

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

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.)	

UNITED STATES’ MOTION FOR A PRELIMINARY INJUNCTION

Even before the Court ruled against NCR Corporation (“NCR”) and Appleton Papers Inc. (“API”) in a series of decisions in a related CERCLA contribution case, NCR and API had made arrangements to perform much of the required cleanup work at the Lower Fox River and Green Bay Superfund Site on their own, including the work required by a Unilateral Administrative Order that EPA issued in November 2007 (the “UAO”). But NCR and API have performed under protest, and they have regularly complained that they believe they are doing and paying more than their share, so the Plaintiffs brought this action to ensure the continuation of critical sediment remediation work at the Site under the UAO. The United States’ Fifth Claim for Relief in its Amended Complaint seeks “a judgment in favor of the United States and against each of the UAO Recipients, that each UAO Recipient is required to comply with all provisions of the UAO.” Dkt. 30 at 32. That Claim invokes the Court’s “jurisdiction to grant such relief as the public interest and the equities may require” under CERCLA § 106, 42 U.S.C. § 9606, including the Court’s power to enforce compliance with the UAO.

This Motion seeks entry of a preliminary injunction requiring NCR and API – and the limited liability company that they control (the “LLC”) – to continue their cleanup work under the UAO at full pace in 2011 while the parties litigate the merits of the United States’ UAO enforcement claim.¹ That relief truly is necessary at this point. Just as cleanup work was due to start this year, NCR and API claimed that they are entitled to scale-back their dredging activity because they “have sufficient cause no longer to comply with the 106 Order,” as argued in this excerpt from a submission they made to the government late yesterday.

The LLC is proposing the [dredging] volumes it is because its Members have sufficient cause for non-compliance with the 106 Order. First, the government’s own deeply flawed volumetric analysis . . . assigns ACPC and Combined Locks a volumetric share of no greater than 30%, and the LLC has already removed more than 30% of the contaminated sediments; second, a comprehensive analysis of PRP discharges shows that ACPC and Combined Locks, together, could not have been responsible for more than 8 - 14% of the PCBs in the river; and third, the ongoing remedy is not cost effective, in violation of CERCLA For these and other reasons, the LLC’s Members have sufficient cause no longer to comply with the 106 Order or, in particular, the Agencies’ desire for greater dredging volumes and increased pace.

NCR and API have defied a specific EPA directive that they perform particular sediment remediation work in Operable Units 3 and 4 this year, consistent with the UAO’s explicit mandate that they conduct “full-scale sediment remediation” each year. Dkt. 30-1. NCR and API have announced their own plan to dredge roughly one-third to one-half as much as they did last year.

In light of the circumstances, the United States hereby moves the Court to enter an appropriate preliminary injunction in favor of the United States and against NCR and API in accordance with Fed. R. Civ. P. 65. Specific proposed terms of an injunction are attached to this

¹ CERCLA § 106 only authorizes the United States to seek judicial enforcement of an Order that the Environmental Protection Agency issued under CERCLA § 106. 42 U.S.C. § 9606(a). Even so, the Wisconsin Department of Natural Resources has been heavily involved in planning and overseeing the cleanup, and the State of Wisconsin supports the United States’ Motion.

Motion. Those terms of injunction closely track the cleanup requirements that EPA included in a Modified Work Plan for 2011 that was sent to NCR and API on March 4, 2011. The United States expects to submit an expanded proposed Order that would include proposed findings of fact, conclusions of law, and terms of injunction by the close of briefing on this Motion.

The United States has filed a Brief in support of this Motion together with three supporting declarations. Those materials demonstrate a clear entitlement to the relief sought here. The United States is highly likely to succeed on the merits of its UAO enforcement claim against NCR and API. There will be irreparable harm – including substantial harm to the public interest – absent a preliminary injunction. The balance of equities also tips strongly in favor of the United States. Finally, the proposed terms of injunction are reasonable and appropriate, as shown by the other filings in support of this Motion.

As detailed in its Brief, the United States at this point believes that its Motion can and should be decided without expedited discovery or an evidentiary hearing. Consistent with the Court's procedures, the undersigned counsel will be contacting the Court's chambers to request a telephonic status conference concerning a possible expedited briefing schedule for this Motion.

For the foregoing reasons, the Court should grant the preliminary injunction sought by the United States.

United States' Motion for a Preliminary Injunction in *United States and the State of Wisconsin v. NCR Corp. et al.*, Civil Action No. 10-C-910 (E.D. Wis.)

