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.

MEMORANDUM OF APPLETON PAPERS INC. IN REPLY TO THE BOARD'S ORDER FOR CLARIFICATION

Appleton Papers Inc. ("API"), by its undersigned counsel, respectfully submits this Reply Memorandum in response to the Board's Order for Clarification.

ARGUMENT

I. ISSUE 1: EPA'S RESPONSE CONFIRMS THAT DEFERRING ACTION ON API'S PETITION PENDING AN APPEAL OF THE DISTRICT COURT'S DECISION WOULD INDEFINITELY DELAY CONSIDERATION OF THE MERITS OF API'S REQUEST FOR REIMBURSEMENT.

API agrees with the Environmental Protection Agency ("EPA") that the District Court's decision on API's CERCLA liability is not final and appealable under 28 U.S.C. § 1291. Under this provision, the Government cannot appeal the decision as of right until the District Court has adjudicated all claims of all parties in the pending enforcement action. That will not occur for an indeterminate period because, as EPA correctly notes, the District Court has postponed *all* action (including discovery) on the Government's claims for natural resource damages and past costs until it has disposed of claims relating to the 106 Order. Because litigation of these deferred claims has not advanced beyond the bare pleadings, EPA is unable to even hazard a guess as to when a final, and appealable, judgment may be entered in the pending action, much less when all appeals

from such a judgment might be completed. Additional time will be required to complete the appellate process once an appeal is possible, if one is taken.

Moreover, EPA cannot even claim that the Government intends to appeal the District Court's ruling on API's CERCLA liability once a final judgment is entered. EPA acknowledges that another government agency over which it has no control — the Office of the Solicitor General in the Department of Justice — will decide whether to pursue an appeal. Presumably, that is the same government agency that elected not to exercise the Government's right to seek an interlocutory appeal of the District Court's ruling pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, even though EPA acknowledges such a route to immediate appellate review was available but not pursued.[1] EPA's response also fails to identify any grounds for challenging the District Court's decision on appeal and does not claim (much less demonstrate) that an appeal has any reasonable likelihood of success.

In short, EPA is asking the Board to dismiss API's Petition pending the outcome of an appeal that the Government:

- Elected not to pursue on an interlocutory basis;
- Cannot now pursue for at least several years;
- May never pursue.

[1] The District Court had even reminded the Government about the availability of interlocutory review. *See* Transcript of April 12, 2012 148:1-148:3 ("Another issue [to discuss] might be whether the decision I've now rendered on [API's CERCLA liability] should be made final and entered a final judgment in case anyone wants to seek review of that.")

As in its original Motion to Dismiss, moreover, EPA seeks this relief without citing any authority supporting its request. EPA also refuses to acknowledge the injustice such a delay would work against API, a party that already incurred more than $170 million to comply with the 106 Order before it was adjudicated not to be liable under CERCLA. EPA's response to the Order for Clarification aptly confirms why an indefinite stay of API's Petition is inappropriate.

II. ISSUE 2: NO CASE LAW OR LEGISLATIVE HISTORY SUPPORTS EPA'S RIGID CONSTRUCTION OF CERCLA'S REIMBURSEMENT LANGUAGE.

In response to the Board's direction to "provide its view on whether API is entitled to reimbursement" if the Decision is affirmed on appeal, EPA *admits* that API would be entitled to reimbursement. EPA's Response to Order for Clarification ("Response") at 3. Nonetheless, EPA clings to its rigid position 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." *Id.* at 3-4. It does so despite conceding "there is no case law on the issue of the meaning of completion in the context of a prior determination of liability…." *Id*. at 4.

In response to the Board's request that EPA provide "legislative history bearing on the question of whether Congress contemplated the issue of completion in the context of a prior determination of liability," EPA comes up empty-handed. It offers no legislative history to support its claim that a party adjudicated not to be liable must wait to seek reimbursement until the remediation is completed by the liable parties. Instead, EPA cites to a general statement from the Congressional Record for the proposition that Congress designed the reimbursement provision "to provide incentives" for parties to

"undertake the work required in the [106] order" while preserving their "legal objection to performing the work." Response at 4.

API agrees that Congress intended the reimbursement provision to incentivize compliance with 106 orders by liable parties, but API is not a liable party. Further, EPA's rigid construction of the reimbursement provision creates a gross *disincentive* to comply with a 106 order. That is because under EPA's construction, even after a court had found that a recipient of a 106 order is not liable under CERCLA, reimbursement would still be improper until the remediation is completed by liable parties. If liable parties never complete the "required action" (*i.e.*, the entire cleanup according to EPA), then the non-liable party can never seek reimbursement.

