EXHIBIT 1

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

In re:	)	
Appleton Papers Inc., (Lower Fox River and Green Bay Site),	)	Petition No. CERCLA 106(b) 12-04
Petitioner	)	

CERTIFIED INDEX TO THE ADMINISTRATIVE RECORD

I, Todd Quesada, am employed by the United States Environmental Protection Agency ("EPA") as a Librarian/Superfund Division Records Manager in the Superfund Division of EPA's Region 5 office located in Chicago, Illinois. As part of my duties, I am responsible for compiling and maintaining documents that comprise the administrative records for Superfund sites, as well as preparing the indexes that list the documents that are in the administrative records for sites.

I have reviewed the Administrative Record Index, dated December 11, 2007, attached to the unilateral Administrative Order (EPA Docket No. V-W-08-C885) ("UAO") issued by EPA on November 14, 2007. The document is maintained in electronic form as a Portable Document Format ("pdf") document in the Superfund Document Management System (SDMS), and is identified through the SDMS document identification number 381715 in the database.

I certify that the attached Administrative Record Index, dated December 11, 2007, is a true and accurate list of the contents of the administrative record that was compiled in connection with the issuance of the UAO.

I swear under penalty of perjury that the foregoing is true and correct.

Dated: 7/10/2012

Todd Quesada
Librarian/Superfund Division Records Manager

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and THE STATE OF WISCONSIN,	)	
Plaintiffs,	)	Civil Action No. 10-C-910
v.	)	
NCR CORPORATION, APPLETON PAPERS INC., CITY OF APPLETON, CBC COATING, INC., GEORGIA-PACIFIC CONSUMER PRODUCTS LP, KIMBERLY-CLARK CORPORATION, MENASHA CORP., NEENAH-MENASHA SEWERAGE COMMISSION, NEWPAGE WISCONSIN SYSTEMS, INC., P.H. GLATFELTER CO., U.S. PAPER MILLS CORP., and WTM I COMPANY,	)	
Defendants.	)	

DECLARATION OF BRYAN A. HEATH IN SUPPORT OF NCR CORPORATION'S MEMORANDUM OF LAW IN OPPOSITION TO THE UNITED STATES' MOTION FOR A PRELIMINARY INJUNCTION

I, BRYAN A. HEATH, of sound mind and full age, declare as follows:

1. I am a senior environmental engineer for Defendant NCR Corporation ("NCR"), and I make this declaration on its behalf, being duly authorized to do so. The contents of this declaration are true and correct to the best of my knowledge, information and belief and are based on my first-hand, personal knowledge. If called and sworn as a witness, I can and will testify competently thereto.

2. As part of my regular duties for NCR, I am responsible for the engineering, scientific, and contract administration aspects of NCR's participation in the Lower Fox River cleanup, including those aspects of NCR's compliance with the Unilateral Administrative Order that the U.S. Environmental Protection Agency ("EPA") issued in November 2007 (the "UAO"). I have been responsible for these duties since October 2010, and I have first-hand, personal knowledge since that time of NCR's compliance with the UAO, its participation in the Lower Fox River Remediation LLC (the "LLC"), and the cleanup work in Operable Units 2-5 of the Lower Fox River site ("OU 2-5"). I am also the custodian of NCR's records related to these topics, and I have reviewed those records, including but not limited to records from before October 2010.

NCR's Remediation Efforts at the Site and Compliance with the UAO

3. NCR has consistently participated and taken a leading role in efforts to clean up the Lower Fox River site.

4. Since 2001, NCR has entered into three separate agreements with the Government, which have provided substantial payments to fund cleanup efforts at the Lower Fox River site. In December 2001, NCR and API entered into a Consent Decree with the Government to fund certain response actions and natural resource restoration projects at the site. In December 2005, NCR and API agreed to extend the 2001 Consent Decree for an additional year to allow funding of some additional natural resource restoration projects and assessment costs. NCR has paid over $18.6 million and API has paid over $22.8 million under the 2001 Decree and the 2005 Extension.

5. In March 2004, NCR entered into an Administrative Settlement Agreement and Order on Consent with the Government and another company to design the remedy for OU 2-5.

That Agreement was amended and re-executed in 2007. NCR has paid over $1.6 million and API has paid over $2 million under that Agreement.

6. In April 2006, NCR entered into a Consent Decree with the Government to implement "Phase 1" of the remedy, which included cleanup of a contamination "hotspot" in OU 4. NCR has paid over $5.4 million and API has paid over $7 million under this Decree.

7. EPA issued the UAO in November 2007. Since that time, NCR has consistently complied with the UAO, and has taken a leading role, with API, in supporting the ordered work.

8. Even before EPA issued the UAO, NCR took the lead in identifying remediation contractors to perform the cleanup work. In early 2008, NCR and API selected Tetra Tech EC, Inc. ("Tetra Tech") as the contractor to perform all of the construction work (i.e., all of the work other than post-construction monitoring) required by the UAO. In April 2008, API entered into an interim contract with Tetra Tech, and Tetra Tech began work.

9. Through Tetra Tech and its subcontractors, NCR and API performed in 2008 the land-based work necessary to allow full-scale, in-water remediation to begin in 2009, as the UAO required. A major portion of this work was the construction of a large sediment processing facility, housed in a six-acre building that Tetra Tech also constructed at a cost of tens of millions of dollars. Among other key equipment, the sediment processing facility includes eight large filter presses to dewater the sediment; these presses cost over $17 million to purchase and required months of lead time for manufacturing and shipment. During this time period, API received invoices from Tetra Tech and other vendors, and NCR paid 40 percent of the amounts due based on the November 2005 Arbitration Award that allocated costs between the two companies.

10. In April 2009, just before dredging began in the river, NCR and API formed the LLC, and the LLC entered into a long-term contract with Tetra Tech, which replaced API's interim contract. The LLC has also entered into numerous contracts with other vendors, including landfills, trucking companies, suppliers of sand and gravel for engineered caps and covers, and oversight consultants to supervise Tetra Tech's work. I describe the structure and functioning of the LLC in the following section.

11. In 2009 and 2010, Tetra Tech and its subcontractors have dredged and properly disposed of over 1.2 million cubic yards of sediment on the LLC's behalf. Through December 2010, NCR and API have paid over $239 million in total for remediation work required by the UAO.

12. The work performed by Tetra Tech under the LLC's supervision has been consistently ahead of schedule. During the 2009 season, the LLC dredged approximately 544,000 cubic yards, versus an estimate in the 2009 Work Plan of 470,000 cubic yards. The total estimated cubic yards for 2010, in the approved 2010 Work Plan, was 550,000. The LLC exceeded that projection by more than 150,000 cubic yards. The approved 2010 Work Plan also estimated cubic yards for 2011 at 550,000 cubic yards.

13. In 2010, EPA issued a document called an "Explanation of Significant Differences". This document included a total cost estimate of $701 million for the remedial action in OU 2-5. The $239 million NCR and API have spent through December 2010 represents over 34 percent of this projected cost.

The LLC's Structure and Functioning

14. As I described above, NCR and API formed the LLC in April 2009. One of the purposes of forming an LLC was to create a vehicle by which other potentially responsible parties could participate in cleanup efforts. In the end, only NCR and API joined the LLC.

15. NCR holds a 40 percent interest in the LLC, and it has 40 percent of the LLC's voting power. The other 60 percent interest and voting power belongs to API and an associated company. Specifically, API itself owns a 45 percent interest (and 45 percent voting power), and Arjo Wiggins Appleton (Bermuda) Ltd. ("AWAB"), a company controlled by API's indemnitor Arjo Wiggins Appleton Ltd., owns the remaining 15 percent interest (and 15 percent voting power). The same two people have represented API and AWAB in all LLC activities.

16. The LLC agreement provides that most issues – including entering into contracts, issuing instructions to Tetra Tech, and issuing "cash calls" to its members – must be decided by majority vote. As a result, API controls these and almost all other LLC actions. Because NCR holds only a minority interest, NCR cannot effect an action by the LLC unless NCR can persuade API to agree with it on that action.

17. The LLC obtains the money needed to pay Tetra Tech and other vendors by issuing "requests" – informally known as "cash calls" – to its members. NCR pays 40 percent of any amount needed, and API pays 60 percent. NCR and API each pay their respective cash call amounts to a trust, and the LLC has the authority to direct the trustees to pay invoices on the LLC's behalf.

18. NCR has consistently voted its LLC shares in favor of actions to comply with the UAO, including entering into the contracts with Tetra Tech and the other vendors involved in the OU 2-5 clean-up, issuing change orders as necessary to Tetra Tech, and approving invoices from

Tetra Tech and the other vendors. NCR has also consistently approved monthly cash calls to support the work, and NCR has met its obligation to pay each cash call the LLC has issued. NCR has also participated directly in meetings between the LLC and the Response Agencies in an effort to build and maintain a cooperative working relationship for the remedial action.

Annual Work Plans

19. The UAO requires the respondents to submit an annual work plan that describes the work to be performed during the coming year. Through Tetra Tech, the LLC submitted work plans for 2009, 2010 and 2011. Until 2011, the work plans NCR and API submitted were always approved by EPA and the Wisconsin Department of Natural Resources ("WDNR") (collectively, the "Response Agencies").

20. Neither the 2009 nor 2010 work plans required the LLC to dredge a specific number of cubic yards of sediment or complete dredging in particular areas of the river. Instead, those work plans described the dredging equipment configuration that would be used during the season and the schedule on which the dredges would operate. The 2009 and 2010 work plans listed specific dredge areas that were planned for a given year, but Tetra Tech had flexibility either to dredge additional areas if time permitted or to forego particular areas if plans changed during the season. The work plans included tables showing the number of cubic yards planned for the year and for specific dredge areas, but these figures were described as "estimated" or "targeted" cubic yards.

21. In February 2011, the LLC submitted a work plan for the 2011 Remedial Action in OU 2-5 (the "February 2011 Work Plan"). On March 4, 2011, EPA notified Tetra Tech that the February 2011 Work Plan had been approved with modifications and directed the LLC to submit a revised 2011 Work Plan by March 25, 2011. For the next three weeks, NCR worked

with API and the LLC's consultants in an effort to make changes in response to EPA's modifications.

22. On March 24, 2011, API informed NCR that it intended to exercise its controlling vote in the LLC to cause the LLC to reject many of the EPA's modifications. NCR objected in writing. On March 25, 2011, API sent NCR notice of an LLC Action by Consent, in which API exercised its controlling vote pursuant to the LLC Agreement. NCR objected in writing to the Action by Consent and requested that its objection be filed with the records of meetings of the LLC. NCR did not play a further role in drafting or submitting the final work plan that the LLC ultimately submitted on March 28, 2011 (the "March 2011 Work Plan").

23. The March 2011 Work Plan that API caused the LLC to submit calls for an estimated 250,000 cubic yards of dredging in 2011, beginning on April 18, 2011.

24. Before and since submission of the March 2011 Work Plan, Tetra Tech has been preparing for the beginning of in-water work. Tetra Tech is scheduled to begin dredging on April 18, 2011, and has informed the LLC that it plans to begin on time.

The Government's Proposed Preliminary Injunction

25. In contrast to the approved work plans for 2009 and 2010, the Government's proposed preliminary injunction would require that dredging be completed in specific, designated areas in 2011. In addition, the proposed preliminary injunction contains various estimates of cubic yards that the Government apparently believes can be dredged in 2011. It is not clear whether the list of designated areas control, or whether the requirement would be to dredge some number of cubic yards.

26. Project Control Companies Inc. ("PCC"), an LLC consultant, has informed the LLC that, if the LLC were required to dredge 810,000 cubic yards in 2011 (the high end of the

range cited by the Government in support of its proposed preliminary injunction), the estimated cost would be over $90 million. I do not believe that Tetra Tech can perform this amount of dredging in 2011.

