 2007, the Response Agencies signed and issued a Record of Decision Amendment for Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4 and Operable Unit 5 (River Mouth) at the Site.

20. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, U.S. EPA provided an opportunity for public comment on all proposed remedial actions at the Site. Similarly, Respondents were given an opportunity to comment on each proposed plan for remedial action and to supplement the Administrative Record regarding a decision for selection of final plans for remedial action.

21. The decisions by the Response Agencies on the remedial action to be implemented at OUs 2-5 at the Site are embodied in the RODs. More specifically, the remedial action to be implemented at OU 2 is specified by the 2002 ROD, as amended and supplemented by the 2007 ROD Amendment, and the remedial action to be implemented at OUs 3-5 is specified by the 2003 ROD, as amended and supplemented by the 2007 ROD Amendment. The RODs are an enforceable part of this Order and are incorporated herein by this reference. The RODs are supported by an Administrative Record which contains the documents and information upon which the Response Agencies based the selection of the response actions. The Response Agencies' selected response actions, as set forth in the RODs, have been determined to provide adequate protection of public health, welfare and the environment; meet all federal and State environmental laws; and be cost effective.

22. The Site is contaminated with PCBs, a hazardous substance and probable human carcinogen, as a result of PCB-contaminated wastewater that the Respondents discharged to the Fox River (either directly or indirectly).

23. OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth) are estimated to contain approximately 6.6 million cubic yards of PCB-contaminated sediment at levels above the risk-based PCB Remedial Action Level of 1.0 part per million specified by the RODs. Other areas in OU 2 and OU 5 contain significant additional volumes of PCB-contaminated sediment.

24. As of 2002, the Lower Fox River and Green Bay areas supported a population of 595,000, about 10% of the population of Wisconsin.

25. Because fish and wildlife are contaminated with PCBs, people who eat contaminated fish or waterfowl may suffer adverse health effects. As noted in the 2003 ROD, a Human Health Risk Assessment for the Site supported a determination that that cancer risks were as high as 7.4 in 10,000 for recreational anglers and 1.0 in 1,000 for high-intake fish consumers. Those cancer risks for recreational anglers and high-intake fish consumers are more than 20 times greater than background risks calculated for eating fish from Lake Winnebago (which is a background location relative to the Lower Fox River and Green Bay).

26. As discussed in the 2003 ROD, the Human Health Risk Assessment for the Site also led to the calculation of hazard indices (HI) for human non-cancer risks that were as high as 27.7 for recreational anglers and 38.0 for high-intake fish consumers, far exceeding the HI value

of 1.0 established to protect people from long-term adverse non-cancer health effects. The non-cancer health effects associated with exposure to PCBs include reproductive effects, developmental effects, and immune system suppression. The highest non-cancer HIs for recreational anglers and high-intake fish consumers are more than 20 times greater than background HIs calculated for eating fish from Lake Winnebago.

27. Fish consumption advisories for the Site were first issued in 1976 and 1977 by WDNR and the State of Michigan, respectively. The advisories are still in effect.

28. Ecological risks from PCBs include risks to benthic invertebrates, fish, fish eating birds, carnivorous birds, and fish eating mammals. At the Site, PCB concentrations in those organisms greatly exceed acceptable risk levels.

29. Based on evaluations supporting the Feasibility Study for the Site, it has been estimated that 276 to 486 pounds of PCBs are discharged from the Lower Fox River to Green Bay each year, and that 269 pounds of PCBs are discharged from Green Bay to Lake Michigan each year.

30. The RODs require sediment removal by dredging as the primary remedial approach at the Site. Under certain eligibility criteria specified in the ROD Amendment, other alternative remedial approaches may be used at the Site, which include a combination of dredging and capping, capping alone, and placement of sand covers. The short-term and long-term objectives of the RODs include: removing and containing PCB-contaminated sediment in each OU; achieving further reductions in PCB surface concentrations through natural recovery processes; achieving corresponding reductions in PCB levels in the water column and in fish tissue; and ensuring continuation of those benefits to human health and the environment through long-term operation and maintenance and institutional controls.

31. The Lower Fox River and Green Bay Superfund Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9). In addition, each paper production facility and each publicly-owned treatment works referenced above in Paragraph 7 is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

32. There has been a "release" and/or a "threatened release" of a "hazardous substance" from each "facility" referenced in the preceding Paragraph, within the meaning of CERCLA Sections 101(14), 101(22), and 107(a), 42 U.S.C. §§ 9601(14), 9601(22), and 9607(a).

For example, PCB-containing wastewater was discharged into the environment from each paper production facility and each publicly-owned treatment works referenced above in Paragraph 7, and PCBs are escaping and leaching into the environment from contaminated sediments at the Site.

33. The releases and/or threatened releases referenced in the preceding Paragraph have caused the incurrence of "response" costs, within the meaning of CERCLA Sections 101(25) and 107(a), 42 U.S.C. § 9601(25) and 9607(a). The potential for future migration of hazardous substances at and from the Site also poses a threat of a "release" as defined in CERCLA Section 101(22), 42 U.S.C. § 9601(22).

34. Each Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

35. For the reasons described above in Paragraph 7, each Respondent is a liable party as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

36. The release or threatened release of one or more hazardous substances from the facilities referenced above may be presenting an imminent and substantial endangerment to the public health or welfare or the environment.

37. The actions required by this Order are necessary to protect the public health, welfare, or the environment and are consistent with the National Contingency Plan, as amended, and CERCLA.

## V. NOTICE TO THE STATE

38. U.S. EPA has notified the State of Wisconsin, as represented by the Wisconsin Department of Natural Resources ("WDNR"), that U.S. EPA intends to issue this Order. U.S. EPA will consult with the State and the State will have the opportunity to consult with U.S. EPA regarding all work to be performed under this Order, and any other issues which arise while the Order remains in effect.

## VI. CURRENT STATUS OF THE REMEDIAL DESIGN AND THE REMEDIAL ACTION

39. The remedial design and remedial action for OU 1 at the Site currently are being

performed and funded by Glatfelter, WTM I, and Menasha, under a Consent Decree that was approved and entered on April 12, 2004 in the case captioned United States and the State of Wisconsin v. P.H. Glatfelter Co. and WTM I Co., Case No. 03-C-0949 (E.D. Wis.). Under that Consent Decree, Glatfelter and WTM have been performing the remedial action in OU 1, as required by the 2002 ROD, since 2004. Since entry of the Consent Decree, Glatfelter, WTM I, and Menasha have agreed to provide additional funding for the continuation of that work in OU 1 pursuant to a set of Agreed Supplements to the Consent Decree. The sediment remediation work in OU 1 will continue, at least through 2008 and 2009. This Administrative Order only addresses OUs 2-5, so it has no effect on the Consent Decree with Glatfelter and WTM I for OU 1.

40. To date, remedial design activities for OUs 2-5 at the Site have been performed under a Settlement Agreement and Administrative Order on Consent with Georgia-Pacific and NCR, captioned In re Lower Fox River and Green Bay Site, U.S. EPA Region 5, CERCLA Docket No. V-W-'04-C-781 (the "RD Settlement Agreement"). The remedial design work is continuing under the RD Settlement Agreement, so this Administrative Order does not address remedial design requirements for OUs 2-5, and it has no effect on the RD Settlement Agreement.

41. U.S. EPA and WDNR previously determined that the remedial action for OUs 2-5 should be conducted in two main phases to expedite the response in a particular area known as the "Phase 1 Project Area." The Phase 1 Project Area is just downstream from the De Pere dam, along the west bank of the Lower Fox River, near the City of Green Bay. Phase 1 of the remedial action addresses PCB-contaminated sediments in that area, which have especially high PCB concentrations. U.S. EPA and WDNR concluded that the accelerated removal of PCBs in that area would therefore have significant benefits to the environment and public health. All remaining elements of the remedial action in OUs 2-5 would be implemented in Phase 2.

42. Phase 1 of the remedial action is currently being implemented under a Consent Decree with NCR and U.S. Paper in the case captioned United States and the State of Wisconsin v. NCR Corporation and Sonoco-U.S. Mills, Inc., Case No. 06-C-484 (E.D. Wis.). Most of work on Phase 1 of the remedial action was completed in 2007. Some additional work is expected to be performed in 2008. This Administrative Order does not address Phase 1 of the remedial action, and it has no effect on that Consent Decree.

43. EPA and WDNR have determined that it will be feasible and practicable for

Respondents to commence full-scale sediment remediation for Phase 2 of the OU 2-5 remedial action at the start of the 2009 construction season, such that sediment remediation occurs throughout the 2009 construction season. Full-scale sediment remediation will then continue throughout subsequent years, until completion of construction of the OU 2-5 remedial action. To adhere to that project schedule, Respondents will need to perform significant preparatory activities in 2008, including: (i) procuring certain equipment (such as dewatering and water treatment equipment), including entering into required contracts; (ii) performing staging site preparation work and associated infrastructure construction, including entering into required contracts; (iii) developing landfill facilities and/or procuring landfill space for disposal of dredged sediment, including entering into required contracts; (iv) completing site surveys (such as historical site investigations); and (v) obtaining access agreements for performance of the remedial action, as described by Paragraph 71. For that reason, U.S. EPA and WDNR have determined that Phase 2 of the OU 2-5 remedial action should be subdivided and staged as follows: (i) Phase 2A consists of work to be performed before the end of 2008, in preparation for the commencement and continuation of full-scale sediment remediation within OUs 2-5; (ii) Phase 2B comprises all remaining work to implement the OU 2-5 remedial action (such as the performance of full-scale sediment remediation in 2009 and subsequent years) and other related response activities (such as operation and maintenance and long-term monitoring activities).

## VII. ORDER

44. The following parties are collectively referred to in this Order as the "Respondents": Appleton Papers Inc.; CBC Coating, Inc. (formerly known as Riverside Paper Corporation); Georgia-Pacific Consumer Products, LP (formerly known as Fort James Operating Company); Menasha Corporation; NCR Corporation; P.H. Glatfelter Company; U.S. Paper Mills Corp.; and WTM I Company (formerly known as Wisconsin Tissue Mills, Inc.).

45. For the purpose of this Order, the term "Affected Respondents" shall mean only those Respondents that are ordered to perform particular tasks under the following Paragraphs of this Section VII of this Order, or under other corresponding provisions of this Order.

46. Phase 2A Work. Based on the foregoing, each of the following Affected

Respondents is ordered to comply with the provisions of this Order and to perform the Phase 2A Work as set forth in the accompanying Phase 2A SOW (attached hereto as Appendix 2):

(i) API, NCR, Riverside, and U.S. Paper are hereby ordered to perform all tasks referenced in the accompanying Phase 2A SOW;

(ii) Georgia-Pacific is hereby ordered to perform all tasks referenced in the accompanying Phase 2A SOW, other than any tasks that relate solely to OU 2 and/or OU 3 at the Site.

All such work shall be completed in accordance with the schedules and requirements specified by the Phase 2A SOW, and with any instructions from U.S. EPA's Remedial Project Manager ("RPM") for the Site. This Paragraph of this Administrative Order, and the obligation to comply with the requirements imposed by this Paragraph, shall take effect on the Effective Date specified by Paragraph 92 of this Order.

47. Phase 2B Work. Based on the foregoing, each of the following Affected Respondents is ordered to comply with the provisions of this Order and to perform the Phase 2B Work as set forth in the accompanying Phase 2B SOW (attached hereto as Appendix 3):

(i) API, Glatfelter, Menasha, NCR, Riverside, U.S. Paper, and WTM I are hereby ordered to perform all tasks referenced in the accompanying Phase 2B SOW;

(ii) Georgia-Pacific is hereby ordered to perform all tasks referenced in the accompanying Phase 2B SOW, other than any tasks that relate solely to OU 2 and/or OU 3 at the Site.

All such work shall be completed in accordance with the schedules and requirements specified by the Phase 2B SOW, and with any instructions from U.S. EPA's RPM for the Site. This Paragraph of this Administrative Order, and the obligation to comply with the requirements imposed by this Paragraph, shall take effect on August 15, 2008.

48. Based on the foregoing, each Respondent is hereby ordered to comply with all other requirements of this Order, as specified herein.

## VIII. WORK TO BE PERFORMED

49. All work plans, reports, engineering design documents, and other deliverables ("work plans and deliverables"), as described throughout this Order, shall be submitted to WDNR (except documents claimed to contain confidential business information) and U.S. EPA. All work plans and deliverables will be reviewed and either approved, approved with

modifications, or disapproved by U.S. EPA, in consultation with WDNR. In the event of approval or approval with modifications by U.S. EPA, the Affected Respondents shall proceed to take any action required by the work plan, report, or other item, as approved or modified by U.S. EPA. If the work plan or other deliverable is approved with modifications or disapproved, U.S. EPA will provide, in writing, comments or modifications required for approval. The Affected Respondents shall amend the work plan or other deliverable to incorporate only those comments or modifications required by U.S. EPA. Within 21 days of the date of U.S. EPA's written notification of approval with modifications or disapproval, the Affected Respondents shall submit an amended work plan or other deliverable. U.S. EPA shall review the amended work plan or deliverable and either approve or disapprove it. Failure to submit a work plan, amended work plan or other deliverable shall constitute noncompliance with this Order. Submission of an amended work plan or other deliverable which fails to incorporate all of U.S. EPA's required modifications, or which includes other unrequested modifications, shall also constitute noncompliance with this Order. Approval by U.S. EPA of the work plan or other deliverable shall cause said approved work plan or other deliverable to be incorporated herein as an enforceable part of this Order. If any work plan or other deliverable is not approved by U.S. EPA, the Affected Respondents shall be deemed to be in violation of this Order.

50. The work performed by the Affected Respondents pursuant to this Order shall, at a minimum, achieve the performance standards specified in the RODs and SOWs. Nothing in this Order, or in U.S. EPA's approval of any work plan or other deliverable, shall be deemed to constitute a warranty or representation of any kind by U.S. EPA that full performance of the remedial design or remedial action will achieve the performance standards set forth in the RODs and in the SOWs. The Affected Respondents' compliance with such approved documents does not foreclose U.S. EPA from seeking additional work.

