

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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UNITED STATES OF AMERICA and	)	
THE STATE OF WISCONSIN,	)	
	)	
Plaintiffs,	)	Civil Action No. 10-C-910
	)	
v.	)	Hon. William C. Griesbach
	)	
NCR CORPORATION, <i>et al.</i> ,	)	
	)	
	)	
Defendants.	)	

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**REPLY BRIEF IN SUPPORT OF UNITED STATES' EXPEDITED MOTION FOR  
A PRELIMINARY INJUNCTION TO COMPEL PERFORMANCE OF  
FULL SCALE REMEDIATION WORK IN 2012**

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**Introduction**

The United States has done its best to tailor this brief today in light of the Court's most recent ruling in this case (Dkt. 349), although the Plaintiffs obviously have not yet had time to give the ruling full consideration.<sup>1</sup>

One thing is clear: nothing in today's ruling diminishes the need for entry of a preliminary injunction requiring the resumption of full-scale dredging work at the Lower Fox River and Green Bay Superfund Site. The only real question concerns the form that the injunction should take, not whether it should issue.

A preliminary injunction certainly should apply to NCR Corporation ("NCR"). The Court recognized last year that the United States had established "a sound basis supporting preliminary injunctive relief against NCR." Dkt. 172 at 23. As the Court explained:

The government may seek appropriate relief to compel NCR to undertake or continue the clean-up, but it has not done so in its current motion. For example, NCR may be able to contract directly with Tetra Tech in the event the LLC discontinues its efforts. This or other possible avenues of relief are not currently before the Court.

Dkt. 172 at 23 n.3. The United States now seeks just that type of relief.

After the Court's preliminary injunction rulings last year, EPA directed NCR to take the lead role in advancing the remediation effort required under its Unilateral Administrative Order. Dkt. 203-4. And the United States urged Appleton Papers Inc. ("API") to cede control of the project to NCR months ago if API wanted to continue pressing its arguments that it has no direct

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<sup>1</sup> The United States has had no chance to address the arguments made in an unexpected response brief that P.H. Glatfelter Company filed this evening (Dkt. 351). The Court's March 20, 2012, Scheduling Order set an April 5 deadline for response briefs (Dkt. 320) and Glatfelter already joined and co-signed another response brief filed on April 5 as one of "Certain Defendants" (Dkt. 328).

CERCLA liability for this Site. Dkt. 313-2. API and API's indemnitor – now known as Windward Prospects, Ltd. (“Windward”) – seemed to do that for a period of time, but we have learned since our preliminary motion was filed that lingering disagreements between NCR and Windward boiled over in mid-March, and that has now led to a complete remediation work stoppage. The public should not suffer because NCR and Windward cannot get along.

In light of the evolving circumstances, the United States respectfully requests that the Court enter an injunction against NCR alone, with the terms of injunction set forth in the attachment hereto. Aside from the fact that the injunction would target NCR only, the substantive terms are virtually the same as those previously proposed by the United States (Dkt. 312-1). NCR would need to ensure that 660,000 cubic yards of sediment is dredged at the Site this year, consistent with EPA's Modified Work Plan for 2012 (Dkt. 313-5 through 313-9). No one has suggested that is infeasible. Despite the mess created by the struggle between NCR and Windward, the evidence that has come to light recently indicates that the project contractors would willingly work for NCR alone, either through the Lower Fox River Remediation LLC (the “LLC”) or through separate contractual arrangements with NCR. Dkt. 330 at 9; Dkt. 357-18; Dkt. 357-20. Tetra Tech has already done 2012 remediation *planning* work for NCR under a special contractual side arrangement approved by the LLC (“Change Directive 12”) and we have recently learned that the LLC has approved a corresponding side arrangement for the *performance* of the 2012 remediation work (“Change Directive 13”). Dkt. 357-12; Dkt. 357-5. Under the circumstances, NCR can and should take the lead in doing the remediation work this year.<sup>2</sup>

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<sup>2</sup> The United States has no reason to believe that an injunction binding NCR alone would negate or diminish API's undeniable obligation (and Windward's corresponding obligation, as API's indemnitor) to pay 60% of any NCR/API costs under the separate arbitration award and final judgment between NCR and API.

The arguments that have been made against entry of a preliminary injunction are not new or different. The Court has considered and dismissed the divisibility theories advanced by NCR and API (Dkt. 172 at 3-13), and the Court should do so again for added reasons that are offered below. The Court also has found that the remedy challenges that have been raised again are unlikely to succeed under the deferential arbitrary and capricious review standard dictated by CERCLA, 42 U.S.C. § 9613(j)(2). Dkt. 172 at 13-15. The Court has recognized that there will be irreparable harm if a slowdown or suspension of the remediation work delays the completion of the overall remedy. Dkt. 172 at 15-16. The “due process” complaints by API carry little weight because the parties worked out arrangements for expedited discovery, the parties have submitted extensive briefs and evidence, and the Court will hear explanatory testimony at an evidentiary hearing on April 12. Finally, even if the Court grants the preliminary injunction against NCR alone, as now requested, API and Windward cannot impede NCR’s compliance efforts, as shown in the final section of this brief.

### **Argument**

#### **1. The Divisibility Arguments Offered By NCR and API Provide No Basis for Denying the Preliminary Injunction Motion**

In its ruling on the preliminary injunction motion filed last spring, the Court devoted ten pages of its decision to the divisibility and apportionment arguments advanced by NCR and API. Dkt. 172 at 3-13. The Court began by discussing the facts and import of the Supreme Court’s decision in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009). Dkt. 172 at 3-6. Because *Burlington Northern* and its predecessor were guided by divisibility and apportionment principles outlined in § 433A of the Restatement (Second) of Torts, the Court identified several key lessons to be drawn from examples presented in the Restatement. *Id.* at 6-11.