The LLC's Ability to Comply with the Government's Proposed Preliminary Injunction

27. I have compared the cubic yard estimates in the proposed preliminary injunction to the cubic yards dredged in previous seasons. If one adds the various cubic yard estimates in the document, one gets a range of between 605,000 and 810,000 cubic yards that the Government expects to be dredged in 2011. The high end of this range is about 100,000 more cubic yards than what Tetra Tech dredged in 2010, which was already the most sediment that had ever been dredged in a single season for any environmental project. In fact, Tetra Tech has told the LLC that it does not believe it can dredge 810,000 cubic yards in 2011.

28. The low end of the cubic yard range also exceeds the 2009 dredging total of 540,300 cubic yards. Although the low end of the cubic yard range is less than the 2010 dredging total, Tetra Tech accomplished that total in 2010 by starting work on April 5, 2010 and by dredging only non-TSCA-regulated sediment. (TSCA-regulated sediment is sediment containing sufficiently high PCB concentrations that regulations under the Toxic Substances Control Act require it to be disposed of in a special, "TSCA waste" landfill.) In contrast, the proposed preliminary injunction would require the LLC to dredge both TSCA and non-TSCA sediment in 2011. Dredging TSCA sediment generally involves a slower production rate than dredging non-TSCA sediment. In addition, Tetra Tech is required to stop dredging completely when switching from TSCA sediment to non-TSCA sediment, so that any remaining TSCA-regulated sediment can be flushed out of the pipeline and processing plant. As a result, the 2010 dredging total is not a good guide to Tetra Tech's potential dredging abilities in 2011.

29. George Berken's declaration states that the work required in the proposed preliminary injunction is "within the functional capabilities of the existing project system". Mr. Berken, however, bases this conclusion only on a mathematical calculation involving the potential capacity of the system as reflected in reports submitted by the LLC. These reports do not give confidence that Tetra Tech can perform the work required in the proposed preliminary injunction. For example, only one of those reports – a report provided just after Tetra Tech began work in 2008 – listed a dredging capacity of greater than 810,000 cubic yards; the others show annual capacities below 810,000 cubic yards. As a result, Mr. Berken's review does not support a requirement to dredge 810,000 cubic yards this year.

30. More generally, the average of the yearly dredging figures in the reports that Mr. Berken reviewed is 628,095 cubic yards, just slightly above the low end of the government's range (605,000 cubic yards). This indicates that, if the actual cubic yards are just moderately greater than the low end of the government's range, the volume would exceed the average of what Tetra Tech has reported its capabilities to be in the past.

31. Based on my participation in discussions with Tetra Tech and the LLC's consultants, I do not believe the LLC can guarantee compliance with an injunction that either requires a specific number of cubic yards of dredging in the range the government has requested, or that requires completion of a set of specified dredge areas with estimated cubic yards in that same range.

32. In contrast, the LLC is capable of complying with an injunction that requires full-scale remediation to begin on April 18, 2011, and continue through a set end date, with all three dredges running 24 hours per day, five days per week, subject only to bona fide operational

issues, such as inclement weather, equipment breakdowns, safety concerns or required maintenance.

Other Inefficiencies of the Government's Proposed Preliminary Injunction

33. The proposed preliminary injunction also compels remediation in a fashion that will result in unnecessary cost to the cleanup project, in at least two ways.

34. First, even the low end of the government's estimated cubic yardage range would compel Tetra Tech to dredge in a way that will create a substantial risk that Tetra Tech will dredge material quantities of non-target, or "clean" sediment. (Non-target sediment is sediment with PCB concentrations below 1 ppm; the RODs do not require this sediment to be removed.) This possibility exists because final dredge designs are not available for all of the areas the proposed preliminary injunction would require to be dredged. The design process to which the government and the LLC have agreed involves creating an initial remedial design for each area. Then, shortly before dredging is due to occur in an area, the LLC takes additional samples, known as "infill sampling", to define the area to be dredged more precisely. Tetra Tech refines the design based on these samples and produces a final design against which the dredges work. In 2009 and 2010, the LLC allowed Tetra Tech to do Production Dredging in areas without final designs, on the assumption that the changes involved in the final design would be small enough that the Production Dredging would capture only target sediment, even if the final design were to change. But the LLC's consultants, since the end of the 2010 season, have determined that, in 2010, this approach resulted in unnecessary dredging of approximately 50,000 cubic yards at a cost of approximately $3.5 million.

35. In 2011, the LLC has directed Tetra Tech not to begin dredging in any area until the final design for that area is complete, and NCR supports this position. However, Tetra Tech

has stated that it is not possible to dredge 605,000 cubic yards in a season unless it is permitted to perform Production Dredging before final designs are complete. As a result, the proposed preliminary injunction is likely to result in spending millions of dollars to remove non-target sediment unnecessarily. In contrast, any injunction could be worded as suggested above in paragraph 32, with an additional statement clarifying that the LLC is permitted to require final dredge designs before Production Dredging begins in an area.

36. Second, the proposed preliminary injunction potentially could require the LLC to incur substantial unnecessary costs by requiring that 30,000 cubic yards of TSCA-regulated sediment be included in this year's work. Although the RODs require that this sediment be dredged, they do not specify when such dredging must take place. Removing this sediment late in the 2011 season or at the beginning of the 2012 season would benefit the cleanup because it would allow the sediment to be disposed in a more cost-efficient way at a nearby landfill. Currently, TSCA-regulated sediment must be trucked to a TSCA-approved landfill located near Detroit, over 500 miles away. A permit for TSCA approval is pending for the Ridgeview landfill in Whitelaw, Wisconsin, which is only about 30 miles from the Site. In addition to being more cost effective, a shorter route would decrease any safety concerns associated with transportation. NCR has taken the lead in working with Tetra Tech and the landfill owner to submit the application for this permit. Approximately $3 to $4 million of cleanup costs would be saved if the proposed preliminary injunction were modified to permit dredging of the TSCA-regulated sediment after the Ridgeview landfill is approved, which is expected near the end of the 2011 season or in time for the beginning of the 2012 season.

Dated: April 12, 2011

/s/ Bryan A. Heath
Bryan A. Heath

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

No. 10-CV-910-WCG

NCR CORPORATION, *et al.*,

Defendants.

MEMORANDUM OF DEFENDANT APPLETON PAPERS INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Appleton Papers Inc. ("API"), by its undersigned attorneys, respectfully submits this Memorandum in Support of its Motion for Summary Judgment.

INTRODUCTION

In its July 5, 2011 Decision and Order, the Court concluded that the United States "will have little success attempting to demonstrate that Appleton Papers Inc. is liable as a successor under CERCLA." Dkt. 172, p. 21. The Court later repeated that API is "unlikely to be deemed liable under CERCLA." *Id.,* p. 24. The Court reasoned that: (a) NCR Corporation ("NCR"), which sold assets to API in 1978, could not divest itself of its CERCLA liability; (b) NCR remains a viable company; and (c) there is no basis for imposing CERCLA liability on an asset purchaser where the seller remains liable and viable. *Id.*, p. 18. Any private financial arrangement between API and NCR is in the nature of an indemnity, which does not impose successor liability on API or make API liable under CERCLA. *Id.*, pp. 18-21. That analysis, made under the "likelihood of success" prong of the requirements for a preliminary injunction, should now be confirmed by granting summary judgment and dismissing with prejudice claims that the

United States and State of Wisconsin (collectively, the "Government") have asserted against API.

The Court's conclusion that successor liability does not apply here because NCR remains viable made it unnecessary for the Court to determine in its July 5 Decision whether API in fact assumed the Fox River liabilities in the 1978 transaction, and the same is true here. However, should the Court wish to consider an independent basis for granting summary judgment, API demonstrates below that it did not assume NCR's Fox River liabilities in that transaction. That is an additional reason why the Government's CERCLA claims against API are groundless.

Finally, the Court's July 5 Decision also addressed a new claim that the United States made in its reply to API's memorandum opposing the motion for a preliminary injunction. The Court wrote that the "United States also throws in a suggestion that Appleton Papers may have itself polluted PCBs into the river following its creation in 1978." *Id.*, p. 21, n.2. The Court rejected the claim, stating: "This argument has not been sufficiently supported and I cannot conclude it has much likelihood of establishing liability." *Id.* Indeed, despite fifteen years of investigation and access to hundreds of thousands of pages of documents, the United States has no credible support for its "suggestion" that API itself discharged PCBs into the river.

Accordingly, it is time to finally bring closure to the Government's baseless claims that API is liable under CERCLA. API respectfully requests that the Court enter summary judgment and dismiss the Government's claims against API with prejudice.

STATEMENT OF FACTS

A. The Government's Allegations As To API's Alleged Liability.

For 15 years, the United States has claimed that API is liable under CERCLA for PCB contamination in the Lower Fox River and Green Bay. Proposed Finding of Fact ("PFOF") ¶ 5.[1] In the Section 106 Order it issued to API and others in November 2007, the United States stated that API was liable under CERCLA because it is the successor to corporations that had such liability:

> 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.

PFOF ¶ 7 (emphasis added). The United States based its successor liability claim on a 1978 asset purchase agreement with NCR:

> In 1978, Appleton Papers Inc. [API] . . . and . . . 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.

PFOF ¶ 8. In the 106 Order, the United States asserted no other basis for its CERCLA liability allegation. PFOF ¶ 9.

In its First Amended Complaint, the Government alleged that API "is a successor to certain relevant liabilities of NCR Corporation." PFOF ¶ 6. API denied that allegation. *Id.*

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[1] API's Proposed Findings of Fact in Support of its Motion for Summary Judgment are being filed with this Memorandum.

B. API Did Not Acquire Assets From NCR Until Seven Years After The Use Of PCB's Had Ceased In 1971.

It is undisputed that the use of PCBs in making NCR brand carbonless copy paper ("CCP") ceased in 1971. PFOF ¶ 10. During the time that PCBs were used in CCP, Appleton Coated Paper Company ("ACPC") owned and operated a paper coating facility in Appleton, Wisconsin, at which CCP was manufactured. PFOF ¶ 11. From 1954 to 1969, Combined Papers Mills, Inc. owned and operated a paper mill in Combined Locks, Wisconsin. PFOF ¶ 12.

In 1969, NCR acquired the stock of Combined Paper Mills, Inc., which became its wholly-owned subsidiary. PFOF ¶ 13. In 1970, NCR acquired the stock of ACPC, making it a wholly-owned subsidiary. PFOF ¶ 14. In 1971, ACPC and Combined Paper Mills, Inc. were merged into Appleton Papers, Inc. (with a comma – a different corporation than API). PFOF ¶ 15. The merged entity, Appleton Papers, Inc., was then merged into NCR Corporation in 1973, at which time it became the "Appleton Papers Division" of NCR. PFOF ¶ 16.

On June 30, 1978, NCR sold the assets of its Appleton Papers Division, including the Appleton and Combined Locks plants, to Lentheric, Inc., a subsidiary of B.A.T Industries, p.l.c. ("BAT"). PFOF ¶ 17. The terms of the purchase and sale were set forth in an asset purchase agreement ("1978 Agreement"). *Id.* Lentheric, Inc. then changed its name to "Appleton Papers Inc." (no comma), the Defendant in this action. PFOF ¶ 18. API first began doing business in July 1978 after it purchased the assets of the Appleton Papers Division. PFOF 19. The 1978 Agreement between NCR and API and BAT does not make any reference to Fox River liabilities, CERCLA liabilities or PCBs. PFOF ¶ 20.

It is undisputed that NCR continued to exist after the 1978 asset transaction, remains in existence today, and is a Defendant in this action. PFOF ¶ 32.

C. The United States' Claims Regarding API's Alleged Liability In Its Motion for Preliminary Injunction.

On March 29, 2011, the United States (but not the State of Wisconsin) filed a Motion For A Preliminary Injunction. PFOF ¶ 21. In its brief in support of the Motion, the United States devoted a single paragraph to the issue of NCR and API's alleged liability under CERCLA stating, in part: "There is no question that NCR and API are liable under CERCLA for the contamination in OUs 2-5." PFOF ¶ 22. The United States, however, offered no facts or argument to show that API (as opposed to NCR) was liable under CERCLA. *Id.* It was not until the United States filed its reply brief ("Preliminary Injunction Reply Brief") that it offered any facts or argument to support its contention that API is liable under CERCLA. PFOF ¶ 23. The United States raised three purported bases for that claim.

