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

In re:

APPLETON PAPERS INC.,

Petitioner.

Petition No. CERCLA 106(b)12-04

MEMORANDUM OF APPLETON PAPERS INC. IN OPPOSITION TO EPA'S MOTION TO DISMISS PETITION FOR REIMBURSEMENT

Appleton Papers Inc. ("API"), by its undersigned counsel, respectfully submits this Memorandum in Opposition to EPA's Motion To Dismiss Petition for Reimbursement ("Motion To Dismiss").

INTRODUCTION

On June 8, 2012, API filed a Petition for Reimbursement from the Fund following the decision of the United States District Court for the Eastern District of Wisconsin ("District Court") that API has no liability under CERCLA for the Lower Fox River Site. Prior to that determination, API had incurred approximately $174 million complying with a Unilateral Administrative Order ("106 Order"). EPA now moves to dismiss or stay API's Petition as premature on two grounds: (1) EPA claims that API must wait to seek reimbursement for at least five years until the liable parties complete the remediation mandated by the 106 Order and EPA issues a written report certifying completion; and (2) EPA claims that API is barred from seeking reimbursement for allegedly failing to comply with the 106 Order, ignoring the fact that the 106 Order is unenforceable as to API. The Board should deny EPA's Motion to Dismiss and allow API's Petition for Reimbursement to proceed to the merits.

As set forth in Section I, API is not aware of another case in which the Board has addressed a request for reimbursement under CERCLA § 106(b)(2)(A) where, prior to the completion of the remediation, a recipient of a 106 Order was adjudicated by a federal court to have no CERCLA liability. EPA contends that, notwithstanding this ruling, API cannot seek reimbursement unless and until the entire remediation is completed by the other PRPs. API, in contrast, contends that the "action" that must be complete is only that which the 106 Order "required" of the party seeking reimbursement. Here, API has completed all of the action that can legally be required of it, because API is not liable under CERCLA. API's interpretation is consistent with *Employers Insurance of Wausau v. Browner,* 52 F.3d 656, 665 (7th Cir. 1995), in which the United States Court of Appeals for the Seventh Circuit "emphasized the need for flexible interpretation of the reimbursement provision," recognizing that there may be situations where reimbursement before completion of the remediation is proper. The circumstances here, where API incurred $174 million in response costs complying with a 106 Order for which it has been determined to have no liability, presents a quintessential example of why the reimbursement provision must be flexibly interpreted to avoid gross injustice.

As set forth in Section II, API likewise is not aware of a case in which the Board has addressed a reimbursement request where, like here, API fully complied with the 106 Order until it had the opportunity for judicial review and where a court ruled that API has no CERCLA liability. EPA contends that API cannot seek reimbursement from the Fund due to alleged non-compliance with the 106 Order during the 2011 and 2012 construction years (while API was challenging its liability in court). EPA's interpretation of CERCLA

creates a "Catch 22" where a party is denied reimbursement for failing to fully comply with a 106 Order that EPA should not have issued to the party in the first place.

Finally, as set forth in Section III, the Board should deny EPA's request for an indeterminate stay of API's Petition. A stay would work the same injustice to API that a dismissal would, and EPA has not demonstrated that a stay is warranted in any event.

As set forth below, API respectfully asks the Board to deny EPA's Motion to Dismiss and allow API's Petition for Reimbursement to proceed on the merits.

API'S RESPONSE TO EPA'S FACTUAL ASSERTIONS

At pages 2-8 of its Motion to Dismiss, EPA makes numerous factual assertions supporting its Motion to Dismiss. API contests the relevance or accuracy of many of EPA's factual assertions. For the Board's convenience, API has set forth its objections to EPA's factual assertions in the same order as provided in EPA's Motion to Dismiss.

A. API's Response: "Brief Background on the Lower Fox River and Green Bay Superfund Site."

API agrees that the facts set forth in this section are those asserted by the Government in the 106 Order, with one clarification. EPA suggests (at page 2) that Appleton Coated Paper Company ("ACPC") and Combined Paper Mills ("CPM") were "licensees" of NCR. EPA offers no evidence to support this claim and there is none. ACPC and CPM were not licensees of NCR.