- Most importantly, the Court emphasized that an apportionment must be based on the degree of harm *caused* by each tortfeasor. *Id.* at 11 (citing *Burlington Northern*).
- Consistent with that principle, the Court observed that an apportionment may be appropriate if the “damages increased in direct proportion to the defendant’s tortious activities,” as suggested by several Restatement examples. *Id.* at 7. Where there is “a proportional relationship between the defendants’ activities and the damage sustained, it makes sense to divide liability along the same lines.” *Id.*
- In contrast, the Court noted that a causation-based apportionment might be out of the question if a tortfeasor’s degree of involvement bore little relationship to the harm suffered by the plaintiff, as indicated by other Restatement examples. For example, if “independent factors played a role in causing the harm,” then that confounding factor might make it impossible to identify an increment of harm caused by one of multiple contributing tortfeasors. *Id.* at 11.<sup>3</sup>

Applying those Restatement rules, the Court found that NCR and API have a “low likelihood of success in meeting their burden to show that the harm is divisible” based on the theories they have offered. *Id.* at 11. It is quite clear that “CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists.” *Burlington N.*, 129 S. Ct. at 1881.<sup>4</sup> NCR and API both focus on arguments that the harm can be divided and apportioned based on the PCB mass percentages contributed by different facilities. The Court was right in finding that such mass percentage-based approaches suffer from two related problems at this Site. First, “the extent and nature of the environmental harm in the River is not easily correlated with volumes of PCBs discharged by the various

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<sup>3</sup> *Accord United States v. Monsanto Co.*, 858 F.2d 160, 172 n.27 (4th Cir. 1988) (“[v]olumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment.”).

<sup>4</sup> NCR goes too far in saying “[i]t is undisputed that divisibility constitutes a valid defense to a CERCLA enforcement action.” Dkt. 342 at 17. A divisibility demonstration may support an affirmative defense to *joint and several* liability to the government under CERCLA. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) (the Restatement (Second) of Torts envisions an “affirmative defense based upon the divisibility of harm”); *United States v. Township of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998) (discussing “the divisibility defense to joint and several liability”).

parties.” *Id.* at 9. Second, “*the cost of the cleanup bears little relation to the relative volume of PCBs released into the River.*” *Id.* at 7.<sup>5</sup>

The Court was exactly right on both those points, for reasons that are detailed in a prior filing in this case (Dkt. 150 at 13-20) and explained again in the accompanying declaration of Richard G. Fox (Dkt. 354). The Lower Fox River is a dynamic, complex, hydrological system which imposes numerous, sometimes competing, physical influences on river sediments and associated PCBs. During the more than half century since PCBs were first discharged into the river, sediments in OU 4 have been repeatedly scoured, resuspended, and transported by seasonal and weather-related high flow events, dredging, seiche events, propeller wash from small and large vessels, and anchor dragging. The continuous impacts, large and small, of this dynamic river system on PCB contaminated sediments renders any effort to trace PCBs from their current locations back to specific sources highly problematic, if not purely speculative. Dkt. 354 at 4, 9-13.

PCB contamination is not evenly distributed throughout the river or even throughout OU 4. Decisions regarding application of different remedial technologies allowed by the Records of Decision for this Site – dredging, capping, and sand covers – are subject to a number of considerations relating to the location and size of the PCB deposit – *e.g.*, thick or thin deposit, depth of contamination, relationship to the shoreline or objects in the river. Selection of remedial technology is not directly dependent on the concentration of PCBs in a specific location. Dkt. 354 at 5-7.

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<sup>5</sup> The Court and the parties have sometimes referred to PCB mass estimates in this matter as “volume” estimates or “volumetric” estimates. In a technical, scientific sense, mass and volume are different: mass is related to weight (and it is measured in units such as kilograms) and volume is a measure of the three dimensional space (expressed in units such as cubic yards). If a mass estimate is referenced here as a “volume” or “volumetric” estimate, it is merely because CERCLA case law tends to use those terms as shorthand expressions for estimates of amount or quantity, as the United States noted in a prior brief (Dkt. 150 at 15 n.11).

The actual costs of dredging, for example, depend on whether the PCB deposit is available to be addressed by a larger “production dredge,” which can remove a larger volume of sediment at a lower unit cost than a smaller, more nimble, “final dredge.” Although the contract costs for dredging are averaged out and do not necessarily track the actual location-specific costs borne by the dredging contractor, the contract costs are driven by the *volume* of sediment addressed, not the *mass or concentration* of PCBs within that sediment. For example, it costs the same for a production dredge to remove a cubic yard of 4 ppm PCB sediment as it does to remove a cubic yard with 40 ppm PCB sediment. Thus, even if one could discern where PCBs discharged by NCR’s predecessors have come to rest, the amount of their PCBs at those locations would not correlate with the cost of remediating those areas. Dkt. 354 at 17.

NCR’s and API’s experts have bulked-up their reports with extended discussions of elaborate “forensic” analyses that they have performed (Dkt. 337-2 through 337-5; Dkt. 339-2), but their apportionment theories still suffer from the same fatal flaw that was exposed last year: they all end up trying to “apportion the harm” using PCB mass-based percentages. And they don’t even agree on the specifics.

- NCR’s expert, Dr. Connolly, opines that a modest percentage of the residual PCB mass in OU 4 came from the Appleton Coated Paper Company (“ACPC”) and Combined Locks (“CL”) facilities – *i.e.*, 9% in an upstream portion of OU 4 and 6% in a downstream portion of OU 4. Dkt. 339-2. In contrast, Dr. Connolly estimates that OU 4 sources such as the U.S. Paper De Pere facility and Georgia-Pacific together contributed 61% of the PCB mass in the upstream area and 72% of the PCB mass in the downstream area. Dkt. 339-2 at 7. Those sweeping conclusions concerning all of OU 4 are extrapolated from a total of only 22 sediment cores from selected locations, including only *four* usable cores for the entire downstream river segment between the Fort Howard Turning Basin and Green Bay (approximately 3.4 miles). Dkt. 339-2 at 46, 67, 101-104.<sup>6</sup> NCR nonetheless claims that Dr. Connolly’s work shows that “NCR has already remediated substantially more than its divisible share of harm at OU4” because NCR and API have already dredged “approximately 53% and 20% of the

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<sup>6</sup> For the sake of comparison, more than 3,100 sediment cores have been collected from OU 4 and analyzed since 2003 to facilitate the remedy planning and implementation efforts in OU 4. Dkt. 354 at 12.

sediment that require dredging from Upper OU 4 and Lower OU 4, respectively.” Dkt. 342 at 23.