51. All materials removed from the Site shall be disposed of or treated at a facility approved in advance of removal by U.S. EPA's RPM and in accordance with: (1) Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3); (2) the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901, et seq., as amended; (3) 40 C.F.R. § 300.440; and (4) all other applicable federal, State, and local requirements. The identity of the receiving facility and state will be determined by Affected Respondents following the award of the

pertinent contract(s) for remedial action construction. The Affected Respondents shall provide written notice to the RPM which shall include all relevant information, including the information required by Paragraph 52 below, as soon as practicable after the award of the contract(s) and before the hazardous substances are actually shipped off-Site.

52. Prior to any off-site shipment of hazardous substances from the Site to an out-of-state waste management facility, the Affected Respondents shall provide written notification to the appropriate state environmental official in the receiving state and to U.S. EPA's RPM of such shipment of hazardous substances. However, the notification of shipments to the state shall not apply to any off-Site shipments when the total volume of all shipments from the Site to the state will not exceed 10 cubic yards. The notification shall be in writing, and shall include the following information, where available: (1) the name and location of the facility to which the hazardous substances are to be shipped; (2) the type and quantity of the hazardous substances to be shipped; (3) the expected schedule for the shipment of the hazardous substances; and (4) the method of transportation. The Affected Respondents shall notify the receiving state of major changes in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same state, or to a facility in another state.

53. The Affected Respondents shall cooperate with U.S. EPA in providing information regarding the work to the public. When requested by U.S. EPA, the Affected Respondents shall participate in the preparation of such information for distribution to the public and in public meetings which may be held or sponsored by U.S. EPA to explain activities at or relating to the Site.

54. Within 30 days after the Respondents conclude that all phases of the remedial action have been fully performed, Respondents shall so notify U.S. EPA and shall schedule and conduct a pre-certification inspection to be attended by Respondents and U.S. EPA. The pre-certification inspection shall be followed by a written report submitted within 30 days of the inspection by a registered professional engineer and the Respondents' Project Coordinator(s) certifying that the remedial action has been completed in full satisfaction of the requirements of this Order. If, after completion of the pre-certification inspection and receipt and review of the written report, U.S. EPA determines that the remedial action or any portion thereof has not been completed in accordance with this Order, U.S. EPA shall notify the Affected Respondents in

writing of the activities that must be undertaken to complete the remedial action and shall set forth in the notice a schedule for performance of such activities. Consistent with this Order, the Affected Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established therein. If U.S. EPA concludes, following the initial or any subsequent certification of completion by Respondents that the remedial action has been fully performed in accordance with this Order, U.S. EPA may notify Respondents that the remedial action has been fully performed. U.S. EPA's notification shall be based on present knowledge and Respondents' certification to U.S. EPA, and shall not limit U.S. EPA's right to perform periodic reviews pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), or to take or require any action that in the judgment of U.S. EPA is appropriate at the Site, in accordance with 42 U.S.C. §§ 9604, 9606, or 9607. Even after certification of completion of the remedial action by U.S. EPA, the Affected Respondents shall continue to perform any ongoing elements of the Phase 2B Work, including and operation, maintenance, and monitoring activities required by the Phase 2B Work Plan.

## IX. PERIODIC REVIEW

55. Under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, where hazardous substances will remain on Site at the completion of the remedial action, U.S. EPA may review the Site to assure that the work performed pursuant to this Order adequately protects human health and the environment. Until such time as U.S. EPA certifies completion of the work, the Affected Respondents shall conduct the requisite studies, investigations, or other response actions as determined necessary by U.S. EPA in order to permit U.S. EPA to conduct the review under Section 121(c) of CERCLA. As a result of any review performed under this Paragraph, the Affected Respondents may be required to perform additional work or to modify work previously performed.

## X. ADDITIONAL RESPONSE ACTIONS

56. In the event that U.S. EPA determines that additional work or modifications to work are necessary to meet performance standards, to maintain consistency with the final remedy, or to otherwise protect human health or the environment, U.S. EPA will notify

Respondents that additional response actions are necessary and U.S. EPA's notice will identify the Affected Respondents that will be required to perform such additional response actions. U.S. EPA may also require the Affected Respondents to modify any plan, design, or other deliverable required by this Order, including any approved modifications.

57. Within 30 days of receipt of notice from U.S. EPA that additional response activities are necessary, the Affected Respondents shall submit for approval an Additional RD/RA Work Plan pursuant to Paragraph 49 herein. Upon U.S. EPA's approval of the Additional RD/RA Work Plan, the Additional RD/RA Work Plan shall become an enforceable part of this Order, and the Affected Respondents shall implement the Additional RD/RA Work Plan for additional response activities in accordance with the standards, specifications, and schedule contained therein. Failure to submit an Additional RD/RA Work Plan shall constitute noncompliance with this Order.

## XI. ENDANGERMENT AND EMERGENCY RESPONSE

58. In the event of any event during the performance of the work which causes or threatens to cause a release of a hazardous substance or which may present an immediate threat to public health or welfare or the environment, the Affected Respondents shall immediately take all appropriate action to prevent, abate, or minimize the threat, and shall immediately notify U.S. EPA's RPM or alternate RPM. If neither of these persons is available, the Affected Respondents shall notify the U.S. EPA Emergency Response Unit, Region V. The Affected Respondents shall take further action in consultation with U.S. EPA's RPM and in accordance with all applicable provisions of this Order, including but not limited to the health and safety plan and the contingency plan. In the event that the Affected Respondents fail to take appropriate response action as required by this Paragraph, and U.S. EPA takes that action instead, the Affected Respondents shall reimburse U.S. EPA for all costs of the response action not inconsistent with the NCP. The Affected Respondents shall pay the response costs in the manner described in Section XIX (Reimbursement of Response Costs) of this Order, within 30 days of U.S. EPA's demand for payment.

59. Nothing in the preceding Paragraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the

environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

## XII. PROGRESS REPORTS

60. In addition to the other deliverables set forth in this Order, the Respondents shall provide monthly progress reports to U.S. EPA and WDNR with respect to actions and activities undertaken pursuant to this Order. More specifically: (1) the Affected Respondents that are responsible for performing the Phase 2A Work shall submit monthly progress reports on the Phase 2A Work until that work is completed; and (2) the Affected Respondents that are responsible for performing the Phase 2B Work shall submit monthly progress reports on the Phase 2B Work until that work is completed and U.S. EPA gives Respondents written notice under Paragraph 94 of this Order. The progress reports shall be submitted on or before the 10th day of each month following the Effective Date of this Order. At a minimum these progress reports shall: (1) describe the actions which have been taken to comply with this Order during the prior month; (2) include all results of sampling and tests and all other data received by the Affected Respondents and not previously submitted to U.S. EPA; (3) describe all work planned for the next 90-days with schedules relating such work to the overall project schedule for RD/RA completion; and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays. Upon request by U.S. EPA, the Affected Respondents shall also provide more frequent progress reports on certain activities undertaken pursuant to this Order (e.g., daily and/or weekly reports on particular activities).

## XIII. COMPLIANCE WITH APPLICABLE LAWS

61. All activities by Respondents pursuant to this Order shall be performed in accordance with the requirements of all federal and State laws and regulations. U.S. EPA has determined that the activities contemplated by this Order are consistent with the National Contingency Plan.

62. Except as provided in Section 121(e) of CERCLA and the NCP, no permit shall be required for any portion of the work conducted entirely on-Site. Where any portion of the

work requires a federal or State permit, the Affected Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

63. This Order is not and shall not be construed to be, a permit issued pursuant to any federal or State statute or regulation.

## XIV. REMEDIAL PROJECT MANAGER AND STATE PROJECT COORDINATOR

64. All communications, whether written or oral, from Respondents to U.S. EPA shall be directed to U.S. EPA's Remedial Project Manager and to WDNR's Project Coordinator. Respondents shall submit five copies of all documents – including plans, reports, and other correspondence which are developed pursuant to this Order – to both U.S. EPA and WDNR, and shall send those documents by overnight delivery service.

U.S. EPA's Remedial Project Manager is:

James Hahnenberg
Remedial Project Manager
Superfund Division, Mail Code: SR-6J
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, IL 60604

WDNR's Project Coordinator is:

Gregory Hill
Project Coordinator
Wisconsin Department of Natural Resources
101 S. Webster St.
Madison, WI 53703

U.S. EPA may also designate an Alternate Remedial Project Manager and WDNR may designate an Alternative Project Coordinator by sending written notice of any such designation to the Affected Respondents.

65. U.S. EPA may change its Remedial Project Manager or Alternate Remedial Project Manager and WDNR may change its Project Coordinator or Alternative Project Coordinator. If U.S. EPA changes its Remedial Project Manager or Alternate Remedial Project Manager, U.S. EPA will inform the Affected Respondents in writing of the name, address, and telephone number of the new Remedial Project Manager or Alternate Remedial Project Manager.

If WDNR changes its Project Coordinator or Alternate Project Coordinator, WDNR will inform the Affected Respondents in writing of the name, address, and telephone number of the new Project Coordinator or Alternate Project Coordinator.

66. U.S. EPA's RPM and Alternate RPM shall have the authority lawfully vested in a Remedial Project Manager and On-Scene Coordinator by the National Contingency Plan. U.S. EPA's RPM or Alternate RPM shall have authority, consistent with the NCP, to halt any work required by this Order, and to take any necessary response action.

## XV. PROJECT COORDINATORS, CONTRACTORS, AND FINANCIAL ASSURANCE

67. Project Coordinators.

a. All aspects of the work to be performed by Affected Respondents pursuant to this Order shall be under the direction and supervision of a Project Coordinator qualified to undertake and complete the pertinent requirements of this Order. The Affected Respondents may select separate Project Coordinators for the Phase 2A Work and the Phase 2B Work. The Project Coordinator(s) shall be the RPM's primary point of contact concerning any work being performed by Affected Respondents and shall possess sufficient technical expertise regarding all aspects of the work. U.S. EPA reserves the right to disapprove any proposed Project Coordinator under this Order. With respect to any proposed Project Coordinator, the Affected Respondents shall demonstrate that the proposed Project Coordinator has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed Project Coordinator's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with the specifications set forth in "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002) or equivalent documentation as determined by U.S. EPA.

b. Within 15 days after the Effective Date of this Order, the Affected Respondents shall notify U.S. EPA and WDNR in writing of the name and qualifications of the Project Coordinator, including primary support entities and staff, proposed to be used in carrying out the Phase 2A Work under this Order.

c. By no later than September 1, 2008, the Affected Respondents shall notify

U.S. EPA and WDNR in writing of the name and qualifications of the Project Coordinator, including primary support entities and staff, proposed to be used in carrying out the Phase 2B Work under this Order.

68. Contractors.

a. Contractors for Phase 2A Work.

i. Within 30 days after U.S. EPA approves the Phase 2A Work Plan that is prepared pursuant to the Phase 2A SOW, the Affected Respondents shall identify a proposed construction contractor and notify U.S. EPA and WDNR in writing of the name, title, and qualifications of the construction contractor proposed to be used in carrying out Phase 2A Work under this Order. With respect to any proposed construction contractor, the Affected Respondents shall demonstrate that the proposed construction contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed construction contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with the specifications set forth in "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002) or equivalent documentation as determined by U.S. EPA.

ii. The Affected Respondents shall submit a copy of the construction contractor solicitation documents for Phase 2A Work to U.S. EPA and WDNR not later than five days after publishing the solicitation documents. Upon U.S. EPA's request, Respondents shall submit complete copies of all bid packages received from all contract bidders.

b. Contractors for Phase 2B Work.

i. Within 30 days after U.S. EPA approves the Phase 2B Work Plan that is prepared pursuant to the Phase 2B SOW, the Affected Respondents shall identify a proposed construction contractor and notify U.S. EPA and WDNR in writing of the name, title, and qualifications of the construction contractor proposed to be used in carrying out Phase 2B Work under this Order. With respect to any proposed construction contractor, the Affected Respondents shall demonstrate that the proposed construction contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National

Standard, January 5, 1995), by submitting a copy of the proposed construction contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with the specifications set forth in "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002) or equivalent documentation as determined by U.S. EPA.

ii. The Affected Respondents shall submit a copy of the construction contractor solicitation documents for Phase 2B Work to U.S. EPA and WDNR not later than five days after publishing the solicitation documents. Upon U.S. EPA's request, Respondents shall submit complete copies of all bid packages received from all contract bidders.

69. Disapproval of Project Coordinators or Contractors. U.S. EPA retains the right to disapprove of the Project Coordinator and any contractor, including but not limited to construction contractors retained by the Affected Respondents. In the event U.S. EPA disapproves a Project Coordinator or contractor, the Affected Respondents shall retain a new project coordinator or contractor to perform the work, and such selection shall be made within 15 days following the date of U.S. EPA's disapproval. If at any time Affected Respondents propose to use a new Project Coordinator or contractor, the Affected Respondents shall notify U.S. EPA of the identity of the new Project Coordinator or contractor at least 15 days before the new Project Coordinator or contractor performs any work under this Order.