B. API's Response: "API's and NCR's Connection to the Site."

EPA has included a section relating to a private cost-sharing agreement between API and another PRP at the Site, NCR Corporation ("NCR").[1] The 60/40 cost-sharing

[1] British American Tobacco ("BAT") is also a party to the cost-sharing agreement.

agreement between NCR, API and BAT is irrelevant to the issues raised in EPA's Motion to Dismiss. It is not a basis of liability *to the Government*, as the District Court held: "In dividing responsibility 60/40 between the parties, the panel was not concluding that API was directly liable under CERCLA or that it had become a successor to NCR's liability." API's Petition, Exhibit 4 at 8.

EPA implies that due to the cost-sharing agreement, API would have incurred response costs even in the absence of the 106 Order. Motion to Dismiss at 6. EPA's insinuation is irrelevant. EPA has no authority to wander into the private-cost sharing agreement between API and another PRP because a federal court has already ruled that this arrangement is not a basis upon which CERCLA liability can lie. API's Petition, Exhibit 4 at 8. Accordingly, the Board should ignore EPA's suppositions about the private cost-sharing agreement – they have no bearing on the EPA's pending motion to dismiss. The question of what sums API may have owed NCR is thus irrelevant to the statutory inquiry by this Board, *i.e.*, whether API has established by a preponderance of the evidence that it is not liable to the Government for response costs under CERCLA, Section 107.

Further, EPA's suppositions are also ill-founded. It is fine for EPA to suppose that API would have paid similar sums to NCR, but EPA can offer no evidence concerning what API would have done had EPA not wrongfully named API a PRP in 1997 or wrongfully named API a respondent to a 106 Order in 2007. Without its own liability to contend with, API – like its counterparty, BAT, may have taken the same route that BAT[2] has taken: paid nothing. EPA is in no position to suppose otherwise.

[2] The Government has never asserted that BAT is liable under CERCLA.

Equally problematic is EPA's claim that certain alleged facts "are uncontested and are set forth in the UAO (API's Petition, Exhibit 1 at 6-8), in several court decisions, and in the underlying agreements analyzed in those decisions." Motion to Dismiss at 4 n.2. EPA has attempted, in only two pages, to summarize a complicated history of events and corporate transactions that transpired over the course of more than three decades. Contrary to EPA's claim, API does not agree that EPA has accurately or completely recited the facts or given justice to the contents of the various corporate documents and settlement agreements, all of which speak for themselves.[3]

C. API's Response: "Current Status of Cleanup Activities at the Site."

Finally, EPA purports to give the Board a summary of the cleanup at the Site. However, EPA has failed to provide the Board with all of the pertinent facts. EPA fails to mention, for example, that the 2011 and 2012 construction seasons were the first in which API had the right to challenge its liability in court (the Government having filed an enforcement action in October 2010). *See* 42 U.S.C. § 9613(h)(2) (authorizing judicial review of a 106 order in "an action to enforce an order issued under Section 9606(a)."). EPA also fails to mention that, notwithstanding API's firm belief that it was not liable, API (together with NCR) offered to perform (and did perform) $50 million worth of remediation during the 2011 construction season. *US v. NCR,* Dkt. 143 at 5 of 48. That offer was not good enough for the Government, so it sought a preliminary injunction against NCR and API (compelling performance of *additional* work). The District Court

[3] If the Board considers EPA's submission in that regard, then API incorporates by reference its motion for summary judgment, and all supporting documents, which lays out a complete recitation of events. *See US v. NCR Corp.,* Case No. 10-cv-910 (E.D. Wis.) ("*US v. NCR*"), Dkt. 194-197, 212, 286, 287 and 311.

denied the injunction, holding, among other things, that the Government was unlikely to prove that API was liable under CERCLA. API's Petition, Exhibit 3.

Likewise, during the 2012 construction season, API offered to perform $42 million worth of remediation. Motion to Dismiss, Exhibit 13. That was not good enough, so the Government again moved for a preliminary injunction against API (and NCR). However, at the start of the 2012 construction season, the District Court held that API was not liable. API's Petition, Exhibit 4. The Government, therefore, amended its motion for preliminary injunction to make clear that it was not seeking injunctive relief against API. *US v. NCR,* Dkt. 358, 358-1.[4]

ARGUMENT

I. BECAUSE API IS NOT LIABLE UNDER CERCLA, IT SHOULD NOT HAVE TO WAIT UNTIL EPA CERTIFIES THAT THE LIABLE PARTIES HAVE COMPLETED THE REMEDIATION BEFORE API MAY SEEK REIMBURSEMENT FROM THE FUND.