Respectfully submitted,

For the United States of America

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

Dated: March 29, 2011

s/ *Randall M. Stone*
RANDALL M. STONE, Senior Attorney
JEFFREY A. SPECTOR, Trial Attorney
IVA ZIZA, Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Telephone: 202-514-1308
Facsimile: 202-616-6584
E-Mail: randall.stone@usdoj.gov

GREGORY J. HAANSTAD
Attorney for the United States, Acting
Under Authority Conferred by 28 U.S.C. § 515

SUSAN M. KNEPEL
Assistant United States Attorney
Office of the United States Attorney
517 E. Wisconsin Avenue, Room 530
Milwaukee, WI 53202

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this day, the foregoing Motion 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:

Mary Rose Alexander
Latham & Watkins LLP
mary.rose.alexander@lw.com

Thomas Armstrong
von Briesen & Roper SC
tarmstro@vonbriesen.com

Paul Bargren
Foley & Lardner LLP
pbargren@foley.com

Linda E. Benfield
Foley & Lardner LLP
lbenfield@foley.com

Dennis P. Birke
DeWitt Ross & Stevens SC
db@dewittross.com

Steven P. Bogart
Reinhart Boerner Van Deuren SC
sbogart@reinhartlaw.com

Michael P. Carlton
von Briesen & Roper SC
mcarlton@vonbriesen.com

Evan R. Chesler
Cravath Swaine & Moore LLP
echesler@cravath.com

Marc E. Davies
Greenberg Traurig LLP
daviesm@gtlaw.com

Brandon J. Evans
Hermes Law Ltd.
bje@hermeslawltd.com

Sandra C. Goldstein
Cravath Swaine & Moore LLP
sgoldstein@cravath.com

Thomas R. Gottshall
Haynsworth Sinkler Boyd PA
lgantt@hsblawfirm.com

Eric W. Ha
Sidley Austin LLP
eha@sidley.com

Scott W. Hansen
Reinhart Boerner Van Deuren SC
shansen@reinhartlaw.com

William H. Harbeck
Quarles & Brady LLP
william.harbeck@quarles.com

Michael L. Hermes
Hermes Law Ltd.
mlh@hermeslawltd.com

Cynthia R. Hirsch
Wisconsin Department of Justice
hirschcr@doj.state.wi.us

Caleb J. Holmes
Greenberg Traurig LLP
holmesc@gtlaw.com

Philip C. Hunsucker
Hunsucker Goodstein & Nelson PC
phunsucker@hgnlaw.com

Paul G. Kent
Stafford Rosenbaum LLP
pkent@staffordlaw.com

Susan E. Lovern
von Briesen & Roper SC
slovern@vonbriesen.com

Kevin J. Lyons
Davis & Kuelthau SC
klyons@dkattorneys.com

Karl S. Lytz
Latham & Watkins LLP
karl.lytz@lw.com

David G. Mandelbaum
Greenberg Traurig LLP
mandelbaumd@gtlaw.com

Tara M. Mathison
Davis & Kuelthau SC
tmathison@dkattorneys.com

Stephen F. McKinney
Haynsworth Sinkler Boyd PA
smckinney@hsblawfirm.com

Heidi D. Melzer
Hermes Law Ltd.
hdm@hermeslawltd.com

Elizabeth K. Miles
Davis & Kuelthau SC
emiles@dkattorneys.com

Sabrina Mizrachi
Greenberg Traurig LLP
mizrachis@gtlaw.com

Monique M. Mooney
Greenberg Traurig LLP
mooneym@gtlaw.com

William J. Mulligan
Davis & Kuelthau SC
wmulligan@dkattorneys.com

Daniel C. Murray
Johnson & Bell Ltd.
murrayd@jbltd.com

Kelly J. Noyes
von Briesen & Roper SC
knoyes@vonbriesen.com

Nancy K. Peterson
Quarles & Brady LLP
nancy.peterson@quarles.com

Thomas M. Phillips
Reinhart Boerner Van Deuren SC
tphillip@reinhartlaw.com

Joan Radovich
Sidley Austin LLP
jradovich@sidley.com

Ronald R. Ragatz
DeWitt Ross & Stevens SC
rrr@dewittross.com

Alexandra Reeve Givens
Cravath Swaine & Moore LLP
agivens@cravath.com

Kathleen L. Roach
Sidley Austin LLP
kroach@sidley.com

Megan A. Senatori
DeWitt Ross & Stevens SC
ms@dewittross.com

Sarah A. Slack
Foley & Lardner LLP
sslack@foley.com

Margaret R. Sobota
Sidley Austin LLP
msobota@sidley.com

James P. Walsh
Appleton City Attorney
jim.walsh@appleton.org

Ted Waskowski
Stafford Rosenbaum LLP
twaskowski@staffordlaw.com

Evan B. Westerfield
Sidley Austin LLP
evanwesterfield@sidley.com

Richard C. Yde
Stafford Rosenbaum LLP
ryde@staffordlaw.com

Patrick J. Ferguson
Latham & Watkins LLP
patrick.ferguson@lw.com

Linda R. Larson
Marten Law
llarson@martenlaw.com

Bradley M. Marten
Marten Law
bmarten@martenlaw.com

Meline G. MacCurdy
Marten Law
mmaccurdy@martenlaw.com

Dated: March 29, 2011

s/ Randall M. Stone