70. Insurance and Financial Assurance.

a. Insurance for Phase 2A Work. At least seven days prior to commencing any Phase 2A Work at the Site pursuant to this Order, the Affected Respondents shall submit to U.S. EPA a certification that the Affected Respondents or their contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages to persons or property which may result from the Phase 2A Work activities to be conducted by or on behalf of the Affected Respondents pursuant to this Order. The Affected Respondents shall ensure that such insurance or indemnification is maintained for the duration of the Phase 2A Work required by this Order.

b. Insurance for Phase 2B Work. At least seven days prior to commencing any Phase 2B Work at the Site pursuant to this Order, the Affected Respondents shall submit to U.S. EPA a certification that the Affected Respondents or their contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages

to persons or property which may result from the Phase 2B Work activities to be conducted by or on behalf of the Affected Respondents pursuant to this Order. The Affected Respondents shall ensure that such insurance or indemnification is maintained for the duration of the Phase 2B Work required by this Order.

c. Financial Assurance for Phase 2B Work. The Affected Respondents shall demonstrate their ability to complete the Phase 2B Work required by this Order and to pay all claims that arise from the performance of the Phase 2B Work by obtaining and presenting to U.S. EPA, by no later than January 15, 2009, one or more of the following forms of financial assurance, which must be satisfactory in form and substance to U.S. EPA:

(i) a surety bond unconditionally guaranteeing payment and/or performance of the Phase 2B Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

(ii) one or more irrevocable letters of credit, payable to or at the direction of U.S. EPA, that is issued by one or more financial institution(s) that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a United States federal or state agency;

(iii) a trust fund established for the benefit of U.S. EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a United States federal or state agency;

(iv) a policy of insurance that provides U.S. EPA with acceptable rights as a beneficiary thereof and is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a state agency;

(v) a demonstration by one or more Affected Respondents that each such Affected Respondent meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the estimated cost of the Phase 2B Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied; or

(vi) a written guarantee to fund or perform the Phase 2B Work executed in favor of U.S. EPA by direct or indirect parent company of an Affected Respondent or a company

that has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with at least one Affected Respondent; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of U.S. EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the estimated cost of the Phase 2B Work that it proposes to guarantee.

The Affected Respondents shall demonstrate financial assurance in an amount no less than the total estimated cost of the Phase 2B Work under the RODs (including the net present value of the estimated cost of all required operation and maintenance and long-term monitoring activities). If any Affected Respondent seeks to provide financial assurance by means of internal financial information, or by guarantee of a third party, that Affected Respondent shall re-submit such information annually, in August of each year. If U.S. EPA determines that such financial information is inadequate, Respondents shall, within 30 days after receipt of U.S. EPA's notice of determination, obtain and present to U.S. EPA for approval one of the other forms of financial assurance listed above.

## XVI. SITE ACCESS AND DOCUMENT AVAILABILITY

71. If any property subject to or affected by the Phase 2A Work, or any other property where access is needed for performance of the Phase 2A Work, is owned in whole or in part by parties other than the Respondents, the Affected Respondents will obtain, or use their best efforts to obtain, access agreements from the present owners within 90 days of the Effective Date specified by Paragraph 94 of this Order, as required by the Phase 2A SOW. If any property subject to or affected by the Phase 2B Work, or any other property where access is needed for performance of the Phase 2B Work, is owned in whole or in part by parties other than the Respondents, the Affected Respondents will obtain, or use their best efforts to obtain, access agreements from the present owners, by no later than January 15, 2009, as required by the Phase 2B SOW. Said agreements shall provide access for U.S. EPA, its contractors and oversight officials, the State and its contractors, and the Affected Respondents or the Affected Respondents' authorized representatives and contractors. Said agreements shall specify that the Affective Respondents are not U.S. EPA's representative with respect to liability associated with Site activities. Affected Respondents' best efforts shall include providing reasonable

compensation to any property owner. If access agreements are not obtained within the time referenced above, the Affected Respondents shall immediately notify U.S. EPA of their failure to obtain access.

72. If the Affected Respondents cannot obtain the necessary access agreements, U.S. EPA may exercise non-reviewable discretion and: (1) use its legal authorities to obtain access for the Affected Respondents; (2) conduct response actions at the property in question; or (3) terminate this Order. If U.S. EPA conducts a response action and does not terminate the Order, the Affected Respondents shall perform all other activities not requiring access to that property. The Affected Respondents shall integrate the results of any such tasks undertaken by U.S. EPA into its reports and deliverables. The Affected Respondents shall reimburse U.S. EPA, pursuant to Section XIX (Reimbursement of Response Costs) of this Order, for all response costs (including attorney fees) incurred by the United States to obtain access for Affected Respondents.

73. Respondents shall allow U.S. EPA and its authorized representatives and contractors to enter and freely move about all property at the Site and off-Site areas subject to or affected by the work under this Order or where documents required to be prepared or maintained by this Order are located, for the purposes of inspecting conditions, activities, the results of activities, records, operating logs, and contracts related to the Site or Respondents and their representatives or contractors pursuant to this Order; reviewing the progress of the Respondents in carrying out the terms of this Order; conducting tests as U.S. EPA or its authorized representatives or contractors deem necessary; using a camera, sound recording device or other documentary type equipment; and verifying the data submitted to U.S. EPA by Respondents. Respondents shall allow U.S. EPA and its authorized representatives to enter the Site, to inspect and copy all records, files, photographs, documents, sampling and monitoring data, and other writings related to work undertaken in carrying out this Order. Nothing herein shall limit U.S. EPA's right of entry or inspection authority under federal law, and U.S. EPA retains all of its information gathering and enforcement authorities and rights under CERCLA, RCRA, and any other applicable statutes and regulations.

## XVII. RECORD PRESERVATION

74. On or before the Effective Date of this Order, Respondents shall submit a written

certification to U.S. EPA that they have not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to their potential liability with regard to the Site since the time of their notification of potential liability by the United States or the State. Respondents shall not dispose of any such documents without prior approval by U.S. EPA. Upon U.S. EPA's request, Respondents shall make all such documents available to U.S. EPA and shall submit a log of any such documents claimed to be privileged for any reason. This privilege log shall list, for each document, the date, author, addressees (including courtesy copies or "cc"s and "bcc"s) and subject matter of the document.

75. Respondents shall provide to U.S. EPA upon request, copies of all documents and information within their possession or control (or their contractors', subcontractors' or agents' possession or control) relating to activities at the Site or to the implementation of this Order, including but not limited to sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, traffic routing, correspondence, or other documents or information. Respondents shall also make available to U.S. EPA their employees, agents, or representatives for purposes of investigation, information gathering or testimony concerning the performance of the work.

76. Until 10 years after U.S. EPA provides notice pursuant to Paragraph 94 of this Order, Respondents shall preserve, and shall instruct their contractors and agents to preserve, all documents, records, and information of whatever kind, nature or description relating to the performance of the work. Upon the conclusion of this document retention period, Respondents shall notify the United States at least 90 days prior to the destruction of any such records, documents or information, and, upon request of the United States, Respondents shall deliver all such documents, records and information to U.S. EPA.

77. Respondents may assert a claim of business confidentiality covering part or all of the information submitted to U.S. EPA pursuant to the terms of this Order under 40 C.F.R. § 2.203, provided such claim is not inconsistent with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7) or other provisions of law. This claim shall be asserted in the manner described by 40 C.F.R. § 2.203(b) and substantiated by Respondents at the time the claim is made. Information determined to be confidential by U.S. EPA will be given the protection specified in 40 C.F.R. Part 2. If no such claim accompanies the information when it is submitted to U.S.

EPA, it may be made available to the public by U.S. EPA or by the State without further notice to the Respondents. Respondents shall not assert confidentiality claims with respect to any data or documents related to Site conditions, sampling, or monitoring.

78. Respondents shall maintain, for the period during which this Order is in effect, an index of documents submitted to U.S. EPA under this Order that Respondents claim contain confidential business information ("CBI"). The index shall contain, for each document, the date, author, addressee, and subject of the document. Respondents shall submit an updated copy of the index to U.S. EPA with each new set of documents claimed to be CBI. The updated index shall also indicate any documents for which CBI claims have been withdrawn.

## XVIII. DELAY IN PERFORMANCE

79. Any delay in performance of this Order according to its terms and schedules that is not properly justified by the Affected Respondents under the terms of this section shall be considered a violation of this Order by the Affected Respondents. Any delay in performance of this Order shall not affect the Affected Respondents' obligation to fully perform all obligations imposed upon such Affected Respondents under the terms and conditions of this Order.

80. The Affected Respondents shall notify U.S. EPA of any delay or anticipated delay in performing any requirement of this Order. Such notification shall be made by telephone to U.S. EPA's RPM or Alternate RPM within 48 hours after the Affected Respondents first knew or should have known that a delay might occur. Affected Respondents shall adopt all reasonable measures to avoid or minimize any such delay. Within seven days after notifying U.S. EPA by telephone, the Affected Respondents shall provide written notification fully describing the nature of the delay, any justification for delay, any reason why the Affected Respondents should not be held strictly accountable for failing to comply with any relevant requirements of this Order, the measures planned and taken to minimize the delay, and a schedule for implementing the measures that will be taken to mitigate the effect of the delay. Increased costs or expenses associated with implementation of the activities called for in this Order is not a justification for any delay in performance.

## XIX. REIMBURSEMENT OF RESPONSE COSTS

81. Respondents shall reimburse U.S. EPA, upon written demand, for all response costs incurred by the United States in overseeing Respondent's implementation of the requirements of this Order. U.S. EPA may submit to Respondents on a periodic basis a written demand and an accounting of unreimbursed oversight response costs incurred by the United States with respect to this Order. U.S. EPA's Itemized Cost Summary Reports, or such other summary as may be certified by U.S. EPA, shall serve as the accounting and basis for payment demands.

82. Respondents shall remit payment of the demanded amount within 30 days of receipt of each demand for payment. Interest shall accrue from either the date that payment of a specified amount is demanded in writing, or the date of the expenditure, whichever is later. The interest rate is the rate established by the Department of the Treasury pursuant to 31 U.S.C. § 3717 and 4 C.F.R. § 102.13.

83. Payment shall be made to U.S. EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures that U.S. EPA Region 5 will provide Respondents, and shall be accompanied by a statement identifying the name and address of the parties making payment, the Site name, U.S. EPA Region 5, and the Site/Spill ID Number A565 and the U.S. EPA docket number for this action. If the response costs demanded under the preceding Paragraph are less than $10,000, payment may, in lieu of the described EFT method, be made by certified or cashier's check made payable to "U.S. EPA Hazardous Substance Superfund." Each check, or a letter accompanying each check, shall identify the name and address of the parties making payment, the Site name, and Site/Spill ID Number A565, and the U.S. EPA docket number for this action, and shall be sent to:

U. S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

Respondents shall send copies of each transmittal letter and check to the U.S. EPA's RPM.

## XX. UNITED STATES NOT LIABLE

84. The United States is not to be construed as a party to, and does not assume any liability for, any contract entered into by any of the Respondents to carry out the activities pursuant to this Order. The proper completion of the work under this Order is solely the responsibility of the Respondents. The United States, by issuance of this Order, also assumes no liability for any injuries or damages to persons or property resulting from acts or omissions by Respondents, or their directors, officers, employees, agents, representatives, successors, assigns, contractors, or consultants in carrying out any action or activity required by this Order.

## XXI. ENFORCEMENT AND RESERVATIONS

85. U.S. EPA reserves the right to bring an action against Respondents under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to this Order and not reimbursed by Respondents. This reservation shall include but not be limited to past costs, direct costs, indirect costs, the costs of oversight, the costs of compiling the cost documentation to support oversight cost demand, as well as accrued interest as provided in Section 107(a) of CERCLA.

86. Notwithstanding any other provision of this Order, at any time during the response action, U.S. EPA may perform its own studies, complete the response action (or any portion of the response action) as provided in CERCLA and the NCP, and seek reimbursement from Respondents for its costs, or seek any other appropriate relief.

87. Nothing in this Order shall preclude U.S. EPA from taking any additional enforcement actions, including modification of this Order or issuance of additional Orders, and/or additional remedial or removal actions as U.S. EPA may deem necessary, or from requiring Respondents in the future to perform additional activities pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), or any other applicable law. This Order shall not affect any Respondent's liability under CERCLA Section 107(a), 42 U.S.C. § 9607(a), for the costs of any such additional actions.

88. Notwithstanding any provision of this Order, the United States hereby retains all of its information gathering, inspection and enforcement authorities and rights under CERCLA,

RCRA and any other applicable statutes or regulations.

89. Nothing in this Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person for any liability it may have arising out of or relating in any way to the Site.

90. If a court issues an order that invalidates any provision of this Order or finds that any Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondents shall remain bound to comply with all provisions of this Order not invalidated by the court's order.

## XXII. ACCESS TO ADMINISTRATIVE RECORD

91. The Section 106 Administrative Record for this Order is available for review on normal business days between the hours of 9:00 a.m. and 5:00 p.m. at the U.S. EPA, Region V, 77 West Jackson Boulevard, Chicago, Illinois. An Administrative Record Index is attached hereto as Appendix 1.

## XXIII. EFFECTIVE DATE AND TERMINATION

92. Except as specifically provided by Paragraph 47, this Order shall become effective 30 days after the date of its issuance.

93. As specified by Paragraph 47, the provisions of this Order relating to the Phase 2B Work shall take effect on August 15, 2008.

94. Within 30 days after Respondents conclude that all phases of the work have been fully performed, that the performance standards have been attained, and that all operation and maintenance activities have been completed, Respondents shall submit to U.S. EPA a written report by a registered professional engineer certifying that the work has been completed in full satisfaction of the requirements of this Order. U.S. EPA shall require such additional activities as may be necessary to complete the work or U.S. EPA may, based upon present knowledge and Respondents' certification to U.S. EPA, issue written notification to Respondents that the work has been completed, as appropriate, in accordance with the procedures set forth in Paragraph 54 for Respondents' certification of completion of the remedial action. U.S. EPA's notification shall not limit U.S. EPA's right to perform periodic reviews pursuant to Section 121(c) of CERCLA,

42 U.S.C. § 9621(c), or to take or require any action that in the judgment of U.S. EPA is appropriate at the Site, in accordance with 42 U.S.C. §§ 9604, 9606, or 9607. The provisions of this Order shall be deemed to be satisfied when U.S. EPA notifies Respondents in writing that Respondents have demonstrated, to U.S. EPA's satisfaction, that all terms of the Order have been completed. This notice shall not, however, terminate Respondents' obligation to comply with Section XVII of this Order (record preservation).

## XXIV. NOTICE OF INTENT TO COMPLY

95. Initial Notice. Within 30 days after the date of issuance of this Order, each Respondent must submit to U.S. EPA: (1) a written notice stating its unequivocal intention to comply with all terms and requirements of this Order that will be applicable to such Respondent, aside from the requirement to perform the Phase 2B Work under Paragraph 47; and (2) the written notice required by Paragraph 74.

