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	)	

MOTION TO DISMISS THE PETITION OF APPLETON PAPERS INC. OR IN THE ALTERNATIVE MOTION TO STAY PROCEEDINGS

The Respondent, U.S. Environmental Protection Agency, Region 5 ("EPA"), by and through its Office of Regional Counsel, hereby moves the Environmental Appeals Board ("Board" or "EAB") pursuant to the Board's June 13, 2012, letter to EPA, Sections II.B and VI.B.2 of the Board's Practice Manual dated June 2012 ("EAB Manual") and Section IV.A.1 of the Board's Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions dated February 23, 2012 ("EAB Guidance"), to dismiss Appleton Paper Inc.'s ("API") Petition for Reimbursement of Costs ("Petition"), dated June 8, 2012, on the basis that 1) the required action has not been completed, and 2) API has not complied with the underlying order in this matter. In the alternative, EPA moves the Board to stay the proceedings in this matter as the issue of API's liability at the Lower Fox River and Green Bay Superfund Site ("Site") is in the process of being adjudicated in federal court.

API has filed the Petition seeking to recover costs the company allegedly incurred under a unilateral Administrative Order (Docket No. V-W-08-C-885) ("UAO") issued by EPA in connection with the Site under Section 106(a) of the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(a). Completion of the required action is a statutory prerequisite for obtaining review under Section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A). However, EPA has not yet made a determination, pursuant to the procedures established in the UAO, that the response action required under the UAO has been completed. At this time, the remedial action is in the construction phase and is scheduled to be completed in 2017. It is EPA's position that until the response action required under the UAO is completed at the Site and EPA notifies API that the response action has been fully performed, the matter is not ripe for review by the EAB. Additionally, API has not complied with the UAO.

The UAO is provided in the Petition as Petitioner's Exhibit 1. As ordered by the Board in its June 13, 2012, letter, a certified index of the administrative record underlying the UAO is attached as EPA Exhibit 1.

Brief Background on the Lower Fox River and Green Bay Superfund Site

The Lower Fox River and Green Bay Superfund Site encompasses a nearly 40-mile stretch of the Fox River and thousands of square miles of Green Bay that have been impacted by polychlorinated biphenyls ("PCBs") released primarily from paper production facilities and paper coating facilities. PCBs were manufactured primarily by Monsanto Corporation which marketed different formulations of PCB congeners under the trade name "Aroclor." Between 1954 and 1971, PCB Aroclor 1242 was used in the production of a particular type of "carbonless" copy paper by NCR Corporation ("NCR") and its licensees at a paper coating facility that is now owned by API (the "Appleton Facility") and at another facility in Combined Locks, Wisconsin (the "Combined Locks Facility"). It is estimated that more than 500,000 pounds of PCBs were released to the Lower Fox River. The PCB contamination that remains at

the Site, which is primarily in sediments, has caused adverse health effects and reproductive effects in fish and birds, and fish and waterfowl in the area are subject to human health-based consumption advisories.

Following EPA's and the Wisconsin Department of Natural Resources' ("WDNR") (collectively "the Response Agencies") investigation into the nature and extent of PCB contamination at the Site, the Response Agencies issued several cleanup decisions. These cleanup decisions divide the Site into 5 operable units ("OU") and select remedies consisting of a combination of dredging, capping and covering of contaminated sediments, and long-term monitoring and maintenance. The construction phase of the OU 1 cleanup was completed under a consent decree between the Response Agencies, P.H. Glatfelter Company and WTM I Company in 2010. EPA issued the UAO in this matter on November 14, 2007, requiring API, NCR, and other potentially responsible parties ("PRPs"), to conduct cleanup activities to address the PCB-contaminated sediment found in OUs 2-5 at the Site. In April 2009, API and NCR formed the Lower Fox River Remediation LLC[1] ("LLC") and the LLC entered into a multi-year contract with Tetra Tech EC, Inc. for the performance of the OUs 2-5 cleanup at the Site. That same month the LLC began removing contaminated sediment from the Site as required by the UAO.

