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	

EPA'S RESPONSE TO ORDER FOR CLARIFICATION

The Respondent, U.S. Environmental Protection Agency, Region 5 ("EPA"), by and through its Office of Regional Counsel, hereby responds to the Environmental Appeals Board's ("Board") August 16, 2012, Order for Clarification, as follows:

> *1. The Region states that the District Court Order [Dismissing Appleton Papers Inc.] 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.*

Under 28 U.S.C. §§ 1291 and 1292 and Fed. R. Civ. P. 54(b), the District Court Order dismissing Appleton Papers Inc. ("API") would only be final and appealable if: (1) it resolved all claims against all parties; or (2) if a party sought and obtained the court's certification of the decision as a partial final judgment under Rule 54(b) or certification of the decision for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court Order plainly does not resolve all claims against all parties so it is not appealable as of right. Additionally, no party in the litigation has sought a certification that would allow an appeal at this point under Rule 54(b) or 28 U.S.C. § 1292(b). The statutes and rules do not impose explicit time limits for seeking

district court approval to appeal a non-final order, but the case law indicates that the Seventh Circuit typically declines to hear an appeal if more than 60 days elapsed between entry of the non-final district court order and the request that the district court certify it for appeal. *See, e.g., Richardson Electronics, Ltd. v. Panache Broadcasting of Penn., Inc.*, 2002 F.3d 957, 958 (7th Cir. 2000); *Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1999); *Schaeffer v. First National Bank of Lincolnwood*, 465 F.2d 234 (7th Cir. 1972). These types of certifications are generally disfavored.[1] For example, Judge Griesbach denied a motion for certification of a partial final judgment under Rule 54(b) in the related contribution case stating, "the Seventh Circuit has already pointed out that multiple judgments are the exception, not the norm" and "I believe a fuller resolution of this case at the district court level is achievable without excessive delay." EPA Exhibit 1 at 2-3.

With regard to the related contribution case, on October 4, 2012, the District Court granted API's motion for summary judgment on the CERCLA counterclaims in that case. Relying on his earlier ruling in the enforcement action that API is not a liable party under CERCLA, Judge Griesbach ruled that API is not a liable party in the contribution case and directed the parties to confer and file a proposed final judgment or explain why an agreement is not reachable within 10 days. Thus, final judgment in that case could be entered soon and appeals may follow shortly, but the Region cannot predict whether any appeals in that case would seek Seventh Circuit review of the ruling concerning API's liability.

In the governments' (the United States and State of Wisconsin) ongoing enforcement action, trial of the Phase 1 claim, which seeks a judicial determination that each unilateral

[1] It should be noted that the adjudication of the governments' claims concerning the Site, ongoing since 2010, has resulted in the issuance of several orders by the District Court and is not limited to the Court's April 10, 2012, Decision Granting Motion for Reconsideration concerning API's liability. These orders have not been entered as final judgments, nor has a party sought to certify these orders as partial final judgments.

administrative order ("UAO") recipient is required to comply with all provisions of the UAO applicable to such UAO recipient, is scheduled for December 3, 2012. A case management order has not been entered by the Court for trial of Phase 2 claims, which seek reimbursement of EPA's past and future response costs and natural resource damages at the Site. Thus, the potential timing of any appeal remains uncertain at the moment. However, after consultation with the United States Department of Justice ("DOJ"), the Region estimates that the opportunity to appeal the District Court Order would likely occur after an additional period of discovery for Phase 2 claims and after a decision is rendered in the Phase 2 trial. It should be noted that the Region would not be the final decision-maker on whether to appeal. DOJ's Office of the Solicitor General must approve the pursuit of any appeal of district court orders.

> *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 shall also 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.*

If the District Court Order is affirmed on appeal and if the Board denies the Region's pending Motion to Dismiss the Petition of Appleton Papers Inc. or in the Alternative Motion to Stay Proceedings in this matter, and does not find in favor of the Region with regard to any response on the merits by the Region, then API may be entitled to reimbursement in accordance with the Agency's Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (Feb. 23, 2012) and any other applicable guidance issued by the Agency to implement the reimbursement provision set forth in CERCLA Section 106(b).

Additionally, as a matter of judicial economy, the Region maintains that the Board should not hear or decide the issue of API's potential reimbursement until there is a final decision on

liability and the response action is completed. If the Board were to decide the reimbursement issue prior to a final determination on liability and on appeal the District Court Order is reversed, additional court and agency resources would potentially need to be expended as EPA would be put in a position where it would seek recovery of funds paid to API through costly and resource intense CERCLA cost recovery litigation. Moreover, while there is no case law on the issue of the meaning of completion in the context of a prior determination of liability, the legislative history concerning CERCLA Section 106(b) supports the Region's position that reimbursement should not be decided until the response action is completed and there is a final decision on liability. The legislative history makes clear that recipients of a cleanup order are expected to continue cleanup work during judicial review. The Congressional Record states that CERCLA Section 106(b)(2) "is intended to provide incentives for parties to undertake the work required in the order, even if they have legal objection to performing the work," and thus "a party who receives an order can begin the work of environmental cleanup while preserving its right to raise objections in a subsequent proceeding." 132 Cong. Rec. H 9624 (1986) (statement of Rep. Dennis Eckhart). Additionally, CERCLA Section 106(b)(2) allows a party who has complied with an order issued under this section to petition for reimbursement of costs from the Fund, plus interest, beginning from the date of expenditure. Thus, a petitioner who complies with an order is not financially harmed by a delay in reimbursement while liability is completely adjudicated or until the work is completed.

> *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.*

API has argued and the District Court has recognized that API's obligation to pay NCR under their cost sharing arrangement is an indemnity agreement. EPA Exhibit 2 at 16-17; EPA Exhibit 3 at 16-21. This indemnity agreement is relevant to this CERCLA Section 106(b) proceeding because in a briefing on the merits the Region may argue that API can have no greater right to a claim against the Fund than NCR where API is NCR's indemnitor. Under such an analysis, API would not be entitled to reimbursement under CERCLA Section 106(b).

Dated this 11th day of October, 2012.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing EPA's Response to Order for Clarification in In re Appleton Papers Inc., Petition No. CERCLA 106(b) 12-04, was filed by electronic submission to the Environmental Appeals Board through the Central Data Exchange this 11th day of October, 2012.

I hereby certify that copies of the foregoing EPA's Response to Order for Clarification in In re Appleton Papers Inc., Petition No. CERCLA 106(b) 12-04, were served via United Parcel Service on the following persons, this 11th day of October, 2012:

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