

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,)	
)	No. 10-cv-00910-WCG
v.)	
)	
NCR CORPORATION, et al.)	
)	
Defendants.)	
)	

CONSENT DECREE WITH NCR CORPORATION AND APPVION, INC.

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Wisconsin (the “State”), on behalf of the Wisconsin Department of Natural Resources (“WDNR”), filed a Complaint and an Amended Complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606 and 9607.

B. In the Amended Complaint, the United States sought, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at the Lower Fox River and Green Bay Superfund Site in northeastern Wisconsin (“Site”), together with accrued interest; and (2) performance of response actions at the Site by the defendants consistent with the National Contingency Plan, 40 C.F.R. Part 300 (“NCP”). In the Amended Complaint, the State sought, *inter alia*, reimbursement of costs incurred by WDNR and the Wisconsin Department of Justice (“WDOJ”) for response actions at the Site, together with accrued interest. Certain submissions to the Court in this case are referenced herein by their docket number (abbreviated as “Dkt. ___”) or exhibit number from the 2012 trial in this case (abbreviated as “2012 Tr. Ex. ___”). The Amended Complaint is Dkt. 30.

C. The Plaintiffs’ Amended Complaint also asserted a joint claim for natural resource damages (“Natural Resource Damages” or “NRD”) under CERCLA, brought on behalf of the U.S. Department of the Interior (“DOI”) and WDNR. After receipt of NRD settlement recoveries valued at approximately \$105 million, the Plaintiffs withdrew their NRD claim with leave of Court in 2015. Of that total NRD settlement recovery, more than \$25 million was contributed by the defendants that have entered into this settlement, NCR Corporation (“NCR”) and Appvion, Inc. (“Appvion”) (collectively the “Settling Defendants” or “SDs”).

D. As a result of the release or threatened release of hazardous substances, EPA and WDNR have undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. In performing these response actions, EPA and WDNR have incurred and will continue to incur response costs at or in connection with the Site. These response actions include, *inter alia*: (1) the performance of a Remedial Investigation and Feasibility Study at the Site; (2) the selection of an overall remedy for the Site that will involve containment and removal of sediment contaminated with polychlorinated biphenyls (“PCBs”) through a combination of capping, dredging, dewatering, and upland landfill disposal, as set forth in two Records of Decision (as amended); (3) oversight of response actions implemented; and (4) various enforcement actions.

E. On July 28, 1998 (63 Fed. Reg. 40,247), pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA proposed to place the Site (also called the “Fox River NRDA/PCB Releases Site”) on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B.

F. The Site includes approximately 39 miles of the Lower Fox River (the “Fox River”) as well as the Bay of Green Bay (the “Bay”). The Fox River portion of the Site extends from the outlet of Lake Winnebago and continues downstream to the mouth of the Fox River at the City of Green Bay. The Bay portion of the Site extends from the mouth of the Fox River at the City of Green Bay to the point where the Bay enters Lake Michigan. The Site has been divided into five geographically-defined Operable Units (“OUs”), as described in the Records of Decision and as depicted in Appendix 1 to this Consent Decree: OU 1 - Little Lake Butte des Morts; OU 2 - Appleton to Little Rapids; OU 3 - Little Rapids to DePere; OU 4 - DePere to Green Bay; and OU 5 - the Bay of Green Bay.

G. In December 2002, the Response Agencies signed and issued a Record of Decision for OUs 1 and 2 at the Site.

H. In June 2003, the Response Agencies signed and issued a Record of Decision for OUs 3, 4, and 5 at the Site.

I. In June 2007, the Response Agencies signed and issued a Record of Decision Amendment for OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth) at the Site.

J. In June 2008, the Response Agencies signed and issued a Record of Decision Amendment for OU 1 at the Site.

K. In February 2010, the Response Agencies signed and issued an Explanation of Significant Differences concerning the selected remedy for OU 2, OU 3, OU 4, and OU 5 (River Mouth) at the Site.

L. The remedial action for OU 1 has been performed pursuant to a judicially-approved Consent Decree with P.H. Glatfelter Co. (“Glatfelter”) and WTM I Company (“WTM”). Monitoring, maintenance, and post-remedy institutional controls activities are ongoing under that Consent Decree.

M. Phase 1 remediation in OU 4 was performed in 2007 pursuant to a judicially-approved Consent Decree with NCR and Sonoco-U.S. Mills Corp. (n/k/a U.S. Paper Mills Corp.).

N. On November 13, 2007, EPA issued a Unilateral Administrative Order (“UAO”) pursuant to 42 U.S.C. § 9606(a) which directed NCR; Appvion (then known as Appleton Papers Inc.); WTM; Glatfelter; Menasha Corporation; U.S. Paper Mills Corp.; Georgia-Pacific Consumer Products, LP, and CBC Coating, Inc. to implement Phase 2 of the remedial action for OUs 2, 3, 4, and 5 of the Site, as set forth in the Records of Decision addressing those portions of the Site.

O. In 2008, NCR and Appvion commenced two related lawsuits concerning the Site against other parties that were consolidated under the caption *Appleton Papers Inc. and NCR Corp. v. George A. Whiting Paper Co., et al.*, No. 08-CV-16 (E.D. Wis.) (the “Whiting Case”). Many of those other parties filed counterclaims against NCR and Appvion in the *Whiting Case*.

P. To date, NCR and Appvion have paid more than \$650 million for response actions and NRD relating to the Site. Much of the money paid by NCR and Appvion has been applied to fund response work through a special purpose entity controlled by NCR, called Lower Fox River Remediation LLC. In addition, other parties have paid more than \$350 million for response actions and NRD relating to the Site.

Q. The litigation in this case and in the *Whiting* Case has already yielded decisions and judgments on various issues rendered by this Court and the U.S. Court of Appeals for the Seventh Circuit. The decisions include, but are not limited to: (1) an interlocutory district court ruling finding that Appvion is not a liable party under CERCLA Section 107 (the “Appvion No Liability Ruling” – Dkt. 349); (2) a set of interlocutory district court rulings finding that NCR failed to meet its burden to demonstrate both that the harm is theoretically capable of divisibility and that there is a reasonable basis for apportionment (the “NCR Divisibility Rulings” – Dkt. 1000; Dkt. 1033; Dkt. 1038); and (3) a district court ruling, affirmed by the Seventh Circuit, that NCR is not liable under CERCLA as an entity that “arranged for disposal” of a hazardous substance (PCBs) based on its corporate predecessor’s sale of broke to recycling mills.

R. The parties to this Consent Decree (the “Consent Decree” or “CD,” as defined below) have previously entered into a number of prior settlements concerning the Site, including, but not limited to: (1) the settlement under which the work described in Paragraph M was performed, the Phase 1 Consent Decree; (2) the 2004 Administrative Order on Consent (amended in 2007) for performance of the remedial design for OUs 2-5; (3) a 2001 Consent Decree and 2006 Consent Decree Modification and Partial Extension; and (4) a Stipulation and Agreed Order Concerning the Parties’ Withdrawal of the Appvion Related Claims in this Case.

S. Among other things, this Consent Decree is intended to: (1) ensure the completion of sediment dredging, capping, and sand cover work at the Site by NCR; (2) eliminate certain pending claims and greatly simplify this lawsuit and the related *Whiting* Case; (3) eliminate litigation risk that both Plaintiffs and Settling Defendants face if they continued this litigation, and (4) provide for full and complete contribution protection for the Settling Defendants with regard to the Site pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2). In executing this agreement, the parties to the agreement share the mutual goal that the Effective Date of this Consent Decree will be no later than June 15, 2017.

T. Nothing in this Consent Decree is intended to alter the covenants or contribution protection provided by the Plaintiffs’ prior settlements for the Site with persons who are not Parties to this Consent Decree, including but not limited to the Consent Decree with Georgia-Pacific Consumer Products LP (Dkt. 2-1, 130) and the Amended Consent Decree for Remedial Design and Remedial Action at Operable Unit 1 of the Lower Fox River and Green Bay Site (Dkt. 276-13).

U. Except as expressly provided herein, the Settling Defendants do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the Complaint or Amended Complaint in this case. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that

implementation of this Consent Decree will expedite the cleanup of the Site and will simplify and shorten prolonged and complicated litigation, and that this Consent Decree is procedurally and substantively fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over SDs. Solely for the purposes of this CD and the underlying Amended Complaint, SDs waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. SDs shall not challenge the terms of this CD or this Court's jurisdiction to enter and enforce this CD.

III. PARTIES BOUND

2. This CD is binding upon the United States and the State and upon SDs and their successors, and assigns. Any change in ownership or corporate or other legal status of a SD including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such SD's responsibilities under this CD.

3. NCR shall provide a copy of this CD to each contractor hired to perform the Work and to each person representing NCR with respect to the Site or the Work, and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this CD. NCR or its contractors shall provide written notice of the CD to all subcontractors hired to perform any portion of the Work. NCR shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this CD. With regard to the activities undertaken pursuant to this CD, each contractor and subcontractor shall be deemed to be in a contractual relationship with NCR within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided in this CD, terms used in this CD that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this CD or its appendices, the following definitions shall apply solely for purposes of this CD:

“100% Design” shall mean the Lower Fox River Remedial Design, 100 Percent Design Report for 2010 and Beyond Remedial Actions, Volume 2 of 2, as approved by the Response Agencies in October 2012, including its Appendices (2012 Tr. Ex. 2000-2014).

“2004 Administrative Order on Consent” shall mean the 2004 Administrative Order on Consent, No. V-W-04-C-781, entered into by the United States Environmental Protection Agency, the State of Wisconsin, and Fort James Operating Company, and the Amended

Administrative Settlement Agreement and Order on Consent, entered into by the same parties in November 2007.

“Appvion” shall mean Settling Defendant Appvion, Inc. Appvion was formerly known as Appleton Papers Inc.

“ATSDR” shall mean the Agency for Toxic Substances and Disease Registry and its successor departments, agencies, or instrumentalities.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Consent Decree” or “CD” shall mean this consent decree and all appendices attached hereto (listed in Section XXI). In the event of conflict between this CD and any appendix, this CD shall control.

“Date of Lodging” shall mean the day on which this proposed Consent Decree is lodged with the Court, before commencement of the public comment period described in Section XXIII.

“Day” or “day” shall mean a calendar day. In computing any period of time under this CD, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

“DOI” shall mean the United States Department of the Interior and any successor departments, agencies or instrumentalities of the United States. DOI acts in consultation with NOAA with respect to the Site and NOAA has formally deferred to DOI as the lead federal trustee for the Site.

“DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall mean the date upon which the approval of this CD is recorded on the Court’s docket, as provided by Section XXIV.

“Enforcement Costs” shall mean all Future Non-OU1 Federal Costs and all Future Non-OU1 State Costs incurred in enforcing this CD, including all costs incurred pursuant to Section XII (Dispute Resolution) and all litigation costs incurred in enforcing this CD.

“EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Fox River Group” shall mean the parties, or their predecessors, that entered into the Funding and Interim Implementation Agreement, effective as of January 31, 1997, and/or the Agreement on Interim Allocation, effective as of July 27, 1999.

“Future Non-OU1 Federal Costs” shall mean all response costs, including, but not limited to, direct and indirect costs, that the United States pays on EPA’s, ATSDR’s, and DOJ’s behalf at or in connection with the Site after September 30, 2015, other than costs associated solely with Operable Unit 1 of the Site, plus Interest on Past Response Costs and Future Non-OU1 Federal Costs that accrues pursuant to 42 U.S.C. § 9607(a) after September 30, 2015.

“Future Non-OU 1 State Costs” shall mean all response costs, including, but not limited to, direct and indirect costs, that the State pays on WDNR’s and WDOJ’s behalf at or in connection with the Site after June 30, 2015, other than costs associated solely with Operable Unit 1 of the Site, plus Interest on such costs that accrues pursuant to 42 U.S.C. § 9607(a) after the Effective Date, to the extent that such costs exceed the remaining balance from prior settlements received of no more than \$4,631,817 held by WDNR as of June 30, 2015.

“Institutional Controls Work” shall mean the response work required to assure the protectiveness of the remedy, as prescribed by: (i) the Institutional Control Implementation and Assurance Plan approved by the Response Agencies in October 2012 (Appendix G of the 100% Design – 2012 Tr. Ex. 2008); and (ii) any modifications or supplements to that Plan approved by the Response Agencies. The “Institutional Controls Work” is divided in time between: (i) the work to be performed before completion of the RA Work (“Interim Institutional Controls Work”); and (ii) the work to be performed after completion of the RA Work (“Post-RA Institutional Controls Work”).