- API’s expert team, led by Dr. Simon, asserts that only 1.9% of the total residual mass in OU 4 came from the ACPC/CL facilities and that NCR and API therefore should pay only 1.9% of the OU 4 costs. Dkt. 337-2 at 2, Dkt. 337-6 at 10. Adopting that view in its brief, API contends that the “ACPC/CL Share, on an aggregated basis is only 1.9% (less than \$5 million) of the total capping/dredging remediation costs in OU 4. Dkt. 338 at 19. But API’s experts deflate the putative ACPC/CL “share” in two illegitimate ways. First, they employ an array of pro-API assumptions to reduce the relative PCB mass percentage share for the ACPC/CL facilities. Dkt. 337-2 at 26-55. Thus, they deem U.S. Paper De Pere and Georgia-Pacific responsible for roughly 93% of all the PCB contamination in OU 4 (Dkt. 337-6 at 9), which is much higher than even Dr. Connolly’s estimate (Dkt. 339-2 at 7). Second, API’s experts purport to “apportion the harm” by applying their PCB mass-based percentage only to a subset of the expected OU 4 costs. API’s experts based their “dollar share” calculation on an undisclosed \$254 million cost estimate for OU 4 capping, dredging, and disposal costs (Dkt. 337-6 at 10; Dkt. 338 at 19) although the consulting firm that generated that cost estimate for API actually projects the OU 4 dredging costs alone at more than \$457 million (Dkt. 333 at 3).<sup>7</sup>

Leaving aside the questionable validity of their mass calculations, NCR’s and API’s expert analyses ignore the more fundamental issue. As recognized in this Court’s prior ruling, the

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<sup>7</sup> API’s expert report suggests that the expert team had been working on a much more elaborate attempt to apply PCB mass-based percentages to remediation costs associated with selectively defined “Apportionment Polygons.” Dkt. 337-7 at 83-96. API does not cite or rely upon any results of that effort in its brief (Dkt. 338), but the information on that approach in API’s expert report proves the fundamental point that the Court recognized in its prior ruling. There is no “proportional relationship between the defendants’ activities and the damage sustained” here. Dkt. 172 at 7. More specifically, the Court was right that “the relationship between [the amount of PCBs] and cost of cleanup is a loose one.” *Id.* at 8. That is evident from a simple comparison of three different “Apportionment Polygons” in OU 4 that have been identified by API’s experts, as summarized here:

	API’s Estimated Remedy Cost for the Polygon	Reported PCB Mass within the Polygon
“Apportionment Polygon 4-18”	\$753,190	46 kilograms
“Apportionment Polygon 4-19”	\$15,698,394	18 kilograms
“Apportionment Polygon 4-41”	\$11,449,108	2,477 kilograms

Dkt. 337-7 at 89, 91. As shown by those examples, it can cost millions of dollars more to remediate 18 kilograms of PCBs than 2,477 kilograms and it can cost much, much less to remediate 46 kilograms of PCBs than 18 kilograms of PCBs. The remediation costs at this Site quite clearly are not proportionate to the residual PCB mass.

calculations assume without proof that the degree of cleanup and associated costs at *this* Site bear some direct proportionate relationship to the parties' PCB mass contributions.

The Supreme Court in no way suggested that an apportionment is *required* (or even appropriate) whenever a district court believes it can make “an educated, but highly imprecise, estimate” of each party’s proportion of hazardous substances, as argued by NCR. Dkt. 342 at 29. In *Burlington Northern*, the Supreme Court noted that the parties had agreed that the harm in that case was theoretically capable of apportionment. Proceeding from that basis, the Supreme Court addressed whether the district court’s calculation of a percentage apportionment was “clearly erroneous” on the record.<sup>8</sup> Given that posture, the Supreme Court’s indication that the actual calculations need not be “exact” cannot be read to remove the requirement that defendants prove that their proposed method of apportionment – the basis of the calculation – correlates directly with the degree of harm. Where that correlative relationship does not exist, the sort of apportionment “guesstimate” proposed by the defendants here amounts to an equitable allocation, something prohibited by the Supreme Court’s ruling. *See Burlington N.*, 129 S. Ct. at 1882 n.9 (“Equitable considerations play no role in the apportionment analysis”). As explained in one leading case that the *Burlington Northern* Court cited with approval:

[W]here causation is unclear, divisibility is not an opportunity for courts to “split the difference” in an attempt to achieve equity. [*United States v. Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998).] Rather, “[i]f they are in doubt, district courts should not settle on a compromise amount that they think best approximates the relative responsibility of the parties.” *Id.* In such circumstances, courts lacking a reasonable basis for dividing causation should avoid apportionment altogether by imposing joint and several liability. *Id.*

*United States v. Hercules, Inc.*, 247 F.3d 706, 718-19 (8th Cir. 2001). And the *Burlington Northern* Court warned that “[n]ot all harms are capable of apportionment.” 129 S. Ct. at 1881.

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<sup>8</sup> *See Burlington N.*, 129 S. Ct. at 1881 (“The question then is whether the record provided a reasonable basis for the District Court’s conclusion” that certain defendants in that case were liable to the United States for only the set percentage of the harm established by the District Court).

When it confronted the same apportionment theories last year, the Court correctly found that in this case “apportioning liability based on volumes would not be advisable.” Dkt. 172 at 8.

NCR also argues that the Court erroneously found that the harm at issue is the cost required to clean up the river and not the pollution itself. Dkt. 342 at 25-27. While the Court did consider whether the divisibility and apportionment analysis should focus on the “the pollution itself” (Dkt. 172 at 9) or on “the *cost* required to clean up the river” (*id.* at 8), the Court ultimately reached the same conclusion after looking at the issue from both perspectives (*id.* at 8-11). The Court was correct in reaching that conclusion and there is therefore no reason to reconsider that decision. As the Court noted, looking at the contamination as the harm does not mean simply what each party contributed, but rather the nature and extent of the environmental problem that now exists in the river. That, as the Court observed, is not well-correlated with the mass of PCBs that parties contributed.