1. Alleged Successor Liability Based Upon The 1978 Agreement.

The United States cited three provisions in the 1978 Agreement as the basis for its claim that API had assumed, and therefore was a successor to, NCR's Fox River liability. PFOF ¶ 23. These provisions are set forth and discussed below. The United States provided nothing but argument to support its allegation that NCR's Fox River liability fell within the express terms of these provisions. PFOF ¶¶ 24-31.

2. Alleged Successor Liability Based Upon The 1998 Agreement.

In its Preliminary Injunction Reply Brief, the United States claimed for the first time that API expressly assumed NCR's CERCLA liability in a 1998 settlement and 2005 arbitration. PFOF ¶ 34. By way of background, the State of Wisconsin first identified

NCR (but not API) as a potentially responsible party ("PRP") for remediation of the PCB contamination in the Fox River in 1995. PFOF ¶ 35. Thereafter, NCR sued API and BAT, claiming that they must indemnify NCR against any Fox River liability pursuant to the terms of the 1978 Agreement. PFOF ¶ 38. In 1998, NCR, API and BAT mediated and settled the case, entering into a "Confidential Settlement Agreement Between NCR Corporation and B.A.T Industries P.L.C. and Appleton Papers Inc." (the "1998 Settlement Agreement"). PFOF ¶ 45. The 1998 Settlement Agreement provided that it was not an admission of liability:

> 7. **NO ADMISSION OF LIABILITY**: By entering into this Settlement Agreement, and the exhibits hereto, **the parties are not admitting to any** unlawful conduct or **liability on their part.** The parties further acknowledge and agree that this Settlement Agreement shall not be admissible as evidence in any federal, state, local, tribal, or administrative agency proceeding, except in a proceeding to enforce same.

PFOF ¶ 46.

In the 1998 Settlement Agreement, the parties agreed that if any costs were ever imposed upon any of them arising from the Fox River PCB contamination or other sites as defined in the 1998 Settlement Agreement, those costs would be split with API/BAT together bearing 55% and NCR bearing 45% of the first $75 million. PFOF ¶ 47. The 1998 Settlement Agreement established parameters for a "compulsory, binding arbitration to allocate as between them . . . costs in excess of $75 million." *Id.* The parties agreed in a contemporaneous Subsequent Allocation Arbitration Agreement that neither side would be allocated more than 75% or less than 25% of the amounts to be expended beyond $75 million, but that: "within that range, the arbitrators may select any allocation that they deem appropriate." PFOF ¶ 48. Under this charge, the arbitrators were not required to base their allocation upon the terms of the 1978 Agreement. *Id.*

Consistent with the terms of the 1998 Settlement Agreement, NCR, API and BAT participated in an arbitration in October and November 2005. PFOF ¶ 49. The arbitrators were not asked to determine, and did not determine, whether NCR's Fox River liability fell within the terms of the assumption provisions in the 1978 Agreement. Rather, the parties' arbitration agreement authorized the arbitrators, within the bounds noted above, to "select any allocation that they deem appropriate." PFOF ¶ 50. Consistent with this charge, the arbitrators made the following division of costs above $75 million:

> Pursuant to this agreement of the parties, the Arbitrators deem appropriate the following allocation:
>
> API/BAT: Sixty (60) percent
>
> NCR: Forty (40) percent.

PFOF ¶ 51. The arbitration award represented the panel's "collective judgment on the appropriate allocation under the terms of the Allocation Agreement." PFOF ¶ 52. The parties have abided by that private settlement arrangement.[2]

3. Alleged Direct Liability.

In its Preliminary Injunction Reply Brief, the United States also alleged that API is liable under CERCLA because there may have been discharges of PCBs from API's facilities when they were owned and operated by API. PFOF ¶ 53. The United States offered no evidence of PCB discharges from the Appleton facility when API owned and operated that facility. PFOF ¶ 63. Instead, the United States submitted documents

[2] Any disputes that may arise as to the rights and obligations of NCR, API and/or BAT are subject to the dispute resolution provisions of the 1998 Settlement Agreement, as explained in API's July 25, 2011 Response of Defendant Appleton Papers Inc. To Defendant NCR Corporation's Filing Regarding The United States' Motion for Entry of Revised Proposed Terms of an Injunction. Dkt. 192.

regarding a leak from a transformer at the Combined Locks plant that was captured by a containment pad (PFOF ¶¶ 54-57) and certain unidentified analytical results of a water sample. PFOF ¶¶ 59-60. These documents provide no evidence of a PCB discharge to the river during the time API owned the Combined Locks plant. PFOF ¶ 63. Moreover, API submitted undisputed evidence that discharges from the Combined Locks plant during the time API owned it did not add PCBs to the river. PFOF ¶ 62.

D. The Court's Decision And Order Denying The Preliminary Injunction.

After reviewing the United States' submissions and arguments, the Court issued its Decision and Order (Dkt. 172) denying the United States' Motion for Preliminary Injunction. PFOF ¶ 64. The Court concluded that it was unlikely that the United States could show that API is liable under CERCLA. *Id.*, p. 24 ("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 that I find unlikely to be deemed liable under CERCLA."). PFOF ¶ 65. The Court reiterated its ruling in its July 28, 2011 Order Denying Renewed Motion For Preliminary Injunction. Dkt. 193. The Court's Decision and Order is discussed in detail below.

LAW AND ARGUMENT

I. API IS ENTITLED TO SUMMARY JUDGMENT BASED UPON THE REASONING IN THE JULY 5, 2011 DECISION AND ORDER.

In its July 5, 2011 Decision and Order, the Court concluded that it is unlikely that the United States can prove that API has successor liability under CERCLA because its alleged predecessor, NCR, retained the CERCLA liability and remains a viable company. The Court ruled that there is no basis for the imposition of successor liability in such circumstances.

The Court briefly summarized the pertinent 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.

Dkt. 172, p. 16.

When a company buys assets, it generally does not succeed to the liabilities of the seller. *Id.*, p. 17. The United States argued that NCR's Fox River liability fell within the scope of certain assumption provisions in the 1978 Agreement. *Id.*, pp. 17-18. However, the Court did not need to reach this issue, ruling that "the exact scope of these clauses is not before me." *Id.*, p. 18.

Rather, the Court ruled that "none of the equitable considerations that would otherwise support the imposition of successor liability are in play here" because NCR remains liable:

> 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.

Id.

The Court explained that a party like NCR cannot divest itself of CERCLA liability through a private agreement. CERCLA § 107(e), 42 U.S.C. § 9607(3)(1). That conclusion is confirmed by the Seventh Circuit's decision in *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342-43 (7th Cir. 1994), which held that § 107(e) "precludes efforts to divest a responsible party of his liability" by "shifting liability from one person to another." Dkt, 172, p. 19. Accordingly, "the 1978 Asset Agreement could not transfer

liability *per se*, it merely transferred the financial risk of that liability, as with an insurance policy." Dkt. 172, p. 18.

This Court then reviewed and summarized the extensive case law holding that where an asset seller remains liable and viable, there is no basis for imposing successor liability on the buyer:

> 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).

Dkt. 172, p. 20.[3] The United States concedes that NCR is still a functioning corporation that is capable of providing the relief it seeks. PFOF ¶ 33. Thus, "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." Dkt. 172, p. 19. Private agreements between API and NCR "do not establish successorship because the original liability under CERCLA has remained with the seller." *Id.*, p. 20.

This Court's analysis is supported by Judge Stadtmueller's decision in *A-C Reorganization Trust v. E.I. DuPont de Nemours & Co.*, No. 94-C-574, 1997 WL 381962

[3] This Court's ruling is consistent with other reported decisions. *See, e.g., Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp. 2d 251, 273-74 (D. Conn. 2003) (refusing to impose CERCLA successor liability where the seller continued to exist as a viable entity); *United States v. Mexico Feed & Seed Company, Inc.*, 980 F.2d 478, 490 (8th Cir. 1992) (refusing to impose CERCLA successor liability where the asset seller continued to be a viable entity because "the very concern animating the doctrine of corporate successor liability – that the corporate veil thwart plaintiffs in actions against corporations which have sold their assets and distributed the proceeds – is not present.").

(E.D. Wis. 1997).[4] In that case, Reichhold Chemicals, Inc. ("Reichhold") had entered into Acquisition and Assumption Agreements with Tenneco Chemicals in which Reichhold stated that it "assumes and agrees to pay, perform, and discharge, all debts, obligations, contracts and liabilities" of Tenneco Chemicals. *Id.* *5. The Court ruled that that provision "is best viewed as an indemnification" because "Reichhold could not assume the CERCLA liability itself." *Id.* *6. The Court held that the contractual assumption provision did not impose CERCLA successor liability on Reichhold:

> **Although the law of corporate succession contemplates that corporate parties may allocate liabilities in an asset sale, CERCLA § 107(e)(1) nullifies any attempted transfer of CERCLA liability.** 42 U.S.C. § 9607(e)(1); *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342 (7th Cir. 1994). While the decision in *Harley-Davidson* theoretically leaves open the possibility that pre-CERCLA transfers of liability could be effective, the Seventh Circuit's discussion and the statute's language both indicate that Congress meant to foreclose all transfers of liability. *Id.* at 343-44. Furthermore, **the court's research revealed no cases holding that CERCLA liability may be transferred by agreement of the parties. Thus, the statute eliminates the exception for express or implied assumption of liabilities in an asset sale.**

Id. at *7 (emphasis added). The court further held that, due to § 107(e)(1), there can be no CERCLA liability where the sole basis for alleged CERCLA liability is a contractual assumption of liability:

> **If there is no transfer of liability in a mere asset sale (and there [is] neither an argument nor a basis in the record for applying any of the other exceptions to the general rule), then Reichhold cannot have acquired liability even if it agreed to do so.** Under the Agreements, Reichhold agreed to assume the obligations and liabilities of Tenneco Chemicals with respect to the Newport Division. Amended Fourth Party Complaint Ex. C at 11. However, CERCLA nullifies this portion of the agreement with respect to CERCLA liability, because Reichhold could not assume Tenneco Chemicals' CERCLA liability. **As there is no indication or allegations that Reichhold is a PRP, there is no basis for successor liability, and the court finds no authority in CERCLA for a possible statutory indemnification [i.e., contribution] action.**

[4] A copy of such decision is attached as Exhibit 5 to the Declaration of Ronald R. Ragatz in Support of Appleton Papers Inc.'s Motion for Summary Judgment.

> Count II of the amended fourth-party complaint must be dismissed for failure to state a claim upon which relief may be granted.

Id. at *8 (footnotes omitted; emphasis added). The court granted Reichhold's FRCP 12(b)(6) motion to dismiss, holding there was no possible § 113 contribution claim against Reichhold. The *A-C* decision was expressly grounded on the Seventh Circuit's decision in *Harley-Davidson.*

In its Preliminary Injunction Reply Brief, The United States cited a Third Circuit case in support of an argument that express assumption language creates direct CERCLA liability. *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234 (3rd Cir. 2005). However, in *Caldwell* the original holder of the liability, Rexon, was no longer viable or capable of providing any relief:

> As noted earlier, the suit before us was filed on April 6, 1995. Rexon was served with process in April and May 1995 and its **certificate of dissolution was not filed until June 30, 1995.** Pullman points out that **Rexon's facilities in Wayne and Fairfield had ceased operations in September, 1994,** the bank had attached the remaining assets, and **by June 30, 1995 Rexon had liquidated.**

Id. at 245. Less than three months after the action was filed "Rexon was tottering on the edge of its grave." *Id.* While Rexon could still be sued, it had no ability to provide meaningful relief. Thus, the situation in *Caldwell*, where the original holder of the liability was an empty shell that had been liquidated and dissolved, bears no resemblance to this case, where the Government took pains to tell the Court that NCR is viable and capable of providing relief. Dkt, 126, p. 13, n.7.[5]

[5] *Caldwell* also is distinguishable on other grounds. It involved a sale of stock (rather than assets) in which the seller (not the buyer), Pullman, was alleged to be responsible for the liability of the subsidiary, Rexon. The language at issue was a provision in the stock purchase agreement captioned "[Pullman] Retention of Certain Liabilities" in which Pullman agreed to pay Rexon's "Superfund liabilities." *Caldwell*, 421 F.3d at 242.