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“Long-Term Monitoring and Maintenance Work” shall mean the response action work in OUs 2-5 prescribed by: (i) the Cap Operations, Maintenance, and Monitoring Plan approved by the Response Agencies in October 2012 (Appendix H of the 100% Design – 2012 Tr. Ex. 2009) (ii) the Long-Term Monitoring Plan approved by the Response Agencies in October 2012 (Appendix I of the 100% Design – 2012 Tr. Ex. 2010); (iii) Wetlands and River Habitat Replacement Work Plan, to be approved by the Response Agencies, or any similar plan approved by the Response Agencies; and (iv) any modifications or supplements to those Plans approved by the Response Agencies.

“NOAA” shall mean the National Oceanographic and Atmospheric Administration, an instrumentality of the United States Department of Commerce, and any successor departments, agencies or instrumentalities of the United States.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Natural Resource” or “Natural Resources” means land, resident and anadromous fish, resident and migratory wildlife, biota, air, water, ground water, sediments, wetlands, drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State.

“Natural Resource Damages” or “NRD” means any damages recoverable by the United States or the State on behalf of the public for injury to, destruction of, or loss or impairment of Natural Resources at the Site as a result of a release of hazardous substances, including but not limited to: (i) the costs of assessing such injury, destruction, or loss or impairment arising from or relating to such a release; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent resources; (iii) the costs of planning such restoration activities; (iv) compensation for injury, destruction, loss, impairment, diminution in value, or loss of use of natural resources; and (v) each of the categories of recoverable damages described in 43 C.F.R. § 11.15 and applicable state law.

“NCR” shall mean Settling Defendant NCR Corporation.

“Operable Unit 1” or “OU 1” shall mean the Little Lake Butte des Morts reach of the Lower Fox River, as delineated by the Record of Decision signed by WDNR and EPA in December 2002. More specifically, OU 1 is the portion of the Lower Fox River (and the underlying River sediment) starting at the outlet of Lake Winnebago at the Neenah Dam and the Menasha Dam downstream to the Upper Appleton Dam, including sediment deposits A through H and POG.

“Paragraph” or “¶” shall mean a portion of this CD identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States, the State, and SDs.

“Past Response Costs” shall mean all response costs, including, but not limited to, direct and indirect costs, that the United States paid on EPA’s, ATSDR’s, and DOJ’s behalf at or in connection with the Site through September 30, 2105, and all response costs, including, but not limited to, direct and indirect costs, that the State paid on WDNR’s and WDOJ’s behalf in connection with the Site through June 30, 2015, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through those dates.

“PCBs” shall mean polychlorinated biphenyls in any form and any break down products of them.

“Performance Standards” or “PS” shall mean the selected remedy requirements and cleanup standards for measuring the achievement of the goals of the Remedial Action, as set forth in the SOW and in: (i) Section XI of the June 2007 Record of Decision Amendment for Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) (Dkt. 276-6); and (ii) Sections IV and V of the February 2010 Explanation of Significant Differences for Operable Unit 2, Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) (Dkt. 404-4).

“Phase 1 Consent Decree” shall mean the 2006 Consent Decree for Performance of Phase 1 of the Remedial Action in Operable Units 2-5 of the Lower Fox River and Green Bay Site.

“Plaintiffs” shall mean the United States and the State.

“RA Work” shall mean the following response actions in Operable Units 2-5 that the RODs and the Remedial Design require for construction of the remedial action: (i) sediment removal by dredging; (ii) sediment containment by installation of engineered caps; (iii) placement of remedy sand covers and residual sand covers; (iv) all associated activities, including dewatering and disposal of dredged sediment, water treatment, and demobilization; and (v) any additional steps required to ensure completion of the RA such that the Performance Standards are achieved.

“RA Work Plan” shall mean the Phase 2B Work Plan for 2017/2018 and Beyond Remedial Actions for OUs 2-5 as approved by the Response Agencies, including any updates and alterations to the 100% Design made in the approved RA Work Plan

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Records of Decision” or “RODs” shall mean, collectively: (i) the December 2002 Record of Decision for OUs 1 and 2 (Dkt. 439-12); (ii) the June 2003 Record of Decision for OUs 3-5 (Dkt. 404-2); (iii) the June 2007 Record of Decision Amendment for OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth) (Dkt. 276-6); (iv) the June 2008 Record of Decision Amendment for OU 1 (Dkt. 439-18); (v) the February 2010 Explanation of Significant Differences for OU 2, OU 3, OU 4, and OU 5 (River Mouth) (Dkt. 404-4); and (vi) the June 2012 Memorandum to File regarding Minor Change to Selected Remedy (Dkt. 439-10).

“Remedial Action” or “RA” shall mean the remedial action for OUs 2-5 selected in the RODs.

“Remedial Design” or “RD” shall mean, collectively: (i) the 100% Design; (ii) the RA Work Plan; and (iii) any remedial design updates or alteration made in any modifications or supplements to the 100% Design or the RA Work Plan that are approved by the Response Agencies.

“Response Agencies” shall mean EPA and WDNR collectively.

“Section” shall mean a portion of this CD identified by an upper case Roman numeral.

“Settling Defendants” or “SDs” shall mean NCR Corporation and Appvion, Inc.

“Settling Defendants’ Related Parties” or “Related Parties” shall mean: (i) the Settling Defendants’ predecessors; (ii) the Settling Defendants’ successors and assigns, but only to the extent that the alleged liability of such person is based on the alleged liability of a Settling Defendant; and (iii) the Settling Defendants’ and Related Parties’ former or current officers, directors, employees, elected or appointed officials, or shareholders, but only to the extent that

the alleged liability of such person is based on acts and/or omissions which occurred in the scope of the person's employment or capacity as an officer, director, employee, elected or appointed official, or shareholder of a Settling Defendant or Related Party.

"Settling Defendants' Releasing Parties" shall mean NCR's and Appvion's former and current parents, subsidiaries, insurers, indemnitors, officers, directors, employees, agents, successors, assigns, and every other party claiming through or on behalf of them including, but not limited to, Paperweight Development Corp., PDC Capital Corp., Windward Prospects, Ltd., Wiggins Teape Appleton, p.l.c., Wiggins Teape Appleton (Holdings), p.l.c., Arjo Wiggins Appleton, p.l.c., Arjo Wiggins Appleton, Ltd., Arjo Wiggins Appleton (Bermuda) Ltd., Arjo Wiggins Appleton (Bermuda) Holdings Ltd., Arjo Wiggins S.A., Appleton Investments, LLC, Arjo Wiggins Delaware General Partnership, Arjo Wiggins U.S. Holdings, Ltd., Arjo Wiggins North America Investments, Ltd., Sequana, S.A.S, Worms & Cie, B.A.T. Industries, p.l.c, BTI 2014 LLC, AT&T Corp., Alcatel-Lucent USA, Inc., and Nokia Corporation, and their successors and assigns.

"Site" shall mean the Lower Fox River and Green Bay Superfund Site which encompasses: (i) approximately 39 miles of the Lower Fox River from the outlet of Lake Winnebago downstream to the mouth of the Fox River at the City of Green Bay; and (ii) the bay of Green Bay from the mouth of the Fox River at the City of Green Bay to the point where the bay enters Lake Michigan.

"Specified Defendants" shall mean Georgia-Pacific Consumer Products LP (as well as Fort James Corporation and Georgia-Pacific LLC) and P.H. Glatfelter Company, and their parents, successors and assigns and any person claiming through or on behalf of them.

"State" shall mean the State of Wisconsin.

"Statement of Work" or "SOW" shall mean the document describing the activities NCR must perform to implement the RA Work, Long-Term Monitoring and Maintenance Work, and Institutional Controls Work regarding OUs 2-5 of the Site, which is attached as Appendix 2.

"Supervising Contractor" shall mean the principal contractor retained by NCR or an entity controlled by NCR to supervise and direct the implementation of the Work under this CD.

"Transfer" shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

"UAO" shall mean the November 2007 Unilateral Administrative Order for Remedial Action in *In the matter of: Lower Fox River and Green Bay Superfund Site*, Green Bay, WI, Operable Units 2-5, U.S. EPA Docket No. V-W-'08-C-885. A copy of the UAO was filed in this case as Dkt. 1056-1.

"United States" shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA and DOI.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous substance” under Wis. Stat. § 292.01.

“WDNR” shall mean the Wisconsin Department of Natural Resources and its successor departments, agencies, or instrumentalities.

“WDOJ” shall mean the Wisconsin Department of Justice and its successor departments, agencies, or instrumentalities.

“Whiting Case” shall mean the above-referenced lawsuit captioned *Appleton Papers Inc. and NCR Corp. v. George A. Whiting Paper Co., et al.*, Case No. 08-CV-16 (E.D. Wis.), including the consolidated case captioned *NCR Corp. v. Kimberly-Clark Corp., et al.*, No. 08-CV-0895.

“Work” shall mean all activities and obligations that NCR is required to perform under this CD, except the activities required under Section XVIII (Retention of Records).

V. GENERAL PROVISIONS

5. **Objectives of the Parties.** The objectives of the Parties in entering into this CD are to protect public health or welfare or the environment by the design and implementation of response actions at the Site by NCR, to pay future response costs of Plaintiffs as provided in this CD, to resolve claims relating to the Site as provided in this CD, including to resolve all NRD claims which the United States and the State may bring, on their own behalf or on behalf of others, against the Settling Defendants (subject to the reservations in this CD), and thus eliminate litigation risk that both Plaintiffs and Settling Defendants face if they continued this litigation, including the risk inherent in appeals of decisions already made and precedents established, and to provide for full and complete contribution protection for the Settling Defendants with regard to the Site pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

6. **Stipulations and Commitments by NCR and Plaintiffs’ Commitments to Exercise Enforcement Discretion.** As provided by this CD, and as summarized by Subparagraphs 6.a-6.g, NCR shall: (i) finance and perform the Work in accordance with this CD and all deliverables developed by NCR and approved or modified by EPA pursuant to this CD; and (ii) pay the United States for its Future Non-OU1 Federal Costs and the State for its Future Non-OU1 State Costs as provided in this CD.

a. NCR stipulates and agrees that it is liable to the United States under CERCLA Section 106, 42 U.S.C. § 9606, for performance of all response actions that the UAO requires for OUs 2-5 at the Site, including but not limited to the RA Work, the Institutional Controls Work, and the Long-Term Monitoring and Maintenance Work. As provided by prior court orders in this case, other recipients of the UAO also are liable to the United States for performance of response actions that the UAO requires for OUs 2-5.

b. NCR stipulates and agrees that it is liable to the United States and the State under CERCLA Sections 107 and 113(g)(2), 42 U.S.C. §§ 9607 and 9613(g)(2), for reimbursement of all Future Non-OU1 Federal Costs incurred by the United States and all Future Non-OU1 State Costs incurred by the State.

c. **RA Work.** NCR shall perform and complete the RA Work as provided by this CD and the SOW. In their enforcement discretion, the United States and the State will initially seek performance, corrective measures, and penalties for noncompliance with RA Work requirements only from NCR, and not from other defendants in this case.

d. **Institutional Controls Work.**

(1) Until completion of the RA Work, NCR shall perform the Interim Institutional Controls Work as provided by this CD and the SOW. In their enforcement discretion, the United States and the State will initially seek performance, corrective measures, and penalties for noncompliance with Interim Institutional Controls Work requirements only from NCR, and not from other defendants in this case, until completion of the RA Work.