NCR defines the harm in this case as “the contamination,” and then treats this term as an abstraction by proposing an analysis under which the only relevant property of “the contamination” is its mass. This Court’s prior decision reflected the fact that the remedial nature of CERCLA makes relevant to the divisibility analysis the problem that must be addressed at a site, not merely the contamination in the abstract. Under CERCLA, that problem is cleanup. CERCLA Section 106 specifies that when EPA has found that “there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility” the United States is entitled to seek “such relief as may be necessary to abate such danger or threat.” 42 U.S.C. § 9606(a). That is the basis for the preliminary injunction motion and the United States’ Fifth Claim for Relief in this case. The divisibility analysis necessarily includes considerations such as the remedial action necessary to address the contamination and the associated costs of that work, as this Court

has found. Dkt. 172 at 8-9. The Seventh Circuit also has highlighted the importance of considering the nature of the remedial action when analyzing a party's responsibility for the harm at a site:

It is easy to imagine a case in which, had X not polluted a site, no clean-up costs would have been incurred; X's pollution would be a necessary condition of those costs and it would be natural to think that he should pay at least a part of them. But suppose that even if X had not polluted the site, it would have to be cleaned up-and at the same cost-because of the amount of pollution by Y. (That would be a case, perhaps rare, in which the clean-up costs were sensitive neither to the amount of pollution nor to any synergistic interaction between the different pollutants.) Then X's pollution would not be a necessary condition of the clean up, or of any of the costs incurred in the clean up. But that should not necessarily let X off the hook. For suppose that if X had not polluted the site at all there still would have been enough pollution from Y to require a clean up, if Y had not polluted the site X's pollution would have been sufficient to require the clean up. In that case, the conduct of X and the conduct of Y would each be a sufficient but not a necessary condition of the clean up, and it would be entirely arbitrary to let either (or, even worse, both) off the hook on this basis.

*Browning-Ferris Indus. v. Ter Maat*, 195 F. 3d 953, 958 (7th Cir. 1999).

This is not inconsistent with Supreme Court's decision in *Burlington Northern*, as NCR argues. In *Burlington Northern*, the Supreme Court acknowledged the lower courts' and the parties' agreement that the harm created by the contamination, although singular, was theoretically capable of apportionment. 129 S. Ct. at 1881. Thus, the Supreme Court had no occasion to consider whether the harm was *capable* of being apportioned according to the parties' relative contributions to the contamination, as the district court found, and simply focused on whether the record provided a reasonable factual basis for the district court's conclusion about each party's relative contribution to the contamination. *Id.* NCR's reliance on one illustration from Restatement Section 433A in which the harm was directly proportional to the contribution of each defendant – Illustration 4, involving water escaping from irrigation ditches – is not persuasive. In other Illustrations – such as Illustrations 14 and 15, which concern the discharge of oil into a stream – the outcome is not proportional to the contribution of each

defendant. *See* Restatement (Second) of Torts § 433A, cmt. i, illus 14, 15. Further, none of these Illustrations speak to the nature of the harm in CERCLA cases. Under CERCLA, the consequence of the release of hazardous substances is not just the government’s abstract concern over the contamination sitting in the environment, but the need for a cleanup. Accordingly, any attempt to divide the harm must take into account what is necessary to clean up the contamination. But the cleanup requirements at this Site bear little relationship to the amount of PCBs that NCR’s predecessors contributed.

Another district court reviewed and endorsed this Court’s reasoning on the divisibility issue in a decision issued just last week. *See Pakootas v. Teck-Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2012 WL 1133656 (E.D. Wash. April 4, 2012). In *Pakootas*, the State of Washington and Native American Tribes are seeking recovery of costs and natural resource damages under CERCLA from Teck-Cominco, a contributor to contamination at the Upper Columbia River Site in eastern Washington (the “UCR Site”). *Id.* at \*1. Teck argued that an apportionment of the harm at that site should be based on the volumetric percentage of the hazardous substances that had come from its own disposal of slag into the Columbia River. *Id.* at \*3. The court disagreed and granted the plaintiffs’ motions for summary judgment on Teck’s divisibility defense, relying on this Court’s July 2011 decision (Dkt. 172) and other authorities. *Id.* at \*4-17. As the *Pakootas* court explained:

This court agrees with the *NCR* court that the nature of cleanup costs are an important consideration in determining whether a defendant can provide that harm is divisible and beyond that, whether there is a reasonable factual basis for apportionment . . . . The harm is not the mere disposal or release of hazardous substances, but the consequences thereof.

*Id.* at \*16. Much like this Court (Dkt. 172 at 7), the *Pakootas* court found that a single harm may be “divisible and susceptible to apportionment in a situation where the degree of harm shows true proportionality or dose-dependence” (2012 WL 1144656 at \*10). But the court found no

such nexus in the *Pakootas* case: “Even if it could be determined that Teck contributed only a certain percentage of the total volume of hazardous substances in the UCR Site, there would not necessarily be a basis to conclude it caused the same percentage of ‘harm’ in the UCR Site . . . .” *Id.* at \*16. The same is true here. *Pakootas* lends persuasive support to this Court’s prior treatment of the divisibility arguments made by NCR and API and it reinforces the United States’ high likelihood of success on the merits in this case.

This Court’s prior ruling recognized that “divisibility considerations imported from the Restatement of Torts and the private injury paradigm . . . do not translate perfectly to the CERCLA context.” Dkt. 172 at 9. That certainly is true in this case. The Seventh Circuit has observed that “the ‘fit’ between § 433A and CERCLA is actually quite unclear.” *United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008). In at least some instances, applying Restatement principles is like “pushing a round peg through a square hole. Traditional tort law principles falter in the CERCLA context because CERCLA is so unlike a typical tort law cause of action.” Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 360 (1995). Tort liability usually hinges on principles of fault and causation, and CERCLA does not. Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 VT. J. ENVTL. L. 307, 355-56 (2009) (“Courts have recognized the square peg/round hole quality of apportioning liability based on causation in the context of a statutory scheme in which liability does not depend on causation.”). In addition, Restatement Section 433A focuses on damages, and specifically on whether “[d]amages for harm are to be apportioned among two or more causes,” because the remedy in a traditional suit against joint tortfeasors is an award of damages. Restatement (Second) of Torts § 433A(1).