96. Subsequent Notice. By no later than August 1, 2008, each Respondent must submit to U.S. EPA a written notice stating its unequivocal intention to comply with all terms and requirements of this Order relating to the requirement to perform the Phase 2B Work under Paragraph 47.

97. In the event any Respondent fails to provide any notice required by the preceding Paragraphs, said Respondent shall be deemed to have refused to comply with the pertinent portions of this Order. A Respondent which fails to provide timely notice of its intent to comply with this Order shall thereafter have no authority to perform any response action at Operable Units 2-5 at the Site, pursuant to Sections 104(a) and 122(e)(6) of CERCLA. In the event such a Respondent subsequently changes its decision and desires to acquire authority from U.S. EPA under Sections 104(a) and 122(e)(6) of CERCLA to undertake the work described in this Order, said Respondent must provide the notice required by the preceding Paragraphs to U.S. EPA and receive from U.S. EPA written permission and authority to proceed with work under this Order.

## XXV. PENALTIES

98. Each Respondent shall be subject to civil penalties under Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), of not more than $32,500 for each day in which said Respondent

willfully violates, or fails or refuses to comply with this Order without sufficient cause. In addition, failure to properly provide response action under this Order, or any portion hereof, may result in liability under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), for punitive damages in an amount at least equal to, and not more than three times the amount of any costs incurred by the Fund as a result of such failure to take proper action.

## XXVI. OPPORTUNITY TO COMMENT AND CONFER

99. Within 15 days after the date of issuance of this Order, each Respondent may submit written comments to U.S. EPA. Respondents asserting a "sufficient cause" defense under Section 106(b) of CERCLA shall describe the nature of any "sufficient cause" defense using facts that exist on or prior to the Effective Date of this Order. The absence of a response by U.S. EPA shall not be deemed to be acceptance of a Respondent's assertions.

100. Within 10 days after the date of issuance of this Order, Respondents may request a conference with the U.S. EPA to discuss this Order. If requested, the conference shall occur within 20 days of the date of issuance of this Order, at the office of U.S. EPA, Region 5, in Chicago, Illinois.

101. The purpose and scope of the conference shall be limited to issues involving the implementation of the response actions required by this Order and the extent to which Respondents intend to comply with this Order. This conference is not an evidentiary hearing and does not constitute a proceeding to challenge this Order. It does not give Respondents a right to seek review of this Order or to seek resolution of potential liability. No record of the conference (e.g., stenographic, tape or other physical record) will be made. At any conference held pursuant to Respondents' request, Respondents may appear in person or by an attorney or other representative. Requests for a conference must be by telephone followed by written confirmation to U.S. EPA's RPM.

**ADMINISTRATIVE ORDER FOR REMEDIAL ACTION FOR OPERABLE UNITS 2-5 OF THE LOWER FOX RIVER AND GREEN BAY SITE**

So Ordered, this 13 day of NOVEMBER, 2007.

BY: Richard C Karl

Director
Superfund Division
U.S. Environmental Protection Agency, Region V

# EXHIBIT 2

McDermott
Will & Emery

Boston Brussels Chicago Düsseldorf London Los Angeles Miami Munich
New York Orange County Rome San Diego Silicon Valley Washington, D C
Strategic alliance with MWE China Law Offices (Shanghai)

Jeffrey C Bates
Attorney at Law
jbates@mwe com
617 535.4068

November 28, 2007

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Mr. James Hahnenberg
Remedial Project Manager
Superfund Division, Mail Code: SR-6J
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, IL 60604

Mr. Gregory Hill
Project Coordinator
Wisconsin Department of Natural Resources
101 S. Webster St.
Madison, WI 53707-7921

Re: Lower Fox River and Green Bay Superfund Site, Unilateral Administrative Order Issued November 13, 2007, EPA Docket No. V-W-08-C-885 ("Order")

Dear Mr. Hahnenberg and Mr. Hill:

In addition to the "sufficient cause" comments submitted jointly by API and NCR with respect to the above-referenced Order, API submits the following comments on its own behalf, and requests that this letter be placed in the Administrative Records for this Site and for the Order.

Contrary to statements made in the Order, API is not a successor to one or more corporate predecessors that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site. With respect to successor liability, in the Seventh Circuit, an asset purchaser does not acquire the liabilities of the seller unless one of four exceptions to this general rule are met: (1) the purchaser agreed to assume the liabilities; (2) the transaction is a de facto merger or consolidation; (3) the purchaser is a "mere continuation" of the seller; or (4) the transaction is an effort to fraudulently escape liability. *North Shore Gas v. Solomon, Inc.*, 152 F.3d 642, 651 (7th Cir. 1998). In 1978, API purchased the assets of NCR's Appleton Papers Division (APD) pursuant to an asset purchase agreement in which it did not agree to accept the liabilities at issue here. None of the other exceptions apply to the 1978 transaction, either.

With respect to releases of hazardous substances from the two API facilities identified in the Order, either any such releases do not make API liable for response costs under Section 107, or the Order was arbitrary and capricious and not in accordance with federal law.

The Appleton Facility is located more than a half mile from the Site. It never discharged wastewater to the Site. The Appleton Facility sent all of its wastewater discharges to the City of Appleton's publicly owned treatment works (POTW) for treatment. It had no other option, and it contracted with, and paid, the POTW to properly treat its wastewater.

As the Order states, it was the POTW that discharged wastewater to the Lower Fox River. Nevertheless, EPA did not name the City of Appleton in the Order. EPA's policies require EPA to do so if there is sufficient evidence to make a determination of liability under Section 107, unless there is a fair and reasonable explanation for not doing so. Documentation of Reason(s) for Not Issuing §106 UAOs to All Identified PRPs (August 2, 1996); OSWER Directive No. 9834.10. There is no such explanation in the Order or in the Administrative Record for not naming the City of Appleton as a respondent. Consequently, if EPA is following its policies, then EPA must have determined that there is not sufficient evidence to name the City of Appleton as a liable party. In that event, then there cannot be sufficient evidence to name API as a liable party on this basis. On the other hand, if EPA believes there is sufficient evidence to name API on this basis, then there must be sufficient evidence to name the City of Appleton, which EPA did not do, in violation of its policies and with no explanation in the administrative record. In that event, then EPA's administrative action in issuing the Order would clearly be arbitrary and capricious under the black letter law of federal administrative procedure. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456-57 (2nd Cir. 2007) and cases cited.

API would agree with the position that there is insufficient evidence that discharges of PCBs from the POTW are a basis for Section 107 liability. Those discharges were sufficiently treated (as they were supposed to be by contract and law) to result in POTW effluent comprised of non-settleable solids. The agencies themselves took this position for over twenty years, and have never sent the City of Appleton a General Notice Letter.

Indeed, the sediment deposits in proximity to the POTW discharge pipe contain low levels of PCBs which do not require the incurrence of response costs per the Records of Decision. Considerable literature on the discharges from this POTW and others further supports this position, especially in light of the fact that PCB capsules in the coating emulsion either were discharged as colloids or were separated out during the treatment process and were not discharged in significant amounts to the Site. This conclusion would also apply to POTW bypasses and "partial treatment", especially since those events would be solely attributable to, and the responsibility of, the City of Appleton's POTW, and the City of Appleton, as noted earlier, is not named on the Order.

With respect to the Combined Locks Facility, we are not aware of any actual data that provide a sufficient basis to conclude that Combined Locks discharged hazardous substances in sufficient amounts to have caused the incurrence of response costs, as required by Section 107.

Moreover, there is no basis for imposing arranger liability on API with respect to the sale of NCR Paper broke. As noted above, API does not bear successor liability. In addition, the sale

of NCR Paper broke was not an arrangement for disposal; it was the sale of a useful product and therefore not covered by the liability provisions of Section 107.

The law in the Seventh Circuit regarding successor liability has been cited above. With respect to "arranger liability", the Seventh Circuit has repeatedly emphasized that "arranger liability" does not apply to transactions involving sales of commercially valuable products, even when they contain hazardous substances: "the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself...." *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 384 (7th Cir. 1995); *United States v. Wedzeb Enterprises, Inc.*, 844 F. Supp. 1328, 1336 (S.D. Ind. 1994) ("A useful, marketable product is not waste under the Act"); *United States v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1354 (N.D. Ill. 1992) ("Selling hazardous substances as part of a complete, useful product does not generally make a party a responsible person"). As the Seventh Circuit has explained, this limitation on the reach of arranger liability is practical and "necessary." *G.J. Leasing Co., Inc.*, 54 F.3d at 384.

The sale of NCR Paper broke falls squarely within the Seventh Circuit's parameters for sale of a useful product.[1] There was never an intent to dispose of NCR Paper broke as a waste. As soon as NCR Paper broke was generated, it was collected, separated, and sorted according to characteristics relevant to potential customers. It was then packaged (i.e., baled). The bales were offered for sale through competitive bidding, and revenues from these sales were recorded in the company's financial records. Moreover, the broke was not sold to recycling mills. Instead, it was sold to independent brokers who themselves resold it as a useful product integral to a viable and established commercial business engaged in supplying materials for the production of paper products. Furthermore, disposal of NCR Paper broke was not on the minds of those purchasing it, either.

Thus, NCR Paper broke was unquestionably a commercially valuable product. It commanded high prices through competitive bidding and was clearly sought after in the paper market. Indeed, the EPA has itself refused to classify the kind of "broke" sold by NCR and its predecessors as a waste. See http://www.epa.gov/epaoswer/non-hw/procure/pdf/paper.pdf (scrap generated in mills at the end of the papermaking process "is not waste" and that "this material is a valuable resource.").

Although neither the Order nor the Administrative Record documents this argument, the US Department of Justice has from time to time suggested that API is liable as an arranger based on cases where the product at issue is a "mixed motive" product, as described by Judge Posner in

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[1] To determine whether a given material constitutes a "useful product," courts in the Seventh Circuit consider, first, whether the "intent" of the parties was to engage in a "bona fide transaction"; and then, second, whether the material itself was "commercially viable." *RSR Corp v. Avanti Development, Inc*, 68 F. Supp. 1037, 1044 (S.D. Ind. 1999) ("Court must examine both the subjective intent of the parties, as revealed by their actions, and whether that intent is justifiable").

*G.J. Leasing Co.* This argument is foreclosed by *G.J. Leasing* and recent case law in the Seventh Circuit.

In *G.J. Leasing*, the court noted that the range of cases arguing for arranger liability could include (1) selling a product such as a used car which would contain a battery with hazardous substances, a situation where CERCLA should not apply, (2) a mixed motive situation where the seller's goals could include both a desire to get rid of wastes and to make a bona fide sale of a commercially valuable property, a situation that some courts had found would trigger arranger liability; and (3) the sale of a facility containing hazardous waste, such as a pond of toxic solvents, to an unsuspecting buyer in order to avoid CERCLA liability, a situation that should be covered by CERCLA.

As in *G.J. Leasing*, and in *Sycamore Industrial Park Associates v. Ericsson, Inc.*, when the material is built into the structure or product being sold, the seller must be discarding or abandoning the entire product in order for such actions to constitute a disposal. See *Sycamore Industrial Park Associates v. Ericsson, Inc.*, 2007 WL 1030298 (N.D. Ill. March 30, 2007), *reconsidered in part, Sycamore Industrial Park Associates v. Ericsson, Inc.*, 2007 WL 1266296 (N.D. Ill. April 26, 2007). Obviously, if such a product is sold, it cannot be found to have been discarded or disposed of. *Sycamore*, *4, n.3. NCR Paper broke was exactly such a product.

In addition, as the *Sycamore* court further explained *G.J. Leasing*, in order for a seller of a product to be found liable as an arranger, a "necessary predicate" must be that the seller "wants to get rid of the wastes without liability under CERCLA...." *Sycamore* at *4, citing to *G.J. Leasing Co.*, 54 F. 3d at 385. When NCR Paper broke was being sold, CERCLA did not exist, the use and sale of PCBs on carbonless paper and broke was not prohibited by any law, and neither NCR nor its predecessors had any specific intent to dispose of any PCBs in the broke. NCR Paper broke was sold for the sole reason of selling paper, whether as feedstock in the recycling process, or something else. It was not, and there is no evidence that it ever was, sold to get rid of PCBs.

Finally, API wishes to note for the record that representatives of the US Department of Justice and the Wisconsin DNR have repeatedly stated that the sole, proximate purpose for issuing the Order is to require the respondents to purchase long lead time equipment and to undertake certain preliminary infrastructure projects. API shares the view that such actions should be taken as quickly as possible, but it notes that EPA and DNR have also been a cause of delaying such actions for bureaucratic reasons, and that API has been aggressive in trying to expedite and fund these actions. In this context, and especially against the extraordinarily

lengthy bureaucratic process utilized at this site, it is hard for API to agree that the Order is in fact based on preventing an imminent and substantial endangerment.

Sincerely,

Jeffrey C. Bates

cc: Randall M. Stone
J. Andrew Schlickman

# EXHIBIT 3

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP., et al.,

Defendants.

**DECISION AND ORDER**

The United States has moved for a preliminary injunction to require Defendants NCR Corporation and Appleton Papers Inc. ("AP") to comply with a recent EPA directive that they complete sediment remediation in the Fox River at a rate substantially similar to remediation accomplished in past years. The motion is a reaction to submissions made to the government in which the Defendants have articulated their reasons for undertaking substantially less work this year. For the reasons given below, the motion will be denied.

**I. Background**

NCR and Appleton Papers have been performing river remediation activities in the Fox River for several years. At issue presently is work performed pursuant to a unilateral administrative order (UAO) issued by the EPA in 2007. The UAO requires the dredging and disposal of some 3.5 million cubic yards of contaminated sediment, as well as the creation and installation of caps and the use of sand to cover PCB-laden riverbed sediment in some areas. In 2009, NCR and AP created an LLC to perform the work. The LLC entered into a long-term contract with a company called

Tetra Tech to perform most of the remediation required under the UAO. In 2009 the company dredged roughly 550,000 cubic yards of material, and in 2010 it dredged about 743,000 cubic yards. The 2010 figure exceeded expectations substantially, and many involved in the process were generally pleased by the pace of the project.