(2) In response to a written demand by EPA (sent after a reasonable opportunity for review and comments by the State), NCR shall perform the Post-RA Institutional Controls Work as provided by this CD and the SOW after completion of the RA Work. In their enforcement discretion, the United States and the State will initially seek performance, corrective measures, and penalties for noncompliance with Post-RA Institutional Controls Work requirements only from other defendants in this case, and not from NCR or Appvion, after completion of the RA Work.

e. **Long-Term Monitoring and Maintenance Work.** In response to a written demand by EPA (sent after a reasonable opportunity for review and comments by the State), NCR shall perform the Long-Term Monitoring and Maintenance Work as provided by this CD and the SOW. In their enforcement discretion, the United States and the State will initially seek performance, corrective measures, and penalties for noncompliance with Long-Term Monitoring and Maintenance Work only from other defendants in this case, and not from NCR or Appvion.

f. **Past Response Costs.** The United States shall seek recovery of its Past Response Costs only from other defendants in this case, and not from NCR or Appvion.

g. **Future Response Costs.** In response to a written demand by the United States or the State, NCR shall reimburse the Plaintiffs' Future Non-OU1 Federal Costs and Future Non-OU1 State Costs as provided by this CD. In their enforcement discretion, the United States and the State will initially seek reimbursement of their Future Non-OU1 Federal Costs and Future Non-OU1 State Costs (other than their Enforcement Costs) only from other defendants in this case, and not from NCR.

h. **Certain Prior Rulings Merged into Partial Final Judgment.** The following prior orders in this case are merged into this CD upon its entry as a partial final judgment, but only to the extent that such orders apply to NCR or Appvion:

- (1) the November 21, 2012, Decision and Order on the Propriety of the Remedy (Dkt. 666);
- (2) the November 23, 2012, Decision and Order on Defendants' Liability (Dkt. 668); and
- (3) the October 11, 2016, Stipulation and Agreed Order Concerning the Parties' Withdrawal of the Appvion Related Claims in this Case (Dkt. 1112).

i. **Appeals of Prior Rulings.** The SDs shall not appeal any orders in this case entered before the Date of Lodging to the extent that such orders apply to the United States or the State, including but not limited to the prior orders listed in ¶ 6.h, the Appvion No Liability Ruling (Dkt. 349), and the NCR Divisibility Rulings (Dkt. 1000; Dkt. 1033; Dkt. 1038). The United States and the State shall not appeal any orders in this case entered before the Date of Lodging to the extent that such orders apply to NCR or Appvion, including but not limited to the prior orders listed in ¶ 6.h, the Appvion No Liability Ruling (Dkt. 349), and the NCR Divisibility Rulings (Dkt. 1000; Dkt. 1033; Dkt. 1038). These obligations not to appeal shall not apply to the extent that a Party is required to file an appeal to preserve appellate rights prior to the Effective Date of this agreement; provided, however that any appeals filed to preserve appellate rights shall be withdrawn promptly after the Effective Date of this CD.

j. The parties stipulate that any remaining obligations of NCR pursuant to (i) the Phase 1 Consent Decree described in Paragraph M, or (ii) the 2004 Administrative Order on Consent for OU 2-5 remedial design or its 2007 amendment, are merged into this CD, and NCR shall have no further obligations associated with those settlements.

k. **Access to the Sediment Treatment Facility.** To complete the RA Work, NCR requires access to the sediment treatment facility that supports on-going remediation activities at the Site and that is located on Georgia-Pacific's property. Plaintiffs agree, if necessary, to exercise authority available to them under Plaintiffs' consent decree with Georgia-Pacific (Dkt. 2-1) to assist NCR with access to the sediment treatment facility on the same terms on which NCR has been provided access prior to the lodging of this CD.

7. **Compliance with Applicable Law.** Nothing in this CD limits SDs' obligations to comply with the requirements of all applicable federal and state laws and regulations. NCR must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the RODs and the SOW. The activities conducted pursuant to this CD, if approved by EPA, shall be deemed to be consistent with the NCP as provided in Section 300.700(c)(3)(ii) of the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, NCR shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. NCR may seek relief under the provisions of Section XI (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 8.a and required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.

c. This CD is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

VI. PERFORMANCE OF THE WORK

9. Coordination and Supervision.

a. Project Coordinators.

(1) NCR shall designate and notify EPA and WDNR of NCR's Project Coordinator. NCR's Project Coordinator must have sufficient technical expertise to coordinate the Work. NCR's Project Coordinator may not be an attorney representing NCR in this matter and may not act as the Supervising Contractor. NCR's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA shall designate and notify WDNR and NCR of EPA's Project Coordinator. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA's Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material. EPA has designated Pablo Valentin as its current Project Coordinator.

(3) WDNR shall designate and notify EPA and NCR of its Project Coordinator. WDNR may designate other representatives, including its employees, contractors and/or consultants to oversee the Work. For any meetings

and inspections in which EPA's Project Coordinator participates, WDNr's Project Coordinator also may participate. WDNr has designated Beth Olson as its current Project Coordinator.

(4) NCR's Project Coordinator shall meet, in person or telephonically, with EPA's and WDNr's Project Coordinators at least biweekly.

b. **Supervising Contractor.** NCR's proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ANSI/ASQC E4-2004, Quality Systems for Environmental Data and Technology Programs: Requirements with Guidance for Use (American National Standard).

c. **Procedures for Disapproval/Notice to Proceed.**

(1) NCR shall designate, and notify EPA, of the names, titles, contact information, and qualifications of NCR's proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA's review for verification based on objective assessment criteria (e.g., experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.

(2) EPA, after a reasonable opportunity for review and comment by the State, shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, NCR shall, within 30 days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. NCR may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify EPA of NCR's selection.

(3) NCR may change its Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of §§ 9.c(1) and 9.c(2).

(4) Notwithstanding the procedures of §§ 9.c(1) through 9.c(3), NCR has proposed, and EPA has authorized NCR to proceed, regarding the following Project Coordinator and Supervising Contractor:

NCR Project Coordinator:

Bryan Heath
Manager, Environment, Health and Safety
NCR Corporation
3097 Satellite Boulevard
Duluth, Georgia 30096
678-808-6061
Bryan.Heath@ncr.com

NCR Supervising Contractor:

Tetra Tech EC, Inc.
Attn: Bill Coleman, Project Manager
1611 State Street
Green Bay, WI 54304
920-445-0721
bill.coleman@tetrattech.com

10. **Performance of Work in Accordance with SOW.** NCR shall: (a) finalize the Remedial Design; (b) perform the RA Work and the Interim Institutional Controls Work, as described by ¶¶ 6.c and 6.d(1) of this CD; and (c) if it receives a written demand from EPA to do so, operate, maintain, and monitor the effectiveness of the RA, including performing the Post-RA Institutional Controls Work and the Long-Term Monitoring and Maintenance Work as described by ¶¶ 6.d(2) and 6.e of this CD; all in accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the CD or SOW shall be subject to approval by EPA in accordance with ¶ 6.6 (Approval of Deliverables) of the SOW.

11. **Emergencies and Releases.** NCR shall comply with the emergency and release response and reporting requirements under ¶ 4.3 (Emergency Response and Reporting) of the SOW. Subject to Section XIV (Covenants by Plaintiffs), nothing in this CD, including ¶ 4.3 of the SOW, limits any authority of Plaintiffs: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site. If, due to NCR's failure to take appropriate response action under ¶ 4.3 of the SOW, EPA or, as appropriate, the State takes such action instead, all costs of the response actions shall be classified as Enforcement Costs and NCR shall reimburse EPA and the State for all such costs under Section IX (Payments for Response Costs).

12. **Community Involvement.** If requested by the Response Agencies, NCR shall conduct community involvement activities until completion of the RA Work under the Response Agencies' oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator. Costs incurred by the United States and the State under this Paragraph constitute Future Response Costs under Section IX (Payments for Response Costs).

13. **Modification of SOW or Related Deliverables.**

a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in deliverables developed under the SOW in order to achieve and/or maintain the Performance Standards or to carry out and maintain the effectiveness of the RA, and such modification is consistent with the Scope of the Remedy set forth in ¶ 1.3 of the SOW, then EPA may notify NCR of such modification. If NCR objects to the modification NCR may, within 30 days after EPA's notification, seek dispute resolution under Section XII.

b. The SOW and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if NCR invokes dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this CD, and NCR shall implement all work required by such modification, consistent with ¶¶ 6 and 10 of this CD. NCR shall incorporate the modification into the deliverable required under the SOW, as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this CD.

14. Nothing in this CD, the SOW, or any deliverable required under the SOW constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW or related deliverable will achieve the Performance Standards.

VII. REMEDY REVIEW

15. **Periodic Review.** Under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and applicable regulations, EPA will conduct periodic reviews of whether the RA is protective of human health and the environment.

16. **EPA Selection of Further Response Actions.** If EPA determines, at any time, that the RA is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

17. **Opportunity to Comment.** NCR and, if required by Sections 113(k)(2) or 117 of CERCLA, 42 U.S.C. § 9613(k)(2) or 9617, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

VIII. FINANCIAL ASSURANCE

18. **Existing Financial Assurance Arrangements.** While performing under the UAO, NCR has utilized a set of financial assurance and funding arrangements for the work. Specifically, NCR has utilized:

a. Agreements with certain corporate indemnitors and co-obligors regarding funding for remediation costs. In the past NCR was a part of, or affiliated with, certain other corporations; as those corporations entered into various transactions, such as divestitures and spinoffs, a variety of agreements were entered into that caused the other corporations to retain or share with NCR certain liabilities related to the Fox River. Under a September 30, 2014 Funding Agreement, B.A.T. Industries p.l.c. (and others) are obligated to provide regular, ongoing funding of NCR incurred Fox River remediation costs; this followed from a certain 1995 cost sharing agreement. Under a 1996 agreement, AT&T Corp. and Nokia are responsible severally for indemnifying NCR for certain Fox River costs. Under these arrangements, NCR anticipates that it will receive reimbursements equal to at least 50% of the total remediation costs that NCR incurs under this CD from B.A.T. Industries p.l.c. and at least 20% of the total remediation costs that NCR incurs under this CD from AT&T Corp. and Nokia.

b. A special-purpose entity to receive and disburse funds for payment of the remediation contractors working at the Site. NCR's remediation costs are incurred through a special purpose limited liability company known as the Lower Fox River Remediation LLC or "the LLC", which has agreements with environmental remediation contractors to perform the work at the Site and pay the costs of these contractors, including a contract with the Supervising Contractor.

c. A financial assurance commitment in the contract between the LLC and the Supervising Contractor. The LLC's contract with the Supervising Contractor required financial assurance instruments in an initial amount of \$49,000,000 with annual adjustments to the required financial assurance amount.

NCR shall continue to utilize the existing financial assurance and funding arrangements described in this Paragraph throughout the RA Work.

19. **Supplemental Financial Assurance Arrangements.** In order to ensure completion of the RA Work, NCR shall secure financial assurance, initially in the amount of \$20,000,000, for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. NCR may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency; or

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

20. Within 30 days after the Effective Date, or 30 days after EPA's approval of the form and substance of NCR's Supplemental Financial Assurance under ¶ 19, whichever is later, NCR shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the EPA Regional Financial Management Officer, to the United States, and to EPA and the State as specified in Section XIX (Notices and Submissions).

21. NCR shall diligently monitor the adequacy of the financial assurance. If NCR becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, NCR shall notify EPA of such information within 7 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify NCR of such determination. NCR shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for NCR, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. NCR shall follow the procedures of ¶ 23 (Modification of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. NCR's inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this CD or the UAO.

22. Access to Financial Assurance.

a. If EPA issues a notice of implementation of a Work Takeover under ¶ 64.b, then, in accordance with any applicable financial assurance mechanism, EPA is entitled

to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 22.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and NCR fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 22.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 64.b, EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism, whether in cash or in kind, to continue and complete the Work, NCR shall, within 30 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 22 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Fox River Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA and WDNR Work Takeover costs not paid under this ¶ 22 must be reimbursed as Enforcement Costs under Section IX (Payments for Response Costs).

23. Modification of Amount, Form, or Terms of Financial Assurance. NCR may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 20, and must include an estimate of the cost of the remaining RA Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify NCR of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. NCR may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XII (Dispute Resolution). NCR may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by SDs pursuant to the dispute resolution provisions of this CD or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this

Paragraph, NCR shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 20.

24. **Release, Cancellation, or Discontinuation of Financial Assurance.** NCR may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Certification of RA Completion under ¶ 4.5 (Certification of RA Completion) of the SOW; (b) in accordance with EPA's written approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XII (Dispute Resolution).

IX. PAYMENTS FOR RESPONSE COSTS

25. Payments by NCR for Future Response Costs.

a. **Future Non-OU1 Federal Costs.** Consistent with Subparagraph 6.g, in response to a written demand from the United States, NCR shall pay to EPA Future Non-OU1 Federal Costs not inconsistent with the NCP. Any such written demand shall be accompanied by a bill requiring payment that includes an EPA Itemized Cost Summary, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and DOJ. NCR shall make all payments within 30 days after NCR's receipt of each bill requiring payment, except as otherwise provided in ¶ 27 (Contesting Future Response Costs), in accordance with ¶ 26.a (instructions for future response cost payments).

b. **Deposit of Payments for Future Non-OU1 Federal Costs.** The total amount paid by NCR pursuant to ¶ 25.a shall be deposited by EPA in the Fox River Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, provided, however, that EPA may deposit a Future Non-OU1 Federal Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Fox River Site Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Non-OU1 Federal Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by NCR pursuant to the dispute resolution provisions of this CD or in any other forum.

c. **Future Non-OU1 State Costs.** Consistent with Subparagraph 6.g, in response to a written demand from the State, NCR shall pay to WDNR Future Non-OU1 State Costs not inconsistent with the NCP. Any such written demand shall be accompanied by a bill requiring payment that includes a State cost summary, which includes direct and indirect costs incurred by WDNR, its contractors, subcontractors, and WDOJ. NCR shall make all payments within 30 days after NCR's receipt of each bill requiring payment, except as otherwise provided in ¶ 27 (Contesting Future Response Costs). NCR shall make all payments to the State required by this Paragraph in accordance with ¶ 26.b.

d. **Deposit of Payments for Future Non-OU1 State Costs.** The total amount paid by NCR pursuant to ¶ 25.c shall be deposited in a segregated fund under the direction of WDNR, and shall be retained and used by WDNR to conduct or finance response actions at or in connection with the Site.