A. API's Interpretation Of The Reimbursement Provision Is Correct, Consistent With The Purposes Of CERCLA, And Should Be Adopted.

CERCLA Section 106(b)(2)(A) states in pertinent part:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

CERCLA does not define "required action" and, as API and EPA's briefs to date show, case law addressing the meaning of the "required action" language is scarce. Neither API nor EPA have cited a case with analogous facts, in which a PRP was adjudicated to have no CERCLA liability prior to completion of the remediation and sought reimbursement

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[4] The District Court issued an injunction in 2012, but that injunction was not issued against API. *US v. NCR*, Dkt. 370. That injunction order has been appealed to the United States Court of Appeals for the Seventh Circuit and oral argument was held on June 4, 2012.

from the Fund. Accordingly, the issue of how the reimbursement provision should be interpreted on the facts here is, so far as API is aware, a matter of first impression.

EPA asks the Board to adopt a strict construction of the "required action" language, contending it means that *all* "required action" by *all* PRPs subject to the 106 Order must be complete before any party can seek reimbursement. EPA claims that API is not eligible to seek reimbursement until *at least* 2017, following EPA's issuance of a "written notice to the UAO PRPs when EPA determines, after review of the written report, that all work has been fully performed in accordance with the UAO." Motion to Dismiss at 9. API, in contrast, contends that the "required action" language means only that the "action" that is "required" of the party seeking reimbursement must be complete. Here, as a result of the no-liability ruling, API has completed all of the action that can legally be required of API.

EPA's construction of the reimbursement provision is contrary to the plain language of the provision and would have practical consequences that could not have been intended by Congress. The first part of the reimbursement provision is clearly specific to the person alleged to have CERCLA liability ("any person who receives and complies…"). EPA, however, contends that the "required action" term in the very same sentence does not refer to the "required action" of the "person who receives and complies" with the 106 Order – but rather, is a reference to the "required action" of *all* persons who receive the 106 Order. Under EPA's construction of the reimbursement provision, if the other PRPs flagrantly violate the 106 Order, and never comply, then API, a non-liable party that did comply when it received the 106 Order, could never seek reimbursement. EPA has presented no statutory history to support such an interpretation.

Further, EPA's interpretation is contrary to the text of the statute, which is designed to *allow* for reimbursement—not to *eliminate* it.

EPA's interpretation also ignores the fact that there is no requirement for a 106 Order to require all persons receiving it to comply in the same manner by completing the same tasks. Instead, a 106 Order may direct different persons to complete different tasks. Here, for example, the 106 Order states that one PRP, Georgia-Pacific, "is hereby ordered to perform all tasks referenced in the accompanying Phase 2B SOW, other than any tasks that relate solely to OU 2 and/or OU 3 at the Site." API's Petition, Exhibit 1 at 20. Under EPA's interpretation of the reimbursement provision, a PRP who complies with the "required action" directed to that PRP in the 106 Order cannot obtain reimbursement until all of the other PRPs complete the "required action" directed to them and, if the other PRPs never comply, then, apparently, the PRP that did comply can never seek reimbursement from the Fund. That cannot be what Congress intended.

EPA's interpretation is also particularly illogical here, where it chose to carve the "required action" into discrete OUs and discrete phases.[5] API's Petition, Exhibit 1 at 5, 20. There is no question that API (with NCR) completed the "required action" in Phase 2A – building the infrastructure necessary for the remediation. There is also no question that API (with NCR) has completed the "required action" in OUs 2 and 3. There is simply no justifiable reason why EPA, having carved the "required action" up into discrete pieces in the 106 Order, should be able to avoid any reimbursement obligation to API until the *entire* remediation is complete.

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[5] As discussed in the 106 Order, EPA divided the Site into five "operable units" – with the 106 Order covering OUs 2-4.

If the Board were inclined to accept EPA's interpretation of the reimbursement provision, however, that would not end the inquiry, because the Board would have to consider whether EPA's interpretation is lawful as applied here. The Seventh Circuit has "emphasized the need for flexible interpretation of the reimbursement provision." *Browner,* 52 F.3d at 665; *See also N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244-45 (7th Cir. 1991). EPA concedes that the Board and the Seventh Circuit both have confirmed that there may be appropriate circumstances "in which something less than total completion of work under a UAO might nonetheless be sufficient for purposes of seeking reimbursement under CERCLA § 106(b)." Motion to Dismiss at 10, citing *Browner,* 52 F.3d at 664; *In re Glidden Co.,* 10 E.A.D. 738, 746 (EAB 2002). If ever there was a case calling for flexible interpretation of the reimbursement provision, this is it.