This is why the “fit” is especially poor here. The United States seeks nothing like “damages” through its preliminary injunction motion and its Fifth Claim for Relief – both

demand performance of sediment remediation work in particular areas within OUs 2-5.<sup>9</sup> NCR's and API's PCB mass percentage-based apportionment theories are ill-suited for avoiding or dividing up the obligation to perform sediment remediation at this Site. For example, even if NCR's corporate predecessors can only be blamed for a fixed percentage of the total PCB mass in OU 4, NCR cannot remedy that contribution to the harm by: (1) dredging a fixed percentage of the estimated total volume of contaminated sediment, as argued by NCR (Dkt. 342 at 23); or (2) spending a fixed percentage of the current estimated total remediation costs, as argued by API (Dkt. 338 at 19). Either approach is based on nothing more than a percentage of an uncertain projection (because the sediment volume to be remediated and the associated costs can only be estimated at this point).<sup>10</sup> Both approaches also wrongly assume that the sediment remediation needs and the amount of costs bear some relationship to each party's percentage contribution to the mass of contaminants. And either approach would let NCR off the hook for undeniable messes that its predecessors caused in other yet-unremediated areas, contrary to the overarching requirement that divisibility and apportionment must be causation-based.

Finally, it should be emphasized that NCR's and API's PCB mass percentage-based apportionment theories assume that NCR only bears liability for its predecessors' own PCB discharges. The Complaint in this case specifically alleges that NCR also is liable because its predecessors "arranged for disposal or treatment" of PCB-containing wastepaper broke under 42 U.S.C. § 9607(a)(3) (Dkt. 30-1 at 12-14) and a judgment against NCR after the recent trial on

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<sup>9</sup> A plaintiff's demand for a cleanup injunction should not be treated as a monetary claim merely because compliance with the injunction may require payments or expenditures. *See United States v. Apex Oil Co., Inc.*, 579 F.3d 734, 737 (7th Cir. 2009) (a cleanup injunction, just like "[a]lmost every equitable decree imposes a cost on the defendant, whether the decree requires him to do something, as in this case, or, as is more common, to refrain from doing something.").

<sup>10</sup> For example, in negotiating the *de minimis* settlements for this Site that the Seventh Circuit affirmed in *United States v. George A. Whiting Paper Co.*, 644 F.3d 368 (7th Cir. 2011), the government assumed that the cost of the required cleanup work in OUs 2-5 might be as high as \$1.05 billion (*i.e.*, an estimated \$700 million plus a 50% uncertainty premium). Dkt. 276-9 at 24-25.

that issue in the *Whiting* case would bind NCR in this case under the rules of issue preclusion. See *Ross-Berger Cos. v. Equitable Life Assur. Soc. of the U.S.*, 872 F.2d 1331, 1335-39 (7th Cir. 1989). If NCR qualifies as a arranger then NCR also bears legal responsibility for any harm traceable to the PCB discharges from the wastepaper recycling mills – not just PCB discharges by NCR’s own predecessors – and the theories based solely on the PCB discharges by NCR’s predecessors cannot qualify as a reasonable basis for apportioning the harm.

## **2. The Remedy Challenge Arguments.**

NCR and API both recycle the remedy challenge arguments that they made last year, though this Court concluded that they have “not come close to showing that the EPA’s decisions on these matters are arbitrary or capricious.” Dkt. 172 at 15. Those arguments have received more than adequate treatment in the prior briefs.

API also tries to shoehorn in a complaint about whether capping will be allowed or whether dredging will be required in certain areas, although one of the declarations submitted by API concedes (as it must) that “the 2012 Eligible Dredge Areas do not include areas currently designated for capping.” Dkt. 333 at 7. The 2007 Record of Decision Amendment for OUs 2-5 recognized that capping may be more feasible and more cost effective than dredging in an area where “deeply buried” contamination is covered by “several feet of relatively clean” sediment and the government’s Agencies/Oversight Team gave preliminary indications in January 2012 that: (1) contamination in OU 4 should be classified as “deeply buried” if it is covered by more than six feet of “relatively clean” sediment; and (2) the overlying sediment can qualify as “relatively clean” if its average PCB concentration does not exceed 10 parts per million. Dkt. 353 at 3. No final decision has been made on those proposed capping eligibility criteria, as noted in the accompanying declaration of Thomas Short, an EPA Superfund Division Branch Chief. Dkt. 353 at 3-4. As Mr. Short explains, by mid-February 2012, EPA had decided that any final

determination on refined capping eligibility criteria should be made and documented in writing by an EPA Superfund Division senior manager, after consultation with WDNR's Water Division Administrator. Any such written decision would be added to the Administrative Record for the Site. Dkt. 353 at 3. Even the LLC Manager's declaration filed by API describes EPA and WDNR as having "shelve[d] the issue for next year's construction and beyond." Dkt. 333 at 7. The prospect of disagreement over next year's work is no reason to deny the United States the relief it is seeking this year, as recognized by NCR. Dkt. 342 at 31 n.18.

### **3. Irreparable Harm.**

Two main arguments have been made to assail United States' showing of irreparable harm. Neither has merit.<sup>11</sup>

First, NCR and API argue that there is no irreparable harm because the government could pursue other UAO recipients for the same relief. That is mere finger pointing, not a lack of irreparable harm.

Most of the finger pointing is aimed a Georgia-Pacific. But Georgia-Pacific cannot be compelled to remove 660,000 cubic yards of sediment from the Eligible Dredging Areas identified in EPA's Modified Work Plan for 2012. Under its Consent Decree with the Plaintiffs, Georgia-Pacific stipulated to liability for the performance of UAO work in the River segment defined as Lower OU 4, but Georgia-Pacific cannot be required to perform UAO work in Upper OU 4. Dkt. 2-1 at 8, 11, 13, 17. This year's Eligible Dredging Areas include a total of more

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<sup>11</sup> API also makes a subsidiary argument that the United States has an "adequate remedy at law" because it could spend its own money performing the remedial action "and then seek cost recovery from any PRP." Dkt. 388-30. Not so at this Site. Years ago, API and the other PRPs drummed-up opposition to the proposed listing of this Site on the CERCLA's National Priorities List and that proposed listing was never finalized. Dkt. 357 at 4; Dkt. 357-24. As a consequence, the expenditure of Hazardous Substance Superfund money for the performance of remedial action work is not authorized at this Site, although Superfund expenditures for agency oversight and other "removal" activities are permitted. 40 C.F.R. § 300.425(b)(1).

than 1.4 cubic yards of sediment that will need to be dredged at some point, but only about 615,000 cubic yards of that sediment is in Lower OU 4. Dkt. 330 at 7; Dkt. 356 at 11-12, 17. Most of the sediment targeted this year is in Upper OU 4 and there are a number of reasons why it is important to get work done in Upper OU 4 this year. As the LLC Manager explained in a recent deposition, “we would like to finish dredg[ing] up at the end of the river -- at the south end and move upstream in a normal progression.” Dkt. 22 at 22, 32. The government’s Agencies/Oversight Team agrees. Dkt. 356 at 17-18. The dredging equipment at the Site also can be used most efficiently by having at least one dredge perform Production Dredging work while one or more other dredges perform less productive Final Dredging work, and many of the Eligible Dredging Areas that require Final Dredging are in Upper OU 4. Dkt. 356 at 17-18.