The United States also cited a second case in support of its argument, *In Re Safety-Kleen Corp.,* 380 B.R. 716 (D. Del. 2008), which is also readily distinguishable. In that case, a bankrupt debtor, Safety Kleen, had sold certain assets to Clean Harbors and the bankruptcy court entered a "Sale Order" approving the sale. Clean Harbors agreed to assume Safety Kleen's obligations under two settlement agreements involving the Kramer Landfill Superfund Site. *Id.* at 731-35. When Clean Harbors tried to renege on the deal, and Safety Kleen's creditors brought an adversary proceeding against Clean Harbors. The bankruptcy court held that the Kramer Landfill settlement obligations were covered by the Sale Order and Acquisition Agreement and that "the Sale Order expressly conferred third-party beneficiary rights on interested parties, including the creditors of Safety Kleen." *Id.*, p. 740. *Safety Kleen* is not at all similar to the facts here where there has been no bankruptcy, no court-ordered sale approved by creditors, no conferral of third-party beneficiary rights on those creditors, no finding of an express assumption, and no need to even consider the equitable principles against imposing CERCLA liability where the asset seller is viable.

The cases cited by the United States are inapposite. The Court correctly ruled in its July 5 Decision and Order that there is no basis to apply the equitable doctrine of successor liability where, like here, the asset seller is viable. API is, therefore, entitled to summary judgment dismissing the Government's claims against it.

II. THE GOVERNMENT CANNOT PROVE THAT NCR'S FOX RIVER LIABILITY WAS WITHIN THE SCOPE OF THE 1978 AGREEMENT.

Having determined that successor liability was inapplicable because NCR remained viable, the Court did not address the factual predicate upon which the Government's successor liability theory is based, namely, that API assumed NCR's Fox

River liabilities in the 1978 Agreement. In fact, however, the United States was unable to explain how NCR's Fox River liability would fall within the scope of the 1978 Agreement. The provision upon which the United States principally relied in claiming that API has successor liability states that API assumed the following:

> . . . all of Seller's liabilities (other than liabilities with respect to claims asserted by or on behalf of private parties), whether accrued, absolute, contingent or otherwise, and whether or not reflected or reserved against on the Financial Statements or the Closing Date Balance Sheet or 1977 Balance Sheet or on the books of account or other records of APD, 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 or the products or operations, of APD with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.**

PFOF ¶ 24 (emphasis added). The abbreviation "APD" in the above quote refers to the Appleton Papers Division of NCR. *Id.*, n.3. The Appleton Papers Division was formed in 1973 and operated until the sale of assets to API in June 1978. PFOF ¶ 25. Thus, the Appleton Papers Division operated for only about five years, 1973-78, all of which were after the use of PCBs in making carbonless copy paper had ceased. The term "Property" refers to the assets that were being purchased. PFOF ¶ 24, n.3.

Accordingly, any assumption under ¶ 1.4.9 of the 1978 Agreement was limited to liabilities arising from the failure of the Property or the products or operations of the Appleton Papers Division to comply with applicable governmental environmental and pollution control laws. The Fox River PCB liability did not result from the failure of the assets acquired in 1978, or the products or operations of the Appleton Papers Division to comply with applicable governmental environmental and pollution control laws. The United States has not even suggested otherwise. It has never identified any environmental law with which the Property or products or operations of the Appleton

Papers Division failed to comply during the period when APD existed, 1973-78. PFOF ¶ 26.

A second provision which the United States cited provides that API assumed: "all of Seller's obligations and liabilities . . . **with respect to the compliance of the assets, properties, products or operations of APD with all governmental laws**, ordinances, regulations, rules and standards." PFOF ¶ 27 (emphasis added). Like ¶ 1.4.9, ¶ 1.4.3 requires a failure of the assets, properties, products or operations of the Appleton Papers Division to comply with governmental laws. The United States offered no facts to suggest that the assets, properties, products, or operations of the Appleton Papers Division were in non-compliance with any law – much less that NCR's Fox River liabilities arose from such non-compliance. PFOF ¶ 28. CERCLA did not exist at the time and CERCLA's later enactment did not establish that any of Appleton Papers Division's operations failed to comply with any laws. CERCLA later created liability for activities that were in compliance with applicable laws, but that is not an obligation assumed under the 1978 Agreement. NCR had no obligation or liability with respect to *compliance* of the Appleton Paper Division's assets, properties, products, or operations with governmental laws in 1978.

The third provision cited by the Government is as follows:

> . . . **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** threatened suit, patent infringement suit, patent or trademark interference or opposition, action, claim, investigation by any governmental body, or legal, administrative or arbitration **proceeding set forth on Schedules A or M,** in each case whether such obligation or liability is accrued, absolute, contingent or otherwise and whether or not such obligation or liability is reflected or reserved against on the Financial Statements or the Closing Date Balance Sheet;

PFOF ¶ 29 (emphasis added).

The United States quoted an excerpt from Schedule A that says that "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." Dkt. 150, p. 7. This language could not have related to CERCLA; CERCLA was not enacted until 1980. Neither Schedule A nor Schedule M to the 1978 Agreement disclose any pending or threatened suit, claim, action, investigation or proceeding relating to PCBs or the Lower Fox River or Green Bay. PFOF ¶ 30. Nor did the United States offer any evidence that the violation that "may be" occurring in 1978 had anything to do with the later-determined Fox River PCB liabilities. PFOF ¶ 31.

The Government has the burden of proving API's liability. *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir. 2001). The United States put forth argument in connection with its preliminary injunction motion in an effort to show a reasonable likelihood of success on the merits. The argument does not hold up factually as explained above, and was rejected by this Court. The Government has not demonstrated, and cannot demonstrate, that NCR's Fox River liability – whatever that liability is ultimately adjudicated to be – falls within the scope of any assumption provision in the 1978 Agreement.[6] The inability of the United States to make even a *prima facie* showing in that regard is a second and independent basis for granting summary judgment dismissing the Government's claims against API. The sole obligation of API regarding the Fox River contamination is as a partial indemnitor (jointly and severally with BAT) to

[6] A ruling by this Court that API did not assume NCR's Fox River liabilities will not affect API's indemnification obligations to NCR. Those obligations arise under the 1998 Settlement Agreement, in which the parties released claims relating to the Fox River based upon the 1978 Agreement. Dkt. 124-1, at 16-18.

NCR pursuant to the 1998 Settlement Agreement, which does not impose CERCLA liability on API or make API liable to the Government at all.

III. THERE IS NO BASIS FOR IMPOSING DIRECT CERCLA LIABILITY ON API.

As the Court noted in the July 5 Decision and Order, the United States threw in a suggestion that API itself may have discharged PCBs into the river.

> 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.

Dkt, 172, p. 21, n.2.[7]

The United States cited three documents to support its allegation that PCBs were discharged by the Combined Locks facility after June 30, 1978: PFOF ¶ 53; Dkt 147-3; Dkt 147-4; and Dkt 147-5. *See* Dkt. 150, p. 6 of 35. The first two are a memorandum and letter about a leak from a transformer that was detected and stopped with a minor level of PCBs detected on the concrete floor beneath the transformer. Dkt. 147-3, 147-4. PFOF ¶¶ 54-58. There is no evidence of any release to the environment, much less any discharge to the Lower Fox River. *Id.*

The final document, Dkt. 147-5, purports to be a laboratory analytical report from 1989, showing the results of analysis of a sample collected from the Combined Locks facility's effluent. PFOF ¶¶ 59-60. The document does not identify the substances for which the sample was analyzed; the words "PCBs" or 'polychlorinated biphenyl" do not appear on the document. *Id.*

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[7] The Court confirmed this in its July 28, 2011 Order Denying Renewed Motion For Preliminary Injunction, Dkt. 193, where the Court stated: "Appleton Papers did not pollute itself, but signed an agreement stating it would indemnify NCR for certain environmental liability," thus recognizing that API's obligation is in the nature of an indemnity arising from the 1998 Settlement Agreement.

Even if one assumes, however, that the test result relates to PCBs, the results are meaningless because the document does not show the level of PCBs that came *into* the Combined Locks facility as *influent* from the Fox River that the plant used as process water. In sampling events analyzing both the influent into *and* the effluent from the Combined Locks facility during API's period of ownership, whenever PCBs were detected in the effluent leaving the facility, they were no higher than the pre-existing level of PCBs in the river water drawn into the plant. PFOF ¶¶ 62-63. Thus, the evidence before the Court shows that the Combined Locks facility was not contributing PCBs to the River. This is supported by testimony from a Combined Locks plant employee:

> A Basically the findings were that we would remove PCBs from the water. It was going back – the effluent that we were discharging had less in it than the water that we were taking in.
>
> Q Okay. Can you explain that for the jury a little bit? What kind of water were you taking into the mill?
>
> A We were taking the raw river water, and we were processing that in our water treatment system, and that was used in the papermaking and pulp making operations, and what we discharged from the paper machines, that went through our primary and secondary waste treatment systems, and someplace along the line PCBs were removed.
>
> Q So in essence the mill was cleaning up the river?
>
> A That's correct.

PFOF ¶ 62 (Dkt. 139-20, pp. 5-6).

The United States has no credible evidence in support of a last-minute allegation of direct discharges thrown in after 15 years of silence on such a theory. Such a theory was never mentioned in the Section 106 Order. It has no basis in fact, as the Court has already recognized. Rather, the evidence establishes that the Combined Locks facility did not contribute to PCB contamination in the Lower Fox River.

CONCLUSION

The Government has had fifteen years to investigate (including the ability to issue mandatory information requests) and build its case against API.[8] However, when the United States was forced to put its cards on the table to support its preliminary injunction motion, the United States' inability to prove a case against API was finally exposed to the Court.

NCR remains liable and viable. That fact alone precludes successor liability. Even if the Court were, despite NCR's viability, interested in expending judicial resources to explore the meaning of the agreements in issue, they do not establish an assumption of NCR's liability. And there is no basis to conclude that API has direct CERCLA liability.

Accordingly, API respectfully requests that the Court enter summary judgment in its favor and against the United States and the State of Wisconsin as to all claims in the First Amended Complaint and dismiss all such claims with prejudice.

[8] In its effort to build its case against API, the United States has served information requests pursuant to CERCLA § 104(e) upon API on at least seven occasions, pursuant to which API has produced thousands of pages of documents. PFOF ¶ 66.

Dated this 28th day of July, 2011.

APPLETON PAPERS INC.

By /s/ Ronald R. Ragatz
One of Its Attorneys

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EXHIBIT 4

STATEMENT OF WORK
FOR COMPLETION OF PHASE 2B OF THE REMEDIAL ACTION AND OTHER RELATED RESPONSE ACTIVITIES FOR OPERABLE UNITS 2, 3, 4 AND 5 AT THE LOWER FOX RIVER AND GREEN BAY SITE BROWN, OUTAGAMIE, AND WINNEBAGO COUNTIES, WISCONSIN

I. PURPOSE

This Statement of Work for completion of Phase 2B of the remedial action and other related response activities (the "Phase 2B SOW") specifies requirements under the accompanying Administrative Order for Remedial Action (the "Order") for performance of certain response activities relating to Operable Units ("OUs") 2, 3, 4 and 5 at the Lower Fox River and Green Bay Site (the "Site") between August 15, 2008 and the completion of the work in OUs 2-5.