The Contribution and Enforcement Cases

Following EPA's issuance of the UAO, API and NCR commenced CERCLA contribution actions under the captions *Appleton Papers Inc. and NCR Corp. v. George A. Whiting Paper Co., et al.*, Case No. 08-C-00016 (E.D. Wis.) and *NCR Corporation v. Kimberley-Clark Corporation et al.*, Case No. 08-C-00895 (E.D. Wis.), which are now consolidated. On October 14, 2010, the

[1] While API and NCR were performing the UAO work jointly, API held a 60% interest in the LLC and had 60% of the voting power while NCR held a 40% voting interest in the LLC and had 40% of the voting power. EPA Exhibit 2 at ¶ 15.

United States and State of Wisconsin commenced an enforcement action under CERCLA Sections 106 and 107 against API, NCR, and several other PRPs captioned *United States and State of Wisconsin v. NCR Corporation, et al.*, Case No. 10-C-910 (E.D. Wis.). Among other things, the governments' complaint seeks enforcement of the UAO to ensure continuation of the cleanup at the Site. As no final or partial final judgments have been entered by the district court, these cases continue to be adjudicated.

API's and NCR's Connection to the Site[2]

During the time that PCB-containing "carbonless" copy paper was made at the Appleton Facility and the Combined Locks Facility, those two facilities were owned by Appleton Coated Paper Company ("ACPC") and Combined Paper Mills, Inc. ("CPM"). ACPC and CPM were merged into another entity and that entity was then merged into NCR, creating NCR's Appleton Papers Division. NCR admits that it is a legal successor to ACPC and CPM and NCR itself owned the Appleton Facility and the Combined Locks Facility from 1973 to 1978. In 1978, API bought the entire NCR Appleton Paper Division through an asset purchase and sale agreement and a related liability assumption agreement with NCR. At the time, API was an affiliate of B.A.T. Industries p.l.c., which is part of British American Tobacco ("BAT"). API owned the Combined Locks Facility until at least 2000 and API still owns the Appleton Facility.

After receiving notice of their potential liability for this Site in the 1990s, NCR sued API and BAT and the parties litigated over the meaning of the liability assumption provisions and indemnity provisions in their 1978 transaction agreements. That litigation was resolved in several stages.

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[2] The facts in this section are uncontested and are set forth in the UAO (Petitioner's Exhibit 1 at 6-8), in several court decisions, and in the underlying agreements analyzed in those decisions. *See Westport Ins. Corp. v. Appleton Papers Inc.*, 787 N.W.2d 894, 909 (Wis. App. 2010); *United States v. NCR Corp.*, No. 10-C-910, 2011 WL 2634262 (E.D. Wis. Jul. 5, 2011); *United States v. NCR Corp.*, No. 10-C-910, 2011 WL 6987813 (E.D. Wis. Dec. 19, 2011 & Apr. 10, 2012).

First, in a 1998 settlement agreement, API, BAT, and NCR agreed to split their collective costs for this Site with API/BAT bearing 55% and NCR bearing 45% of the costs up to $75 million. The parties also agreed to a subsequent arbitration to fix their relative responsibility for costs exceeding $75 million, with the proviso that neither side would be allocated more than 75% or less than 25% of the amounts to be expended above $75 million. The 1998 settlement agreement also memorialized API's and NCR's "joint and common legal interests with respect to the Fox River sites," their agreement "to continue to cooperate, coordinate, and assist one another in the defense of the Sovereigns' and third-party claims related to the Fox River sites" and "to implement a coordinated and joint defense effort among themselves," and their commitment "to work together as closely as possible as if the parties are one entity" in the defense of such claims.

Second, when their joint costs for this Site exceeded $75 million, API, BAT, and NCR, commenced arbitration proceedings to establish their final cost sharing formula. Based on the terms of the 1978 transaction agreements and the 1998 settlement agreement, and other extrinsic evidence, an arbitration panel that API and NCR convened in 2005 issued an award that assigned final responsibility for API's and NCR's joint costs, with API and BAT held responsible for 60% and NCR responsible for 40%. As provided by their 1998 settlement agreement, API and NCR then had the arbitration award confirmed and entered as a final judgment by the U.S. District Court for the Southern District of New York in 2007. As a result, NCR and API/BAT share a common liability for the Site, with their collective expenditures being split among them: API and BAT now pay 60% and NCR pays 40%.

