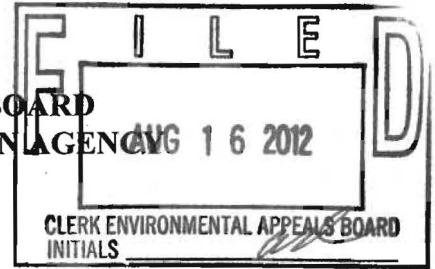


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC



In re: _____)

Appleton Papers, Inc.)
(Lower Fox River & Green Bay Site))

_____)

CERCLA § 106(b) Petition No. 12-04

ORDER FOR CLARIFICATION

On November 13, 2007, the United States Environmental Protection Agency, Region 5 (“the Region”) issued a unilateral administrative order (the “UAO”) under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675 (“CERCLA”). The UAO required Appleton Papers, Inc. (“API”) and other potentially responsible parties to conduct remedial action, including dredging, capping and covering of contaminated sediments, and long-term monitoring and maintenance, to address polychlorinated biphenyl-contaminated sediments at the Lower Fox River and Green Bay Superfund Site (“Site”) in northwestern Wisconsin. When the remedial actions have been completed, the UAO includes procedures, including notification by respondents and certification by the Region, for determining that respondents have performed the required actions at the Site in full satisfaction of the UAO.

On June 8, 2012, API filed a petition for reimbursement of approximately \$174 million in costs in complying with the UAO. Petition for Reimbursement of Costs (June 8, 2012) (“Petition”). According to the Petition, API is entitled to reimbursement because in an ongoing enforcement action initiated by the United States and the State of Wisconsin in the U.S. District Court for the Eastern District of Wisconsin,¹ the District Court has ruled that API is not a liable party under CERCLA. The District Court’s order is attached as Exhibit 4 to API’s Petition. See Decision Granting Motion for Reconsideration (Apr. 10, 2010) (“District Court Order”).

Although API concedes that the remediation actions contained in the UAO currently are ongoing, API asserts that due to the District Court Order ruling that API is not liable under CERCLA, all of API’s required actions under the UAO are completed. Petition at 4. The Region has filed a response seeking dismissal of the petition on the ground that API has not completed the actions required by the UAO. In the alternative, the Region moves for a stay of the proceedings because the issue of API’s liability is in the process of being litigated in federal court. See Motion to Dismiss the Petition of Appleton Papers Inc. or in the Alternative Motion to Stay Proceedings (July 13, 2012) (“Motion to Dismiss”). API has filed a reply to the Region’s response. Memorandum of Appleton Papers Inc. in Opposition to EPA’s Motion to Dismiss Petition for Reimbursement (Aug. 1, 2012) (“API’s Reply”). In its reply, API urges this Board to deny the Region’s Motion to Dismiss. API asserts that even though the work required by the UAO has

¹ The enforcement action is captioned: *United States and State of Wisconsin v. NCR Corp., et al*, Case No. 10-CV-910 (E.D. Wis.).

not been completed, CERCLA's reimbursement provisions must be interpreted flexibly where, as here, a recipient of a UAO "was adjudicated by a federal court to have no CERCLA liability." API's Reply at 2. API states further that the Region has failed to articulate any basis for staying this matter.

After reviewing API's Petition, the Motion to Dismiss, and API's Reply, the Board has determined that supplemental briefing would be helpful in the decisionmaking process. In particular, the Board seeks a thorough and detailed clarification from the Region on the following issues:

1. The Region states that the District Court Order is not final and not yet appealable. The Region is ordered to provide additional information on the status of the District Court Order. In particular, the Region must provide an explanation of why this order is not currently appealable and, if the Region anticipates a later appeal, the Board requires clarification on the potential timing of any such appeal and final determination.
2. Assuming hypothetically that the District Court Order is affirmed on appeal in the ongoing enforcement action, the Region must provide its view on whether API is entitled to reimbursement under CERCLA § 106(b), along with supporting cases and rationale. This also shall include any legislative history bearing on the question of whether Congress contemplated the issue of completion in the context of a prior determination of liability.
3. The Region states that API has an indirect obligation to pay a share of all UAO costs incurred by certain other parties pursuant to a binding cost sharing arrangement. The Region states further that the District Court Order concluded that API did not assume direct CERCLA liability through this arrangement. The Region must provide clarification on the relevance (if any) of any cost sharing arrangement to the issues before the Board.

The Region's clarification on these three issues must be filed with the Board no later than September 14, 2012. API will have until September 28, 2012, to file a reply.²

So ordered.

Dated: *August 16, 2012*

ENVIRONMENTAL APPEALS BOARD

By: *Leslye M. Fraser*
Leslye M. Fraser
Environmental Appeals Judge

² The Board's identification of these issues should not be interpreted to suggest that the Board has made any determinations on the merits regarding any of the facts, issues, or legal matters relating to the Petition. The Board will defer a decision on whether to hold oral argument until it receives additional briefing.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order for Clarification in the matter of Appleton Papers, Inc., CERCLA § 106(b) Petition No. 12-04, were sent to the following persons in the manner indicated:

By First Class Mail: Ronald R. Ragatz
Dennis P. Birke
Megan A. Senatori
DeWitt Ross & Stevens S.C.
Two East Mifflin Street
Madison, WI 53703

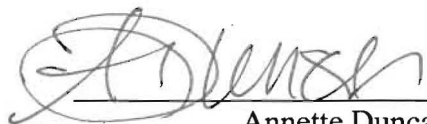
Gregory A. Krauss
1629 K St., NW, Suite 300
Washington, D.C. 20006

Michael L. Hermes
Heidi D. Melzer
Ericka L. Krumrie
Hermes Law, Ltd.
333 Main Street, Suite 601
Green Bay, WI 54301

By Pouch Mail: Richard M. Murawski
Associate Regional Counsel (C-14J)
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604

By Inter-Office Mail: Antoinette Powell-Dickson (2271A)
Office of Site Remediation Enforcement
U.S. EPA

Dated: AUG 16 2012



Annette Duncan
Secretary