As noted in our principal brief, there also is no unfairness in requiring NCR to perform the 2012 remediation work on its own this year given this Court’s rulings in the *Whiting* case and the prospect that NCR and API could pursue contribution claims against others if this Court’s *Whiting* rulings are reversed on appeal.

Second, API attacks this Court’s prior finding that “an injunction requiring an increased pace in river cleanup is clearly directed to avoiding the irreparable harm caused by continued exposure to PCBs” (Dkt. 172 at 16). Dkt. 338 at 28-29. Certain Defendants also insert themselves into the fray on that issue. Dkt. 328.

API and Certain Defendants actually neutralize each other on one relatively minor point. Certain Defendants argue that all dredging should be deferred this year because dredging without immediate sand covering increases the risk of “short-term harm by increasing the availability of PCBs to environmental and human health receptors.” Dkt. 328 at 9. The LLC Manager disagrees based on recent experience at this Site, as detailed in a declaration submitted by API. Dkt. 330 at 9 (“Some production dredging has already occurred in OU4, which has not resulted

in increasing the concentration of PCBs in the surface sediments compared to pre-dredging conditions.”).

API simply is wrong when it says that work can safely be postponed because “the sediments in OU4 with PCBs are located at depths in the sediment.” Dkt. 338 at 29. The main declaration cited by API does not say that; it says “the *majority of the PCB mass* is covered by cleaner sediment.” Dkt. 335 at 5 (emphasis added). Whether or not that is true, it ignores the fact that some of the 2012 Eligible Dredging Areas have relatively high PCB concentrations right at the sediment surface, ranging above 40 ppm PCBs. Dkt. 356 at 19. It would be particularly beneficial to dredge those areas with high surface concentrations sooner rather than later to reduce the exposure risk and the risk of sediment migration and re-suspension from natural forces. Dkt. 356 at 19.

API also is wrong that postponement of 660,000 cubic yards of dredging would not delay the overall remediation project. Dkt. 338 at 28. NCR does not even make that argument. API offers two declarants on that issue. The LLC Manager offers a conclusory assertion that the active remediation work “can be completed by the end of the 2017 construction season even if no remedial work is performed in 2012” (Dkt. 330 at 10), but API’s other declarant is a bit more candid in adding that “the dredging quantities in the last couple of years may be larger than currently anticipated” if no work is done this year (Dkt. 335 at 5). If dredging work is not done this year, then Herculean efforts would be required to finish all active remediation work by 2017, including the likely need to bring in additional dredges in the later years, as explained in the accompanying declaration of George Berken. Dkt. 356 at 13-16. Of course, it is easy for API to say that the pace can be picked up substantially in the coming years, because API is at the same time demanding that other unaffiliated parties like Georgia-Pacific should have to perform and fund that future work.

More importantly, the UAO did not set a 2017 target date for remedy completion; it ordered “commencement of full-scale sediment remediation at the start of the 2009 construction season (such that sediment remediation occurs throughout the 2009 construction season), continuation of full-scale sediment remediation throughout subsequent years (until completion of construction of the OU 2-5 remedy), and performance of operation and maintenance and long-term monitoring activities (during and after construction of the remedy).” Dkt. 30-1 at 61. There is no “slack” built into the schedule.

That is because the full benefits of the remediation effort will not start to be realized until the active remediation work is completed. Certain Defendants miss the mark by focusing solely on “irreparable harm in the short term” (Dkt. 328 at 6) and they are wrong that “long-term harm is *not* the relevant harm for this motion” (Dkt. 328 at 7). Those arguments seem to be based on a misconception by Certain Defendants that the modeled time periods for fish tissue PCB level reductions in OU 4 will be roughly the same regardless of the cleanup pace. Dkt. 328. The key point they seem to miss is that those modeled recovery periods do not *begin* until “after completion of active remediation” in OU 4, so remediation benefits actually are highly dependent on the pace of the work. Dkt. 276-6 at 39.<sup>12</sup> The Court recognized that was true from the evidence the United States cited last year (and relies upon here again):

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<sup>12</sup> Certain Defendants also criticize the precision of the predictive models used to project those fish tissue recovery times. Dkt. 328 at 1. But EPA and WDNR have never claimed that those models will yield perfect predictions. As explained in the Final Feasibility Study that assessed a range of remediation alternatives for this Site:

There is always considerable uncertainty in using a long-term predictive model to forecast risks to human health and the environment . . . . However, the uncertainties are mitigated by the fact that the alternative-specific risk assessment is intended solely to provide a relative level of residual risk between each of the proposed action levels, and not necessarily to provide 100 percent accurate predictions.

Dkt. 357-23 at 30. In other words, the predictive models were mainly meant to help EPA and WDNR compare different remediation options in a relative sense, rather than to yield absolute accuracy for any

It is true that the PCB problem will not be solved this year, regardless of the pace of cleanup. But it should go without saying that any significant reduction in pace in one year will forestall the full remediation of the problem in the future. Under the government's proposal, substantially more dredging will be undertaken this year, which means the public will benefit from the full cleanup sooner. Depriving the public of that benefit is certainly irreparable harm. After all, we are not talking about picayune disputes at the margins of the cleanup effort but a fundamental difference involving hundreds of thousands of cubic yards and up to \$44 million dollars. In addition, reduction in PCB levels, even if not a complete reduction, result in a safer river. People continue to eat fish from the Fox River despite warnings to the contrary, and the public health will thus be improved by entry of an injunction. Provided that the remedy proposed meets with the regulatory requirements addressed above, an injunction requiring an increased pace in river cleanup is clearly directed to avoiding the irreparable harm caused by continued exposure to PCBs.

Dkt. 172 at 15-16. The United States has demonstrated irreparable harm.

