

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

Case No. 10-C-910

NCR CORPORATION, *et al.*,

Defendants.

**[REVISED PROPOSED] TERMS OF PRELIMINARY INJUNCTION
UNDER FED. R. CIV. P. 65(d)**

Brief Background

The Court denied an earlier request for a preliminary injunction sought by the United States but the United States has filed a new motion for entry of revised proposed terms of an injunction. That new motion seeks relief mainly against Defendant NCR Corporation (“NCR”), including a preliminary injunction ordering NCR alone to comply with particular environmental cleanup requirements at the Lower Fox River and Green Bay Superfund Site (the “Site”) under a November 2007 Unilateral Administrative Order (“UAO”) that the Environmental Protection Agency (“EPA”) issued under Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9606. Since at least April 2009, NCR and Appleton Papers Inc. (“API”) have arranged for performance of cleanup work required by the UAO through a set of contracts and arrangements put in place by NCR, API, Arjo Wiggins Appleton (Bermuda) Limited, and an entity they formed called the Lower Fox River

Remediation LLC (the “LLC”). To obtain timely and meaningful relief in light of the existing agreements and arrangements between NCR and API, the United States therefore seeks minor and ancillary injunctive requirements directed at API, including a mandate that API grant NCR a proxy to adjust the voting rights in the LLC, which has the current agreements with the environmental contractors at the Site.

The UAO requires performance of specified environmental cleanup work in portions of the Site from the outlet of Little Lake Butte des Morts to the Bay of Green Bay – *i.e.*, Operable Units 2 through 5 (“OUs 2-5”) at the Site. Among other things, the UAO requires remediation of sediment that is contaminated with polychlorinated biphenyls (“PCBs”) in accordance with Records of Decision (“RODs”) issued by EPA and the Wisconsin Department of Natural Resources (“WDNR”). The RODs specify that dredging must be used as the primary remedial approach for sediment with PCB concentrations exceeding a 1.0 part per million Remedial Action Level, but also set specific criteria for allowing use of specially engineered, in-water caps and sand covers as alternative remedial approaches in certain areas. Under the RODs and EPA regulations issued under the Toxic Substances Control Act (“TSCA”), sediment with a PCB concentration equal to or greater than 50 parts per million must be disposed of in a TSCA-approved landfill.

Dredges can be used for at least two different purposes at the Site. First, dredges can be used for “Production Dredging,” which removes sediment at a relatively high rate but does not perform the more precise work needed to complete the dredging in that area. Second, dredges can be used for “Final Dredging” which removes sediment at a lower rate but performs the more precise work needed to complete the dredging in that area. Simultaneous Production Dredging and Final Dredging with different dredges can help ensure the full and efficient utilization of the

Sediment Processing Facility at the Site. “Final Dredging” must ultimately be performed in all designated dredge areas, which have generally been assigned an area number with a “D” prefix, such as area “D100.”

As a complement or as an alternative to dredging, the RODs allow installation of engineered caps to contain contaminated sediment in certain areas. Depending on location-specific circumstances, one of three different cap designs may be required. The different designs have been called “A” caps, “B” caps, and “C” caps, and capping areas have been assigned corresponding designations with a “CA,” “CB,” and “CC” prefix, such as areas “CA6” and “CB2.”

The RODs allow sand placement for two distinct purposes. First, “Final Residual Sand Cover” may be placed to cover dredge residuals where Final Dredging has been completed. Second, “Final Remedy Sand Cover” may be placed in particular areas with very thin layers of low-level surface contamination. Final Remedy Sand Cover Areas have been assigned an area number with an “SC” prefix, such as area “SC12.”

Terms of Preliminary Injunction

NOW, THEREFORE, in light of the United States’ Motion, and good cause appearing, **IT IS HEREBY ORDERED**:

1. NCR shall comply with the following terms:
 - a. If full-scale sediment remediation has not commenced at the Site before issuance of this Order, NCR shall commence full-scale sediment remediation as described below as soon as practicable after issuance of this Order. NCR shall continue full-scale sediment remediation work as described below through at least November 12, 2011.

- b. During 2011, NCR shall complete all remaining sediment remediation that the UAO and the RODs require in OU 3 at the Site (*i.e.*, the portion of the River between Little Rapids and the De Pere Dam), including:
- i. completing Final Dredging of the following designated dredge areas in OU 3: D100, D101, D102, D103A, D103B, D104, D105A, D105B, D105C, D105D, D106A, D106B, D106C, D107, D108, D109A, D109B, D110, D111, and D112 (D20B) to meet the requirements of the RODs. (EPA estimates that this work will involve approximately 70,000 cubic yards of dredging.)
 - ii. placing Final Residual Sand Cover over dredging areas in OU 3 to meet the requirements of the RODs.
 - iii. installing engineered caps in the following designated capping areas in OU 3: CA6, CA9A, CA9B, CA13A, CA13B, CA13C, CA13D, CA13E, CA69, CA15, CA16A, CA16B, CA17, CB2, CB3A, CB3B, and CB5 to meet the requirements of the RODs. (EPA estimates that this work will involve approximately 25 acres of capping.)
 - iv.. placing Final Remedy Sand Cover in the following designated sand cover areas in OU 3: SC12, SC13, SC14A, SC14B; SC18, SC20A, SC20B, SC20C, SC21A, SC21B, SC22A, SC22B, SC22C, SC63, SC24A, SC24B, SC24C, SC25A, SC25B, SC26A, SC26B, SC27, SC28A, SC28B, SC28C, SC31A, SC31B, and SC79 to meet the requirements of the RODs. (EPA estimates that this work will involve approximately 25 acres of sand cover.)
- c. During 2011, NCR shall perform the following sediment remediation work in OU 4 at the Site (*i.e.*, the portion of the River between De Pere Dam and Green Bay):