The UAO and the governments' complaint in the district court enforcement action alleged that the contractual arrangements between NCR and API amounted to an agreed

assumption of liability that made API directly liable for compliance with the UAO under successor liability principles.[3] API never denied its obligation to pay 60% of all costs of UAO work incurred by NCR or API, as required by its arbitration award and final judgment with NCR, but it characterized that obligation as purely a contractual indemnity obligation owed only to NCR, rather than an assumption of CERCLA liability for UAO compliance. The district court struggled with that issue, first siding with API, then siding with the government, but ultimately ruling in April 2012 that API did not assume direct CERCLA liability to the governments through its agreements with NCR. *See United States v. NCR*, 2011 WL 2634262 at *9-*12; *United States v. NCR*, 2011 WL 6987813. Even if that ruling is finalized and affirmed on appeal, API has emphasized that it "will not affect API's indemnification obligations to NCR," so API will continue to pay 60% of all costs that NCR incurs in performing work under the UAO. EPA Exhibit 3 at 16 n.6.

Current Status of Cleanup Activities at the Site

The construction season for in-water cleanup work at the Site typically begins in April and continues through mid-November. Based on this seasonal work pattern, the UAO requires the submission of a draft and final annual work plan prior to the start of the construction season. Most recently, on March 7, 2012, NCR alone submitted an amended version of the remedial action work plan ("RAWP") for 2012; however, NCR failed to incorporate certain Response Agency comments into the 2012 RAWP. The Response Agencies' comments called for full-scale sediment remediation at the Site, as required by the UAO's statement of work. EPA Exhibit 4. NCR's version of the 2012 RAWP called for the removal of 500,000 cubic yards of

[3] *See, e.g., See U.S. Bank Nat'l Assn. v. EPA*, 563 F.3d 199, 205-07 (6th Cir. 2009) (holding that a party acquired CERLCA liability by agreeing to assume the environmental liabilities of a prior owner of the facility); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233, 1238-44 (E.D. Cal. 1997) (same); *United States v. Chrysler Corp.*, Nos. 88-341, 88-534, 1990 WL 127160, at *4-7 (D. Del. Aug. 28, 1990) (same).

contaminated sediment and thus fell far short of EPA's requirement to dredge at least 660,000 cubic yards at the Site. On March 14, 2012, the LLC by a 60(API) to 40(NCR) vote, voted not to take action to implement NCR's version of the 2012 RAWP. Consequently, on March 19, 2012, EPA approved, with certain modifications, the 2012 RAWP and directed API and NCR to begin implementing the cleanup work required by it.[4] EPA Exhibit 7.

On the same day, the United States filed a motion for preliminary injunction in the United States District Court for the Eastern District of Wisconsin requesting the court to order API and NCR to implement the 2012 RAWP. The 2012 RAWP required cleanup activities to begin on April 2, 2012, but API and NCR failed to begin cleanup activities on that date. On April 10, 2012, the court ruled that API cannot be deemed a legal successor to the prior owners of the Appleton Facility. On April 27, 2012, the court granted the United States' motion for preliminary injunction and ordered NCR to implement the cleanup work specified in the UAO's 2012 RAWP. Among other things, the court's order requires the removal of a minimum of 660,000 cubic yards of contaminated sediment at the Site through at least November 9, 2012. On May 14, 2012, NCR resumed sediment remediation activities at the Site on its own. At this time, three dredges are operating at the Site 24 hours/day and removing more than 27,000 cubic yards of PCB-contaminated sediment each week. EPA Exhibit 8 at ¶ 4.

As described above, the cleanup activities required under the UAO for OUs 2-5 at the Site are in the process of being performed. Under the current cleanup schedule, the construction phase of the OUs 2-5 cleanup is scheduled to be completed in 2017. EPA Exhibit 8 at ¶ 4; EPA

[4] Similarly, in 2011 API and NCR submitted a work plan that failed to provide for full-scale cleanup work at the Site. Thus, on March 28, 2011, EPA approved the 2011 RAWP with certain modifications requiring removal of at least 605,000 cubic yards of sediment at the Site in 2011 and directed API and NCR to implement that modified work plan. EPA Exhibit 5 at ¶ 40. Despite that directive under the UAO, the LLC controlled by API and NCR did not perform full scale dredging throughout the entire construction season in 2011 (as explicitly required by the UAO's SOW) and less than 240,000 cubic yards of sediment was dredged in all of 2011. EPA Exhibit 6 at ¶ 6.