#### **4. API's "Due Process" Complaint.**

Although the point may be moot in light of the Court's ruling from earlier today, API claims that it "is entitled to a full and fair trial on the merits . . . before it is further deprived of its property." Dkt. 338 at 11. Not true. As the Supreme Court has explained:

Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. . . . What the Constitution does require is an opportunity granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. . . . The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.

*Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (internal quotations and citations omitted).

See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

What is most relevant for present purposes is that "a district court may grant a preliminary injunction based on less formal procedures and on less extensive evidence than a trial on the merits." *Dexia Crédit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010).

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one remediation alternative. The modeled recovery period for walleye fish tissue levels in OU 4 is 20 years after the completion of active remediation. Dkt. 276-6 at 39. The actual recovery period may be 18 years or it may be 22 years from remedy completion – but whatever it is, it will be one year more if remedy completion is delayed for a year.

For example, a preliminary injunction request can be considered on short notice,<sup>13</sup> with an abbreviated hearing and offers of proof,<sup>14</sup> or with paper submissions alone and no evidentiary hearing whatsoever.<sup>15</sup>

The process here has been more than adequate. The briefing schedule established by the Court enabled NCR and API to submit lengthy briefs and multiple declarations. More than 1.9 million pages of documents concerning this Site have been exchanged in discovery in the related *Whiting* case. Dkt. 355 at 1. The United States provided NCR, API, and other parties approximately 290,000 pages of Administrative Record materials concerning the Site more than a year ago. *Id.* at 2. Supplemental Administrative Record materials and additional relevant documents were produced to NCR and API through an accelerated discovery process since the preliminary injunction motion was filed. *Id.*; Dkt. 340; Dkt. 340-1. The United States and the State also agreed to make four witnesses available for deposition between March 29 and April 3 in response to deposition notices served by API, but API ultimately cancelled all of those depositions. Dkt. 355 at 3. And NCR, API, and the United States have agreed on other prehearing procedures and on proposed procedures for the April 12 hearing. Dkt. 347. API's due process objection simply has no merit.

##### **5. The Disagreements Between NCR and Windward and the Terms and Effect of the Proposed Injunction.**

On March 15, 2012, about a week after EPA and WDNR received NCR's proposed Remedial Action Work Plan for removal of at least 500,000 cubic yards of sediment from the Site this year, counsel for API sent the U.S. Department of Justice a letter that implicitly rejected

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<sup>13</sup> See *Illinois v. Peters*, 871 F.2d 1336, 1340 (7th Cir. 1989); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1153 (10th Cir. 2001).

<sup>14</sup> See *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994).

<sup>15</sup> See *Dexia*, 602 F.3d at 884; *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 814 (7th Cir. 2002).

NCR's proposal to have the LLC perform a substantial amount of remediation work at the Site this year. Dkt. 313-1. But API extended another offer: "API can take administrative steps within the LLC to free the remediation contractor to perform work in 2012 for any defendant in the enforcement action, on exactly the same terms and at exactly the same rates set forth in the LLC's contracts." Dkt. 313-1 at 9. That and related actions set off a struggle between Windward and NCR. As shown below, the surrounding facts merely underscore the need for relief from this Court and the propriety of the relief being requested now.

As noted in prior briefs, API – the employee-owned company headquartered in Appleton – actually makes none of the decisions concerning this Site and it currently pays none of the bills. At this Site and in this litigation, API is nothing more than a puppet manipulated by those who control Windward (formerly known as Arjo Wiggins Appleton Ltd.), and an indirect subsidiary of Windward, Arjo Wiggins Appleton (Bermuda) Limited ("AWAB"). Dkt. 124-3 at 11-12; Dkt. 137 at 3; Dkt. 141 at 5. A single U.S. representative of those affiliated entities serves as both the General Counsel of Windward and the Vice President of AWAB. Dkt. 357-6 at 4. API has granted AWAB its proxy to vote its shares in the LLC (Dkt. 357-1), so Windward's U.S. representative serves as the API/AWAB LLC Representative and he routinely exercises that proxy to vote a 60% controlling interest in the LLC (Dkt. 357-3; Dkt. 357-6; Dkt. 357-7). He also gives the LLC Manager instructions on virtually a daily basis. Dkt. 357-22 at 4.

After the motion for a preliminary injunction was filed on March 19, 2012, the United States learned much more about the March 15 offer that API could "free the remediation contractor to perform work in 2012 for any defendant" and the disagreement it spawned between Windward and NCR. Dkt. 313-1 at 9. This behind-the-scenes look at the LLC's inner workings and dealings with its contractors came from a limited set of documents that API and NCR

produced to the United States on March 24, March 26, March 29, and April 4, and from deposition testimony by the LLC Manager on April 4, 2012. Dkt. 357.

- On March 13, NCR provided formal notice that it was requesting votes by the LLC Members on two motions by NCR for performance of 2012 work at the Site by the LLC. One of the motions concerned NCR's proposal that the LLC perform at least 500,000 cubic yards of dredging work at the Site in 2012, as outlined in the March 7, 2012, proposed Remedial Action Work Plan that NCR has submitted to EPA and WDNR. Dkt. 357-13; Dkt. 357-14.
- Meanwhile, on March 13 and 14, Windward's representative was meeting in person with representatives of the LLC contractor team in Wisconsin to discuss a dramatically different plan to carve all 2012 remediation work from the LLC's contract through a contract "Change Directive." Dkt. 357-3 at 1; Dkt 357-22 at 13-14.
- Voting on NCR's 2012 work motions occurred in a telephonic meeting of the LLC member representatives in the afternoon on March 14. NCR voted its shares in favor of having the LLC perform at least 500,000 cubic yards of dredging work at the Site this year. Windward's representative voted the API/AWAB shares against that proposal and NCR's motion was defeated 60 to 40. Windward's representative explained that Windward "was not prepared to deplete its available resources to do this volume of work." Dkt. 357-7 at 1-2; Dkt. 357-14.
- As a result of the Windward representative's meeting with the LLC's contractor about the proposed contract Change Directive, Tetra Tech and its main subcontractors sent Windward a letter on March 15 expressing their willingness to perform 2012 remediation work for other parties under specified terms and conditions. One key condition was that "the work to be performed is at least equal to that described in [the March 7, 2012, proposed Remedial Action Work Plan prepared for NCR]." Dkt. 357-1.
- On March 19, Windward's representative provided formal notice of the need for a vote of the LLC members on a motion he made to transfer all of API's and AWAB's LLC shares to NCR. Dkt. 357-8. That motion could only be passed with a 75% "supermajority" vote under the LLC's Operating Agreement.
- NCR voted against the share transfer motion on March 20 and the motion was defeated because a 75% supermajority could not be reached with the API and AWAB shares alone. Dkt. 357-9.
- On March 20, Windward's representative directed the LLC Manager to send NCR a copy of Tetra Tech's March 15 letter along with a draft "Change Directive 13" that would remove all 2012 remediation work from the scope of the LLC's contract with Tetra Tech. Dkt. 357-9; Dkt. 357-2. NCR objected that "the draft

change directive appears intended to allow API to avoid paying its 60 percent share of the 2012 work, rather than to accomplish an LLC purpose.” Dkt. 357-15.