- i. dredging TSCA-regulated sediment from areas D23 and D26A in OU 4, near the De Pere Dam to the extent required by the RODs. (EPA estimates that this work will involve approximately 30,000 cubic yards of dredging.)
 - ii. using the 12-inch dredge and (after completion of dredging in OU 3) two 8-inch dredges to perform Production Dredging and/or Final Dredging 24 hours per day, five days per week, throughout the construction season, subject only to bona fide operational limitations (of the LLC's contractor, Tetra Tech EC, Inc., and its subcontractors), and with the goal of maintaining the efficiency of the Sediment Processing Facility. (During startup of operations, the dredges may be operated 16 hours per day, pending confirmation that all systems and processes are functioning as planned.)
 - iii. completing Final Dredging in the following areas south of the State Highway 172 Bridge: Phase 1, D23, D24, D25, D25A, D25C, D26A, D26B, D26C, D27A, D27B, D27C, D27D, D27E, D27F, D28, D29, D30A, D61, and D91.
 - iv. performing Production Dredging in the following areas north of the State Highway 172 Bridge: D31, D32, and/or D35A.
- d. To meet the requirements of the RODs and the UAO, NCR shall remove a total of at least 605,000 cubic yards of sediment from OU 3 and OU 4 during 2011.
 - e. In 2011, NCR shall conduct infill sampling and revisions of engineering designs as follows:

i. As soon as practicable after issuance of this Order, NCR shall submit a 2011 Infill Sampling Plan to EPA and WDNR, addressing all infill sampling needed to support remediation in the following areas in 2011 and 2012:

(1) All areas north of the State Highway 172 Bridge and south of the Canadian National Railway Bridge

(2) In addition to these areas, NCR may include in the 2011 Infill Sampling Plan samples needed to support remediation in the future in areas other than those listed in (1) above.

ii. Upon approval of the Infill Sampling Plan, NCR shall immediately begin to implement the plan in accordance with the approved plan. (If NCR objects to a milestone included in the approved plan, NCR may request that EPA modify the milestone, and EPA must consider the request in good faith. If EPA refuses to adjust the milestone, NCR may seek relief from the Court.) Execution of the Infill Sampling Plan must be done promptly and efficiently.

2. Within one business day after entry of this Order, API shall: (1) revoke any existing proxy to vote API's shares in the LLC that API has granted to Arjo Wiggins Appleton (Bermuda) Limited; and (2) execute and file a new written proxy granting NCR a right to vote all of API's LLC shares for a period of at least nine months in accordance with Section 3.8(h) of the LLC's Amended and Restated Operating Agreement.

3. NCR shall provide actual notice of this injunction to the following persons and entities so that they will be bound by its terms pursuant to Fed. R. Civ. P. 65(d)(2):

a. all officers, agents, servants, employees, and attorneys of NCR who are involved in decisionmaking concerning the performance or direction of remediation work at the

Site or contractual arrangements or funding arrangements for remediation work at the Site;

b. all other persons who are in active participation or concert with NCR, or any person described in the preceding Subparagraph, concerning the performance or direction of remediation work at the Site or contractual arrangements or funding arrangements for remediation work at the Site, including: (i) Lower Fox River Remediation LLC; (ii) Arjo Wiggins Appleton Ltd.; and (iii) Arjo Wiggins Appleton (Bermuda) Ltd.

4. All remedial action work required by this preliminary injunction shall be subject to EPA oversight, with supervision by the Court.

5. NCR shall not be held in contempt of this Order or otherwise held responsible for any failure to carry out their respective obligations under this Order if such failure is attributable to a “*force majeure*.” For purposes of this Preliminary Injunction, a “*force majeure*” is defined as any event arising from causes beyond the control of NCR or any entity controlled by NCR, or any of NCR contractors or subcontractors, including but not limited to equipment failure and equipment unavailability, that delays or prevents the performance of any obligation under this Order despite NCR’s best efforts to fulfill the obligation.

a. The requirement that NCR exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential *force majeure* and best efforts to address the effects of any potential *force majeure*.

b. If any event occurs or has occurred that may delay the performance of any obligation under this Order for which NCR intends or may intend to assert a claim of *force majeure*, NCR shall notify EPA within seven days of learning of such an event and provide sufficient explanation of the reasons for delay and the actions to be taken. If

EPA agrees that the delay or anticipated delay is attributable to a *force majeure*, the provisions of this injunction shall be adjusted as necessary to enable NCR to fulfill its obligations. If EPA disagrees that the delay or anticipated delay is attributable to a *force majeure*, then the Court shall determine whether the provisions of this injunction should be adjusted.

6. The terms of this Order may be modified by a subsequent written agreement signed by the appropriate representatives of the United States and NCR. Where the modification constitutes a material change to this Order, it shall be effective only upon approval by the Court. No modification to Paragraph 2 of this Order shall take effect without Court approval. Nothing in this Order shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Order.

7. The Court shall terminate this preliminary injunction in response to a motion by NCR showing that: (i) NCR has complied with all of the requirements specified above in Paragraph 1; and (ii) the written proxy granting NCR a right to vote all of API's LLC shares has expired by its terms after being in effect for at least nine months, consistent with Paragraph 2.

SO ORDERED this _____ day of _____, 2011.