By early 2011, however, AP and NCR began indicating that they wanted to scale back the project. This development likely arose because of several unfavorable rulings they had received from this Court, which had dimmed their hopes of recouping the costs they were expending in the cleanup effort. The EPA did not approve the AP/NCR plan for 2011, which called for dredging of some 250,000 cubic yards, but instead issued a modified work plan requiring the accomplishment of several specific benchmarks in different operating units, including the dredging of between 605,000 and 810,000 cubic yards in certain areas of OU4 and other specified areas. In the EPA's view, continuing the project at full bore is required in order to remove the most contaminated sediment and restore the river to its natural state. It points to the success of Little Lake Butte des Morts, where dredging recently concluded, and notes that a typical walleye caught there is now considered safe for human consumption.

**II. Analysis**

To justify a preliminary injunction, a plaintiff must show that it is likely to succeed on the merits, that it is likely to suffer irreparable harm without the injunction, that the harm it would suffer is greater than the harm that the preliminary injunction would inflict on the defendants, and that the injunction is in the public interest. These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted. *Judge v. Quinn,* 612 F.3d 537, 546 (7th Cir. 2010).

**A. Likelihood of Success on the Merits**

The government argues it is highly likely to succeed on the merits of its UAO enforcement claim: NCR and AP are unquestionably liable for the contamination in OU2-OU5, and the cleanup remedy selected by the EPA and imposed by the UAO is amply supported.

**1. Divisibility Defense**

AP and NCR raise a number of arguments suggesting that the government has a low likelihood of success on the merits. Their chief focus is their divisibility defense. As discussed in other decisions in this and related actions, AP and NCR believe the harm caused to the Fox River is divisible in a number of ways. If they can show that they are responsible only for discrete portions of the river, measurable volumes of PCB pollution, or specific kinds of PCBs, then they believe they are not subject to the standard joint and several liability under CERCLA but are liable only for that portion of the harm that the court apportions to them. They believe their proper share of apportioned liability is low (or in AP's case, nonexistent). As such, if they are found liable only for a small, divisible, portion of the harm, then they should not be made to comply with the EPA's modified work plan.

The Seventh Circuit has described divisibility as "the exception . . . not the rule," *United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008), and divisibility is "a rare scenario." *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007). The divisibility defense was given new life, however, by the Supreme Court's 2009 decision in *Burlington Northern and Santa Fe Railway Co. v. United States,* 129 S.Ct. 1870 (2009). In that case, which bears some extended discussion, Burlington Northern's predecessor railroad owned about an acre of land that it leased to B&B, a

chemical business. B&B also operated its own adjacent site, which was 3.8 acres. Over many years, three different harmful chemicals leaked into the groundwater, resulting in remediation efforts and significant cleanup expenses. In an action brought by the government, the district court accepted the railroad's divisibility argument and found that the railroad was only liable for 9 percent of the harm at the site. The Supreme Court described the district court's analysis as follows:

> The District Court calculated the Railroads' liability based on three figures. First, the court noted that the Railroad parcel constituted only 19% of the surface area of the Arvin site. Second, the court observed that the Railroads had leased their parcel to B & B for 13 years, which was only 45% of the time B & B operated the Arvin facility. Finally, the court found that the volume of hazardous-substance-releasing activities on the B & B property was at least 10 times greater than the releases that occurred on the Railroad parcel, and it concluded that only spills of two chemicals, Nemagon and dinoseb (not D-D), substantially contributed to the contamination that had originated on the Railroad parcel and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. The court then multiplied .19 by .45 by .66 (two-thirds) and rounded up to determine that the Railroads were responsible for approximately 6% of the remediation costs. "Allowing for calculation errors up to 50%," the court concluded that the Railroads could be held responsible for 9% of the total CERCLA response cost for the Arvin site.

*Id.* at 1882.

To paraphrase, the district court found a small share of liability because Burlington Northern had only owned a small portion of the site; it had owned it for less than half of the time period during which the chemicals were spilled; and the railroad property only had spills of two of the three chemicals found at the site.

In upholding the district court's analysis, the Supreme Court seemed moved by the fact that the site was not an area with uniform levels of pollution. Instead, the land was sloped towards a sump and a pond, and those areas, which were *not* on railroad property, contained the bulk of the pollution. "[T]he primary pollution at the Arvin facility was contained in an unlined sump and an

unlined pond in the southeastern portion of the facility most distant from the Railroads' parcel and that the spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10% of the total site contamination . . . some of which did not require remediation. With those background facts in mind, we are persuaded that it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis." *Id.* at 1883.

The Supreme Court also upheld (albeit tepidly) the district court's conclusion that because one of the three chemicals on-site was not spilled on railroad property, the railroad should only be liable for two-thirds of the harm (in combination with the other multipliers the district court used). Even so, the Court recognized that the district court's underlying assumption might have been flawed. Specifically, the lower court had concluded that because two out of three chemicals had been spilled on railroad property, the railroad should be assessed a liability calculator of 66% (two-thirds). (Or, looked at another way, it received a one-third liability "discount.") But there had not been any evidence that the actual *harm* was so easy to calculate. Suppose there had been 50 spills of Chemical A, 40 spills of B, and 10 spills of C at the site. If Chemical C was the one that had not been spilled on railroad property, it would not make sense to reduce the railroad's liability by one-third when Chemical C only accounted for 10 percent of the total spills. Similarly, the different chemicals could have had different environmental impacts: a spill of one could be ten times more dangerous than another.

The Supreme Court got past these issues because the district court had added a 50% uncertainty factor to its analysis. Thus, it ultimately increased the railroad's liability to 9% (from 6%), and this factor cancelled out any error it may have made in the analysis described above. As such, the Supreme Court found the error harmless because the overall result (9% liability) was

sound and could be reached without application of the district court's dubious one-third "discount."

NCR and AP argue that the comparison to *Burlington Northern* is strong. They concede at the outset that because discovery on divisibility issues has not yet occurred (which to them is a reason for denying the motion for preliminary relief) we do not yet have a clear picture of the relative amounts of pollution caused by the different parties. Even so, based on preliminary evidence, it is clear that we have a number of PRPs who deposited distinct and potentially ascertainable amounts of PCBs into the Fox River. Thus, the divisibility argument may be addressed even though fully-developed figures are not before me.

**a. Divisibility Based on Volume of PCB Discharges**

Courts have recognized that § 433A of the Restatement of Torts is the starting point for a divisibility analysis, and NCR and AP argue that the examples found therein match the circumstances we have here. To illustrate their point, I cite three similar examples found in the Restatement.

> 3. Five dogs owned by A and B enter C's farm and kill ten of C's sheep. There is evidence that three of the dogs are owned by A and two by B, and that all of the dogs are of the same general size and ferocity. On the basis of this evidence, A may be held liable for the death of six of the sheep, and B liable for the death of four.
>
> 4. Through the negligence of A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. There is evidence that 50 per cent of the water came from A's ditch, 30 per cent from B's and 20 per cent from C's. On the basis of this evidence, A may be held liable for 50 per cent of the damages to C's farm, B liable for 30 per cent, and C liable for 20 per cent.
>
> 5. Oil is negligently discharged from two factories, owned by A and B, onto the surface of a stream. As a result C, a lower riparian owner, is deprived of the use of the water for his own industrial purposes. There is evidence that 70 per cent of the oil has come from A's factory, and 30 per cent from B's. On the basis of this evidence, A may be held liable for 70 per cent of C's damages, and B liable for 30 per cent.

Rest. (2d) Torts, § 433A cmt. d.

Although the Defendants' analogy to these illustrations has some ostensible attraction, the analogy does not bear closer scrutiny. One principal distinction is that in the examples above, the damaged party was a private party who suffered private damages: dead sheep, a flooded farm, and loss of water use. A related distinction is that the private party's damages increased in direct proportion to the defendant's tortious activities. For example, the more hungry dogs A and B allowed loose, the more dead cattle and the more financial loss suffered by the cattle owner. And as A, B and C released more water, the farmer's land became more flooded, increasing his loss. In short, the damages in the examples increased in direct proportion to the number of dogs or amount of water released. Because of this proportional relationship between the defendants' activities and the damage sustained, it makes sense to divide liability along the same lines.

Instead of a dispute between private individuals suing about damages, this is an enforcement action brought by the government to require the Defendants to pay for the cleanup of the river. This cleanup, and its attendant costs, have little in common with the scenarios described above. In particular, the cost of the cleanup bears little relation to the relative volume of PCBs released into the River. For example, suppose that dredging one square foot of sediment from the river bed costs one dollar. It will cost roughly that same dollar whether the PCB levels are 20 parts per million or 200 parts per million. The sediment has to be sucked off the river bottom by a specially equipped barge and disposed of properly.[1] Transportation of the dredged material adds to the cost, and that cost is based on distance and volume rather than PCB concentration. Although the volumes of

[1]There are admittedly some differences in disposal costs when PCB concentrations exceed 50 parts per million, but overall the cost of cleanup is not largely dependent on relative PCB contamination.

PCBs discharged obviously have some correlation with the extent of the costs, the relationship between volume and cost of cleanup is a loose one. As such, apportioning liability based on volumes would not be advisable.

It is worth taking a detour to explore the premise of the government's argument. Implicit in my analysis so far is that the"harm" at issue here is the *cost* required to clean up the river. After all, this is not a case about the environment or pollution in the abstract, but about who should *pay* for cleaning up the Site. These cleanup costs – not the pollution itself – are what is subject to apportionment, and if these costs do not have a strong causal link with pollution volume, then there would seem to be little reason to apportion them on that basis. There is some precedent for this approach. *See Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F.Supp.2d 692, 738 (D.S.C. 2010) ("A method [of apportionment] that does not take . . . the cost of the remediation into account does not reasonably account for the harm at the Site."); *Chem-Nuclear Systems, Inc. v. Bush,* 292 F.3d 254, 260 (D.C. Cir. 2002) (finding that, to show divisibility, party must prove "the amount of the harm that it caused" was less than $7,660,315 worth of cleanup costs).

The divisibility cases before and after *Burlington Northern* do not generally focus on the harm's relationship to cleanup costs, however. Instead, they treat the divisibility issue as though the "harm" to be divided is the actual, physical pollution at issue: the plume of oil, the contaminated river, or the land itself. That is, many cases treat the divisibility question as a matter of whether the pollution in question can actually be divided, rather than whether the *cost* of cleaning up the pollution is separable based on geography or volume. This could be because in a typical divisibility case it is simply assumed that more pollution equals more cleanup cost, and that is surely a reasonable assumption in most cases, particularly when the pollution involves a discrete piece of

land or geographically distinct areas. But it could also be because CERCLA cases rely on divisibility considerations imported from the Restatement of Torts and the private injury paradigm, which do not translate perfectly to the CERCLA context. In short, cleaning up a polluted site is different than compensating a cattleman for his poisoned cows. As noted above, in a CERCLA enforcement action the plaintiff (the United States) is not seeking to be compensated for the value of the property it lost, it is seeking either to be compensated for its own cleanup efforts or (as here) to require others to undertake such efforts. Ultimately, the divisibility question is a causation question, and when the case is about cleanup we should be concerned with assessing to what extent the parties' behavior caused the cleanup expenses rather than which parties caused the pollution itself. Although in many cases the two questions have identical answers, here the cleanup expenses are not reasonably correlated with the volumes of pollution each party contributed. Thus, I agree with the United States that the "harm" at issue in this action is the cleanup cost, and I conclude that these costs are not reasonably divisible on the basis of volume.

But even if I were to view the "harm" here as the pollution itself, rather than the costs of cleaning it up, I would still conclude that the Site is not divisible based on volume. I reach this conclusion because, as with the cleanup costs, the extent and nature of the environmental harm in the River is not easily correlated with volumes of PCBs discharged by the various parties. Instead, numerous factors independent of the volume of pollution have affected the Site. First, I note that vast quantities of PCBs have flowed downstream and into Green Bay and Lake Michigan. We do not know exactly how much, of course, but the EPA has estimated the figure at 160,000 pounds:

> It is estimated that some 160,000 pounds of PCBs have already left the Fox River and entered Green Bay and Lake Michigan. On average, 300 to 500 additional pounds are flushed from the Lower Fox sediment each year. Floods would flush

> additional thousands of pounds into Green Bay. Once PCBs are released into the bay and Lake Michigan, they are extremely difficult, if not impossible, to recover. In addition, countless amounts of PCBs have been released into the air as well.

(*See* http://www.dnr.state.wi.us/org/water/wm/foxriver/sites/depositn.html, last visited July 5, 2011.)

Whatever the exact figures are, it is undeniable that what's left in the River bottom *now* (the problem to be addressed by the cleanup) is not necessarily representative of the pollution that was released into the River decades ago during the period that carbonless copy paper was produced. The harm, in other words, is not a stable, stationary site but a dynamic one. The sediment that is currently at the bottom of the River is in many ways just a snapshot of the pollution that has persisted, often by the mere happenstance of river depth, currents, etc. Moreover, geography and the flow of the river over 50 years have created a variety of different areas requiring remediation. Some of these areas may be capped, while others must be dredged. The depth of the sites and their location largely control these decisions. These independent factors preclude an apportionment analysis that is based primarily on the volumes of PCBs that the parties discharged.

This conclusion is borne out by analogy to other examples from the Restatement. Illustrations 14 and 15 use the same river example described above, but impose joint and several liability because the damages were not dependent on the relative volumes of the oil discharged. Instead, independent factors played a role in causing the harm:

> 14. A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C's barn, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them.
>
> 15. The same facts as Illustration 14, except that C's cattle drink the water of the stream, are poisoned by the oil and die. The same result.

Rest. (2d) Torts, § 433A, cmt. 1, illus. 14, 15.