If EPA's construction is adopted by the Board, no recipient of a 106 order that questions its CERCLA liability will undertake the work if its right to reimbursement is contingent upon the actions of other parties over which it has no control. Instead, it will refuse to do the work and wait to be sued by EPA. The situation before the Board is precisely why the Seventh Circuit has "emphasized the need for flexible interpretation of the reimbursement provision." *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 665 (7th Cir. 1995); *see also N. Shore Gas Co. v. Envtl. Prot. Agency*, 930 F.2d 1239, 1245 (7th Cir. 1991). API has completed all "required action" directed to API under the 106 Order and it is, therefore, now entitled to proceed to the merits of its Petition for reimbursement. EPA has failed to show otherwise.

Instead, EPA attempts to discount the effect of an indeterminate delay by claiming that a party who complies with a 106 order "is not financially harmed by a delay in reimbursement" because CERCLA allows parties successfully petitioning for reimbursement to recover interest from the date of expenditure. Response at 4. EPA has

no factual basis for making such a blanket assertion. EPA has no knowledge of the finances of API, an employee-owned company, or the financial impact and burdens arising from the Government's wrongful issuance of the 106 Order to API. The Board should reject EPA's cavalier and unsupported assertion that there is no harm in making API wait, indefinitely, for reimbursement.

API has done all that was required of it. Along with NCR, API undertook the lead in complying with the 106 Order, it challenged its liability at the first opportunity after the Government filed the enforcement action, and it prevailed in obtaining a finding of non-liability. The suggestion that API should have completed the remediation even after obtaining an adjudication of non-liability is nonsense. EPA's position has no basis in case law or legislative history. Accordingly, the Board should reject EPA's attempt to force API to wait indefinitely to obtain reimbursement.

III. ISSUE 3: API'S PRIVATE INDEMNITY AGREEMENT WITH NCR IS NOT RELEVANT TO THE ONLY ISSUE NOW BEFORE THE BOARD – WHETHER API'S PETITION IS RIPE FOR CONSIDERATION.

Finally, the Board directed EPA to "provide clarification on the relevance (if any) of any cost sharing arrangement to the issues before the Board." In response, EPA claims only that the agreement "is relevant" "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." Response at 5 (emphasis added).

EPA's response misses the mark for two reasons. First, the response confirms that API's indemnity obligations to NCR are relevant (if at all) only to the ultimate *merits* of API's Petition. The merits of API's Petition are not before the Board:

> CERCLA § 106(b) establishes four prerequisites for obtaining review of a reimbursement petition on the merits, and the petitioner must demonstrate that it satisfies all four of them. The EAB will not address the merits of a petition unless the petitioner has first demonstrated that it has satisfied these prerequisites.

Revised Guidance for Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions at 5. Despite the Board's express invitation, EPA offers no explanation as to why API's indemnity obligations have any relevance to the only issue presently before the Board, namely, whether API's Petition is ripe for consideration.

Second, EPA's focus upon API's indemnity obligations to NCR is a red-herring in any event. This is not a case where an indemnitor is seeking to recover amounts it paid to a party named in a 106 order in order to discharge an indemnity obligation. Here, in contrast, API was *itself* named in the 106 Order and it was thereby *directly* compelled to incur more than $170 million to discharge *its* obligations under the Order. Despite the Board's invitation, EPA has failed to explain the relevance of API's contractual relationship with NCR in view of the fact that API was itself personally and directly subjected to the 106 Order. Accordingly, the private agreement between NCR and API is irrelevant to the issues before the Board.

CONCLUSION

For the foregoing reasons, as well as those set forth in API's Memorandum in Opposition, API respectfully asks that the Board deny EPA's Motion to Dismiss, and allow API's Petition to proceed to the merits.

Dated this 1st day of November, 2012.

APPLETON PAPERS INC.

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2012, a true and correct copy of the foregoing **MEMORANDUM OF APPLETON PAPERS, INC. IN REPLY TO THE BOARD'S ORDER FOR CLARIFICATION** 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 November, 2012, a true and correct copy of the foregoing **MEMORANDUM OF APPLETON PAPERS, INC. IN REPLY TO THE BOARD'S ORDER FOR CLARIFICATION** was served by Federal Express on the following person:

Richard M. Murawski
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s/Ronald R. Ragatz
Ronald R. Ragatz