The selected remedy for OUs 2-5 at the Site is set forth in two Records of Decision and a Record of Decision Amendment issued by the U.S. Environmental Protection Agency ("U.S. EPA") and the Wisconsin Department of Natural Resources ("WDNR"). The Record of Decision for OUs 1 and 2 at the Site was signed in December 2002 (the "2002 ROD"), and the original Record of Decision for OUs 3-5 at the Site was signed on June 30, 2003 (the "2003 ROD"). A Record of Decision Amendment, signed June 26, 2007 (the "2007 ROD Amendment"), modified certain aspects of the selected remedy for OUs 2-5. The 2002 ROD, the 2003 ROD, and the 2007 ROD Amendment are collectively referred to herein as the "RODs".

The remedial design for OUs 2-5 is being prepared under a separate Settlement Agreement and Administrative Order on Consent, 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 Phase 2B SOW and the accompanying Order do not address remedial design requirements for OUs 2-5. However, in performing the work

under the Order and this Phase 2B SOW, the Affected Respondents shall coordinate their activities with the activities being performed under the RD Settlement Agreement, and all work to implement this Phase 2B SOW shall be consistent with all plans that are prepared and approved under the RD Settlement Agreement.

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. EPA and WDNR concluded that the accelerated removal of PCBs in that area would therefore have significant benefits to the environment and public health. Phase 1 of the remedial action is currently being implemented under a Consent Decree 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.). All remaining elements of the remedial action in OUs 2-5 will be implemented in Phase 2.

The Statement of Work that accompanies the RD Settlement Agreement recognizes that many elements of the remedial action for OUs 2-5 will be designed in a traditional, stepwise fashion (i.e., through sequential development of a Preliminary Design, Intermediate Design, Pre-Final Design, and Final Design), but it also specifies that certain other elements of remedial action that require long lead time planning shall be designed on an expedited basis, as necessary to permit commencement of full-scale sediment remediation for Phase 2 of the OU 2-5 remedial action at the start of the 2009 construction season. A specific plan and schedule for designing all elements of the remedial action that require long lead time planning will be set forth in an RD Work Plan Addendum that is due to be submitted on December 31, 2007. That plan and schedule must be designed to permit commencement of 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, certain Affected Respondents will need to perform significant preparatory activities in 2008. EPA and WDNR have therefore 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). Section III of this Phase 2B SOW identifies tasks that the Affected Respondents shall perform to implement the Phase 2B Work as required by Paragraph 47 and other corresponding provisions of the Order. Any and all remedial action work that is commenced under the separate Statement of Work for Phase 2A, but not completed in Phase 2A, shall be completed during Phase 2B pursuant to the Order and this Phase 2B SOW.

II. THE REMEDIAL ACTION

The accompanying Order requires the Affected Respondents to implement all aspects of the remedy for OUs 2-5 as necessary to meet the Performance Standards and specifications set forth in the RODs, as summarized below.

THE REMEDY IN OU2 (EXCLUDING DEPOSIT DD). This portion of the remedy was unchanged by the 2007 ROD Amendment. The selected remedy is Monitored Natural Recovery ("MNR"). An institutional control plan and a long-term monitoring plan for PCB levels and possibly for mercury levels in water, sediment, and biota will be developed during the remedial design process, and the Affected Respondents will need to implement such institutional controls and long-term monitoring plans as part of the remedial action

THE REMEDY IN OU2 (DEPOSIT DD), OU3, OU4, AND OU5 (RIVER MOUTH). In these areas, the 2007 ROD Amendment adopted sediment dredging as the primary remedial approach for sediments exceeding the 1.0 ppm PCB Remedial Action Level ("RAL"), but permitted the use of other alternative remedial approaches (i.e., a combination of dredging and capping, capping alone, and/or placement of a sand cover) if certain

performance standards specified by the 2007 ROD Amendment are met. The short-term and long-term objectives of the Amended Remedy include: removing and containing PCB-contaminated sediment in each OU to meet the RAL performance standard and/or the SWAC goal upon construction completion, as set forth in the 2007 ROD Amendment; achieving further reductions in PCB surface water and sediment concentrations through natural recovery processes; achieving corresponding reductions in PCB levels in the water column and in fish tissue; and ensuring improvement in PCB levels in surface water at the Site through long-term operation and maintenance and institutional controls. Pursuant to the accompanying Order, the Affected Respondents will need to perform all required sediment remediation in OUs 2-5 using the primary remedial approach and alternative remedial approaches in accordance with the RODs.

THE REMEDY IN OU5 (EXCLUDING THE RIVER MOUTH). This portion of the remedy was unchanged by the 2007 ROD Amendment. The selected remedy is MNR. An institutional control plan and a long-term monitoring plan for PCB levels and possibly for mercury levels in water, sediment, and biota will be developed during the remedial design process, and the Respondents will need to implement such institutional controls and long-term monitoring plans as part of the remedial action

As discussed below, some aspects of the OU 2-5 remedial action will be performed under a separate Statement of Work for Phase 2A (the "Phase 2A SOW") and all other elements of the overall remedy will be performed under this Phase 2B SOW.

III. THE PHASE 2B WORK

A. Timing

The Affected Respondents shall commence the work required by this Phase 2B SOW by no later than August 15, 2008 and shall continue such work until all requirements under the RODs have been met and the performance standards set forth in the RODs have been achieved. Among other things, the Affected Respondents will be required to prepare and submit a draft and final work plan for Phase 2B (hereinafter the "Phase 2B Work Plan") by December 15, 2008, and the Affected Respondents will need to implement the approved Phase 2B Work Plan and perform other aspects of

Phase 2B of the remedial action after the Phase 2A Performance Period ends on December 31, 2008.

B. Scope of Phase 2B Work

This Phase 2B SOW requires the Affected Respondents to: (i) prepare and submit a draft and final work plan for Phase 2B of the remedial action (the "Phase 2B Work Plan") and certain other plans in accordance with the schedule specified by Section IV of this Phase 2B SOW; (ii) continue and complete all preparatory activities and all other remedial action activities that were required to be commenced under the Phase 2A SOW, but that were not completed during Phase 2A, after the Phase 2A Performance Period ends on December 31, 2008; (iii) perform all remaining aspects of the remedial action for OUs 2-5 in accordance with the RODs, Phase 2B Work Plan, and this Phase 2B SOW; and (iv) perform all other response activities – such as operation and maintenance and long-term monitoring activities – specified by the RODs, the Phase 2B Work Plan, and all pertinent plans approved under the RD Settlement Agreement (hereinafter the "Phase 2B Work"). The Phase 2B Work shall include commencement of full-scale sediment remediation at the start of the 2009 construction season (such that sediment remediation occurs throughout the 2009 construction season), continuation of full-scale sediment remediation throughout subsequent years (until completion of construction of the OU 2-5 remedy), and performance of operation and maintenance and long-term monitoring activities (during and after construction of the remedy, as required by the RODs, the Phase 2B Work Plan, and all pertinent plans approved under the RD Settlement Agreement).

C. The Phase 2B Work Plan

The Affected Respondents shall prepare a Phase 2B Work Plan that establishes detailed plans and schedules for performance of all elements of the Phase 2B Work, and shall submit that work plan to U.S. EPA and WDNR in accordance with Paragraph 49 of the Order and the schedule specified by Section IV of this Phase 2B SOW. The Phase 2B Work Plan shall include, but shall not be limited to, plans and schedules for:

- Continuing and completing all preparatory activities and all other remedial action activities that were required to be commenced under the Phase 2A SOW,

but that were not completed during Phase 2A, after the Phase 2A Performance Period ends on December 31, 2008;

- Implementing all aspects of the approved Final Design prepared under the RD Settlement Agreement, including:
  - Providing an overall schedule for performing all aspects of the remedial action in OUs 2-5, with dates for major interim milestones and for completing construction of the remedy;
  - Providing detailed plans for performing the remedial action over multiple construction seasons, with dredging, capping, and cover target quantities broken out by season, OU, and OU sub-area (such as dredge management unit);
  - Providing a detailed description of sediment load out, transportation, and disposal plans; and
- Implementing all aspects of the approved Final Operation, Maintenance and Monitoring Plan and the approved Final Long-Term Monitoring Plan prepared under the RD Settlement Agreement.

The Phase 2B Work Plan shall also include a description of qualifications of key personnel performing the Phase 2B Work, including contractor personnel.

D. Other Phase 2B Work Requirements

1. Phase 2B Health and Safety Plan

The Affected Respondents shall prepare a Health and Safety Plan for the Phase 2B Work, and shall submit that Plan to U.S. EPA and WDNR in accordance with Paragraph 49 of the Order and the schedule specified by Section IV of this Phase 2B SOW. The Plan shall be designed to protect on-site personnel and area residents from physical, chemical and all other hazards posed by activities conducted as part of the Phase 2B Work, and shall cover health and safety matters not addressed by the Community Health and Safety Plan that will be prepared pursuant to the RD Settlement Agreement. The Affected Respondents shall perform the Phase 2B Work in accordance with the approved Phase 2B Health and Safety Plan.

2. Financial Assurance

By no later than January 15, 2009, the Affected Respondents shall comply with

the financial assurance requirements specified by Subparagraph 70.c of the Order.

3. Access Agreements

By no later than January 15, 2009, the Affected Respondents shall obtain all access agreements required for performance of the Phase 2B Work, as described by Paragraph 71 of the Order.

4. Community Relations Support

U.S. EPA shall implement a community relations program. The Affected Respondents shall cooperate with the U.S. EPA and at the request of U.S. EPA, shall participate in the preparation of appropriate information to be disseminated by U.S. EPA to the public. At the request of U.S. EPA, the Affected Respondents shall participate in public meetings that may be held or sponsored by U.S. EPA to explain activities at or concerning the Site.

Community relations support will be consistent with Superfund community relations policy, as stated in the "Guidance for Implementing the Superfund Program" and Community Relations in Superfund - A handbook.

5. Progress Reports

The Affected Respondents shall submit monthly progress reports on the Phase 2B Work pursuant to Paragraph 60 of the Order. Upon request by U.S. EPA, the Affected Respondents shall also provide more frequent progress reports (e.g., daily and/or weekly reports on sediment remediation progress and production).

E. Implementation of the Phase 2B Work

The Affected Respondents shall implement the Phase 2B Work in accordance with the RODs, this Phase 2B SOW, and the plans and schedules contained in the approved Phase 2B Work Plan. The Affected Respondents also shall perform the Phase 2B Work in accordance with all pertinent plans approved under the Phase 2A SOW and the RD Settlement Agreement, including: (i) the Final Design; (ii) the Phase 2A Health and Safety Plan; (iii) the Phase 2A Contingency Plan; (iv) the Phase 2A Construction Quality Assurance Project Plan; (v) the Community Health and Safety Plan prepared under the RD Settlement Agreement; (vi) the Contingency Plan prepared under the RD Settlement Agreement; (vii) the Construction Quality Assurance Project Plan prepared under the RD Settlement Agreement; (viii) the Mitigation Plan prepared

under the RD Settlement Agreement; (ix) the Institutional Control Implementation and Assurance Plan; (x) the Sediment Removal Verification/Capping and Covering Plan; (xi) the Operation, Maintenance, and Monitoring Plan; and (xii) the Long-Term Monitoring Plan.

IV. SUMMARY OF MAJOR MILESTONES AND DEADLINES

A summary of major milestones for the Phase 2B Work is presented below. The Affected Respondents shall adhere to the following schedule unless it is modified in writing by U.S. EPA's Remedial Project Manager.

Milestone	Schedule
Monthly Progress Reports	Due on a monthly basis, as described in the Order
Draft Phase 2B Work Plan	Due by no later than October 1, 2008
Final Phase 2B Work Plan	Target Date: December 15, 2008 Due Date: Due no later than 30 calendar days after receipt of U.S. EPA's comments on the Draft Phase 2B Work Plan
Final Phase 2B Health and Safety Plan	Due by no later than December 15, 2008
Deadline for compliance with financial assurance requirements under Subparagraph 70.c of the Order	January 15, 2009
Deadline for obtaining access agreements under Paragraph 71 of the Order	January 15, 2009
Performance of all other elements of the Phase 2B Work	Due to be performed in accordance with the schedule contained in the approved Phase 2B Work Plan

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and THE STATE OF WISCONSIN,	)	
Plaintiffs,	)	Civil Action No. 10-C-910
v.	)	Hon. William C. Griesbach
NCR CORPORATION, *et al.*	)	
Defendants.	)	

DECLARATION OF LAWRENCE SCHMITT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Lawrence Schmitt, declare as follows:

1. I am employed by the U.S. Environmental Protection Agency ("EPA") at its Region 5 office in Chicago. I currently serve as the Superfund Division's Enforcement Coordinator and I previously served as a Section Chief in the EPA Region 5 Superfund Division. In those positions with EPA, I have been involved in matters relating to polychlorinated biphenyl ("PCB") contamination at the Lower Fox River and Green Bay Superfund Site (the "Site") since at least 2001.

