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

In re:

APPLETON PAPERS INC.,

Petitioner.

PETITION FOR REIMBURSEMENT OF COSTS

Appleton Papers Inc. ("API"), by its undersigned counsel, respectfully submits this Petition for Reimbursement of Costs pursuant to section 106(b)(2)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9606(b)(2)(C).

INTRODUCTION

On November 13, 2007, the Environmental Protection Agency ("EPA") issued a Unilateral Administrative Order ("UAO" or "106 Order") to API and seven other parties. In its written response to the 106 Order, API objected on the ground that it was not liable under CERCLA. EPA rejected API's objection. API was unable to challenge its liability in court due to CERCLA's bar against pre-enforcement judicial review. 42 U.S.C. § 9613(h). API thus complied with the 106 Order, rather than risk severe penalties for noncompliance.

In October 2010, the United States commenced an enforcement action against API (and others), thus allowing API to challenge its liability in court. *United States v. NCR Corporation, et al.*, United States District Court for the Eastern District of

Wisconsin, Civil Action No. 10-CV-910 (the "Enforcement Action"). On April 10, 2012, the District Court ruled that API is not a liable party under CERCLA:

> I conclude that the terms of the 1978 assumption agreement are not broad enough to encompass the CERCLA liability at issue here. Accordingly, the motion for reconsideration is GRANTED in part, and **API is entitled to summary judgment that it is not a liable party under CERCLA**. **All claims against API are DISMISSED.**

Dkt. 349 at 9 (emphasis added).[1]

API has incurred approximately $174 million in response costs complying with the 106 Order prior to the District Court's April 10, 2012 decision,[2] and now seeks reimbursement from the Fund to the extent permitted by law.

FACTUAL AND PROCEDURAL BACKGROUND

A. API.

API is a paper company with its principal place of business located at 825 E. Wisconsin Avenue, Appleton, WI 54912. API started doing business on June 30, 1978, after it purchased certain paper manufacturing and coating facilities from NCR Corporation ("NCR").

B. The 106 Order.

On November 13, 2007, the United States issued an order pursuant to CERCLA § 106 (106 Order) to API and seven others ("Respondents") under U.S. EPA Docket No. V-W-08-C885. A copy of the 106 Order is attached to this Petition as Exhibit 1. The 106 Order relates to PCB contamination in a 39-mile span of the Lower Fox River and

[1] "Dkt." refers to the docket entry in the Enforcement Action.

[2] As set forth in the Declaration of Susan J. O'Connell ("O'Connell Dec."), $174 million is the total cost that API incurred under the 106 Order from 2008 through March 2012. *Id.* at ¶ 6.

Green Bay Superfund Site ("Site"), in northeastern Wisconsin.[3] Ex. 1 at ¶ 6. According to the Government, most of the PCBs were released to the Site as the result of the manufacture and recycling of NCR Paper brand carbonless copy paper, which, from 1954 to 1971, used a paper coating containing Aroclor 1242. The Government claims in the 106 Order that:

> By both the production of carbonless copy paper and the reprocessing of carbonless copy paper as feedstock, PCBs were released from paper production mills either directly to the Fox River, or indirectly, after passing through publicly-owned wastewater treatment plants. PCBs that were discharged to the Fox River contaminated sediments in the Fox River and the Bay.

Ex. 1 at ¶ 6.

The Government divided the Site into five geographically defined "operable units" – OU's 1-5. *Id.* The remedial action addresses contaminated sediments in the Lower Fox River by dredging, capping, and a combination of dredging and capping. *Id.* at ¶ 30. The overall remediation program for OU2-5 is set forth in the 2003 Record of Decision ("2003 ROD"), the 2007 Record of Decision Amendment ("2007 Amended ROD"), and the 2010 Explanation of Significant Differences ("2010 ESD"). Declaration of Jeffrey Thomas Lawson ("Lawson Dec.") at ¶ 6; Ex. 1 at ¶ 21.

The 106 Order directs the Respondents "to implement the remedial action for Operable Units 2, 3, 4 and 5" at the Site. Ex. 1 at ¶ 1. It also directs the Respondents to:

> [C]ommence 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.