26. **Payment Instructions.**

a. **Future Non-OU1 Federal Costs Payments and Stipulated Penalties Payable to the United States.**

(1) For all payments subject to this ¶ 26.a, NCR shall make such payment by Fedwire EFT, referencing Site/Spill ID A565 and DJ number 90-11-2-1045/3. The Fedwire EFT payment must be sent as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read
“D 68010727 Environmental Protection Agency”

(2) For all payments made under this ¶ 26.a, NCR must include references to the Site/Spill ID and DJ numbers. At the time of any payment required to be made in accordance with ¶ 26.a, NCR shall send notices that payment has been made to the United States, EPA, and the EPA Cincinnati Finance Center, all in accordance with ¶ 84. All notices must include references to the Site/Spill ID and DJ numbers.

b. **Future Non-OU1 State Costs Payments and Stipulated Penalties Payable to the State.**

(1) For all payments subject to this ¶ 26.b, NCR shall make such payment by EFT, referencing WDNR, this Consent Decree, and the Lower Fox River and Green Bay Superfund Site. The EFT payment must be sent as follows:

Company/Vendor Information

Vendor Name: State of WI Dept. of Natural Resources
Federal ID #: 39-6006436
Remit to Address: 101 S. Webster St., P.O. Box 7921
Madison WI 53707-7921
Contact Person: Margaret Hooper
Email Address: margaret.hooper@wisconsin.gov
Telephone Number: 608-266-7497

Bank/Financial Information

Bank Name: U.S. Bank
Address: 777 E. Wisconsin Ave.
Milwaukee WI 53202
Bank Routing #: 075000022
Account Name: State of WI General Control
Bank Account #: 111851166
Type of Account: Checking
ACH Format: CTX or CCD+

(2) At the time of any payment required to be made in accordance with this ¶ 26.b, NCR shall send notice that payment has been made to the State in accordance with ¶ 83 and to the following additional contact person by fax or e-mail:

Contact Name: Margaret Hooper
Fax #: 608-264-6277
Email Address: margaret.hooper@wisconsin.gov

27. **Contesting Future Response Costs.** NCR may submit a Notice of Dispute, initiating the procedures of Section XII (Dispute Resolution), regarding any Future Non-OU1 Federal Costs or any Future Non-OU1 State Costs billed to NCR under ¶ 25 (Payments by NCR for Future Response Costs) if NCR determines that EPA or the State has made a mathematical error or included a cost item that is not within the definition of Future Non-OU1 Federal Costs or Future Non-OU1 State Costs, or if they believe EPA or the State incurred excess costs as a direct result of an EPA or State action that was inconsistent with a specific provision or provisions of the NCP. Such Notice of Dispute shall be submitted in writing within 30 days after receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) or the State (if the State's accounting is being disputed) pursuant to Section XIX (Notices and Submissions). Such Notice of Dispute shall specifically identify the contested Future Non-OU1 Federal Costs or Future Non-OU1 State Costs and the basis for objection. If NCR submits a Notice of Dispute, NCR shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Non-OU1 Federal Costs to the United States and all uncontested Future Non-OU1 State Costs to the State, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation ("FDIC"), and remit to that escrow account funds equivalent to the amount of the contested Future Non-OU1 Federal Costs or Future Non-OU1 State Costs. NCR shall send to the United States or the State, as appropriate and as provided in Section XIX (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Non-OU1 Federal Costs or Future Non-OU1 State Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If the United States or the State prevails in the dispute, NCR shall pay the sums due

(with accrued interest) to the United States (if Future Non-OU1 Federal Costs were disputed) or the State (if Future Non-OU1 State Costs were disputed) within 7 days after the resolution of the dispute. If NCR prevails concerning any aspect of the contested costs, NCR shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States (if Future Non-OU1 Federal Costs were disputed) or the State (if Future Non-OU1 State Costs were disputed) within 7 days after the resolution of the dispute. NCR shall be disbursed any balance of the escrow account. All payments to the United States under this Paragraph shall be made in accordance with ¶ 26.a. All payments to the State under this Paragraph shall be made in accordance with ¶ 26.b. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding NCR's obligation to reimburse the United States and the State for their Future Non-OU1 Federal Costs and Future Non-OU1 State Costs.

28. **Interest.** In the event that any payment for Future Non-OU1 Federal Costs or Future Non-OU1 State Costs required under this Section is not made by the date required, NCR shall pay Interest on the unpaid balance. The Interest shall begin to accrue on the date of the bill. The Interest shall accrue through the date of NCR's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of NCR's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Section XIII (Stipulated Penalties).

X. INDEMNIFICATION AND INSURANCE

29. NCR's Indemnification of the United States and the State.

a. The United States and the State do not assume any liability by entering into this CD or by virtue of any designation of NCR as EPA's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). NCR shall indemnify, save, and hold harmless the United States and the State and their officials, agents, employees, contractors, subcontractors, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of NCR, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on NCR's behalf or under their control, in carrying out activities pursuant to this CD, including, but not limited to, any claims arising from any designation of NCR as EPA's authorized representatives under Section 104(e) of CERCLA. Further, NCR agrees to pay the United States and the State all costs they incur including, but not limited to, attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States and the State based on negligent or other wrongful acts or omissions of NCR, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this CD. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of NCR in carrying out activities pursuant to this CD. Neither NCR nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State, respectively, shall give NCR notice of any claim for which the United States or the State plans to seek indemnification pursuant to this ¶ 29, and shall consult with NCR prior to settling such claim.

30. NCR covenants not to sue and agrees not to assert any claims or causes of action against the United States and the State, respectively, for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between NCR and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, NCR shall indemnify, save and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between NCR and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

31. **Insurance.** NCR shall secure, and shall maintain until the first anniversary after issuance of EPA's Certification of RA Completion pursuant to ¶ 4.5 (Certification of RA Completion) of the SOW commercial general liability insurance with limits of liability of at least \$1 million per occurrence, automobile liability insurance with limits of liability of at least \$1 million per accident, and umbrella liability insurance with limits of liability of at least \$5 million in excess of the required commercial general liability and automobile liability limits, naming the United States and the State as additional insureds with respect to all liability arising out of the activities performed by or on behalf of NCR pursuant to this CD. In addition, for the duration of this CD, NCR shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of NCR in furtherance of this CD. NCR shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. NCR shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If NCR demonstrates by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, NCR need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. NCR shall ensure that all submittals to EPA under this Paragraph identify the Lower Fox River and Green Bay Superfund Site and the civil action number of this case.

XI. FORCE MAJEURE

32. "Force majeure," for purposes of this CD, is defined as any event arising from causes beyond the control of NCR, of any entity controlled by NCR, or of NCR's contractors that delays or prevents the performance of any obligation under this CD despite NCR's best efforts to fulfill the obligation. 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 (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to

the greatest extent possible. “Force majeure” does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

33. If any event occurs or has occurred that may delay the performance of any obligation under this CD for which NCR intends or may intend to assert a claim of force majeure, NCR shall notify WDNR’s Project Coordinator and EPA’s Project Coordinator orally or, in the event EPA’s Project Coordinator is unavailable, the EPA Region 5 Superfund Division Director, within 48 hours of when NCR first knew that the event might cause a delay. Within five days thereafter, NCR shall provide in writing to EPA and WDNR an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; NCR’s rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of NCR, such event may cause or contribute to an endangerment to public health or welfare, or the environment. NCR shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. NCR shall be deemed to know of any circumstance of which NCR, any entity controlled by NCR, or NCR’s contractors or subcontractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude NCR from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 32 and whether NCR has exercised its best efforts under ¶ 32, EPA may, in its unreviewable discretion, excuse in writing NCR’s failure to submit timely or complete notices under this Paragraph.

34. If EPA, after a reasonable opportunity for review and comment by WDNR, agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this CD that are affected by the force majeure will be extended by EPA, after a reasonable opportunity for review and comment by WDNR, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify NCR in writing of its decision. If EPA, after a reasonable opportunity for review and comment by WDNR, agrees that the delay is attributable to a force majeure, EPA will notify NCR in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

35. If NCR elects to invoke the dispute resolution procedures set forth in Section XII (Dispute Resolution) regarding EPA’s decision, NCR shall do so no later than 15 days after receipt of EPA’s notice. In any such proceeding, NCR shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that NCR complied with the requirements of ¶¶ 32 and 33. If NCR carries this burden,

the delay at issue shall be deemed not to be a violation by NCR of the affected obligation of this CD identified to EPA and the Court.

36. The failure by EPA to timely complete any obligation under the CD or under the SOW is not a violation of the CD, provided, however, that if such failure prevents NCR from meeting one or more deadlines in the SOW, NCR may seek relief under this Section.

XII. DISPUTE RESOLUTION

37. Unless otherwise expressly provided for in this CD, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this CD. However, the procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations of SDs that have not been disputed in accordance with this Section.

38. A dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute. Any dispute regarding this CD shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute.

39. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, NCR invokes the formal dispute resolution procedures of this Section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by NCR. The Statement of Position shall specify NCR's position as to whether formal dispute resolution should proceed under ¶ 40 (Record Review) or ¶ 41.

b. Within 28 days after receipt of NCR's Statement of Position, EPA will serve on NCR its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under ¶ 40 (Record Review) or ¶ 41. Within 21 days after receipt of EPA's Statement of Position, NCR may submit a Reply.

c. If there is disagreement between EPA and NCR as to whether dispute resolution should proceed under ¶ 40 (Record Review) or ¶ 41, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if NCR ultimately appeals to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in ¶¶ 40 and 41.

40. **Record Review.** Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this CD, and the adequacy of the performance of response actions taken pursuant to this CD. Nothing in this CD shall be construed to allow any dispute by NCR regarding the validity of the RODs' provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The EPA Region 5 Superfund Division Director will issue a final administrative decision resolving the dispute based on the administrative record described in ¶ 40.a. This decision shall be binding upon NCR, subject only to the right to seek judicial review pursuant to ¶¶ 40.c and 40.d.

c. Any administrative decision made by EPA pursuant to ¶ 40.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by NCR with the Court and served on all Parties within 30 days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this CD. The United States and the State may file responses to NCR's motion.

d. In proceedings on any dispute governed by this Paragraph, NCR shall have the burden of demonstrating that the decision of the EPA Region 5 Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to ¶ 40.a.

41. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. The EPA Region 5 Superfund Division Director will issue a final decision resolving the dispute based on the statements of position and reply, if any, served under ¶ 39. The Superfund Division Director's decision shall be binding on NCR unless, within 30 days after receipt of the decision, NCR files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the CD. The United States and the State may file responses to NCR's motion.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

42. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of NCR under this CD, except as provided in ¶ 27 (Contesting Future Response Costs), as agreed by EPA, or as determined by the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute, as provided in ¶ 51. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this CD. In the event that NCR does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIII (Stipulated Penalties).

XIII. STIPULATED PENALTIES

43. NCR shall be liable to the United States and the State for stipulated penalties in the amounts set forth in ¶¶ 44, 45.a and 46 for failure to comply with the obligations specified in ¶¶ 44, 45.b and 46, unless excused under Section XI (Force Majeure). “Comply” as used in the previous sentence includes compliance by NCR with all applicable requirements of this CD, within the deadlines established under this CD. If an initially submitted or resubmitted deliverable contains a material defect, and the deliverable is disapproved or modified by EPA under ¶ 6.6(a) (Initial Submissions) or ¶ 6.6(b) (Resubmissions) of the SOW due to such material defect, then the material defect shall constitute a lack of compliance for purposes of this Paragraph. Any stipulated penalties under ¶ 46 concerning payments due to the United States and/or the State shall be divided between the United States and the State in proportion to the amounts that are unpaid or overdue. Any other stipulated penalties under ¶ 44, 45.b, or 46 shall be divided evenly between the United States and the State.

44. **Stipulated Penalty Amounts – Major Work Obligations.** The following stipulated penalties shall accrue per violation per day for any noncompliance identified in the following table:

	Period of Noncompliance and Penalty Per Violation Per Day		
Obligations	1st through 14th day	15th through 30th day	31st day and beyond
Performance of the Remedial Design in accordance with the requirements established by ¶ 10 of the CD and the SOW	\$2,000	\$5,000	\$10,000
Performance of the RA Work in accordance with the requirements established by the UAO, ¶ 10 of the CD, the SOW, and the RA Work Plan	\$5,000	\$10,000	\$20,000
Performance of the Institutional Controls Work in accordance with any requirements imposed upon NCR by ¶¶ 6.d and 10 of the CD and the SOW	\$1,000	\$2,500	\$5,000
Performance of the Long-Term Monitoring and Maintenance Work in accordance with any requirements imposed upon NCR by ¶¶ 6.e and 10 of the CD and the SOW	\$1,000	\$2,500	\$5,000
Requirement to take response action as required by ¶ 11 of the CD and the SOW.	\$5,000	\$10,000	\$20,000

45. Stipulated Penalty Amounts - Payments, Financial Assurance, Major Deliverables, and Other Milestones.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in ¶ 45.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$1,000
15th through 30th day	\$2,500
31st day and beyond	\$5,000

b. Obligations.