The key point in these examples is that the occurrence of the harm – the burned barn, the dead cattle – is *not* dependent on the volumes of oil polluted into the river. (Or at least it is not well-correlated with volume.) For example, if B had discharged only *half* the oil into the stream, presumably the barn would still have burned and the cattle would still have poisoned. And even if A polluted 90% of the oil and B polluted only 10%, it is possible that, due to the vagaries of dispersal of oil on a river, it was B's oil that actually ignited and caused the damage. The occurrence of independent events means we cannot reasonably conclude that either A or B actually caused the harm, and so joint and several liability is appropriate.

The overarching point is that divisibility allows a party to be liable only "for the portion of the total harm that he has himself caused." *Burlington Northern,* 129 S. Ct. at 1881 (emphasis added). Here, even if it could be determined that NCR and AP contributed, say, 25% of the PCBs into the river, there would not be a reasonable basis to further conclude that they only caused 25% of the harm. This is because the harm is the cost of remediation itself, and this is only loosely based on the actual PCB contributions of NCR, AP and the numerous other parties. And even if the harm is the actual pollution in the riverbed, independent factors and the passage of time have precluded our ability to conclude that any specific party caused given portions of harm. For these reasons, I conclude that NCR and AP have a low likelihood of success in meeting their burden to show that the harm is divisible on the basis of the companies' volume of PCB discharges.

**b. Divisibility Based on Geography**

NCR (but not AP) also argues that there is a basis for dividing OU4, which is the largest area of the river and the most expensive to remediate, on the basis of geography. Its expert, Dr. John

Connolly, argues that when a particular area of the river is found to have much higher concentrations of PCBs in it, compared to the area immediately upriver of that location, that signifies the presence of a new, independent source of contamination. The contribution of the new source can be measured by measuring the increased contamination. Dr. Connolly opined, based on core samples and Aroclor comparisons between different sites, that in OU4, upriver sources contributed 38% of the total PCBs in OU4A and 22% of the total PCBs in OU4B. The rest of the contamination in OU4 came from sources local to OU4 itself. Thus, he believes the contamination is divisible on the basis of geography. (Dkt. # 142 at ¶¶ 8-11.)

Even accepting Connolly's calculations, however, the divisibility argument suffers from the same problem identified above. Specifically, NCR has done nothing to link the cost of cleaning up OU4 to the specific amounts and locations of the PCB pollution. Even if it were true that upriver sources only contributed 38% of the total PCBs in the area known as OU4A, for example, that does not translate into the conclusion that such sources should only be liable for 38% of the cost of cleaning up that part of the river. As noted above, the cost of remediating a given section of the river is not directly dependent on the level of contamination, as many of the costs are fixed (dredging, transportation), and others are based on other independent factors. It might be another story if NCR could identify sections of the river into which its PCB discharges simply never flowed at all (for example, OU1, but that is not at issue here). In such a case, geographical divisibility could make sense because it is simple enough to measure the costs of cleaning up area A versus area B. "Typically, this will involve showing that the 'site consists of non-contiguous areas of soil contamination.'" *United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008) (quoting Hercules, 247 F.3d at 717-18 (quotations omitted)). But here, NCR's own expert concedes that

substantial quantities of its PCB discharges made their way into OU4. Thus, there are likely numerous sections of OU4 that would need to be cleaned up even if the other polluters had never existed. Other areas need to be capped or dredged (at different costs) based on how deep and how contaminated the sediment is. In sum, the geography argument is really just a twist on the volumetric argument. As such, I conclude that NCR would have little likelihood of success showing that areas of the river into which its PCBs flowed are separable on the basis of geography.

**2. The Remedy**

NCR and AP also argue that the United States has a low likelihood of showing that the remedy selected by the EPA is not arbitrary and capricious. In particular, they argue that dredging – as opposed to capping and sand covering – is a more expensive and potentially environmentally harmful remedy. In addition, they also argue that the EPA should have used a ROD amendment to account for cost increases between 2007 and the present rather than the more recent "Explanation of Significant Differences" ("ESD").

I address the procedural objection first, keeping in mind that the EPA is afforded substantial deference in construing its own regulations. Here, the regulations provide for two alternatives when a remedy requires significant changes:

> (2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency shall consult with the support agency, as appropriate, and shall either:
>
> (i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:

(A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under §300.815 and the information repository; and
(B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or

(ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost.

40 C.F.R. § 300.435.

To summarize: under subsection (i), the agency may issue an explanation of significant differences if the differences "do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost." But under subsection (ii), an amendment to the ROD is required if the differences *do* "fundamentally alter the basic features of the selected remedy." (An amendment to the ROD requires a number of additional procedural steps, including a further round of public comment.)

Here, the government states that the changes, which resulted from additional data derived from subsequent design work, resulted in a 62% increase in the remedy cost estimate. In the outside world, a 62% increase in cost projections is exceptionally large, but that is not necessarily true here. In its ESD, the EPA explained its decision to use an ESD rather than a ROD amendment. (Dkt. # 147, Ex. 1 at 15.) Specifically, it explained that cost estimates have an expected accuracy range of -30% to +50% – in other words, a large built-in uncertainty factor. Because the +62% increase was close to the actual expected range, the additional 12% above the uncertainty factor was relatively minor. As such, although it was undeniably a significant difference in cost, the EPA did not believe it fundamentally altered the remedy because it was close to the expected range. Given the deference

owed to such determinations, I conclude that the government has a strong likelihood of succeeding in showing that it followed proper procedures in making the proposed changes.

As for the "merits" of the remedy, I reach the same conclusion. The capping-versus-dredging debate has been waged for a long time, and the EPA has explained at length why it has chosen to require dredging in some areas and allow the less expensive capping in others. Dredging has the obvious benefit of getting the PCBs out of the River entirely, whereas capping may be more appropriate when, for example, the PCBs are buried beneath clean sediment. NCR and AP's preferences for the less expensive option are clear, but these are merely preferences. They do not come close to showing that the EPA's decisions on these matters are arbitrary or capricious.

**B. Irreparable Harm**

NCR and AP also argue that the government has not shown that it or the public will suffer irreparable harm if the preliminary injunction is not issued. First, they argue that they are essentially being penalized for having performed ahead-of-schedule in previous years. In particular, last year (2010) was a record year for dredging, which means the cleanup project will not fall behind original projections if the preliminary injunction is denied. Moreover, they have agreed to spend some $50 million on cleanup costs this year and the cleanup effort is currently active (albeit not at the pace preferred by the government). The bottom line, they argue, is that even at the government's proposed pace, there will still be PCBs in the river at the end of 2011. As such, the government cannot say that the public will be harmed by any reduction in the pace of the cleanup.

It is true that the PCB problem will not be solved this year, regardless of the pace of cleanup. But it should go without saying that any significant reduction in pace in one year will forestall the full remediation of the problem in the future. Under the government's proposal, substantially more

dredging will be undertaken this year, which means the public will benefit from the full cleanup sooner. Depriving the public of that benefit is certainly irreparable harm. After all, we are not talking about picayune disputes at the margins of the cleanup effort but a fundamental difference involving hundreds of thousands of cubic yards and up to $44 million dollars. In addition, reduction in PCB levels, even if not a complete reduction, result in a safer river. People continue to eat fish from the Fox River despite warnings to the contrary, and the public health will thus be improved by entry of an injunction. Provided that the remedy proposed meets with the regulatory requirements addressed above, an injunction requiring an increased pace in river cleanup is clearly directed to avoiding the irreparable harm caused by continued exposure to PCBs.

**C. The Relief Sought**

**1. Liability of Appleton Papers Inc.**

Although the liability of NCR has not been contested, Appleton Papers argues that its own liability under CERCLA has not been established and that the government will have difficulty showing that it is liable as a successor in interest. Understanding its argument requires a brief corporate history. The PCBs at issue here were released into the Fox River by a plant in Appleton, owned by Appleton Coated Paper Company ("ACPC"), and at Combined Locks, a facility then owned by Combined Papers Mills, Inc. These two companies were merged into a company called Appleton Papers, Inc. (with a comma, a different entity than the Defendant of the same name), and that company was then merged into NCR in 1973.

In 1978 a company called Lentheric, Inc. bought the Appleton and Combined Locks plants from NCR. Lentheric then changed its name to Appleton Papers Inc., which is the Defendant here. Although the purchase of those plants was an asset purchase rather than a corporate stock purchase,

the buyer (i.e., the present Defendant) did agree to assume several of the plants' liabilities from the seller. As part of the asset purchase agreement, the future Appleton Papers Inc. agreed that it would "assume, pay, perform, defend and discharge, if and when due, to the extent not paid, performed, defended or discharged prior to the Closing Date," all of the following:

> all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date, which are not known to Seller on the Closing Date, with respect to the compliance of the assets, properties, products or operations of APD [NCR's Appleton Papers Division] with all governmental laws, ordinances, regulations, rules, and standards; ...
>
> all of Seller's liabilities ... whether accrued, absolute, contingent, or otherwise ... whether asserted or not and whether arising from transactions, events or conditions occurring prior to or after the Closing Date, with respect to compliance of the Property ... with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.

(Dkt. # 139, Ex. 3 at 17-21.)

As suggested above, when a company buys assets, rather than stock, it is not generally assuming the liabilities of the seller. In some cases, however, an asset-buying company may be held liable under CERCLA as a successor. *United States v. General Battery Corp., Inc.,* 423 F.3d 294, 305 (3d Cir. 2005); *United States v. Mexico Feed and Seed Co., Inc.,* 980 F.2d 478, 487 (8th Cir. 1992). The successor liability doctrine reflects courts' belief that, in enacting CERCLA, Congress did not want to "leave a loophole that would enable corporations to die 'paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities.'" *North Shore Gas Co. v. Salomon Inc.,* 152 F.3d 642, 649 (7th Cir. 1998) (quoting *Mexico Feed & Seed Co.,* 980 F.2d at 487). In other words, successor liability prevents polluters from being able to shift away their liabilities by agreement.

Here, the government argues that the terms of the 1978 asset purchase agreement demonstrate that Appleton Papers Inc. has assumed CERCLA liability as a successor to the activities of ACPC and Combined Paper Mills. It is true that the terms of the clauses quoted above generally cover liability arising out of the violation of environmental regulations and government investigations and the like. (The exact scope of these clauses is not before me.) But successor liability is an equitable doctrine designed to prevent injustice or fraud, not to create a wholly new suable entity with duplicate liability to the government. Here it is crucial that NCR, the seller of the assets, remains in existence and is undeniably liable to the United States under CERCLA. It is already funding substantial portions of the cleanup. The 1978 asset sale was not an attempt to shirk environmental liability, and no corporation died a "paper death." As such, none of the equitable considerations that would otherwise support imposition of successor liability are in play here. Because NCR was liable and remains so, there is no liability for Appleton Papers to "succeed" to. There cannot be a "successor" without a succession.

This conclusion flows not only from common law of successor liability but from CERCLA itself. Section 107(e) of CERCLA provides: "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from ... any person who may be liable ... under this section, to any other person the liability imposed under this section." 42 U.S.C. § 9607(e)(1). In other words, agreements between private parties do not affect those parties' underlying CERCLA liability with respect to the government. This means that the 1978 asset agreement could not transfer liability *per se*, it merely transferred the financial risk of that liability, as with an insurance policy. If a tortfeasor has insurance, that does not give the injured party a second defendant to name. The insurer is not liable for the tort itself, it is liable as a result of its

indemnity agreement with the insured. And in fact the next sentence in § 107(e) of CERCLA provides that "Nothing in this subsection [107(e)] shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e). Thus, CERCLA allows parties to distribute the financial impact of liability by contract, they cannot contract away CERCLA liability itself. *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342-343 (7th Cir. 1994) ("we agree with every other appellate court that has been called on to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability.") As the Seventh Circuit explained: "The first sentence speaks of 'transfer[ring] ... liability,' that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting." *Id.*

The above provisions of CERCLA mean that even if NCR had wanted to divest itself of CERCLA liability, its effort would have been void. Instead, at most the asset purchase agreement merely made Appleton Papers liable as an indemnitor to NCR rather than a substitute or successor to liability *vis-a-vis* the government. "Indemnification does not, as we have already explained, 'transfer' liability from the person indemnified. The latter remains fully liable to the victims of his wrongdoing. If a person buys automobile liability insurance and later is sued for damages arising out of an automobile accident, he cannot defend by saying, 'I have insurance, so am not liable to you; go sue the insurance company.'" *Harley-Davidson,* 41 F.3d at 343. The government has cited several cases involving successor liability arising out of asset purchase agreements, but these are all cases between private companies litigating the scope of such agreements. (Just as Appleton

Papers and NCR litigated and arbitrated the scope of their own agreement.) Notably, none of these cases involves an action by the United States seeking to hold a non-polluter liable as a successor under CERCLA itself merely by virtue of such an agreement. In sum, when the seller of assets is still in existence and its liability to the government is still "live," an assumption of liability agreement like the one at issue here does not create liability on the buyer's part, it merely creates a duty to indemnify the seller. "If the predecessor is still a functioning corporation which can compensate Plaintiffs, there is no equitable reason for holding Clark liable. The rationale behind successor liability in CERCLA, to distribute costs and to allocate the burden of the cleanup to others than the taxpayers are irrelevant if the predecessor can provide a remedy." *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 728 (N.D. Ind. 1996).

The United States also argues that a 1998 settlement agreement between NCR and Appleton Papers creates successor liability. But again, private agreements between companies cannot create or shift liability to the government under CERCLA. They merely distribute the risk of paying for that liability, and that is what the parties' settlement agreement did. It established a shared responsibility for payments, and subsequent arbitration adjusted those amounts further. Moreover, the agreement explicitly disclaimed any suggestion that either party was admitting to any liability whatsoever. All these agreements demonstrate is that Appleton Papers and NCR will share in the costs resulting from the Fox River cleanup. They do not establish that Appleton Papers is a successor to the liability that underlies this action.