Id. at ¶ 43.

[3] The Government alleges that the "Site" is a "facility."

When all phases of the remedial action have been fully performed, the 106 Order provides for a process that includes notification of completion by the Respondents, a pre-certification inspection by EPA, and a written report by EPA certifying that the remedial action has been completed in full satisfaction of the requirements of the 106 Order. *Id.* at ¶ 54. After certification, the 106 Order provides that the Respondents "shall continue to perform any ongoing elements of the Phase 2B Work, including and [sic] operation, maintenance, and monitoring activities required by the Phase 2B Work Plan." *Id.*

The remediation effort is currently ongoing, but, due to the District Court's decision of April 10, 2012 that API is not liable under CERCLA, all of API's actions under the 106 Order are completed.

C. The Government's Allegations Regarding API's Alleged Liability.

The United States alleged in the 106 Order 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.

Id. at ¶ 7a, ii. (emphasis added). The United States based its successor liability claim against API 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.

Id. at ¶ 7a, vi.

In a written response to the 106 Order, API advised the Government that it did not have any liability under CERCLA:

> Contrary to statements made in the Order, API is not 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. With respect to successor liability, in the Seventh Circuit, an asset purchaser does not acquire the liabilities of the seller unless one of four exceptions to this general rule are met: (1) the purchaser agreed to assume the liabilities; (2) the transaction is a de facto merger or consolidation; (3) the purchaser is a "mere continuation" of the seller; or (4) the transaction is an effort to fraudulently escape liability, *North Shore Gas v. Solomon, Inc.*, 152 F.3d 642, 651 (7th Cir. 1998). In 1978, API purchased the assets of NCR's Appleton Papers Division (APD) pursuant to an asset purchase agreement in which it did not agree to accept the liabilities at issue here. None of the other exceptions apply to the 1978 transaction, either.

A copy of API's response letter is attached to the Petition as Exhibit 2.

However, the Government rejected API's position and asserted that API must comply with the 106 Order. Due to CERCLA's bar against pre-enforcement judicial review in Section 113(h), 42 U.S.C. § 9613(h), API could not challenge its liability without risking severe penalties. Accordingly, API complied.

D. API's Compliance With The 106 Order.

API and NCR undertook work necessary to implement the 106 Order. As required by the 106 Order, API and NCR entered into long-term contracts with contractors and other vendors necessary to implement the cleanup plan for OU2-5, creating the Lower Fox River Remediation LLC ("LLC") for that purpose. Lawson Dec. at ¶ 3. Through the LLC, API and NCR negotiated and finalized a contract with a general contractor, Tetra Tech EC, Inc. *Id.* They constructed the infrastructure necessary for the remediation, including construction of a sediment processing plant. *Id.* at ¶ 7. Actual in-water remediation began in April 2009, on the schedule demanded by the

Government. *Id.* API complied with the terms of the 106 Order through the 2010 construction season. *Id.* at ¶ 10.

Thereafter, API acted in accordance with the District Court's determination of its obligations with respect to the 106 Order. As explained in the Lawson Declaration, API conducted work in the 2011 construction season. Lawson Dec. at ¶¶ 8-9. However, at the outset of that construction season, API had a disagreement with the Government about the amount of work the Government was demanding. *Id.* at ¶ 11. When the Government moved for a preliminary injunction to force the additional work it was demanding, the District Court denied the motion, holding that the Government was not likely to prevail on its claims against API. *Id.* In a July 5, 2011 Order denying the United States' motion for preliminary injunction, the District Court determined that the United States would have "little success in attempting to demonstrate that Appleton Papers Inc. is liable as a successor under CERCLA." Dkt. 172 at 21. A copy of the July 5, 2011 Decision is attached as Exhibit 3.

The Government moved for a preliminary injunction again for the 2012 construction season. Dkt. 312. As discussed below, on April 10, 2012, the District Court entered summary judgment to API dismissing the Government's claims against API. Dkt. 349. That decision was issued essentially at the start of the 2012 construction season, and, accordingly, API has done no work in 2012.