(1) Payment of any amount due under Section IX (Payments for Response Costs).

(2) Establishment and maintenance of financial assurance in accordance with Section VIII (Financial Assurance).

(3) Establishment of an escrow account to hold any disputed Future Response Costs under ¶ 27 (Contesting Future Response Costs).

46. **Stipulated Penalty Amounts – Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables pursuant to the CD other than those specified in Paragraph 45.b:

Period of Noncompliance	Penalty Per Violation Per Day
1st through 14th day	\$500
15th through 30th day	\$1,000
31st day and beyond	\$2,000

47. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 64 (Work Takeover), NCR shall be liable for a stipulated penalty in the amount of \$600,000. Stipulated penalties under this Paragraph are in addition to the remedies available under ¶¶ 22 (Access to Financial Assurance) and 64 (Work Takeover).

48. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under ¶ 6.6 (Approval of Deliverables) of the SOW, during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies NCR of any deficiency; (b) with respect to a decision by the EPA Region 5 Superfund Division Director under ¶ 40.b or 41.a of Section XII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that NCR's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this CD shall prevent the simultaneous accrual of separate penalties for separate violations of this CD.

49. Following EPA's determination that NCR has failed to comply with a requirement of this CD, EPA may give NCR written notification of the same and describe the noncompliance. EPA and the State may send NCR a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified NCR of a violation.

50. All penalties accruing under this Section shall be due and payable to the United States and the State within 30 days after NCR's receipt from EPA of a demand for payment of the penalties, unless NCR invokes the Dispute Resolution procedures under Section XII (Dispute Resolution) within the 30-day period. All payments to the United States and the State under this

Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 26.a (instructions for future response cost payments).

51. Penalties shall continue to accrue as provided in ¶ 48 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA and the State within 15 days after the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, NCR shall pay all accrued penalties determined by the Court to be owed to EPA and the State within 60 days after receipt of the Court's decision or order, except as provided in ¶ 51.c;

c. If the District Court's decision is appealed by any Party, NCR shall pay all accrued penalties determined by the District Court to be owed to the United States and the State into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA and the State or to NCR to the extent that it prevails.

52. If NCR fails to pay stipulated penalties when due, NCR shall pay Interest on the unpaid stipulated penalties as follows: (a) if NCR has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to ¶ 51 until the date of payment; and (b) if NCR fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 50 until the date of payment. If NCR fails to pay stipulated penalties and Interest when due, the United States or the State may institute proceedings to collect the penalties and Interest.

53. The payment of penalties and Interest, if any, shall not alter in any way NCR's obligation to complete the performance of the Work required under this CD.

54. Nothing in this CD shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of SDs' violation of this CD or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is collected pursuant to this CD.

55. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this CD.

XIV. COVENANTS BY PLAINTIFFS

56. **Covenants for SDs by United States.** Except as provided in ¶¶ 58, 59 (Plaintiffs' Pre- and Post-Certification Reservations) and ¶¶ 61-63 (General Reservations of Rights and other reservations), the United States covenants not to sue or to take administrative action against SDs or their Related Parties pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, and Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of RA Completion by EPA pursuant to ¶ 4.5 (Certification of RA Completion) of the SOW. As to each SD, these covenants are conditioned upon the satisfactory performance by the SD of its obligations under this CD. These covenants extend only to SDs and their Related Parties and do not extend to any other person.

57. **Covenants for SDs by the State.** Except as provided in ¶¶ 58, 59 (Plaintiffs' Pre- and Post-Certification Reservations) and ¶¶ 61-63 (General Reservations of Rights and other reservations), the State covenants not to sue or to take administrative action against SDs or their Related Parties pursuant to Section 107 of CERCLA 42 U.S.C. § 9607, Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), and Wisconsin statutory or common law, relating to the Site. Except with respect to future liability, these covenants shall take effect upon the Effective Date. With respect to future liability, these covenants shall take effect upon Certification of RA Completion by EPA pursuant to ¶ 4.5 (Certification of RA Completion) of the SOW. As to each SD, these covenants are conditioned upon the satisfactory performance by the SD of its obligations under this CD. These covenants extend only to SDs and their Related Parties and do not extend to any other person.

58. **Plaintiffs' Pre-Certification Reservations.** Notwithstanding any other provision of this CD, the United States and the State reserve, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel NCR to perform further response actions relating to the Site and/or to pay the United States and the State for additional costs of response if, (a) prior to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the RA is not protective of human health or the environment.

59. **Plaintiffs' Post-Certification Reservations.** Notwithstanding any other provision of this CD, the United States and the State reserve, and this CD is without prejudice to, the right to institute proceedings in this action or in a new action, and/or to issue an administrative order, seeking to compel NCR to perform further response actions relating to the Site and/or to pay the United States and the State for additional costs of response if, (a) subsequent to Certification of RA Completion, (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or this information

together with other relevant information indicate that the RA is not protective of human health or the environment.

60. For purposes of ¶ 58 (Plaintiffs' Pre-Certification Reservations), the information and the conditions known to EPA will include only that information and those conditions known to EPA as set forth in the Site Administrative Record and UAO Administrative Record (as indexed in Dkt. 474-2) and any other information received by EPA pursuant to the requirements of the UAO, the Phase 1 Consent Decree, or the 2004 Administrative Order on Consent for Remedial Design of Operable Units 2-5 (and the 2007 Amended Administrative Settlement Agreement and Order on Consent for Remedial Design of Operable Units 2-5) prior to the Date of Lodging. For purposes of ¶ 59 (Plaintiffs' Post-Certification Reservations), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of RA Completion and set forth in the Site Administrative Record and the UAO Administrative Record (including any additions to the those administrative records after issuance of the RODs), or in any information received by EPA pursuant to the requirements of this CD, the UAO, the Phase 1 Consent Decree, or the 2004 Administrative Order on Consent for Remedial Design of Operable Units 2-5 (and the 2007 Amended Administrative Settlement Agreement and Order on Consent for Remedial Design of Operable Units 2-5) prior to Certification of RA Completion.

61. **General Reservations of Rights.** The United States and the State reserve, and this CD is without prejudice to, all rights against SDs and their Related Parties with respect to all matters not expressly included within Plaintiffs' covenants. Notwithstanding any other provision of this CD, the United States and the State reserve all rights against SDs and their Related Parties with respect to:

- a. liability for failure by a SD to meet a requirement of this CD;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based on a SD's future transportation, treatment, storage, discharge, or disposal, or arrangement for transportation, treatment, storage, discharge, or disposal of Waste Material at or in connection with the Site, other than as provided in the RODs, the Work, or otherwise ordered by EPA, after signature of this CD by SDs;
- d. liability for damages for injury to, destruction of, or loss of natural resources resulting from releases or threatened releases of Waste Material outside of the Site;
- e. criminal liability;
- f. liability for violations of federal or state law that occur during or after implementation of the Work; and
- g. liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance

Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to ¶ 13 (Modification of SOW or Related Deliverables).

62. Plaintiffs' Reservations for Unknown NRD Conditions and New NRD

Information. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve the right to institute proceedings against NCR in this action or in a new action seeking recovery of Natural Resource Damages, based on: (1) conditions with respect to the Site, unknown to DOI and WDNR as of the Date of Lodging, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of Natural Resources ("Unknown NRD Conditions"), or (2) information received by DOI and WDNR after the Date of Lodging which indicates that the releases of hazardous substances at the Site have resulted in injury to, destruction of, or loss of Natural Resources of a type or future persistence that was unknown to the Trustees as of the date of lodging of this Consent Decree ("New NRD Information"). The following shall not be considered Unknown NRD Conditions or New NRD Information for the purpose of this Paragraph: (1) an increase solely in any trustee's assessment of the magnitude of a known injury to, destruction of, or loss of Natural Resources at the Site; or (2) injury to, destruction of, or loss of Natural Resources at the Site arising from the re-exposure, resuspension, or migration of hazardous substances known to be present in the sediments of the Site. For the purpose of this Paragraph, the information and conditions known to the trustees shall include any information or conditions listed or identified in records relating to the Site that were in the possession or under the control of DOI or WDNR as of the Date of Lodging of this Consent Decree.

63. Additional Reservation for Hazardous Substances Other than PCBs.

Notwithstanding any other provision in this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to institute proceedings against SDs in this action or in a new action or to issue an administrative order to a SD seeking to compel it to perform future response actions relating to the Site, pay future costs of response incurred by EPA or WDNR, and/or pay additional sums for Natural Resource Damages to the extent such response actions, response costs, or Natural Resource Damages relate to a hazardous substance (or hazardous substances) other than PCBs. The reservation in this Paragraph shall not be construed to require the SDs to perform or reimburse costs of the remedial action prescribed by the existing RODs for the Site.

64. Work Takeover.

a. In the event EPA determines that NCR: (1) has ceased implementation of any portion of the Work; (2) is seriously or repeatedly deficient or late in its performance of the Work; or (3) is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice ("Work Takeover Notice") to NCR. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide NCR a period of 10 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 10-day notice period specified in ¶ 64.a, NCR has not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary ("Work Takeover"). EPA will notify NCR in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this ¶ 64.b. Funding of Work Takeover costs is addressed under ¶ 22 (Access to Financial Assurance).

c. NCR may invoke the procedures set forth in ¶ 40 (Record Review), to dispute EPA's implementation of a Work Takeover under ¶ 64.b. However, notwithstanding NCR's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under ¶ 64.b until the earlier of (1) the date that NCR's remedy, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (2) the date that a final decision is rendered in accordance with ¶ 40 (Record Review) requiring EPA to terminate such Work Takeover.

65. Notwithstanding any other provision of this CD, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

XV. COVENANTS BY SDs

66. **Covenants by SDs.** Subject to the reservations in ¶ 68, SDs covenant not to sue and agree not to assert any claims or causes of action against the United States or the State with respect to the Site, and this CD, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112 or 113, or any other provision of law, regarding the Site or this CD;

b. any claims under CERCLA §§ 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding the Site or this CD; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Wisconsin Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

67. Except as provided in ¶¶ 70 (Waiver of Claims by SDs) and 75 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States or the State brings a cause of action or issues an order against a SD pursuant to any of the reservations in Section XIV (Covenants by Plaintiffs), other than in ¶¶ 61.a (claims for failure to meet a requirement of the CD), 61.e (criminal liability), and 61.f (violations of federal/state law during or after implementation of the Work), but only to the extent that the SD's claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

68. NCR reserves, and this CD is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of NCR's deliverables or activities.

69. Nothing in this CD shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

70. Waiver of Claims by SDs.

a. Subject to the reservations in this ¶ 70, NCR and Appvion, to the maximum extent allowable by law, on behalf of themselves and Settling Defendants' Releasing Parties, waive, release, and agree not to assert any claims or causes of action (including but not limited to claims for contribution under CERCLA) that it may have for all matters relating to the release of PCBs to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver includes, but is not limited to, any asserted or unasserted claims or causes of action by a SD, whether in this action, the *Whiting* Case, or any future action related to the Site, for recovery of its Fox River Group costs based on contract law or any other theory of recovery.

b. The waiver in ¶ 70.a shall not apply to any claims that SDs may have against a Specified Defendant, including but not limited to any claim for Fox River Group costs, if a Specified Defendant pursues a claim of any type based on any theory relating to this Site against a SD, or both SDs.

c. The waiver in ¶ 70.a shall not apply to any claim that NCR may have against a Specified Defendant, including but not limited to any claim for Fox River Group costs, if a Specified Defendant is liable for Future Non-OU1 Federal Costs or Future Non-OU1 State Costs, Post-RA Institutional Controls Work, or Long-Term Monitoring and Maintenance Work and fails to pay any portion of such costs or perform any portion of such work in a manner that triggers a written demand and NCR's obligation to pay such costs or perform such work pursuant to ¶ 6.d(2), 6.e, or 6.g.

d. The waiver in ¶ 70.a shall not apply to any claims that SDs may have as a result of the Plaintiffs' exercising any rights against the SDs pursuant to ¶ 58, 59, or 61-63.

e. The waiver in ¶ 70.a shall not apply to any claims that a SD may have against its own insurance carriers or indemnitors.

f. The claim waivers in this ¶ 70 shall take effect upon the Effective Date, but are conditioned on this CD's continued effectiveness. Nothing in this ¶ 70 is intended to diminish the contribution protection provided to the SDs by this CD or any other consent decree or administrative settlement agreement relating to this Site.