Exhibit 6 at ¶ 26. The LLC's consultant concurs with this statement. EPA Exhibit 9 at ¶ 29. Thus, for the next five construction seasons, contaminated sediment will continue to be dredged and capped at the Site.

I. Statutory Prerequisites for Obtaining Review Under CERCLA § 106(b)

A petitioner must meet certain statutory prerequisites for obtaining review on the merits. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A), provides, in relevant part, as follows:

> 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.

The Board explained that these statutory prerequisites must be met before the Agency will consider a petition for reimbursement on its merits and "the failure to satisfy any one of these conditions justifies denial of the petition without any consideration of the merits of petitioner's claim." *In re CoZinCo, Inc.*, 7 E.A.D. 708 (EAB 1998), 721; *see also* Environmental Appeals Board, U.S. EPA, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* 5 (Feb. 23, 2012) ("2012 CERCLA Guidance") (A CERCLA § 106(b) petition must state that "the petitioner has complied with the underlying Section 106(a) order" and that "the [required] action has been completed.")

A. <u>The Required Action Under the UAO Has Not Been Completed</u>

Paragraphs 54 and 94 of the UAO provide the mechanism for notifying API that the work required under the UAO has been completed. In relevant part, paragraph 54 of the UAO states:

> Within thirty (30) days after the Respondents conclude that all phases of the remedial action have been fully performed, Respondents shall so notify U.S. EPA and shall schedule and conduct a pre-certification inspection to be attended by Respondents and U.S. EPA. The pre-certification inspection shall be followed by a written report submitted within 30 days of the inspection by a registered professional engineer and Respondents' Project Coordinator(s) certifying that the remedial action has been completed in full satisfaction of the requirements of this

> Order…If U.S. EPA concludes, following the initial or any subsequent certification of completion by Respondents that the remedial action has been fully performed in accordance with this Order, U.S. EPA may notify Respondents that the remedial action has been fully performed.

In relevant part, paragraph 94 of the UAO further states:

> The provisions of this Order shall be deemed satisfied when U.S. EPA notifies Respondents in writing that Respondents have demonstrated, to U.S. EPA's satisfaction, that all terms of the Order have been completed.

Generally, the above-described EPA notification constitutes "completion of the required action" for purposes of a petition for reimbursement under CERCLA § 106(b)(2)A). *See In re Safe Environmental Corporation of Indiana*, 2012 WL 1379413 (EAB Apr. 6, 2012) (citing *In re Glidden Co. and Sherwin-Williams Co.*, 10 E.A.D. 738, 747 n.7 (EAB 2002) (citing *In re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001); *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302 (EAB 1996), *affirmed* 962 F.Supp. 1232 (N.D. Cal 1997), *affirmed in part and reversed in part on other grounds*, 146 F.3d 1107 (9th Cir. 1998); *In re ASARCO, Inc.*, 6 E.A.D. 410, 419 (EAB 1996)). As described above, EPA will provide 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.

The written report is itself a UAO requirement, and as such is a "required action" for purposes of CERCLA § 106(b)(2)(A). *See Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 663 (7th Cir. 1995) (construing "completion of the required action" to mean "required by the order" and "whatever action is required by the terms of any order."); *Glidden*, 10 E.A.D. at 743 (construing "required action" to mean "actions required by the UAO"). Completion of the required action must include, but is not limited to, completion of on-site activities as well as submission and review of a complete and sufficient written report. It is through its review of the

written report that EPA determines whether or not all actions have been completed in accordance with the UAO.

In *Wausau*, although the Seventh Circuit determined that the "required action" was not completed, the court engaged in a lengthy discussion of the kinds of 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). Specifically, the court considered several circumstances, including: where "the agency takes steps to postpone completion, making it impossible for the party to argue that it has completed the action required of it by the agency," *Id.* at 662; "where the agency unreasonably refuse[s] to acknowledge the completion of the clean-up," *Id.*; "where the party cannot complete the required action for reasons beyond its control," *Id.* at 663; or where the Agency issues "unreasonably, oppressively broad orders." *Id.* at 664. Therefore, the court concluded that common law doctrines such as "impossibility," "impracticability," and "frustration" might be drawn on to allow for substantial compliance "when to require more would be unreasonable." *Id.* The Board did not agree, nor disagree, with the Seventh Circuit's dicta that "something less than complete satisfaction of an agency's demands might be sufficient for purposes of CERCLA reimbursement." *Glidden*, 10 E.A.D. at 746. Rather, the Board explained that in that specific case there was no colorable basis for petitioners to claim "impossibility," "impracticability," or "frustration." *Id.* Similarly, none of the above circumstances exist here.