- Windward’s representative took unilateral action on Change Directive 13 by an LLC Action by Consent backed by the API/AWAB controlling voting interest. The Action by Consent directed the LLC Manager to take steps to work with Tetra Tech to finalize Change Directive 13. As a result, the draft version of Change Order 13 was sent to Tetra Tech on the evening of March 20. Dkt. 357-3.
- The March 20 Action by Consent clarified that the Change Directive arrangement technically only applied to the LLC’s contract with Tetra Tech, but it also directed the LLC Manager “to take reasonable steps and make reasonable efforts to facilitate the use, if possible, of the LLC’s transportation and disposal vendors by whichever party or parties contract with Tetra Tech to perform the 2012 Work.” Dkt. 357-3 at 2. At Windward’s direction, the LLC Manager informed those other LLC contractors that the LLC would still pay them under the LLC contracts even if they were providing their services to someone else. Dkt. 357-24 at 26.<sup>16</sup>
- On March 23, Tetra Tech wrote to the LLC Manager noted that it was “unclear whether a third party will in fact step forward and assume the contract terms for the 2012 Remediation.” Tetra Tech highlighted the need to “achieve agreement on contract terms [with any such third party] before April 2, 2012,” because the remediation work was due to start that day. Even so, Tetra Tech noted that “we are proceeding with mobilization of the project and will be prepared to start full scale remediation under the Agreement [with the LLC] (or a third party agreement) on April 2, 2012.” Dkt. 357-16.
- The LLC Manager finalized Change Directive 13 on March 26. Dkt. 357-5. NCR informed Windward’s representative that NCR viewed the Action by Consent on Change Directive 13 as “ineffective, invalid, and *ultra vires*.” Dkt. 357-17.
- On March 27, Tetra Tech Tetra Tech wrote to NCR and set a deadline of “5 p.m. Friday, March 30, 2012,” for reaching a signed contract with NCR or another entity for performance of the 2012 remediation work. Dkt. 357-18 at 2. In a parallel letter to the LLC Manager, Tetra Tech requested “specific direction in writing as to how the LLC wants to proceed.” Dkt. 357-19 at 3.

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<sup>16</sup> Among other things, that would have the benefit of avoiding or reducing charges for *unused* landfill space under the LLC’s sediment disposal contract. That contract includes a “put or pay” provision. The LLC must “pay” the landfill operator a minimum amount each year even if the LLC does not “put” the expected amount of sediment in the landfill. Due to the reduced pace of dredging in 2011, the LLC paid the landfill operator nearly \$2 million for unused landfill space last year, in addition to the payments for space actually used. Dkt. 357-22 at 13, 38.

- On April 2, Tetra Tech notified the LLC Manager that it would “begin demobilizing our staff immediately this morning” because “[n]o written response [had] been received from the LLC.” Dkt. 357-21 at 2-3.

As a consequence, no remediation work is being done at the Site. Dkt. 357-22 at 7, 21.

At a key point in all the back and forth summarized above, Tetra Tech wrote to NCR and explained that “achieving an NCR – Tetra Tech contract can be as simple a matter as merely changing ‘LLC’ to ‘NCR’ in the LLC contract.” Dkt. 357 -18 at 2-3. NCR’s March 31, 2012, letter response to Tetra Tech stated: “[I]t appears that the Court will have to resolve the issues of when work will start and how much work will be done this season. NCR will, of course, abide by the ruling of the Court, subject to NCR’s appeal rights.” Dkt. 357-20 at 2.

The accompanying revised proposed terms of injunction would require NCR to ensure the immediate commencement of full-scale dredging work at the Site and the removal of at least 660,000 cubic yards of sediment in 2012.<sup>17</sup> The revised proposed terms of injunction also include a general indication that it will bind the following persons, consistent with Fed. R. Civ. P. 65(d): (1) the parties; (2) the parties’ officers, agents, servants, employees, and attorneys; and (3) other persons who are in active concert or participation with anyone described in the preceding categories. Rule 65(d) codified district courts’ common law powers to fashion effective relief and protect their judgments, and that includes the power to prohibit disruption or interference with compliance requirements of an injunctive order. *See, e.g., SEC v. Wenke*, 622 F.2d 1363, 1369-70 (9th Cir. 1980); *United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1973); *United States v. Crookshanks*, 441 F. Supp. 268, 269 (D. Or. 1977). At a minimum, that should

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<sup>17</sup> The contractors’ readiness to perform work at the Site is changing on a daily basis at this point and the United States acknowledges that NCR could not be held in contempt for failing to do the impossible. *See United States v. Rylander*, 460 U.S. 752, 757 (1983); *Star Financial Services, Inc. v. AASTAT Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996) (“While good faith will not excuse civil contempt, impossibility of compliance does constitute a defense.”). But the Court should still adopt an immediate startup requirement. For its part, NCR has committed to “use its best efforts to comply with the Government’s target” (Dkt. 342 at 13 n.9).

prevent API, AWAB, and Windward from interfering with NCR's compliance efforts. As the Court noted last year, API "cannot continue to control the means of cleanup and yet remain outside the injunctive powers of this Court." Dkt. 172 at 24.

### **Conclusion**

The Court should grant the United States' request for a preliminary injunction against NCR for the reasons cited in this brief and the United States principal brief, especially in light of the Court's prior rulings in this case.

Respectfully submitted,

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The undersigned hereby certifies that, on this day, the foregoing Brief was filed electronically with the Clerk of the Court using the Court's Electronic Court Filing System, which sent notification of such filing to the following counsel:

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