API is an employee-owned company based in Appleton, Wisconsin, that contended, from day one, it was not liable under CERCLA. It is undisputed that API did nothing to cause the PCB contamination in the Fox River – it did not exist until seven years after the use of PCBs was discontinued in the manufacture of carbonless copy paper. Due to CERCLA's express provisions, however, API could not challenge its liability when the 106 Order was first issued. *See* 42 U.S.C. § 9613(h) (barring judicial pre-enforcement review of a 106 Order except in specified circumstances).

Unable to risk draconian penalties, API complied with the 106 Order until the opportunity for judicial review became available. Thus, API, together with NCR, undertook the lead in handling the largest remediation project in United States history. All the while, the Government promised that API could seek reimbursement from the Fund if it proved it was not liable or paid more than its share of any liability. *US v. NCR*,

Dkt. 150 at 24 of 35; Dkt. 126 at 24 of 35. When API finally had an opportunity to challenge its liability in court after the Government filed the enforcement action in October 2010,[6] API availed itself of that opportunity – and won.

Nonetheless, EPA asks the Board to make API, an adjudicated non-liable party, wait for reimbursement from the Fund until at least 2017, while the remediation is completed by the liable parties. EPA takes this drastic position even though: (1) API is not liable and no longer subject to the 106 Order; (2) API has no control over whether the other PRPs comply, timely or otherwise, with the 106 Order; and (3) there is no guarantee that the Fund will have sufficient resources to reimburse API in the future. Moreover, EPA gives no rationale for forcing API to shoulder the inherent risk of waiting for recovery from the Fund, or why, having previously carved the river into discrete OUs and the UAO work into discrete phases, API should be required to wait for completion of the work in other OUs and other phases by other parties before it can seek reimbursement. The Board should reject EPA's construction of the reimbursement provision and hold that API's Petition can proceed to its merits.

B. EPA's Construction Of The Reimbursement Provision Would, As Applied Here, Violate API's Due Process Rights.

The Board should reject EPA's construction of the reimbursement provision for another important reason – because, as applied here – it would violate API's due process rights. The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation and citations omitted). Due process entitles API to receive

[6] The Government filed its enforcement action in October 2010 against NCR, API and all of the other PRPs, even though NCR and API were the only PRPs complying with the 106 Order at the time.

"procedural protections as the particular situation demands." *Id.* at 334. (internal citation omitted). Courts are to consider three distinct factors when determining whether this due process standard has been satisfied:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Applying those factors here, EPA's construction of the reimbursement provision would result in an unconstitutional deprivation of API's due process rights. API received and complied with the 106 Order given the promise of a post-deprivation procedure that would allow it to seek reimbursement in a timely fashion if it prevailed in showing it was not liable. Now, having so prevailed, that post-deprivation procedure is little consolation if API cannot have its reimbursement request heard for at least another five years or longer (if ever, given EPA's interpretation). API is not asking for additional or substitute procedures – it is asking only for that which it relied upon when it incurred response costs complying with the 106 Order – a right to have a reimbursement request reviewed by the Board in a "meaningful time" and in a "meaningful manner." There is nothing "meaningful" about the review process being advanced by EPA here.

II. THE BOARD SHOULD REJECT EPA'S CLAIM THAT API FAILED TO FULLY COMPLY WITH THE 106 ORDER.

EPA next contends, analogizing this case to *In re Findley Adhesives, Inc.,* 5 E.A.D. 710 (EAB 1995), that API is not entitled to seek reimbursement because "it is clear that API's non-compliance is likewise significant and serious in nature." Motion to Dismiss at 13. A simple comparison of the facts here with *Findley Adhesives* aptly

demonstrates the sheer desperation of EPA's theory about API's supposed non-compliance:

Findley Adhesives	**API**
Undisputed that Findley Adhesives sent drums containing waste from its manufacturing operations to the site. *Id.* at 715.	Undisputed that API never released PCBs to the site.
Claimed it was not liable because its waste was not hazardous. *Id.*	Adjudicated to have no CERCLA liability. API's Petition, Exhibit 4.
Received the 106 Order and failed to timely comply with a single one of the initial deadlines and then, when EPA revised the dates (without excusing the earlier non-compliance), failed to comply with a single one of the revised deadlines. *Id.* at 719.	Received the 106 Order and immediately undertook the lead (with NCR) in the remediation and began in–water remediation on the schedule demanded by the Government, without any meaningful assistance from any of the other PRPs. API's Petition, Declaration of Jeffrey Thomas Lawson ("Lawson Dec."); *see also US v. NCR,* Dkt. 137 at ¶ 5.
Failed to remove hazardous waste and failed to remediate soil contamination more than 18 months after the deadlines imposed by the 106 Order. *Id.* at 720.	Removed 1.487 million cubic yards of sediment and capped and sand covered approximately 141 acres. API's Petition, Lawson Dec. at ¶ 9.
As a result of Findley Adhesives' actions, releases of hazardous substances continued to occur after issuance of the 106 Order. *Id.* at 714.	As a result of API's actions, substantial and tangible progress toward completing the remediation has been made. *Id.* at ¶¶ 7-10; API's Petition, Exhibit 3 at 2.
Incurred $102,369.74 in response costs under the 106 Order. *Id.* at 711.	Incurred $174 million in response costs under the 106 Order. API's Petition, Declaration of Susan J. O'Connell at ¶ 6.

Further, in *Findley Adhesives,* EPA contended, correctly, that there was never compliance by Findley Adhesives (or any other PRP for that matter). In contrast here, EPA *concedes* that API fully complied with the 106 Order through the 2010 construction season. EPA complains only that API allegedly failed to fully comply with the 106 Order during the 2011 and 2012 construction seasons. EPA ignores the fact that during those construction seasons API was challenging its liability in court and, of course, API

ultimately prevailed in proving it has no CERCLA liability. This case is nothing like *Findley Adhesives*.

API is aware of no case in which the Board has addressed a reimbursement request arising from facts like those here, where a PRP complied with a 106 Order until its right to challenge its CERCLA liability ripened during the course of the remediation, and the PRP was then adjudicated to have no CERCLA liability. The Seventh Circuit envisioned the potential for such a case in *Browner,* which the Board should use to guide its analysis. There, the Seventh Circuit affirmed the Board's denial of a reimbursement petition because Wausau Insurance, which was undisputedly a liable party under CERCLA, stopped the remediation mid-stream claiming that it could be forced to clean up its own contamination, but not contamination caused by others. The Seventh Circuit disagreed.

The Seventh Circuit noted that Wausau had essentially made a mountain out of a molehill, because it was clearly a liable party and it, therefore, would not have been "unduly burdensome for it to shell out another couple of hundred thousand dollars to complete the clean-up project on which it has already spent in excess of $2 million." *Browner*, 52 F.3d at 664. The Seventh Circuit stated, however, that it could envision a case where continued compliance would be unduly burdensome such that a PRP could seek reimbursement where it complied with valid parts of an order, but not with invalid parts:

> Suppose the order had required [Wausau] to clean up the recycling facility and, while it was at it, also to clean up the residual contamination in Chernobyl from the nuclear disaster there in 1986. If [Wausau] cleaned up just the recycling facility it would not be complying with the order and if the EPA is right it would never be able to seek reimbursement. Our actual case is less extreme. But according to [Wausau], the EPA was completely unreasonable in ordering it (if that is what the agency actually *did* in the original order—this is the interpretive

> question that we mentioned) to clean up not only PCB contamination for which it would be responsible if it did arrange for the transportation of the fluids from its insured's transformers, but also unrelated contamination at the site, for which it could not possibly bear any responsibility.
>
> We imagine that in a case, illustrated by our Chernobyl hypothetical, in which the clean-up order is so grotesquely broad as plainly to exceed the agency's powers, the party against whom it is directed can comply with the valid part of the order and disregard the rest as void, a nullity, and having complied with the valid part seek reimbursement for the costs of that compliance. An order so completely ultra vires is no order for purposes of deciding whether compliance and completion have been achieved; the valid and the void commands in the order can be separated, and the void discarded.

Id. at 664-65 (italics original).