As described above, the cleanup at the Site is in its fourth year of construction and will continue to be implemented over the next five construction seasons. Consequently, it comes as no surprise that none of the requirements set forth in paragraph 54 of the UAO have been executed. Specifically, EPA has not received notification that the remedial action has been fully

performed, has not attended a "pre-certification inspection" at the Site, has not received a written report certifying that the remedial action has been completed in full satisfaction of the requirements of the UAO, and has not issued a written notification to the UAO PRPs that all terms of the UAO have been completed. EPA Exhibit 8 at ¶ 7. Based on these specific circumstances, it is clear that there is no evidence to support Petitioners's claim that the required action under the UAO has been completed.

B. API Has Not Complied with the UAO

Compliance with the terms of any EPA order is a statutory prerequisite for a petition for reimbursement under CERCLA § 106(b)(2), 42 U.S.C. § 9696(b)(2). In the instant matter, API failed to comply with the UAO in at least the following instances:

-- API failed to submit a draft 2011 RAWP by due date of January 31, 2011. EPA Exhibit 5 at ¶ 32.

-- API failed to incorporate EPA's comments and resubmit the 2011 RAWP by due date of March 25, 2011. EPA Exhibit 5 at ¶¶ 38, 40; EPA Exhibit 2 at ¶ 22; EPA Exhibit 10 at ¶ 3.

-- API failed to implement full-scale cleanup activities at the Site to remove at least 605,000 cubic yards of sediment in 2011, as required by the modified 2011 RAWP. More specifically, API directed its contractors to suspend dredging before the end of the construction season in 2011 and less than 240,000 cubic yards of sediment was dredged in all of 2011. EPA Exhibit 6 at ¶ 6; EPA Exhibit 11.

-- API has failed to implement full-scale cleanup activities in accordance with the modified 2012 RAWP. Among other things, API took steps to ensure that no

> UAO work occurred during about six weeks of this year's construction season before the district court ordered the resumption of remediation in response to the United States' motion for a preliminary injunction in its enforcement action. EPA Exhibit 12 at ¶ 2; EPA Exhibit 13; EPA Exhibit 6 at ¶ 25; *United States v. NCR Corp.*, No. 10-C-910, 2012 WL 1490200 (E.D. Wis. Apr. 27, 2012); EPA Exhibit 14.

In *In re Findley Adhesives, Inc.*, 5 E.A.D. 710 (EAB 1995), the Board dismissed a petition for reimbursement and refused to consider the merits of the petition, where the petitioner, Findley Adhesives, Inc. ("Findley"), working with other respondents, eventually completed the required action but failed repeatedly and extensively to comply with both the original and extended UAO deadlines, as well as certain other site security and paperwork requirements of the relevant EPA order and amendments. The Board rejected Findley's claim that Findley "achieved substantial compliance" with the cleanup orders. *Findley Adhesives*, 5 E.A.D. at 719, n.26. Instead, the Board found that Findley's non-compliance was of a "significant" and "serious" nature. *Id.* at 720-721. The Board therefore ruled that Findley's petition was not entitled to consideration on the merits, in spite of the Board's finding that Findley, in conjunction with other respondents, eventually completed the necessary work. *Id.* at 718-719. *See also Wausau*, 52 F.3d 656 (upholding a finding of failure to comply with an order and denying review of a petition for reimbursement in spite of the petitioner's claims it was not liable for any contamination, where the petitioner did not finish all the cleanup work required by the order).

In explaining the purposes behind requiring compliance as a condition for a petition for reimbursement, the Board stated:

> CERCLA § 106(b) expressly limits the right of reimbursement to persons who receive *and comply with* an Agency cleanup order. In fact, the addition of CERCLA § 106(b) was clearly intended as a specific means of *encouraging compliance* with an order. As stated in the House Committee on Energy and Commerce report on the legislation, CERCLA § 106(b) was intended to:
>
> > [F]oster compliance with orders and promote expeditious cleanup, by allowing potentially responsible parties who agree to undertake cleanup to preserve their arguments concerning liability and the appropriateness of response action.