2. EPA and the Wisconsin Department of Natural Resources ("WDNR") developed and selected an overall cleanup remedy for the Site in accordance with the procedures outlined in the National Contingency Plan ("NCP"), 40 C.F.R. Part 300.

a. In 1998, WDNR began a series of investigations and studies prescribed by the NCP, with funding and assistance from EPA.

a. WDNR performed a Remedial Investigation to collect data necessary to adequately characterize the Site for the purpose of developing and evaluating effective remedial alternatives, as prescribed by 40 C.F.R. § 300.430(d). WDNR evaluated physical, biological, and chemical characteristics of the Site based on more than 500,000 analytical results for over 200 chemical parameters collected during numerous investigations between 1971 and 2000. WDNR considered factors such as PCB distribution and sediment volumes, contaminant fate and transport, changes in sediment bed elevation and the potential for natural biodegradation of PCBs.

b. As part of its Remedial Investigation, WDNR performed a formal Risk Assessment to identify the current and potential threats to human health and the environment at the Site and to identify acceptable exposure levels for use in developing remedial alternatives, as prescribed by 40 C.F.R. § 300.430(d)(4). Following a screening level risk assessment that identified chemicals at the Site that posed the greatest risk to people and animals, the baseline risk assessment focused on the most significant human exposure routes and most sensitive ecological receptors.

c. WDNR performed a Feasibility Study to develop and evaluate a range of remedial alternatives that could be considered in the process of selecting the appropriate remedy action, as prescribed by 40 C.F.R. § 300.430(e). The alternatives subject to detailed analysis were: no action; monitoring; dredging with off-site disposal; dredging with on-site disposal; dredging with thermal treatment; capping; and dredging to confined aquatic disposal sites. Each

alternative was evaluated in light of nine criteria specified in the NCP, 40 C.F.R. § 300.430(e)(9)(iii), including risk reduction, overall protectiveness of human health and the environment, long-term effectiveness and permanence, implementability, and cost.

d. In accordance with 40 C.F.R. § 300.430(d) and (e), WDNR issued final reports on its Remedial Investigation, Risk Assessment, and Feasibility Study in December 2002.

e. Draft versions of the Remedial Investigation and Feasibility Study reports were released in February 1999 for public review and comment, and the received comments were used to make refinements and revisions that were incorporated into the final reports listed above.

f. In October 2001, EPA and WDNR issued a joint Proposed Remedial Action Plan for the Site, and the agencies publicized that Proposed Plan and solicited public comments, as prescribed by 40 C.F.R. § 300.430(f)(2), (f)(3).

g. The Proposed Plan divided the Site into five geographically-defined Operable Units ("OUs") stretching from Little Lake Butte des Morts (OU 1) to the Bay of Green Bay (OU 5). The Proposed Plan also identified and described seven different remedial alternatives evaluated for each OU during the Feasibility Study. The Proposed Plan's "Proposed Alternative" called for extensive dredging in OUs 1, 3, and 4, and long-term monitoring during natural recovery in most of OUs 2 and 5.

h. As prescribed by 40 C.F.R. § 300.430(f)(4) and (5), EPA and WDNR issued a Record of Decision ("ROD") selecting a final cleanup remedy for OUs 1

and 2 at the Site in December 2002. Much like the Proposed Plan, that ROD called for sediment removal by hydraulic dredging in OU 1 and "monitoring only" in most of OU 2, but it also allowed possible installation of engineered caps to contain contaminated sediment in certain areas.

i. As prescribed by 40 C.F.R. § 300.430(f)(4) and (5), EPA and WDNR issued a separate ROD selecting a cleanup remedy for OUs 3, 4, and 5 in June 2003. That ROD called for extensive sediment removal by dredging in OUs 3 and 4, removal of deposit DD from OU 2 as part of the OU 3 remedy, removal of contaminated sediment from the River mouth area of OU 5, and "monitoring only" in other portions of OU 5, but it also allowed possible installation of engineered caps to contain contaminated sediment in certain areas.

j. In making their final remedy selection decisions, EPA and WDNR re-evaluated multiple remedial alternatives under the NCP's nine remedy selection criteria, especially in light of voluminous comments that NCR, API, and others submitted during a formal public comment period on the Proposed Plan. The agencies documented that effort in the RODs and in lengthy Responsiveness Summaries that were appended to the RODs.

k. In June 2007, EPA and WDNR issued a ROD amendment for OUs 2 (Deposit DD), 3, 4, and 5, in accordance with 40 C.F.R. § 300.435(c)(2)(ii). The amendment retained sediment removal by dredging as the primary remedial approach, but allowed in some instances a combination of dredging and capping, capping alone, and placement of a sand cover.

l. In June 2008, EPA and WDNR issued a ROD amendment for OU 1, in accordance with 40 C.F.R. § 300.435(c)(2)(ii). Much like the June 2007 ROD Amendment, the June 2008 ROD Amendment retained sediment removal by dredging as the primary remedial approach, but allowed in some instances a combination of dredging and capping, capping alone, and placement of sand cover.

m. EPA and WDNR solicited public comments before finalizing the RODs and the ROD Amendments, in accordance with 40 C.F.R. §§ 300.400(f)(3) and 435(c)(2)(ii), and addressed them in the Responsiveness Summaries.

n. In February 2010, EPA and WDNR issued an Explanation of Significant Differences concerning the cleanup remedy in OUs 2, 3, 4, and 5 (River Mouth), in accordance with 40 C.F.R. § 300.435(c)(2)(i).

o. As prescribed by 40 C.F.R. § 300.800, EPA and WDNR have compiled an administrative record supporting their remedy selection decisions for the Site (the "Site Administrative Record"). The Site Administrative Record includes draft and final versions of the documents and reports referenced above, as well as many other documents. The Site Administrative Record is accessible to members of the public at the Superfund Records Center located at EPA Region 5 at 77 West Jackson Boulevard in Chicago, IL, via a computer connected to EPA's Superfund Documents Management System ("SDMS"). A 113-page index of the documents that compose the Site Administrative Record is attached as Exhibit 1 to this Declaration.[1]

[1]This index consists of documents located in the offices of EPA Region 5 in Chicago and documents located in WDNR offices. Pages 1-36 of the index list all the documents located at EPA's

3. In April 2004, the court approved a Consent Decree for performance of the remedial action in OU 1 in *United States and the State of Wisconsin v. P.H. Glatfelter Co. and WTM I Co.*, Case No. 03-C-949 (E.D. Wis.). That Consent Decree required P.H. Glatfelter Co. ("Glatfelter") and WTM I Company ("WTM") to dredge and dispose of PCB-contaminated sediment in OU 1 (Little Lake Butte des Morts). That effort, which began in mid-2004, marked commencement of the on-site remedial action work in OU 1. The court approved an Amended Consent Decree with Glatfelter and WTM in August 2008, after EPA and WDNR issued their ROD Amendment for OU 1.

4. Remedial design work for OUs 2-5 began in 2004 under an Administrative Order on Consent with EPA and WDNR that NCR and a corporate predecessor of Georgia-Pacific Consumer Products LP ("Georgia-Pacific") executed as Respondents on March 5, 2004. Sediment sampling performed during the OU 2-5 remedial design process identified an area of very high PCB contamination just downstream from the De Pere Dam.

5. In November 2006, the court approved a Consent Decree for performance of an initial phase (called "Phase 1") of the remedial action in OUs 2-5 in *United States and the State of Wisconsin v. NCR Corp. and Sonoco-U.S. Mills, Inc.*, Case No. 06-C-484 (E.D. Wis.). That Consent Decree required NCR Corp. ("NCR") and U.S. Paper Mills Corp. ("U.S. Paper") to dredge and dispose of much of the highly contaminated sediment that had been discovered below the De Pere Dam, in accordance with the ROD for OUs 2-5. That effort, which began in the spring of 2007, marked commencement of the on-site remedial action work in OUs 2-5.

6. While the Phase 1 remedial action was underway, NCR and Georgia-Pacific continued to design the remaining remedial action work in OUs 2-5 (called "Phase 2"). The

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office and identify them by their Superfund Documents Management System ("SDMS") numbers. Pages 37-113 contain documents in WDNR's possession.

Administrative Order on Consent that covered that work, executed in March of 2004, was amended and re-executed in 2007 (the "RD AOC").

7. In the RD AOC, NCR and Georgia-Pacific agreed that the "obligations of the Respondents to finance and perform the Work and to pay the amounts owed to EPA and WDNR under this Consent Order are joint and several."

8. Work under the RD AOC was originally performed by Shaw Environmental, Inc. and Anchor Environmental, L.L.C. pursuant to a set of arrangements among those two contracting firms, NCR, and Georgia-Pacific.

9. In February 2007, EPA and WDNR sent notice letters to eight parties, asking them to enter into negotiations with the United States and the State that might yield an agreement to perform Phase 2 of the remedial action in OUs 2-5. Those eight parties were NCR, Appleton Papers Inc. ("API"), Glatfelter, WTM, Georgia-Pacific, U.S. Paper, CBC Coating, Inc. ("CBC Coating"), and Menasha Corporation ("Menasha"). The government parties also urged those potentially responsible parties ("PRPs") to engage a third-party neutral to help them resolve their long-standing disagreements over cost allocation. The eight PRPs hired a nationally renowned mediator and devoted much of 2007 to the mediation process. Unfortunately, the mediation yielded no allocation settlement, and none of the PRPs were willing to negotiate an agreement with the government to perform the OU 2-5 remedy without a separate PRP cost allocation agreement.

10. In November 2007, EPA issued a Unilateral Administrative Order ("UAO") that required the eight parties listed in the preceding paragraph (the "UAO Recipients") to complete the remaining portions of the remedial action in OUs 2-5 (called "Phase 2A" and "Phase 2B"), as specified by the ROD and ROD Amendment for OUs 2-5. The UAO was issued in November

2007 to ensure commencement of the appropriate remedial action work early in the 2008 construction season. A copy of the UAO has been filed with this Court.

11. The UAO included two accompanying Statements of Work that established specific requirements and schedules for work up to December 31, 2008 in preparation for the commencement and continuation of full-scale sediment remediation work (the "Phase 2A Work"), and for the performance of full-scale sediment remediation work in 2009 and subsequent years (the "Phase 2B Work"). In September 2008, EPA modified the Summary of Major Milestones and Deadlines in the Statement of Work for the Phase 2B Work to extend the Deliverables Schedule for Phase 2B. A copy of that revised Deliverables Schedule is included at the end of the copy of the UAO that has been filed with the Court.

12. Since 2004, the PRPs' remedial design and remedial action work at the Site has been monitored and supervised by an Agency/Oversight Team composed of representatives from EPA, WDNR, and The Boldt Company.

13. Due to weather conditions and other factors, the "construction season" for in-water remediation activity at the Site typically begins in early April and continues through at least mid-November. Much of the remediation planning work for an upcoming construction season therefore occurs during the winter. Based on that seasonal pattern, and based on the Agency/Oversight Team's experience in overseeing the remediation in OU 1 since 2004, the UAO's most recent Deliverables Schedule requires submission of a Draft Phase 2B Annual Work Plan for Remedial Action by January 31 of each year.

14. The UAO (including the associated Statements of Work) was issued as an exercise of the President's authority, which has been delegated to EPA, under CERCLA Section 106(a), 42 U.S.C. § 9606(a).