71. SDs agree not to seek judicial review of a final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from performance of work under the UAO or the performance Work under this CD in any way affected the basis for listing the Site.

XVI. EFFECT OF SETTLEMENT; CONTRIBUTION

72. Except as provided in ¶ 70 (Waiver of Claims by SDs) and the provisions concerning Settling Defendants' Related Parties, nothing in this CD shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this CD. Except as provided in Section XV (Covenants by SDs), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this CD diminishes the right of the United States or the State, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

73. The Parties agree, and by entering this CD this Court finds, that this CD constitutes a judicially-approved settlement pursuant to which each SD and its Related Parties has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this CD. The "matters addressed" in this CD are Natural Resource Damages and all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States, the State, or any other person; provided, however, that if the United States or the State exercises rights against SDs under the reservations in Section XIV (Covenants by Plaintiffs), other than in ¶¶ 61.a (claims for failure to meet a requirement of the CD), 61.e (criminal liability), and 61.f (violations of federal/state law during or after implementation of the Work), the "matters addressed" in this CD will no longer include those particular response costs or response actions or natural resource damages that are within the scope of the exercised reservation.

74. The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States and the State in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this CD constitutes a

judicially-approved settlement pursuant to which each SD has, as of the Effective Date, resolved liability to the United States and the State within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

75. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, SDs shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XIV (Covenants by Plaintiffs).

XVII. ACCESS TO INFORMATION

76. NCR shall provide to EPA and the State, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within NCR’s possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this CD, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information regarding the Work. NCR shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

77. Privileged and Protected Claims.

a. NCR may assert that all or part of a Record requested by Plaintiffs is privileged or protected as provided under federal law, in lieu of providing the Record, provided NCR complies with ¶ 77.b, and except as provided in ¶ 77.c.

b. If NCR asserts a claim of privilege or protection, NCR shall provide Plaintiffs with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, NCR shall provide the Record to Plaintiffs in redacted form to mask the privileged or protected portion only. NCR shall retain all Records that they claim to be privileged or protected until Plaintiffs have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the NCR’s favor.

c. NCR may make no claim of privilege or protection regarding: (1) any data regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other

Record that evidences conditions at or around the Site; or (2) the portion of any Record that NCR is required to create or generate pursuant to this CD.

78. **Business Confidential Claims.** NCR may assert that all or part of a Record provided to Plaintiffs under this Section or Section XVIII (Retention of Records) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). NCR shall segregate and clearly identify all Records or parts thereof submitted under this CD for which NCR asserts business confidentiality claims. Records that NCR claims to be confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA and the State, or if EPA has notified NCR that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to NCR.

79. If relevant to the proceeding, the Parties agree that validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this CD.

80. Notwithstanding any provision of this CD, Plaintiffs retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XVIII. RETENTION OF RECORDS

81. Until 10 years after EPA's Certification of Work Completion under ¶ 4.8 (Certification of Work Completion) of the SOW, NCR shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site. NCR must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to the performance of the Work, provided, however, that NCR (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

82. At the conclusion of this record retention period, NCR shall notify the United States and the State at least 90 days prior to the destruction of any such Records, and, upon request by the United States or the State, and except as provided in ¶ 77 (Privileged and Protected Claims), NCR shall deliver any such Records to EPA or the State.

83. Each SD certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since

notification of potential liability by the United States or the State and that it has fully complied with any and all requests for information regarding the Site by the United States and the State pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XIX. NOTICES AND SUBMISSIONS

84. All approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, and requests specified in this CD must be in writing unless otherwise specified. Whenever, under this CD, notice is required to be given, or a report or other document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the address(es) specified below. Any Party may change the person and/or address applicable to it by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Notices required to be sent to EPA, and not to the United States, should not be sent to the DOJ. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the CD regarding such Party.

As to the United States:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
eescdcopy.enrd@usdoj.gov
Re: DJ # 90-11-2-1045/3

As to EPA:

Superfund Division Director
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (SR-6J)
Chicago, IL 60604-3590

and:

Pablo Valentin
EPA Project Coordinator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (SR-6J)
Chicago, IL 60604-3590
valentin.pablo@epa.gov

**As to the EPA Regional Financial
Management Officer:**

Chief, Program Accounting and Analysis Section
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (MF-10J)
Chicago, IL 60604-3590

As to EPA Cincinnati Finance Center:

EPA Cincinnati Finance Center
26 W. Martin Luther King Drive
Cincinnati, Ohio 45268
cinwd_acctsreceivable@epa.gov

As to the State:

Beth Olson
State Project Coordinator
Wisconsin Department of Natural Resources
2984 Shawano Ave.
Green Bay, WI 543136727
beth.olson@wisconsin.gov

and

F. Mark Bromley
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
bromleyfm@doj.state.wi.us

As to NCR:

Bryan Heath
Manager, Environment, Health and Safety
NCR Corporation
3097 Satellite Boulevard
Duluth, Georgia 30096
678-808-6061
Bryan.Heath@ncr.com

and

John Heyde
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
312-853-7716
jheyde@sidley.com

As to Appvion:

Attn: Tami L. Van Straten
825 East Wisconsin Avenue
P.O. Box 359
Appleton, Wisconsin 54912-0359
920-734-9841
tvanstraten@appvion.com

XX. RETENTION OF JURISDICTION

85. This Court retains jurisdiction over both the subject matter of this CD and SDs for the duration of the performance of the terms and provisions of this CD for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this CD, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XII (Dispute Resolution).

XXI. APPENDICES

86. The following appendices are incorporated into this CD:

<u>Appendix</u>	<u>Document Reference</u>	<u>Description</u>
Appendix 1	Attachment 1 to this CD	Map of the Site
Appendix 2	Attachment 2 to this CD	Statement of Work
Appendix 3	Dkt. 439-12	December 2002 Record of Decision for OUs 1 and 2
Appendix 4	Dkt. 404-2	June 2003 Record of Decision for OUs 3-5
Appendix 5	Dkt. 439-12	June 2007 Record of Decision Amendment for OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth)
Appendix 6	Dkt. 439-18	June 2008 Record of Decision Amendment for OU 1 (Dkt. 439-18);
Appendix 7	Dkt. 404-4	February 2010 Explanation of Significant Differences for OU 2, OU 3, OU 4, and OU 5 (River Mouth)
Appendix 8	Dkt. 439-10	June 2012 Memorandum to File regarding Minor Change to Selected Remedy
Appendix 9	2012 Tr. Ex. 2000-2014	100% Design (including its Appendices)

Appendix 10	Dkt. 1056-1	UAO (including UAO Statements of Work)
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XXII. MODIFICATION

87. Except as provided in ¶ 13 (Modification of SOW or Related Deliverables) and ¶ 88, material modifications to this CD, including the SOW, shall be in writing, signed by the United States and SDs, and shall be effective upon approval by the Court. Except as provided in ¶ 13 and ¶ 88, non-material modifications to this CD, including the SOW, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and SDs. All modifications to the CD, other than the SOW, also shall be signed by the State, or a duly authorized representative of the State, as appropriate. A modification to the SOW shall be considered material if it implements an amendment to the RODs that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii). Before providing its approval to any modification to the SOW, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification.

88. Any modification that does not affect the obligations of or the protections afforded to Appvion may be executed without the signature of Appvion.

89. Nothing in this CD shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this CD.

XXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

90. This CD shall be lodged with the Court for at least 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the CD disclose facts or considerations that indicate that the CD is inappropriate, improper, or inadequate. SDs consent to the entry of this CD without further notice.

91. If for any reason the Court should decline to approve this CD in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXIV. SIGNATORIES/SERVICE/EFFECTIVENESS

92. Each undersigned representative of a SD to this CD, the undersigned delegated official within the Environment and Natural Resources Division of the Department of Justice, and each undersigned representative of the State certifies that he or she is fully authorized to enter into the terms and conditions of this CD and to execute and legally bind such Party to this document.

93. Each SD agrees not to oppose entry of this CD by this Court or to challenge any provision of this CD unless the United States has notified SDs in writing that it no longer supports entry of the CD.

94. Each SD shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this CD. SDs agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

95. The Effective Date of this CD shall be the date upon which the approval of this CD is recorded on the Court's docket; provided, however, that NCR hereby stipulates and agrees that it shall be bound upon the Date of Lodging to comply with obligations of NCR specified in this CD that arise before the date upon which this CD is entered by the Court. The Parties to this CD understand and expect that Work under this CD, including RA Work, needs to commence and continue before and through the CD's Effective Date. The United States contends that the continuation of that Work is not only required by this agreement, but also by the UAO. In the event the United States withdraws or withholds consent to the Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to comply with requirements of the Consent Decree upon the Date of Lodging shall terminate.

XXV. FINAL JUDGMENT

96. This CD and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the CD. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this CD.

97. Upon entry of this CD by the Court, this CD shall constitute a final judgment between and among the United States, the State, and SDs. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 23rd DAY OF August, 2017.

s/William C. Griesbach
WILLIAM C. GRIESBACH, Chief Judge
United States District Court - WIED

Signature Page for Consent Decree with NCR Corp. and Appvion, Inc. regarding the
Lower Fox River and Green Bay Superfund Site

FOR THE UNITED STATES OF AMERICA:

March 28, 2017

Dated



BRUCE S. GELBER
Deputy Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

March 29, 2017

Dated



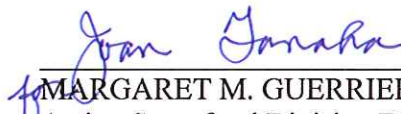
RANDALL M. STONE
Senior Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: 202-514-1308
Facsimile: 202-616-6584

GREGORY J. HAANSTAD
United States Attorney
Eastern District of Wisconsin

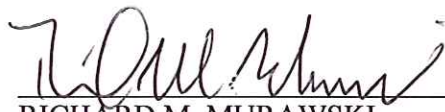
SUSAN M. KNEPEL
Civil Division Chief
Eastern District of Wisconsin
517 E. Wisconsin Ave., Ste. 530
Milwaukee, WI 53202

Signature Page for Consent Decree with NCR Corp. and Appvion, Inc. regarding the
Lower Fox River and Green Bay Superfund Site

3/15/17
Dated


MARGARET M. GUERRIERO
Acting Superfund Division Director
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604


3/10/2017
Dated


RICHARD M. MURAWSKI
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Signature Page for Consent Decree with NCR Corp. and Appvion, Inc. regarding the
Lower Fox River and Green Bay Superfund Site

FOR THE STATE OF WISCONSIN:

3/20/17
Dated



CATHY STEPP
Secretary
Wisconsin Department of Natural Resources
1001 South Webster Street
Madison, WI 53703

Dated

F. MARK BROMLEY, Assistant Attorney General
RACHEL L. BACHHUBER, Assistant Attorney General
CYNTHIA R. HIRSCH, Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857


Signature Page for Consent Decree with NCR Corp. and Appvion, Inc. regarding the
Lower Fox River and Green Bay Superfund Site

FOR THE STATE OF WISCONSIN:

Dated

CATHY STEPP
Secretary
Wisconsin Department of Natural Resources
1001 South Webster Street
Madison, WI 53703

March 14, 2017
Dated

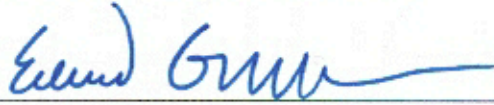

F. MARK BROMLEY, Assistant Attorney General
RACHEL L. BACHHUBER, Assistant Attorney General
CYNTHIA R. HIRSCH, Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Signature Page for Consent Decree with NCR Corp. and Appvion, Inc. regarding the
Lower Fox River and Green Bay Superfund Site

FOR NCR CORPORATION:

March 8, 2017

Dated

A handwritten signature in blue ink, appearing to read "Edward Gallagher", written over a horizontal line.