In sum, private agreements such as the ones entered into by Appleton Papers and NCR can constitute evidence that one entity succeeded another. But here, they do not establish successorship because the original liability under CERCLA has remained with the seller. The United States has

not established any reason based on equity or CERCLA itself to allow it to sue an additional entity merely because of indemnity and settlement agreements. Accordingly, I find that it will have little success in attempting to demonstrate that Appleton Papers Inc. is liable as a successor under CERCLA.[2]

**2. Appleton Papers Inc. as a Necessary Party**

The United States argues that even if I conclude Appleton Papers Inc. is likely not liable under CERCLA, it should still be subject to the injunction because it is "joined at the hip" with NCR by virtue of the agreements described above. In addition, it has a controlling interest in the LLC that NCR and Appleton Papers have formed to undertake the cleanup. Thus, if an injunction bound NCR but not Appleton Papers, it would be ineffective because NCR does not control the LLC that is actually running the cleanup work.

I am not aware of any authority for issuing an injunction to a party when that party is not liable under the law that is the basis for the injunction motion. The United States cites Rule 19, but that is simply a rule governing the joinder of necessary parties to a lawsuit. Appleton Papers has never denied that it is a proper party to this lawsuit; it has asserted that, having been sued properly, it is not liable. Accordingly, Rule 19 does not provide authority for an injunction against Appleton Papers.

The government also cites Rule 65(d)(2)(C), which states that an injunction may bind the parties as well as "other persons who are in active concert or participation with" them. Fed. R. Civ.

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[2]The United States also throws in a suggestion that Appleton Papers may have itself polluted PCBs into the river following its creation in 1978. Thus, it would have primary liability under CERCLA. This argument has not been sufficiently supported, and I cannot conclude it has much likelihood of establishing liability.

P. 65(d)(2)(C). That rule "is a codification of the common-law rule allowing a non-party to be held in contempt for violating the terms of an injunction when a non-party is legally identified with the defendant or when the non-party aids or abets a violation of an injunction." *Illinois v. U.S. Dep't of Health & Human Servs.*, 772 F.2d 329, 332 (7th Cir. 1985). "Consistent with this purpose, we have explained that a person is in 'active concert or participation' with an enjoined party, and thus bound by the injunction, if 'he aids or abets an enjoined party in violating [the] injunction,' or if he is in privity with an enjoined party." *Blockowicz v. Williams,* 630 F.3d 563, 567 (7th Cir. 2010) (citations omitted). Here, the government has not suggested that Appleton Papers will be aiding and abetting any injunction violations. But by arguing that Appleton Papers is joined at the hip with NCR, it suggests that it is "in privity" with NCR and thus subject to any injunction this Court might issue.

First, I note that the rule does not explicitly apply because it deals with "other persons" (non-parties), and here Appleton Papers is a party. The rule, and the cases applying considerations of "non-party privity" thus do not apply. *See, e.g., National Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of Baha'is of U.S., Inc.,* 628 F.3d 837, 850 (7th Cir. 2010). The ultimate question is: on what basis would Appleton Papers be bound by an injunction? It is not CERCLA itself, as discussed above. Instead, its liability here is to NCR – not to the government – by virtue of the asset purchase and settlement agreements described above. The government, of course, was not a party to these agreements and cannot enforce their terms through the injunction it is proposing. Accordingly, I cannot discern any basis upon which I could enjoin Appleton Papers Inc. to comply with the EPA's unilateral administrative order and recent directive that it complete sediment remediation in 2011 pursuant to that order when

the underlying liability of Appleton Papers Inc. is so questionable.

**3. The Proposed Injunction**

Above I concluded that the United States has established, at least in the abstract, a sound basis supporting preliminary injunctive relief against NCR but not against Appleton Papers Inc. This creates a number of practical problems, as all sides appear to concede. The principal problem is that Appleton Papers Inc. controls the LLC that is directing the cleanup. Normally, a court would not find itself hamstrung by the private agreements entered into by defendants subject to its injunctive power. But the circumstances here create an exception. The LLC the Defendants have created has all the contracts with the environmental contractor, a company called Tetra Tech, which in turn controls one or more subcontracts. These entities are currently in place and are performing the cleanup. Given the complexity of the cleanup action and the equipment involved, not to mention the paperwork, it is undisputed that the LLC is the only instrument that could accomplish the government's directive *this season*. Because Appleton Papers – not NCR – controls that instrument, however, an injunction directed solely at NCR would essentially be meaningless. NCR simply does not have the power to achieve what the government wants. Accordingly, the injunction sought by the United States will be denied. If NCR and Appleton Papers are truly "joined at the hip" (to use the government's phrase), then an injunction against only one entity will be pointless.[3]

**D. Conclusion**

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[3]This is not to say that private agreements can preclude injunctive relief. It is only the particular circumstances of this case that make the specific relief sought by the government unavailable. The findings set forth above support injunctive relief of some kind against NCR, which would then apparently be entitled to indemnification from AP. The government may seek appropriate relief to compel NCR to undertake or continue the clean-up, but it has not done so in its current motion. For example, NCR may be able to contract directly with Tetra Tech in the event the LLC discontinues its efforts. This or other possible avenues of relief are not currently before the Court.

I conclude that the Plaintiffs have set forth a *prima facie* basis for preliminary relief against NCR, but not against Appleton Papers Inc., an entity I find unlikely to be deemed liable under CERCLA. I am unable to discern any basis for asserting preliminary equitable power over an entity whose liability under the statute sued upon is highly questionable. Because that entity controls the only means that apparently could implement the preliminary relief sought by the government, the motion for preliminary relief must be denied. Although I cannot find a legal basis for ordering the relief the government seeks, it is hoped that both Defendants will find it in their interest to comply with the proposed injunction to the extent feasible. Ultimately, it is doubtful that Appleton Papers Inc. will be able to have it both ways. It cannot continue to control the means of cleanup and yet remain outside the injunctive power of this Court. The fact that it does control the cleanup is only a practical bar to the injunctive relief sought here; the parties' private arrangement cannot pose a long-term bar to the government's enforcement powers.

The motion for a preliminary injunction is **DENIED**. The motion for registration of judgment is **GRANTED**. The motion to file a sur-reply is **GRANTED**.

**SO ORDERED** this 5th day of July, 2011.

/s William C. Griesbach
William C. Griesbach
United States District Judge

# EXHIBIT 4

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

## DECISION GRANTING MOTION FOR RECONSIDERATION

On July 5, 2011, this Court denied the government's motion for a preliminary injunction against Defendants NCR and Appleton Papers Inc. ("API") on the basis that the government was unlikely to prove Appleton Papers was a liable party. In a December 19, 2011 decision, I denied API's motion for summary judgment on that point and instead accepted the government's argument that it appeared API had in fact agreed by contract to assume CERCLA liability when it purchased the Appleton Papers Division from NCR. API soon moved to reconsider, citing several points of error. For the reasons given below, I agree with API to the extent that the purchase agreement in question was not drafted broadly enough to encompass API's direct liability for the CERCLA liability at issue in this case. The motion for reconsideration will therefore be granted in part.

To recall, the result reached in my December 19, 2011 Decision and Order was based on two discrete conclusions. First, I concluded that NCR's continued existence did not *per se* preclude an agreement to create liability to a third party such as the government. Although it was not a traditional "successorship" liability situation (because NCR did not go out of business), I found that

there was nothing within CERCLA that would preclude parties, as a matter of contract, from effectively creating additional liability under CERCLA (although presumably that would be a rare scenario). The second aspect of my decision required interpretation of the purchase agreement, between NCR and API's predecessor, for NCR's Appleton Papers Division. I concluded that the language and matters disclosed in Schedule A to that agreement were broad enough to encompass the CERCLA liability at issue in this case. Because I now conclude otherwise, I do not address the first prong of that decision, which is now moot.

**I. The 1978 Agreement**

In 1978 NCR sold its Appleton Papers Division to API's predecessor, which for ease of understanding will be referred to simply as API. A key clause in that agreement provided that API agreed to "assume, pay, perform, defend and discharge . . . all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any state of facts, matter, event or disclosure set forth on an attachment to the agreement that was designated as Schedule A." (Section 1.4.4; Dkt. # 139, Ex. 3 at 19.)

Schedule A contains the following clause:

> Seller has reason to believe that the facilities of Appleton Papers Division located in Pennsylvania and Wisconsin may be operating; in violation of applicable federal, state, local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.
>
> APD receives and has received notices from time to time from various federal, state, local and other governmental authorities claiming violation of environmental and pollution control laws, ordinances, regulations, rules and standards (collectively "laws"). These claims may result, and have resulted in fines and corrective action.

(Dkt. # 195, Ex. 3 at 4.)

In my previous decision, I concluded that because NCR had disclosed that the Appleton Papers Division "receives" (present tense) notice of various environmental violations, which "may

result" (in the future) in corrective action, the buyer was accepting liability for the Division's "proclivity" for environmental violations. In other words, the buyer was on the hook not just for specific past violations but for any future environmental issues as well.

**A. The present liability does not arise from any "violation" of law or any "compliance" issue**

I am now convinced that there are at least two problems with the approach taken at the summary judgment stage. First, the clauses that trigger liability require notice of the "violation" of environmental laws and standards, as well as past and potential fines for those violations. API notes that no one has argued that the PCB pollution at issue in this case was the product of any legal or regulatory violations. CERCLA did not yet exist in 1978, of course, and the PCBs were released into the environment primarily in the 1960s before they were regulated. In fact, as noted in the parallel contribution action, No. 08-C-16, in more recent years PCBs were released in smaller quantities at least partly with governmental acquiescence due to the difficulty in separating them from recyclable paper.

In response, the government now attempts to bolster my earlier ruling by citing, for the first time, the federal Refuse Act, as well as Wisconsin law barring the unauthorized disposition of refuse into waterways. 33 U.S.C. § 407. It also cites the Clean Water Act, 33 U.S.C. § 1311(a), which regulates discharge of pollutants. Because the Appleton Papers Division may have been operating in violation of those laws, the government argues, that should trigger the liability clause in Schedule A.

API notes that these are new arguments and, as such, are waived. Even if the argument is not waived, however, the violations of various environmental laws now alleged would not be enough to create CERCLA liability under the terms of the 1978 agreement. To recall, Schedule A discloses that the Division may have been operating in violation of various environmental laws and

regulations, and thus the buyer would be assuming any liability arising out of those violations. Here, the massive CERCLA liability at issue, which is based on the discharge of PCBs, does not "arise out of" any Clean Water Act, Refuse Act or other state or federal statutory or regulatory violations. First, for the period in question the release of PCBs was not known to be environmentally toxic, and so their release would not have given rise to any statutory or regulatory violations.[1] Second, violations of laws like the Clean Water Act are not a precondition to CERCLA liability, which is strict. Put another way, the liability that CERCLA creates does not depend on any "violations" of, or compliance with, then-existing environmental laws. Thus, even if the Division had been operating in violation of, say, the Refuse Act, that does not mean that CERCLA liability "arises out of" those violations. CERCLA liability is its own creature.

Moreover, Schedule A appears to premise liability on receipt of a "notice" of a violation. Schedule A tells the buyer that the Division has received notices of noncompliance with laws and regulations and might receive similar notices in the future. This creates liability for those "claims" and anything "arising" from them. The clause underscores the fact that the liability being assumed is not open-ended environmental liability but is instead linked to specific claims and notices of environmental violations. Needless to say, the Appleton Papers Division had never received a "notice" that it was "violating" CERCLA. Had the parties wanted to draft a broader clause, it would have been much easier to simply say so in the text of the agreement itself. Instead, by drafting a schedule, the parties were clearly limiting liability to the particular circumstances disclosed therein.

The government also cites other sections of the purchase agreement (§§ 1.4.3 and 1.4.9) that create liability arising out of "compliance" with applicable environmental laws. It argues that the

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[1]With the exception that certain insiders began to appreciate the risks of PCBs in the late 1960s.

present CERCLA enforcement action is itself an action to assure "compliance" with CERCLA's requirement that liable parties clean up pollution sites. That is, the government appears to argue that this lawsuit is *itself* a trigger for liability because it is being brought to ensure compliance with CERCLA.

The claim that the government, simply by bringing a lawsuit, has the power to trigger the very liability it is seeking to enforce is a wholly circular argument. That is, the government's argument begs the question of API's liability: this is only an action to enforce "compliance" with CERCLA to the extent API is actually *liable* under CERCLA, and of course that is one of the centerpiece questions being adjudicated in this lawsuit. It makes little sense to argue that the very act of suing someone *under* CERCLA makes a defendant "non-compliant" with CERCLA. Accordingly, I cannot find that liability exists on the basis of any compliance issues.

In sum, even if the Appleton Papers Division were operating in violation of certain environmental laws, I am unable to conclude that CERCLA liability "arises out of" such laws. The various environmental laws now cited by the government have their own provisions for liability and their own remedies, none of which are integral to a CERCLA action. The government has not explained how, for example, violating the Clean Water Act could make a party liable to pay for the billion-dollar cleanup of a large river. Because liability under CERCLA is distinct from these other provisions, it does not arise out of (or even relate to) those alleged violations. And, as API points out, had the parties wanted to include all environmental liability, it would have been simple enough to do so.

**B. At a Minimum, the Contractual Language is Silent, Which Means No Liability**

Ultimately, perhaps the most important point is that the 1978 agreement is silent about CERCLA liability and lacks a broad "catch-all" environmental liability clause. The question of

API's liability has a long history. In 1995 NCR sued API in the Southern District of New York to resolve liability for the PCB cleanup. In a brief ruling, the district court concluded that it was unable to determine from the 1978 asset purchase agreement whether API had, in fact, assumed liability for PCB cleanup expenses. (Dkt. # 208, Ex. 2 at 8.) It found that the contract was negotiated before CERCLA came into existence and that none of the clauses in the asset purchase agreement was conclusive as to liability. The parties agreed to arbitrate the matter, and an arbitration panel also concluded that the agreement was unclear. The arbitration panel concluded that API pay 60% and NCR 40% of any expenses in excess of $75 million. The panel found, like the district judge, that the contractual language "is not sufficiently clear and unambiguous with respect to the issue of responsibility for the environmental costs at issue to permit an award based solely on the contract language." (Dkt. # 208, Ex. 1 at 4.) Thus, three judicial bodies (including this one) have now concluded that there is no clear language indicating that API's successor agreed to assume liability *to the government* for any CERCLA claims. At most, as the arbitrators found, API agreed to indemnify NCR for a *portion* of such liability.