E. The *Whiting* Action.

In January 2008, API and NCR filed an action for cost recovery and contribution against other Fox River PRPs pursuant to CERCLA, §§ 107 and 113(f).[4] *See Appleton*

[4] The cost recovery claims were dismissed by the District Court. *Whiting*, Dkt. 227 at 751.

Papers Inc. and NCR Corporation v. George A. Whiting Paper Company, et al., United States District Court for the Eastern District of Wisconsin, Civil Action No. 08-CV-16-WCG ("*Whiting*"). A total of 25 parties were named as defendants, including the six other UAO Respondents. *Whiting,* Dkt. 1. In a summary judgment decision issued December 16, 2009, the District Court held that NCR and API were not entitled to contribution. *Whiting,* Dkt. 795. To date, NCR and API have not been able to appeal that decision. The action remains pending before the District Court due to counterclaims brought by certain defendants.

F. The Enforcement Action.

On October 14, 2010, the Government filed an action against API and others. Dkt. 1. The requested relief included a declaration that "each UAO Recipient is required to comply with all provisions of the UAO applicable to such UAO Recipient." Dkt. 30, First Amended Complaint at 32, ¶ 5. The Government sought such relief because:

> An actual controversy exists regarding the United States' rights and the UAO Recipients' legal obligation under the UAO, as evidenced by several sets of written objections that UAO Recipients sent the Plaintiffs after issuance of the UAO.

Id. at 30, ¶ 132. The Government's Complaint does not allege any failure on the part of any 106 Order Respondent to comply with the terms of the 106 Order.

In the Enforcement Action, the Government again alleged that API "is a successor to certain relevant liabilities of NCR Corporation." Dkt. 30 at 11, ¶ 45. API again denied that allegation. Dkt. 65, pp. 13-17, ¶¶ 45-54 and p. 34, ¶¶ 1-6.

G. The District Court's Ruling That API Is Not Liable Under CERCLA.

In the Enforcement Action, API moved for summary judgment that it is not a liable party under CERCLA. Dkt. 194. The District Court originally denied the motion

(Dkt. 279), but API moved for reconsideration. Dkt. 286. On April 10, 2012, the District Court granted API's motion for reconsideration. Dkt. 349. A copy of the District Court's Decision is attached as Exhibit 4.

The District Court examined the 1978 Asset Purchase Agreement upon which the Government based its successor liability claim against API and concluded, among other things, that because "the 1978 agreement is silent about CERCLA liability and lacks a broad 'catch-all' environmental liability clause," then "API did not agree to assume direct CERCLA liability." Dkt. 349 at 5-6. The District Court therefore ruled that "API is entitled to summary judgment that it is not a liable party under CERCLA. All claims against API are **DISMISSED**." Dkt. 349 at 9 (emphasis original). API has filed this Petition within 60 days of that ruling.

ARGUMENT

I. API IS ENTITLED TO REIMBURSEMENT FROM THE FUND BECAUSE IT HAS BEEN ADJUDICATED NOT LIABLE UNDER CERCLA.

The District Court held that API is not liable under CERCLA, granted summary judgment to API, and dismissed all claims against API in the Enforcement Action. The 106 Order has no further force or effect as to API. API is, therefore, entitled to reimbursement to the extent permitted by CERCLA, § 106(b)(2)(C), for the costs it incurred complying with the 106 Order from the time of its issuance through April 10, 2012, when API's non-liability under CERCLA was adjudicated in the Enforcement Action.

II. API MEETS THE THRESHOLD REQUIREMENTS FOR REIMBURSEMENT FROM THE FUND.

A. API Complied With The 106 Order And Incurred Costs In Doing So.

As set forth above, notwithstanding its position that it was not a liable party, API complied with the terms of the 106 Order through the 2010 construction season, and, thereafter, as directed by the District Court. API (together with NCR) built a treatment facility and removed, treated, and disposed of 1.487 million cubic yards of sediment from OU2-4. Lawson Dec. at ¶ 9. In addition, approximately 141 acres of caps and sand covers have been placed in OU2 and OU3 by API and NCR, as required by the 106 Order. *Id.*

API challenged the Government's demands the first construction season that API had the opportunity to do so and, as explained above, the Court ruled in favor of API.