Edward Gallagher
General Counsel

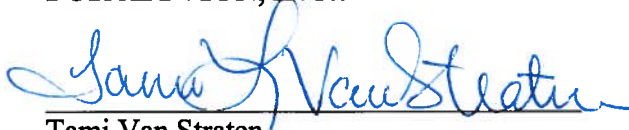
Agent Authorized to Accept Service on Behalf of Above-signed Party:

Edward Gallagher
General Counsel
NCR Corporation
250 Greenwich St.
New York, NY 10007

Signature Page for Consent Decree with NCR Corp. and Appvion, Inc. regarding the
Lower Fox River and Green Bay Superfund Site

FOR APPVION, INC.:

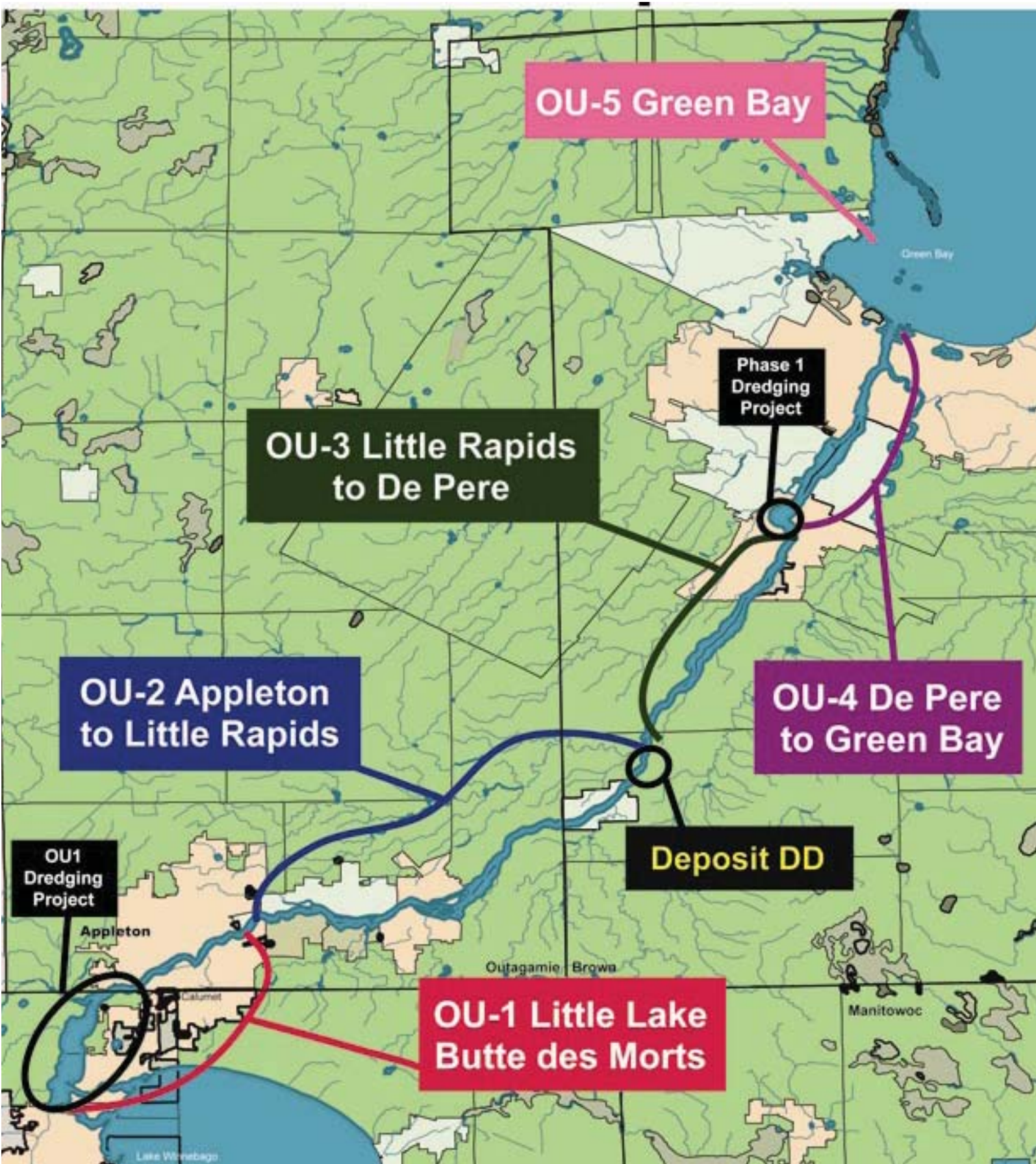
03/07/2017
Dated


Tami Van Straten
Senior Vice President and General Counsel

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Tami Van Straten
Senior Vice President and General Counsel
Appvion, Inc.
825 E. Wisconsin Ave.
P.O. Box 359
Appleton, WI 54912

Appendix 1: Map of the Lower Fox River and Green Bay Superfund Site



REMEDIAL DESIGN/REMEDIAL ACTION
STATEMENT OF WORK
OPERABLE UNITS 2-5
LOWER FOX RIVER AND GREEN BAY SUPERFUND SITE

EPA Region 5
and the
Wisconsin Department of Natural Resources

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1. INTRODUCTION

1.1 Purpose of the SOW. This Statement of Work (“SOW”) sets forth the procedures and requirements for implementing the Work.

1.2 Structure of the SOW.

- Section 2 (Community Involvement) sets forth the Response Agencies’ and NCR’s responsibilities for community involvement.
- Section 3 (Remedial Design) sets forth the process for developing the Remedial Design, which includes the submission of specified primary deliverables.
- Section 4 (Remedial Action) sets forth requirements regarding the completion of the RA, including primary deliverables related to completion of the RA.
- Section 5 (Reporting) sets forth NCR’s reporting obligations.
- Section 6 (Prior Submittals and Other Deliverables) describes the content of the supporting deliverables and the general requirements regarding NCR’s submission of, and the Response Agencies’ review of, approval of, comment on, and/or modification of, the deliverables.
- Section 7 (Schedules) sets forth the schedule of milestones regarding the completion of the RA.
- Section 8 (References) provides a list of references, including URLs.

1.3 The Scope of the Remedy. The Scope of the Remedy includes the actions described in: (i) Section XI of the June 2007 Record of Decision Amendment for Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) (Dkt. 276-6); and (ii) Sections IV and V of the February 2010 Explanation of Significant Differences for Operable Unit 2, Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) (Dkt. 404-4), including:

- (a) remediating sediment in OU2 (Deposit DD), OU3, OU4, and OU5 (River mouth area) with PCB concentrations greater than the 1.0 ppm remedial action level (“RAL”) or achieving a surface weighted average concentration (“SWAC”) as follows after addressing such sediment either by the primary remedial approach (sediment removal by dredging) or by one of the alternate remedial approaches (engineered cap or sand cover) if the eligibility criteria specified by the RODs will be met;

For OU3 (including Deposit DD in OU2)	0.28 ppm SWAC
---------------------------------------	---------------

For OU4 (including the River mouth area of OU5)	0.25 ppm SWAC
---	---------------

- (b) dewatering of the sediment that is removed;
- (c) treatment of the water collected during the dewatering process;
- (d) off-Site disposal of the removed sediment after dewatering;

- (e) demobilization and site restoration;
- (f) Long-Term Monitoring and Maintenance activities in OUs 2-5 (including cap maintenance); and
- (g) Institutional Controls for OUs 2-5.

1.4 The terms used in this SOW that are defined in CERCLA, in regulations promulgated under CERCLA, or in the Consent Decree (“CD”), have the meanings assigned to them in CERCLA, in such regulations, or in the CD, except that the term “Paragraph” or “¶” means a paragraph of the SOW, and the term “Section” means a section of the SOW, unless otherwise stated.

2. COMMUNITY INVOLVEMENT

2.1 Community Involvement Responsibilities

- (a) In April 2005, the Response Agencies issued a Revised Community Involvement Plan (“CIP”) for the Site. Pursuant to 40 C.F.R. § 300.435(c), EPA shall review the existing CIP and determine whether it should be revised to describe further public involvement activities during the Work that are not already addressed or provided for in the existing CIP.
- (b) If requested by the Response Agencies, NCR shall participate in community involvement activities, including participation in (1) the preparation of information regarding the Work for dissemination to the public, with consideration given to including mass media and/or Internet notification, and (2) public meetings that may be held or sponsored by the Response Agencies to explain activities at or relating to the Site. NCR’s support of the Response Agencies’ community involvement activities may include providing online access to initial submissions and updates of deliverables to community groups identified by the Response Agencies. All community involvement activities conducted by NCR at the Response Agencies’ request are subject to the Response Agencies’ oversight. The Response Agencies have already established community information repositories near the Site.
- (c) **NCRs’ CI Coordinator.** If requested by the Response Agencies, NCR shall, within 21 days, designate and notify the Response Agencies of NCR’s Community Involvement Coordinator (“NCR’s CI Coordinator”). NCR may hire a contractor for this purpose. NCR’s notice must include the name, title, and qualifications of the NCR’s CI Coordinator. NCR’s CI Coordinator is responsible for providing support regarding the Response Agencies’ community involvement activities, including coordinating with the Response Agencies’ CI Coordinators regarding responses to the public’s inquiries about the Site.

3. REMEDIAL DESIGN

3.1 100% Design. The Response Agencies approved the 100% Design in October 2012.

3.2 Remedial Design Refinements. Since approval of the 100% Design, refinements have been made to the Remedial Design through annual remedial action work plans approved by the Response Agencies under the UAO. Additional refinements to the Remedial Design shall be included in the RA Work Plan covering the remaining RA Work. NCR shall finalize the Remedial Design through the RA Work Plan approved by the Response Agencies pursuant to the UAO, the CD, and this SOW, and through any other Remedial Design refinements approved by the Response Agencies.

4. REMEDIAL ACTION

4.1 RA Work Plan. Pursuant to the UAO, on October 31, 2016, NCR submitted a draft RA Work Plan for the remaining RA Work. NCR shall finalize that document as a Final RA Work Plan for 2017/2018 and Beyond for approval by the Response Agencies. In addition, NCR shall prepare and submit an Updated RA Work Plan for 2017/2018 and Beyond for approval by the response Agencies. Both versions of the RA Work Plan shall schedule the completion of all remaining dredging, capping, and sand covering work by no later than December 15, 2018. Both versions of the RA Work Plan shall follow the same general format and cover the same general topics as prior remedial action work plans approved by the Response Agencies under the UAO, with comparable detail, and shall include, at a minimum:

- (a) A schedule and sequence of activities for the RA Work;
- (b) A list of areas to be dredged during the remaining RA Work, with an estimated dredge volume and an engineering design drawing for each dredge area;
- (c) A list of areas to be covered with engineered sediment containment caps during the remaining RA Work, with an acreage estimate, a description of the cap type, a supporting Technical Memorandum required by the 100% Design, and an engineering design drawing for each cap area;
- (d) A list of areas to be covered with a remedy sand cover during the remaining RA Work, with an acreage estimate for each area;
- (e) A list of areas to be covered with a residual sand cover during the remaining RA Work, with an acreage estimate for each area;
- (f) A general plan for any further sediment sampling and analysis to delineate the nature and extent of contamination;
- (g) For the Updated RA Work Plan for 2017/2018 and Beyond, plans for mobilization and demobilization.

As in previous annual RA work plans pursuant to the UAO, the engineered drawings in the Final RA Work Plan for 2017/2018 and Beyond shall generally be two-dimensional drawings; however, the Response Agencies may request three-dimensional presentations of particular areas as appropriate.

Notwithstanding ¶ 6.6, the schedule and procedures outlined in the UAO shall govern the Response Agencies' review and approval of the Final RA Work Plan for 2017/2018 and Beyond.

4.2 Meetings and Inspections

- (a) **Periodic Meetings.** During the RA Work, NCR's representatives shall meet regularly in person or telephonically with the Response Agencies, and others as directed or determined by the Response Agencies, to discuss RD/RA issues. NCR shall distribute an agenda and list of attendees to all Parties prior to each meeting. NCR shall prepare minutes of the meetings and shall distribute the minutes to all Parties.
- (b) **Inspections**
 - (1) The Response Agencies' Agencies/Oversight Team ("A/OT") shall have an on-site presence during the RA Work, and representatives of the Response Agencies shall conduct periodic inspections of the RA Work. At the Response Agencies' request, the Supervising Contractor or other designee shall accompany the Response Agencies' representatives during inspections.
 - (2) NCR shall continue to provide currently sized and equipped on-site office/meeting space for A/OT personnel to perform their oversight duties.
 - (3) Upon notification by the Response Agencies of any deficiencies in the RA Work, NCR shall take all necessary steps to correct the deficiencies and/or bring the RA Work into compliance with the Remedial Design, any approved design changes, and/or the approved RA Work Plan. If applicable, NCR shall comply with any schedule provided by the Response Agencies in their notice of deficiency.

4.3 Emergency Response and Reporting

- (a) **Emergency Response and Reporting.** If any event occurs during performance of the Work that causes or threatens to cause a release of Waste Material on, at, or from the Site and that either constitutes an emergency situation or that may present an immediate threat to public health or welfare or the environment, NCR shall: (1) immediately take all appropriate action to prevent, abate, or minimize such release or threat of release; (2) immediately notify the authorized EPA and WDNR officers (as specified in ¶ 4.3(c)) orally; and (3) take such actions in consultation with the authorized EPA and WDNR officers and in accordance with all applicable provisions of the Health and Safety Plan, the Emergency Response

Plan, and any other deliverable approved by the Response Agencies under the SOW.