This case presents a different twist on Judge Posner's Chernobyl example in *Browner*. Here, there has been a judicial determination that EPA never had legally sufficient grounds for naming API in the 106 Order. EPA's "non-compliance" argument ignores this fact. Further, this is not a case where full compliance with the 106 Order could have been achieved simply by "shell[ing] out another couple hundred thousand dollars," as was the case in *Browner*. The cost of full compliance here is currently estimated to be in the ballpark of $700 million. EPA cannot seriously contend that API must shell out such an amount in order to qualify for reimbursement, even though it has been found to have no CERCLA liability. Yet, that is precisely what EPA appears to be contending.

The egregiousness of the situation here was compounded by the fact that the Department of Justice was not enforcing the 106 Order against any other PRP (except NCR). Motion to Dismiss, Exhibit 13 at 8-9 of 11. It was, instead, insisting that API and NCR, alone, agree to spend $75 million for the 2012 construction season. *Id.* at 3 of 11. The Government was thus allowing the other 106 Order recipients to sit on the sidelines and do nothing despite the significant remaining cost of the remediation.

Despite these exceptional circumstances, API, did not, like Wausau Insurance, simply refuse to do work. Instead, API (and NCR) offered to spend enormous sums of money to allow the remediation to move forward while API challenged its liability.[7] API acted in the utmost of good faith—yet apparently only giving the Government a blank check for the remaining remediation costs would have been satisfactory to the Government.

Unlike in *Browner*, API could not have simply capitulated to the Government's demands by completing the remediation required by the 106 Order. API therefore chose to exercise its constitutional right to defend itself and put the Government to its proof in the enforcement action that it initiated against API and the other PRPs. The Government failed to sustain that burden, and the District Court held that API has no CERCLA liability. The Board should reject EPA's effort to prohibit API from now seeking reimbursement on grounds of supposed non-compliance with, as to API, an improvidently issued and invalid 106 Order.

III. THERE IS NO BASIS FOR EPA'S REQUEST FOR A STAY.

Finally, in the alternative to a dismissal, EPA seeks an order staying proceedings before the Board pending final resolution of the enforcement action and the *Whiting* contribution action. Motion to Dismiss at 14-15. If granted, a stay would, like EPA's request for dismissal, result in a significant and indeterminate delay of any reimbursement to API. The Enforcement Action has been divided into several phases, only the first of which is set for trial in December 2012. *US v. NCR,* Dkt. 322, 405.

[7] For example, in 2012, API offered to fund $42 million of remediation work. Motion to Dismiss, Exhibit 13 at 11 of 11.

There has been no discovery on the other phases, and those additional phases are not yet scheduled for trial. *Id.* There is no final judgment entered in the *Whiting* contribution action. In both cases, there could be appeals that would take more time to resolve. As set forth in Section I above, the delay sought by EPA would create a grave injustice to API and would violate of API's right to meaningful review of its reimbursement request.

Nonetheless, EPA seeks an indefinite stay, but has not provided the Board with any reason that imposing a stay makes sense here. EPA cites no authority whatsoever in support of its motion. In other analogous contexts, however, a party seeking to stay a proceeding pending resolution of another matter must demonstrate, at a minimum, a likelihood of success on the merits and that the potential harm to the movant outweighs the harm to the opposing party should a stay not be granted. *See, e.g., Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997). Here, EPA does not even argue that an appeal would be likely to result in restoring the validity of the 106 Order as to API. Accordingly, there is no basis in the record for the Board to conclude that awaiting the completion of the pending litigation would be likely to result in a reversal of the District Court's holding that API is not liable under CERCLA such that there is any actual risk of allowing API's Petition to proceed to the merits now.

CONCLUSION

For the foregoing reasons, API respectfully asks that the Board deny EPA's Motion to Dismiss or Stay, and allow API's Petition to proceed to the merits.

Dated this 1st day of August, 2012.

APPLETON PAPERS INC.

By /s/ Ronald R. Ragatz
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2012, a true and correct copy of the foregoing **MEMORANDUM OF APPLETON PAPERS INC. IN OPPOSITION TO EPA'S MOTION TO DISMISS PETITION FOR REIMBURSEMENT** was electronically delivered to the following:

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

I further hereby certify that on the 1st day of August, 2012, a true and correct copy of the foregoing **MEMORANDUM OF APPLETON PAPERS INC. IN OPPOSITION TO EPA'S MOTION TO DISMISS PETITION FOR REIMBURSEMENT** was served by Federal Express on the following person:

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s/Ronald R. Ragatz
Ronald R. Ragatz