15. EPA compiled a separate administrative record supporting the UAO (the "UAO Administrative Record"). The UAO Administrative Record includes: (1) all of the materials in the Site Administrative Record (Exh. 1); and (2) additional documents that are listed in an index that is attached as Exhibit 2 to this Declaration.

16. The UAO documents EPA's finding under CERCLA Section 106(a) that there may be an imminent and substantial endangerment to human health or the environment at the Site because of an actual or threatened release of hazardous substances. Materials in the UAO Administrative Record support that finding by EPA. For example:

a. WDNR/Retec Group, Inc.: Final Baseline Human Health and Ecological Risk Assessment for the Lower Fox River (2002) identifies risks to humans and the environment posed by the compounds of concern. Although other chemicals, such as DDT, lead, mercury, and dioxins, were identified as compounds of concern in the report, the threat posed by PCBs was found to be greater than the risks for any other compound. The report identifies fish consumption as the primary source of exposure to PCBs, focuses on recreational anglers that catch fish along the River and in Green Bay and other high-intake fish consumers as groups at highest risk, and concludes that the PCB contamination at the Site is associated with increased cancer risks and effects on human reproductive, developmental and immune systems. It also documents risks to fish, bottom-dwelling invertebrates, mammals, birds, and other ecological receptors. (Exh. 1 at 37).

b. Toxicological Profile for Polychlorinated Biphenyls Update, prepared by the U.S. Department of Health and Human Services Agency for Toxic Substances

and Disease Registry in September 1997, offers general information on PCBs, their sources, and common health risks associated with them. PCBs have been linked to skin irritations, respiratory symptoms, altered immune response, and damage to the liver. Consumption of PCB-contaminated fish by women before or during pregnancy has been associated with decreased birth weight, gestational age, and head circumference of infants, as well as a decrease in their learning ability later in life. (Exh. 1 at 13).

c. The following reports show, among other things, that anglers and other fish consumers are exposed to PCBs through consumption of locally caught fish and that sport fish consumption is the major source of exposure to PCBs in Wisconsin: WDNR/Wisconsin Department of Health, Important Health Information for People Eating Fish from Wisconsin Waters (1997); Beth Jones Fiore et al., Sport Fish Consumption and Body Burden Levels of Chlorinated Hydrocarbons: A Study of Wisconsin Anglers (1989); Patrick C. West et al., Michigan Sport Anglers Fish Consumption Study (1993) (Exh. 1 at 12, 78, 77). These documents include information about the quantities of recreational fishing licenses issued in the counties adjacent to the Site and data about fish consumption among anglers.

d. WDNR in-person surveys of recreational fishing activity in Lake Michigan, Green Bay, and various tributaries quantified the number of fish of different species that were caught and "harvested" (i.e., caught and kept) from the late 1980s through at least 1996. A report on those surveys, entitled Creel Survey of the Wisconsin Waters of Lake Michigan, indicates that up to 33,000 walleye,

perch, and bass were harvested from the Brown County waters of the Lower Fox River each year during the mid-1990s. (Exh. 1 at 15). An excerpt from that report is attached to this Declaration as Exhibit 3. Another survey indicates that half of the anglers from the Brown County fish on Green Bay or Lake Michigan. Wisconsin Division of Health/State Laboratory of Hygiene, Study of Sport Fishing and Fish Consumption Habits and Body Burden Levels of PCBs, DDE, and Mercury in Wisconsin Anglers: Final Report to Study Participants (1997) (Exh. 1 at 78).

e. Sampling results show elevated levels of PCBs in fish species that are commonly fished for along the Lower Fox River and Green Bay, including trout, walleye, bass, perch and catfish. U.S. Fish and Wildlife Service, Fish Consumption Advisories in the Lower Fox River/Green Bay Assessment Area, Appendix A (1998); WDNR, PCB in Fish from the Lower Fox River and Green Bay (1995); (Exh. 2 at 1; Exh. 1 at 95).

f. The following documents related to the establishment of fishing advisories at the Site due to PCBs show that advisories range from limited to no consumption in all OUs of the Site. Fish Consumption Advisories in the Lower Fox River/Green Bay Assessment Area; Great Lakes Sport Fish Advisory Task Force, Protocol for a Uniform Great Lakes Sport Fish Consumption Advisory (1993); Important Health Information for People Eating Fish from Wisconsin Waters. (Exh 2 at 1; Exh. 1 at 78, 12).

g. Studies performed as part of the natural resources damage assessment ("NRDA") under CERCLA document injuries to fishery, surface water, and avian

resources, and indicate that fish, birds, mammals, and other species are at risk from PCB presence at the Site. For example, exposure to PCBs at the Site has been associated with liver damage in walleye and reproductive injuries to lake trout. Various fish-eating birds, including terns and bald eagles, have also been injured as a result of exposure to PCBs. U.S. Fish and Wildlife Service, Injuries to Fishery Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment (1999); Injuries to Surface Water Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment (1999); Injuries to Avian Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment (1999); Mace G. Barron et al., Association Between PCBs, Liver Lesions and Biomarker Responses in Adult Walleye (*Stizostedium vitreum vitreus*) Collected from Green Bay, Wisconsin (1999). (Exh. 2 at 1).

17. The UAO documents EPA's finding that the prompt performance of the selected remedial action in OUs 2-5 is necessary to protect public health and welfare and the environment, as prescribed by the UAO (including the associated Statements of Work) and the ROD and Amended ROD for OUs 2-5. Materials in the UAO Administrative Record support that finding by EPA. For example:

a. The Remedial Investigation Report and the RODs, (Exh. 1 at 37; Exh. 2 at 1) estimated that approximately 280 kilograms of PCBs are transported from the River to Green Bay and Lake Michigan each year as contaminated River sediment is re-suspended and carried downstream. The RODs then estimated that the required sediment remediation in the River would yield at least a 93% to 97% reduction in PCB loading from the River to the Bay. Pertinent excerpts of the

Remedial Investigation Report are attached as Exhibit 4 to this Declaration and pertinent excerpts of the June 2003 ROD are attached as Exhibit 5 to this Declaration.

b. The 2002 ROD also projected the benefits that the selected cleanup remedy would have in reducing River water PCB levels, reducing risks to fish-eating birds and mammals, and reducing fish tissue PCB concentrations to acceptable levels for routine human consumption. For example, PCB levels in walleye in OU 1 would remain high for decades if no remediation was done, but the tissue concentrations in those fish were expected to be reduced to acceptable levels for human consumption within about one year after the completion of sediment remediation using the 1 part per million PCB Remedial Action Level adopted in the RODs. Pertinent excerpts of the December 2002 ROD are attached as Exhibit 6 to this Declaration.

18. The UAO describes facts that indicate that the UAO Recipients fall within one or more of the classes of liable parties defined by CERCLA Section 107(a), 42 U.S.C. § 9607(a). Pertinent facts are contained in materials in the UAO Administrative Record. For example:

a. WDNR, Lower Fox River and Green Bay PCB Fate and Transport Model Evaluation Technical Memorandum 2d: Compilation and Estimation of Historical Discharges of Total Suspended Solids and PCB from Lower Fox River Point Sources (1999) ("Tech Memo 2d") is a comprehensive estimate of PCB discharges into the River based on the available production, flow, solids discharge, and PCB concentration data. Tech Memo 2d estimates that five of the UAO Recipients contributed at least 99% of the estimated cumulative load, and

concludes that the highest contributor to the cumulative PCB load was the Appleton Coated Paper facility, one of the two facilities owned by NCR and API. (Exh. 2 at 1).

b. Sampling results from the Wisconsin State Laboratory of Hygiene, summarized in Appendix C of Tech Memo 2d, show presence of Aroclor 1242 in the effluent discharged by Glatfelter, WTM, U.S. Paper-Menasha Division, Riverside Paper (now CBC Coating), Appleton Coated Paper and Appleton Combined Locks (now NCR and API), and Fort James Corporation (now Georgia-Pacific) between 1972 and 1977. EPA/WDNR, Investigation of Chlorinated and Nonchlorinated Compounds in the Lower Fox River Watershed (1978) contains sampling results taken in 1976 and 1977 of effluent from, among others, Fort Howard (now Georgia-Pacific) Bergstrom (now Glatfelter), WTM, and Appleton Paper (now NCR and API). Stanton J. Kleinert, PCB Problem in Wisconsin (1976) also contains sampling results showing PCB presence in paper mill effluent in 1975 and 1976, including at the John Strange Paper facility (formerly owned by Menasha). Historic documents included in the UAO Administrative Record, such as Institute of Paper Chemistry, Polychlorinated Biphenyls in Pulp and Paper Mills: Part II, Distribution and Removal (1977), indicate that PCBs had been known to be present in paper products and mill effluents since the late 1960s. (Exh. 1 at 7; Exh. 2 at 2).

c. Stratus Consulting, PCB Pathway Determination for the Lower Fox River/Green Bay NRDA (1999) ("PCB Pathway Determination") concludes that PCBs were primarily contributed to the Site through the loss of PCB emulsion

during the paper coating process from 1954 until about 1971 at Appleton Coated Paper, coating trials at the Combined Locks Mill, and releases of PCBs from secondary fiber mills that purchased and recycled paper converter trimmings and wastepaper "broke" sold by the predecessors of API and NCR. The PCB Pathway Determination is based, for the most part, on published reports on PCB use in the paper industry, the information obtained by the United States Fish and Wildlife Service ("FWS") from the UAO Recipients under the authority of CERCLA Section 104(e), 42 U.S.C. § 9604(e), and supplemental information and data obtained by WDNR. The UAO Recipients' 104(e) responses are also a part of the UAO Administrative Record. (Exh. 2 at 1, 2-6).

d. Other reports that demonstrate that PCBs were present in the effluent of paper mills that produced and recycled NCR Paper include: EPA/Versar, Inc., PCBs Involvement in the Pulp and Paper Industry (1977); Institute of Paper Chemistry, Interlaboratory Study of the Determination of Polychlorinated Biphenyls in a Paper Mill Effluent (1979); Institute of Paper Chemistry, Determination of Polychlorinated Biphenyls in Paper Mill Effluents and Process Streams (1996). (Exh. 1 at 88, Exh. 2 at 2).

e. 104(e) responses and reports submitted by the UAO Recipients and listed on pages 2-6 of Exhibit 2 establish that they are past or current owners of facilities that released PCBs into the Lower Fox River.

f. In its response to a 104(e) request, API indicated that up to 1.4% of the PCB-containing emulsion received at the Appleton Coated Paper facility would

have been discharged with its wastewater sent to the City of Appleton's publicly owned treatment works. (Exh. 2 at 2).

19. Taken together, the UAO and the RODs required the UAO Recipients to do, among other things, the following in OUs 2-5: (1) dredge and dispose of approximately 3.5 million cubic yards of contaminated sediment; (2) install specially engineered in-water caps to contain another 2.1 million cubic yards of contaminated sediment; (3) place sand covers in areas with thin layers of relatively low-level PCB-contamination; and (4) perform long-term monitoring and maintenance for years after the expected completion of the major remediation activities in 2016 or 2017. At more than a dozen points in the documents, the UAO and its Statements of Work reference the need for "full-scale sediment remediation" throughout the 2009 construction season and throughout subsequent years.

20. The RODs specify that dredging must be used as the primary remedial approach for sediment with PCB concentrations exceeding a 1.0 part per million Remedial Action Level, but the RODs also set specific criteria for allowing use of specially engineered in-water caps and sand covers as alternative remedial approaches in certain areas.

21. Dredges can be used for at least two different purposes at the Site. First, dredges can be used for "Production Dredging," which removes sediment at a relatively high rate but does not perform the more precise work needed to complete the dredging in that area. Second, dredges can be used for "Final Dredging," which removes sediment at a lower rate but performs the more precise work needed to complete dredging in that area. "Final Dredging" must ultimately be performed in all designated dredge areas, which have generally been assigned an area number with a "D" prefix, such as area "D100."