API has incurred approximately $174 million in costs complying with the 106 Order. O'Connell Dec. at ¶ 6.

B. API Has Now Completed All Required Action Under The 106 Order And This Petition For Reimbursement Is Timely Filed.

A petitioner seeking reimbursement from the Fund must file its petition "within 60 days after completion of the required action." CERCLA, § 106(b)(2). CERCLA does not define the term "required action."[5] In *Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995), the Seventh Circuit Court of Appeals considered the question of when a party may seek reimbursement:

> The right of reimbursement extends to "any person who receives and complies with the terms of [any order]," and ripens into a right to petition and to sue "after

[5] CERCLA also "does not require an EPA determination that the clean-up is complete before a complying PRP may file a reimbursement petition." *General Electric Co. vs. Jackson*, 595 F. Supp. 2d 8, 31 (D.D.C. 2009), *aff'd* 610 F.3d 110 (D.C.Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (U.S. June 6, 2011).

> completion of the required action." § 9606(b)(2)(A). Obviously "required" means "required by the order." **Once a party completes whatever action is required by the terms of the order, it can seek reimbursement for the costs of that action."**

Id. at 663 (emphasis added). The Court "emphasized the need for flexible interpretation of the reimbursement provision." *Id.* at 665. *See also N. Shore Gas Co. v. Envtl. Prot. Agency*, 930 F.2d 1239, 1245 (7th Cir. 1991) ("If the provision on suits for reimbursement is not interpreted generously, a firm in North Shore's position may find itself without any judicial remedy against arbitrary and capricious agency action, and that was not Congress's intent."). In *In re Glidden Co.*, 10 E.A.D. 738, 749 (EAB 2002), the EAB agreed with "the notion advanced by the Seventh Circuit that there may be circumstances along the lines of those catalogued in *Wausau* in which something less than complete satisfaction of Agency demands might be sufficient for purposes of CERCLA reimbursement"). This Petition presents such a circumstance.

API is a 106 Order Respondent that has now been judicially determined to have no CERCLA liability. The Government's claims against API in the Enforcement Action have now been dismissed. API is no longer subject to the 106 Order and cannot be required to take any further action pursuant to it. Thus, while the remediation itself is not yet complete, it is undisputed that all of the "required action" by API under the 106 Order is now complete. The "completion of the required action" was on April 10, 2012, when the District Court granted summary judgment to API. This petition is filed within 60 days of the District Court's decision. Therefore, API's Petition for Reimbursement is ripe for review.

CONCLUSION

For the foregoing reasons, API requests reimbursement of the costs it incurred under the 106 Order to the extent permitted by law, the precise amount of which will be documented for the Board following the determination of API's entitlement to reimbursement.

Dated this 8th day of June, 2012.

APPLETON PAPERS INC.

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

Counsel for Appleton Papers Inc.:

Michael L. Hermes (Wis. #1019623)
Heidi D. Melzer (Wis. #1076125)
Ericka L. Krumrie (Wis. #1066383)
Hermes Law, Ltd.
333 Main Street, Suite 601
Green Bay, WI 54301
(920) 436-9870

Ronald R. Ragatz (Wis. #1017501)
Dennis P. Birke (Wis. #1018345)
Megan A. Senatori (Wis. #1037314)
DeWitt Ross & Stevens S.C.
Two East Mifflin Street
Madison, WI 53703
rrr@dewittross.com
(608) 255-8891
(608) 252-9243 (Facsimile)

Gregory A. Krauss (DC #420221)
Gregory A. Krauss PLLC
1629 K St. NW
Suite 300
Washington, DC 20006
(202) 355-6430

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2012, a true and correct copy of the foregoing **PETITION FOR REIMBURSEMENT OF COSTS** was electronically delivered to the following:

U.S. Environmental Property 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 8th day of June, 2012, a true and correct copy of the foregoing **PETITION FOR REIMBURSEMENT OF COSTS** was served by Federal Express on the following person:

Richard C. Karl
Director, Superfund Division – Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

/s/ Ronald R. Ragatz
Ronald R. Ragatz