The contract's silence on the point is enough to support a finding that API did not agree to assume direct CERCLA liability. In *Olin Corp. v. Consolidated Aluminum Corp.*, the Second Circuit noted that indemnification agreements are interpreted strictly under New York law (which applies here at the agreement of the parties). 5 F.3d 10, 15 (2d Cir. 1993). If an arbitration panel and another district court could not even conclude that API had agreed to *indemnify* NCR for its CERCLA liability, it should go without saying that the notion that API had agreed to become liable to a *third* party is even more tenuous. In *Olin*, where the Second Circuit found an assumption of liability, the district court had noted that "One would be hard pressed to draft broader or more inclusive indemnification provisions than those entered into by Conalco and Olin." 807 F.Supp.

1133, 1142 (S.D.N.Y. 1992). Here, the opposite is true. The parties drafted a number of indemnification and liability clauses, but each of those clauses contains limitations linking liability to Schedule A or compliance with applicable regulations and the like. They are not the narrowest of clauses, but neither are they the "extremely broad language" at issue in *Olin*. 5 F.3d at 15. Ultimately, API's overarching point remains salient: if the parties had wanted to make the buyer liable for all future unknown environmental liabilities, it would have been much easier to simply use the kind of broad language used in *Olin* and the other cases. That lawyers and courts have spilled so much ink on the question for more than seventeen years is itself suggestive of an intent *not* to create CERCLA liability.

**C. Given NCR's continued viability, the negating clause precludes the creation of additional CERCLA liability to third parties**

API has also cited what it describes as the purchase agreement's negating clause, which in its view bars the government from seeking to enforce the contract as a third party beneficiary. That clause provides that "Nothing in this Agreement, express or implied, is intended to confer upon any other person not a party to this Agreement any rights and remedies hereunder." (Dkt. # 139, Ex. 4 at § 10.10.) The government asserts that this is not a true negating clause and, in any event, it could not operate to bar the federal government from suing a party under CERCLA.

I agree with the government in part. Specifically, I conclude that a negating clause (or "no third parties" clause) cannot be dispositive of the issue of successor liability in cases in which the seller ceases its existence. Otherwise, a simple negating clause could leave both the seller and the buyer off the hook for CERCLA liability, even if the buyer would otherwise be deemed a successor. Clearly that would not be a satisfactory result, as private parties cannot simply "contract out" of CERCLA liability to the government.

But where, as here, the seller remains in existence, we are not dealing with successorship in an equitable sense, we are dealing with successorship in a contractual sense, which means we must explore the question of the parties' contractual intentions. In that context, a negating clause is dispositive. Ultimately, the clause underscores the point made above: if the parties had intended to create liability to the government, surely they would have done so more clearly. They would not have transferred very specific environmental liabilities referenced in Schedule A and then used a negating clause to make clear that they wanted no third parties to be able to benefit from the contract. Thus, even though a negating clause could not be determinative of the issue in a traditional successorship context, I conclude here that it precludes any reading of the Agreement that would make API directly liable to the government for CERCLA-type liability.

**D. No estoppel applies**

The government and some of the other Defendants in this action argue that the arbitration order, which was confirmed by the New York district court, means that API is estopped from arguing that it is not liable under CERCLA. Yet the arbitration panel, like the district court, was not persuaded that API had actually assumed CERCLA liability through the asset purchase agreement. Instead, the arbitration was the product of a settlement between NCR and API, a settlement made advisable for the principal reason that API's actual liability was *not* crystal clear (as the district court found). In dividing responsibility 60/40 between the parties, the panel was not concluding that API was directly liable under CERCLA or that it had become a successor to NCR's liability. Instead, the 60/40 division appears to have been the result of a number of quasi-equitable factors that pointed to requiring API to bear a larger share of responsibility.

More importantly, the arbitration and the award itself were an assessment of how much each party should *pay*, which is an entirely different question than whether API had assumed direct

CERCLA liability. No one ever posed that question to the arbitrators, and in fact it is doubtful that private arbitration could ever resolve a question involving one party's liability to the federal government. Accordingly, it would be improper to view the arbitration award as having any kind of estoppel effect on API's ability to argue that it never agreed to become directly liable under CERCLA.[2]

**II. Conclusion**

For the reasons given above, I conclude that the terms of the 1978 assumption agreement are not broad enough to encompass the CERCLA liability at issue here. Accordingly, the motion for reconsideration is **GRANTED** in part, and API is entitled to summary judgment that it is not a liable party under CERCLA. All claims against API are **DISMISSED**.

**SO ORDERED** this 10th day of April, 2012.

/s William C. Griesbach
William C. Griesbach
United States District Judge

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[2]In previous briefing, the other Defendants opposing API's motion argued (the government does not join this argument) that summary judgment would have been improper because there are countless documents and witnesses that have not been produced in discovery. But these Defendants do not explain how additional discovery would shed any light on any terms in the 1978 agreement. Most importantly, they do not even identify any of the terms they believe to be ambiguous. The Rule 56(d) declaration lists numerous categories of information that have not been subject to discovery, but that is irrelevant if the contract not ambiguous.

Here, I am not concluding that any specific term is "ambiguous," I am simply concluding that because the contract is silent as to CERCLA liability, because it lacks a broad enough liability assumption provision, and especially because it contains a negating clause, API did not assume direct liability under CERCLA. Thus, I do not believe additional discovery could shed light on the question of the parties' intent, particularly given that CERCLA had not even been enacted at the time.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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In re:

APPLETON PAPERS INC.,

Petitioner.

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**DECLARATION OF JEFFREY THOMAS LAWSON IN SUPPORT OF PETITION FOR REIMBURSEMENT OF COSTS**

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I, JEFFREY THOMAS LAWSON, declare as follows:

1. I am employed by Project Control Companies, Inc. ("PCC") as Senior Principal. I have practiced for over thirty years in engineering and environmental geology and management of environmental investigation and remediation projects. I am a registered geologist in several states and have extensive experience developing and implementing combined administrative, financial and technical management programs for environmental projects predominantly on CERCLA sites. I offer this Declaration in support of Appleton Papers Inc.'s Petition for Reimbursement of Costs.

2. PCC is a consulting firm, based in Nashua, New Hampshire, that provides project management and related services. For approximately twelve years, PCC has provided a variety of project management services to Appleton Papers Inc. ("API") and other entities in connection with the investigation and remediation of PCB contamination of the Lower Fox River ("LFR") in northeastern Wisconsin. I have been involved in performing and managing these services throughout this period.

3. I also serve as the Resident LLC Manager of the Lower Fox River Remediation LLC ("LLC"). The LLC is a limited liability company that API and

NCR Corporation formed in 2009 to serve as a vehicle to perform remedial work required by the Unilateral Administrative Order dated November 13, 2007 ("UAO" or "106 Order"). The UAO required API, NCR and six other entities to implement the Government's remedial plan to address PCB contamination in Operating Units ("OU") 2 through 5 in the LFR site. The LLC has entered into a contract with Tetra Tech EC, Inc. ("Tetra Tech"), pursuant to which Tetra Tech serves as the general contractor for implementing the remedial plan.

4. Upon its formation, the LLC contracted with PCC to perform two roles: Resident LLC Manager and LLC Controller. In these two roles, PCC has day-to-day, hands-on knowledge of the technical and financial aspects of the remediation.

5. As Resident LLC Manager, I maintain regular contact with representatives of the Fox River remediation contractors. This includes Tetra Tech and its subcontractors, as well as additional firms that have entered into contracts with the LLC to provide service related to remediation of the Fox River. I am familiar with the work performed by Tetra Tech and other contractors.

6. The overall remediation program for OU2-5 is set forth in the 2003 Record of Decision ("2003 ROD"), the 2007 Record of Decision Amendment ("2007 Amended ROD"), and the 2010 Explanation of Significant Differences ("2010 ESD"). These documents, prepared by the Wisconsin Department of Natural Resources and the United States Environmental Protection Agency ("Response Agencies"), articulate five remedial action objectives that the remedy must accomplish: (1) Achieve, to the extent practicable, surface water quality criteria throughout the Lower Fox River and Green Bay; (2) Protect humans who consume fish from exposure to Contaminants of Concern

("COCs") that exceed protective levels; (3) Protect ecological receptors from exposure to COC's above protective levels; (4) Reduce transport of PCBs from the Lower Fox River into Green Bay or Lake Michigan; and (5) Minimize the downstream movement of PCBs during implementation of the remedy.

7. The UAO required expedited completion of certain remedial action tasks in 2008 in order to commence full-scale sediment remediation in OU2-5 at the start of the 2009 construction season. API and NCR completed those tasks. Actual in-water remediation began in April 2009, on the schedule established by the Government. (The LFR construction seasons typically run from mid-April through mid-November.) During 2009, construction of a sediment processing plant was completed, along with construction of a secondary support site in OU3. API and NCR, through the LLC, dredged in OU2-4 in the 2009, 2010 and 2011 construction seasons. Sand covering and engineered capping was performed in 2009 and 2011.

8. During the 2009 - 2011 construction seasons, the LLC's contractors completed the remedial action construction required by the UAO for OU2 and OU3. In OU4, the only operating unit left to be remediated, approximately 1.2 million cubic yards of production dredging was completed during the 2009, 2010 and 2011 construction seasons.

9. Through the end of the 2011 construction season, approximately 1.487 million cubic yards of sediment has been removed from OU2-4, including non-TSCA, TSCA, residual dredging, and Phase 1 dredging. In addition, approximately 141 acres of caps and sand covers have been placed in OU2 and OU3.

10. To the best of my knowledge and belief, API complied with the terms of the 106 Order through the 2010 construction season.

11. During the Spring of 2011, there was a disagreement among the parties regarding the volume of sediment to be dredged during the 2011 construction season. In response, the Government filed a motion for a preliminary injunction seeking to compel API and NCR to dredge approximately 600,000 cubic yards of sediment, rather than the approximately 250,000 cubic yards that API proposed. In July 2011, the United States District Court for the Eastern District of Wisconsin entered a Decision and Order which denied the Government's motion for a preliminary injunction because the Court determined that "[the Government] will have little success in attempting to demonstrate that Appleton Papers Inc. is liable as a successor under CERCLA." Decision at p. 21. Notwithstanding the decision, during the 2011 construction season, API and NCR, through the LLC, dredged approximately 250,000 cubic yards and performed other capping related work.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 7, 2012

/s/ Jeffrey Thomas Lawson
Jeffrey Thomas Lawson
Resident LLC Manager

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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In re:

APPLETON PAPERS INC.,

Petitioner.

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**DECLARATION OF SUSAN J. O'CONNELL IN SUPPORT OF PETITION FOR REIMBURSEMENT OF COSTS**

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I, SUSAN J. O'CONNELL, declare as follows:

1. I am employed by Project Control Companies, Inc. ("PCC") as Senior Principal and President. I offer this Declaration in support of Appleton Papers Inc.'s Petition for Reimbursement of Costs.

2. PCC is a consulting firm, based in Nashua, New Hampshire, that provides project management and related services. For approximately twelve years, PCC has provided a variety of project management services to Appleton Papers Inc. ("API") and other entities in connection with the investigation and remediation of PCB contamination of the Lower Fox River ("LFR") in northeastern Wisconsin. I have been involved in performing and managing these services throughout this period.

3. I also served as the Controller of the Lower Fox River Remediation LLC ("LLC"). The LLC is a limited liability company that API and NCR Corporation formed in 2009 to serve as a vehicle to perform remedial work required by the Unilateral Administrative Order dated November 13, 2007 ("UAO" or "106 Order"). The UAO required API, NCR and six other entities to implement the Government's remedial plan to address PCB contamination in the LFR. The LLC has entered into a contract with

Tetra Tech EC, Inc. ("Tetra Tech"), pursuant to which Tetra Tech serves as the general contractor for implementing the remedial plan.

4. Upon its formation, the LLC contracted with PCC to perform two roles: Resident LLC Manager and LLC Controller. In these two roles, PCC has day-to-day, hands-on knowledge of the technical and financial aspects of the remediation. Jeffrey Lawson was designated, and acts as the Resident LLC Manager. I was designated, and act as the LLC Controller.

5. As LLC Controller, I am responsible for managing and overseeing all accounting functions related to the LLC's activities. My duties include tracking costs incurred in connection with implementation of the work required under the UAO.

6. From 2008 through March 2012, costs expended to perform work mandated by the UAO in OU2-5 total approximately $327 million. Of this amount, approximately $290 million was paid for by API and NCR. API's share of the latter amount (*i.e.*, the amount of costs related to the 106 Order paid for by API) totals approximately $174 million.

7. Upon request and subject to client approval, PCC can provide a detailed accounting of the costs that API has incurred to comply with the 106 Order.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 7, 2012

/s/ Susan J. O'Connell
Susan J. O'Connell
LLC Controller

**BEFORE THE ENVIRONMENTAL APPEALS BOARD**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

In re:

APPLETON PAPERS INC.,

Petitioner.

## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2012, a true and correct copy of the foregoing:

1. Exhibits 1 through 4 to the Petition for Reimbursement of Costs;
2. Declaration of Jeffrey Thomas Lawson in Support of Petition for Reimbursement of Costs; and
3. Declaration of Susan J. O'Connell in Support of Petition for Reimbursement of Costs;

were delivered electronically and by Federal Express to the following:

U.S. Environmental Property Agency
Clerk of the Board, Environmental Appeals Board
Ronald Reagan Building, EPA Mail Room
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

I further hereby certify that on the 8th day of June, 2012, a true and correct copy of the foregoing:

1. Exhibits 1 through 4 to the Petition for Reimbursement of Costs;
2. Declaration of Jeffrey Thomas Lawson in Support of Petition for Reimbursement of Costs; and
3. Declaration of Susan J. O'Connell in Support of Petition for Reimbursement of Costs

were served by Federal Express on the following person:

Richard C. Karl
Director, Superfund Division – Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

/s/ Ronald R. Ragatz
Ronald R. Ragatz