22. As a complement or an alternative to dredging, the RODs allow installation of engineered caps in certain areas. Depending on location-specific circumstances, one of three different cap designs may be required. The different designs have been called "A" caps, "B" caps, and "C" caps, and designated capping areas have been assigned corresponding designations with a "CA" "CB" and "CC" prefix, such as areas "CA6" and "CB2."

23. The RODs also allow sand placement for two distinct purposes. First, "Final Residual Sand Cover" may be placed to cover dredge residuals where Final Dredging has been completed. Second, "Final Remedy Sand Cover" may be placed in particular areas certain areas with very thin layers of low-level surface contamination. Final Remedy Sand Cover Areas have been assigned an area number with an "SC" prefix, such as area "SC12."

24. In April 2009, an entity known as the Lower Fox River Remediation LLC (the "LLC") entered into a contract with Tetra Tech EC, Inc. ("Tetra Tech") and engaged that firm to assume primary responsibility for performance of all remediation services required by the RD AOC and the UAO, other than long-term monitoring and maintenance of engineered caps and monitoring of water and fish. In a posting on Tetra Tech's website (printout attached as Exhibit 7 to this Declaration), Tetra Tech has described that contract as a "$700 million, 10 year contract awarded by the Lower Fox River Remediation LLC." EPA requested and received access to a copy of that contract in early 2010. Based on my brief review of that contract and my knowledge of the Site, I understand that: (1) the LLC was formed solely by NCR, API, and an entity known as Arjo Wiggins Appleton (Bermuda) Ltd.; (2) the other UAO Recipients are not, and have never been, members of the LLC; and (3) the other UAO Recipients have no independent contractual relationship with Tetra Tech for the performance of any remediation services required by the RD AOC or the UAO.

25. The LLC's contract with Tetra Tech also envisioned that Tetra Tech would enter into related subcontracts with particular firms, including: (1) J.F. Brennan Co., Inc. – the subcontractor responsible for dredging and construction of caps; and (2) Boskalis Dolman and its affiliates – the subcontractors responsible for designing the sediment dewatering system and operating the desanding and dewatering system. Those subcontractors' roles are described in a posting on the LLC's website (printout attached as Exhibit 8 to this Declaration).

26. In 2009 and 2010, the LLC's contracting team conducted dredging operations using three different dredges for 24 hours a day on weekdays from April to November, as noted in this summary from the LLC's website:

> The Fox River Cleanup Project is using three different dredges - a 12-inch hydraulic dredge and two eight-inch hydraulic dredges . . . .
>
> The 12-inch dredge will be used where larger thicknesses of contaminated sediment are present. The eight-inch dredges will be used where there are thinner accumulations of contaminated sediment and to complete dredging to the required elevation where the 12-inch dredge has removed the overlying sediments.
>
> In addition, the two eight-inch dredges are constructed to operate in waters as shallow as two feet deep. This allows for dredging in areas traditionally requiring mechanical dredging (e.g., clamshell bucket on a crane loading into barges), increasing production and shortening the overall cleanup schedule while reducing the amount of clean sediment that is dredged.
>
> The dredging operation is expected to run from April to November of each calendar year. The actual timeframe each year will vary depending on river and weather conditions. Crews will conduct dredging activities 24 hours a day, five days a week and will avoid peak times for recreational boaters on Saturdays and Sundays.

(A printout from that website is attached as Exhibit 9 to this Declaration.)

27. The LLC's website also summarizes the sediment removal and disposal volumes that the LLC's contractor team achieved in 2009 and 2010, as follows:

2009
Estimated volume of sediment dredged – 541,218 cubic yards
Amount of processed sediment hauled to landfill – 335,207 tons
Truckloads to Landfill – 14,131

2010
Estimated volume of sediment dredged – 720,759 cubic yards
Estimated tonnage hauled to landfill – 378,291 tons
Truckloads to landfill – 16,050

(A printout from that website is attached as Exhibit 10 to this Declaration.)

28. The LLC's contractor team is disposing of most of the dewatered sediment at the Hickory Meadows Landfill in Calumet County, which is operated by Veolia Environmental Services.

29. Under the RODs and EPA regulations issued under the Toxic Substances Control Act ("TSCA"), sediment with a PCB concentration equal to or greater than 50 parts per million must be disposed of in a TSCA-approved landfill. For that reason, the LLC's contractor team has disposed of TSCA-regulated sediment from this Site at the TSCA-approved Wayne Disposal Landfill in Wayne County, Michigan.

30. As required by the UAO, the LLC members and their contractor team submitted draft Annual Work Plans for Remedial Action in 2009 and 2010, and those Annual Work Plans were finalized after they were reviewed and approved by the Agency/Oversight Team. A copy of the 2010 Annual Work Plan (without the Appendices) is attached as Exhibit 11 to this Declaration.

31. Until recently, the LLC members and their contractor team had expressed their intent to perform full-scale dredging work in OUs 2-5 from April through November 2011, consistent with the level of effort devoted in 2009 and 2010. For example, the main webpage on the LLC's website says that "[p]lanning and design work for the 2011 dredging, capping and

covering operations continue with the resumption of remedial activities scheduled for April" and the "Project Update" webpage indicates that "dredging and processing [are] expected to begin in April." (See Exhibits 12 and 10 to this Declaration).

32. NCR and API failed to submit a draft Annual Work Plan for Remedial Action in 2011 by the January 31, 2011 deadline set in the UAO Deliverables Schedule. Tetra Tech submitted an incomplete draft of that Work Plan belatedly, on February 18, 2011, on behalf of the NCR and API. A copy of that draft Work Plan (without the Appendices) is attached as Exhibit 13 to this Declaration.

33. The February 2011 draft Work Plan that Tetra Tech submitted on behalf of NCR and API had multiple deficiencies. For example:

a. The draft Work Plan did not outline a plan to perform full-scale dredging work in OUs 2-5 from April through November 2011, consistent with the level of effort devoted in 2009 and 2010.

b. Although the companies' Annual Work Plans for 2009 and 2010 included estimated total annual dredging volumes for the upcoming year and future years, the NCR/API draft Work Plan for 2011 deleted all such dredging volume projections.

c. Unlike the prior Annual Work Plans, the NCR/API draft Work Plan for 2011 did not identify the specific areas that would be dredged in 2011 or area-specific dredge volumes that would be removed. The draft merely listed areas where some dredging was "expected to be performed" in 2011. Prior Annual Work Plans stated that "dredging will be performed" in particular areas shown on detailed Engineered Plan Drawings, but the NCR/API draft Work Plan for 2011

only said that "dredging may be performed as shown on the Engineered Plan Drawings."

d. The prior Annual Work Plans indicated that three dredges would normally operate simultaneously, to balance the sediment slurry flow to the processing facility and "to maximize efficiency and reduce [the] overall project schedule." That language was deleted from the NCR/API draft Work Plan for 2011. It only says that "the same three dredges used in 2010 could be used again."

e. The prior Annual Work Plans provided specific start dates and end dates for the year's planned dredging operations, but the NCR/API draft Work Plan for 2011 gave no such dates. It said: "Equipment startup will commence on the first day of dredging operations," with operations continuing "for the remainder of the 2011 season."

f. The overdue draft Work Plan for 2011 was not complete when it was submitted. Four of the six appendices were missing.

34. Annual Work Plans that are required by the UAO are subject to review by EPA, acting in consultation with WDNR. Under Paragraph 49 of the UAO, a draft Annual Work Plan that is submitted to EPA and WDNR can either be: (1) approved by EPA as submitted; (2) approved with modification made by EPA; or (3) disapproved by EPA. When an Annual Work Plan is approved with modifications, UAO Paragraph requires the relevant UAO Recipients to start work under the modified Work Plan immediately and to submit a revised written version of the Plan that incorporates all of EPA's modifications within 21 days. The pertinent portions of UAO Paragraph 49 provide as follows:

> 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.

35. On March 4, 2011, EPA notified NCR and API that the agency had approved the 2011 Work Plan with specific modifications (the "Modified Work Plan"), as provided by the UAO. Copies of EPA's transmittal letter to Tetra Tech and an accompanying memorandum containing the Work Plan modifications are attached as Exhibits 14 and 15 to this Declaration.

36. The Modified Work Plan calls for full-scale dredging work in OUs 2-5 from April through November 2011, consistent with the level of effort devoted in 2009 and 2010. For example:

a. Work must start no later than April 4, 2011 and continue through at least November 12, 2011

b. All required remediation in OU 3 must be completed in 2011. That will involve the following work in OU 3: (1) Final Dredging to remove approximately 70,000 cubic yards of sediment above the RODs' remedial action level from 20

different dredge areas; (2) installing approximately 25 acres of engineered cap in 17 different capping areas; (3) placing approximately 25 acres of Final Remedy Sand Cover; and (4) placing a Final Residual Sand Cover over dredged areas to meet requirements under the RODs.

c. Approximately 30,000 cubic yards of highly-contaminated, TSCA-regulated sediment must be dredged from two specific areas in OU 4, near the De Pere Dam.

d. Contaminated sediment must be dredged to complete Final Dredging in 20 different areas in OU 4, south of the State Highway 172 Bridge. The amount of sediment to be removed from those areas in 2011 is estimated to be in the range of about 455,000 to 610,000 cubic yards.

e. Production Dredging must be performed in certain areas in OU 4, north of the State Highway 172 Bridge, to maintain the efficiency of the Sediment Processing Facility. The amount of sediment to be removed from those areas in 2011 is estimated to be in the range of about 50,000 to 100,000 cubic yards.

37. EPA's March 4 transmittal letter for the Modified Work Plan "recommend[ed] that the parties meet as soon as possible to discuss the cleanup work contemplated for the upcoming construction season" and it asked the companies to contact EPA's Remedial Project Manager to arrange "a meeting at the WDNR offices in Madison during the week of March 7th or March 14th." NCR and API never contacted EPA to arrange that technical meeting.

38. NCR and API also did not submit a revised written version of the 2011 Work Plan incorporating EPA's modifications by March 25, 2011, as required by the UAO. Instead, at the close of business on that day, an LLC representative sent EPA and the other members of the

Agency/Oversight Team an e-mail saying that the LLC and its contractors were still working "to revise the 2011 Phase 2B Work Plan and respond to the agencies' comments." A copy of that e-mail is attached as Exhibit 16 to this Declaration.

39. After the close of business on March 28, 2011, the NCR/API contractor team submitted: (1) a written response to Agency/Oversight Team's comments on the February 2011 draft Annual Work Plan; and (2) a March 2011 revised draft Work Plan. The NCR/API response to comments is attached as Exhibit 17 to this Declaration and a copy of the March 2011 revised draft Work Plan (without appendices) is attached as Exhibit 18 to this Declaration.

40. The March 2011 revised draft Work Plan submitted by NCR and API did not incorporate the requirements of the Modified Work Plan that EPA approved on March 4, 2011. Among other things, the NCR/API revised draft Work Plan did not incorporate specific requirements under the Modified Work Plan for Final Dredging or Production Dredging in OU 4. The NCR/API revised draft Work Plan outlined a proposed plan for dredging only 250,000 cubic yards of sediment in 2011, as opposed to at least 605,000 cubic yards that would be removed under the Modified Work Plan. The NCR/API revised draft Work Plan that was submitted on March 28, 2011 also was still missing at least one appendix. The revised draft Work Plan did not incorporate all of EPA's modifications, as required by UAO Paragraph 49, and it did not outline a plan for full-scale sediment remediation in 2011, as required by other portions of the UAO. The revised draft Work Plan was therefore deficient and noncompliant with the UAO.

41. If allowed to proceed under the March 2011 revised draft Work Plan, the NCR/API contractors would dredge approximately one-third to one-half of the total amount of sediment that could be removed through full-scale dredging in 2011. Work at half-pace or less throughout April probably would extend the entire project completion schedule by at least one

month, and work at that slowed pace from April through November probably would extend that schedule by a full year or more.

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

Executed on: March 29, 2011

Lawrence P. Schmitt

Lawrence Schmitt

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this day, the foregoing Declaration was filed electronically with the Clerk of the Court using the Court's Electronic Court Filing System, which sent notification of such filing to the following counsel:

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Dated: March 29, 2011

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