Findley Adhesives at 718 (emphasis in original). The Board also cited *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990), which stated that in enacting the provision, Congress intended to encourage potentially responsible parties to conduct a cleanup expeditiously and postpone litigation about responsibility to a later time. *Findley Adhesives*, 5 E.A.D. at 718, n.24. *See also Wausau*, 52 F.3d at 665 ("[T]he design of the reimbursement provision ... is to defer liability issues until after the clean-up is completed – that is, until the reimbursement proceeding.")

In the instant matter, API had a clear choice in light of its belief that it was not liable: either comply with the UAO and then seek remedies given to all UAO respondents under the CERCLA § 106(b) process as intended by Congress, or refuse to comply with the UAO and thereby lose its rights under CERCLA § 106(b). As described above, API rejected the path of compliance on numerous occasions. Comparing API's instances of non-compliance to those found in *Findley Adhesives*, it is clear that API's non-compliance is likewise significant and serious in nature. There, the petitioner repeatedly failed to meet work deadlines and other site security and paperwork requirements. Here, API failed to meet deadlines for submission of the 2011 RAWP, incorporate specific Response Agency comments into the 2011 RAWP, and implement the full-scale cleanup work provided under the UAO's modified 2011 and 2012 RAWPs. API's behavior in these instances directly contravenes CERCLA's goal of expeditious

cleanups under administrative orders. Based on these circumstances, it is clear that there is no evidence to support Petitioner's claim that it has complied with the UAO.

II. Motion to Stay Proceedings in this Matter

As noted above, the contribution and enforcement actions filed in federal district court continue to be adjudicated. API argues in its Petition that it is not liable because the district court has made a non-final, non-appealable ruling denying the government direct relief against API in its enforcement action.[5] The court has not entered a final judgment or partial final judgment in API's favor in the enforcement action or the consolidated contribution cases. Thus, there is no right of appeal at this time. In fact, issues concerning the CERCLA claims that can be asserted by and against API are still being litigated in the ongoing cases. For example, API is continuing to press claims against other PRPs for recovery of some or all of its UAO expenditures and the district court's resolution of those claims could well affect (and potentially reduce or eliminate) API's Superfund reimbursement claim. EPA Exhibit 15.

A Board decision requiring EPA to reimburse API for any portion of API's costs would be final agency action. EPA would have no right to appeal such a decision, as only non-EPA parties have a right to obtain judicial review of a Board decision. Accordingly, in this instance because the district court has not entered a final or partial judgment in either the contribution or enforcement actions, EPA believes it is more appropriate for the federal courts to be the venue to determine the liability or non-liability of API.

Conclusion

For the foregoing reasons, EPA respectfully requests the dismissal of the Petition, without prejudice, on the ground that it has been prematurely filed, because EPA has not yet

[5] As noted above, API continues to have an indirect obligation to pay a share of all UAO costs incurred by NCR under its binding cost sharing arrangement with NCR.

issued a notice of completion of the required action at the Site. Otherwise, EPA respectfully requests the dismissal of the Petition with prejudice because API failed to comply with the UAO. Alternatively, EPA respectfully requests that the Petition be stayed pending resolution in the federal courts of the liability issues in the case.

Dated this 12th day of July, 2012,

Respectfully submitted,

By: _____

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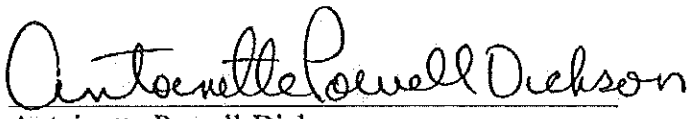

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss the Petition of Appleton Papers Inc. or in the Alternative Motion to Stay the Proceedings, including exhibits, in the matter of In re Appleton Papers Inc., Petition No. CERCLA 106(b) 12-04, were served via UPS on the following persons, this 12th day of July, 2012:

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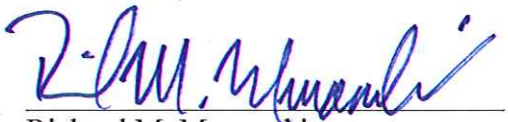

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