- (b) **Release Reporting.** Upon the occurrence of any event during performance of the Work that NCR is required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (“EPCRA”), 42 U.S.C. § 11004, NCR shall immediately notify the authorized EPA and WDNR officers orally (and then provide follow-up written notice within 24 hours of the incident).
- (c) The “authorized EPA officer” for purposes of immediate oral notifications and consultations under ¶ 4.3(a) and ¶ 4.3(b) is the EPA Project Coordinator or the EPA Region 5 Emergency Response Branch (if the EPA Project Coordinator is unavailable). The “authorized WDNR officer” for purposes of immediate oral notifications and consultations under ¶ 4.3(a) and ¶ 4.3(b) is the WDNR Project Coordinator
- (d) For any event covered by ¶ 4.3(a) and ¶ 4.3(b), NCR shall: (1) within 14 days after the onset of such event, submit a report to the Response Agencies describing the actions or events that occurred and the measures taken, and to be taken, in response thereto; and (2) within 30 days after the conclusion of such event, submit a report to the Response Agencies describing all actions taken in response to such event.
- (e) The reporting requirements under ¶ 4.3 are in addition to the reporting required by CERCLA § 103 or EPCRA § 304.

4.4 Off-Site Shipments

- (a) NCR may ship hazardous substances, pollutants, and contaminants from the Site to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. NCR has complied with CERCLA § 121(d)(3) and 40 C.F.R. § 300.440, and presently intends to continue complying with those requirements, by shipping sediment removed from the Site to the Hickory Meadows Landfill operated by Advanced Disposal Services in the town of Chilton in Calumet County, Wisconsin, the Ridgeview Landfill operated by Waste Management in Manitowoc County, Wisconsin, or the Wayne Disposal treatment and disposal facility in Belleville, Michigan. NCR will be deemed to be in compliance with CERCLA § 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment to an alternate facility if NCR obtains a prior determination from EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b). The requirements of this ¶ 4.4(a) do not apply to shipments of separated sand for beneficial use, in accordance with “low-hazard exemptions” issued by WDNR.
- (b) NCR may ship Waste Material from the Site to an out-of-state waste management facility only if, prior to any shipment, NCR provides notice to the appropriate

state environmental official in the receiving facility's state and to the EPA and WDNR Project Coordinators. This notice requirement will not apply to any off-Site shipments when the total quantity of all such shipments does not exceed 10 cubic yards. The notice must include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. NCR also shall notify the state environmental official referenced above and the EPA and WDNR Project Coordinators of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. NCR shall provide the notice before the Waste Material is shipped.

- (c) NCR may ship Investigation Derived Waste ("IDW") from the Site to an off-Site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), 40 C.F.R. § 300.440, *EPA's Guide to Management of Investigation Derived Waste*, OSWER 9345.3-03FS (Jan. 1992), and any IDW-specific requirements contained in the RODs. Wastes shipped off-Site to a laboratory for characterization, and RCRA hazardous wastes that meet the requirements for an exemption from RCRA under 40 CFR § 261.4(e) shipped off-site for treatability studies, are not subject to 40 C.F.R. § 300.440.

4.5 Certification of RA Completion

- (a) The "RA Work" comprises the following response activities in Operable Units 2-5 that the RODs and the Remedial Design require for construction of the RA:
 - (i) sediment removal by dredging; (ii) sediment containment by installation of engineered caps; (iii) placement of remedy sand covers and residual sand covers; (iv) all associated activities, including dewatering and disposal of dredged sediment, water treatment, and demobilization; and (v) any additional steps required to ensure completion of the RA such that the Performance Standards are achieved.
- (b) The RA Work in an OU will be deemed complete if the 1.0 ppm PCB RAL Performance Standard has been met throughout the OU. If the RAL Performance Standard has not been met after employing the primary remedial approach (sediment removal by dredging) and/or the alternate remedial approaches (such as capping and sand covering) throughout the OU, then the RA Work will be deemed complete if the SWAC for PCBs in the sediment, as determined by the Response Agencies, meets the following SWAC goals for the OU:

For OU3 (including Deposit DD in OU2) 0.28 ppm SWAC

For OU4 (including the River mouth area of OU5) 0.25 ppm SWAC

The construction of the RA will not be deemed complete based on the SWAC goal unless and until all sediment exceeding the RAL has been remediated using

the primary remedial approach and/or the alternate remedial approaches. *See* 2007 Record of Decision Amendment for OUs 2-5, § XI.B. (Dkt 276-6)

- (c) **RA Completion Inspection.** The RA is “Complete” for purposes of this ¶ 4.5 when it has been fully performed and the Performance Standards have been achieved. NCR shall schedule an inspection for the purpose of obtaining EPA’s Certification of RA Completion (and any re-inspection that may be needed after completion of any additional Work needed for Certification of RA Completion). Each inspection must be attended by representatives of NCR and the Response Agencies.
- (d) **RA Report.** Following an inspection, NCR shall submit a RA Report to the Response Agencies requesting EPA’s Certification of RA Completion. The report must: (1) include certifications by a registered professional engineer and by NCR’s Project Coordinator that the RA is complete; (2) include as-built drawings signed and stamped by a registered professional engineer; (3) be prepared in accordance with Chapter 2 (Remedial Action Completion) of EPA’s Close Out Procedures for NPL Sites guidance (May 2011); (4) contain post-dredge sediment sampling data to demonstrate that Performance Standards have been achieved; and (5) be certified in accordance with ¶ 6.5 (Certification).
- (e) If EPA (after a reasonable opportunity for review and comment by the State) concludes that the RA is not Complete, EPA shall so notify NCR and the State. EPA’s notice must include a description of any deficiencies. EPA’s notice may include a schedule for addressing such deficiencies or may require NCRs to submit a schedule for EPA approval. NCR shall perform all activities described in the notice in accordance with the schedule.
- (f) If EPA (after a reasonable opportunity for review and comment by the State) concludes, based on the initial or any subsequent Monitoring Report requesting Certification of RA Completion, that the RA is Complete, EPA shall so certify to NCR (with notice to the State). This certification will constitute the Certification of RA Completion for purposes of the CD, including Section XIV of the CD (Covenants by Plaintiffs).

4.6 Institutional Controls Work and Case Closure.

- (a) Until EPA’s Certification of RA Completion, NCR shall perform the Interim Institutional Controls Work required by the ICIAP, including coordinating and cooperating with other parties to finalize the memoranda of agreement described in the ICIAP.
- (b) In connection with the RA completion requirements in ¶ 4.5, NCR also shall supply GIS Registry information and associated maps, as well as all other readily available information requested by WDNR, to support a subsequent completion of WDNR Case Closure - GIS Registry form 4400-202 (or any replacement form

developed by WDNR pursuant to Wis. Stat. ch. 292 and Wis. Admin. Code Chs. NR 725-26).

- (c) If EPA has made a written demand that NCR perform Post-RA Institutional Controls Work or Long-Term Monitoring and Maintenance Work pursuant to ¶¶ 6.d and 6.e of the CD, then NCR shall prepare and submit a completed WDNR Case Closure - GIS Registry form 4400-202 (or any replacement form developed by WDNR pursuant to Wis. Stat. ch. 292 and Wis. Admin. Code Chs. NR 725-26) as part of the Post-RA Institutional Controls Work.

4.7 Periodic Review Support Plan (PRSP). If EPA has made a written demand that NCR perform Post-RA Institutional Controls Work or Long-Term Monitoring and Maintenance Work pursuant to ¶¶ 6.d and 6.e of the CD, NCR shall submit a PRSP for EPA approval. The PRSP addresses the studies and investigations that NCR shall conduct to support EPA's reviews of whether the RA is protective of human health and the environment in accordance with Section 121(c) of CERCLA, 42 U.S.C. § 9621(c) (also known as "Five-year Reviews"). NCR shall develop the plan in accordance with *Comprehensive Five-year Review Guidance*, OSWER 9355.7-03B-P (June 2001), and any other relevant five-year review guidances.

4.8 Certification of Work Completion. If the Plaintiffs have made a written demand that NCR perform Post-RA Institutional Controls Work or Long-Term Monitoring and Maintenance Work, then NCR shall fulfill the requirement of this ¶ 4.8.

- (a) **Work Completion Inspection.** NCR shall schedule an inspection for the purpose of obtaining EPA's Certification of Work Completion. The inspection must be attended by representatives of NCR and the Response Agencies.
- (b) **Work Completion Report.** Following the inspection, NCR shall submit a report to the Response Agencies requesting EPA's Certification of Work Completion. The report must: (1) include certifications by a registered professional engineer and by NCR's Project Coordinator that the Work, including all Post-RA Institutional Controls Work and Long-Term Monitoring and Maintenance Work, is complete; and (2) be certified in accordance with ¶ 6.5 (Certification)..
- (c) If EPA (after a reasonable opportunity for review and comment by the State) concludes that the Work is not complete, EPA shall so notify NCR and the State. EPA's notice must include a description of the activities that NCRs must perform to complete the Work. EPA's notice must include specifications and a schedule for such activities or must require NCR to submit specifications and a schedule for EPA approval. NCR shall perform all activities described in the notice or in the EPA-approved specifications and schedule.
- (d) If EPA (after a reasonable opportunity for review and comment by the State) concludes, based on the initial or any subsequent report requesting Certification of Work Completion, that the Work is complete, EPA shall so certify in writing to NCR (with notice to the State). Issuance of the Certification of Work Completion

does not affect the following continuing obligations: (1) activities under the Periodic Review Support Plan; (2) obligations under Sections XVII (Access to Information) and XVIII (Retention of Records); (3) Institutional Controls obligations as provided in the ICIAP; and (4) reimbursement of Future Response Costs under Section IX (Payments for Response Costs) of the CD.

5. REPORTING

- 5.1 Progress Reports.** Commencing with the first month following lodging of the CD and until EPA's Certification of RA Completion, NCR shall submit progress reports to the Response Agencies on a monthly basis, or as otherwise requested by the Response Agencies. The reports must cover all activities that took place during the prior reporting period, including:
- (a) The actions that have been taken toward achieving compliance with the CD;
 - (b) A summary of all results of sampling, tests, and all other data received or generated by NCR;
 - (c) A description of all deliverables that NCR submitted to the Response Agencies;
 - (d) A description of all RA Work activities that are scheduled for the next six weeks;
 - (e) An updated RA Work schedule, together with information regarding percentage of completion, delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays;
 - (f) A description of any modifications to the work plans or other schedules that NCR has proposed or that have been approved by the Response Agencies; and
 - (g) A description of all activities undertaken in support of the Community Involvement Plan during the reporting period and those to be undertaken in the next six weeks.
- 5.2 Notice of Progress Report Schedule Changes.** If the schedule for any activity described in the Progress Reports, including activities required to be described under ¶ 5.1(d), changes, NCR shall notify the Response Agencies of such change at least 7 days before performance of the activity.
- 5.3 Annual Remedial Action Summary Reports.** Consistent with past practice for this Site, NCR shall prepare and submit an annual Remedial Action Summary Report for 2016 and each subsequent year of the RA Work. Each Remedial Action Summary Report shall summarize the results of the remedial action in OUs 2-5 during the preceding calendar year, with a format and level of detail comparable to the report that the Response Agencies accepted entitled *2015 Remedial Action Summary Report, Lower Fox River Operable Units 2-5* (October 2016). With the Response Agencies' approval, a summary

of any RA Work completed after 2018 may be included in the RA Report required by ¶ 4.5(d), rather than in a separate Remedial Action Summary Report.

6. PRIOR SUBMITTALS AND OTHER DELIVERABLES

- 6.1 Applicability.** NCR shall submit deliverables for the Response Agencies' approval or for the Response Agencies' comment as specified in the SOW. If neither is specified, the deliverable does not require the Response Agencies' approval or comment. Paragraphs 6.2 (In Writing) through 6.4 (Technical Specifications) apply to all deliverables. Paragraph 6.5 (Certification) applies to any deliverable that is required to be certified. Paragraph 6.6 (Approval of Deliverables) applies to any deliverable that is required to be submitted for approval by one or both of the Response Agencies.
- 6.2 In Writing.** As provided in ¶ 84 of the CD, all deliverables under this SOW must be in writing unless otherwise specified.
- 6.3 General Requirements for Deliverables.** All deliverables must be submitted by the deadlines in the RD/RA Schedule, as applicable, or by such other date to which the Response Agencies and NCR agree in writing. NCR shall submit all deliverables to the Response Agencies in electronic form (and/or in paper copy form, upon request). Technical specifications for sampling and monitoring data and spatial data are addressed in ¶ 6.4. All other deliverables shall be submitted to the Response Agencies in the electronic form specified by the EPA and WDNR Project Coordinators. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5" by 11", NCR shall also provide the Response Agencies with paper copies of such exhibits upon request.
- 6.4 Technical Specifications**
- (a) Sampling and monitoring data should be submitted in standard regional Electronic Data Deliverable (EDD) format. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.
 - (b) Spatial data, including spatially-referenced data and geospatial data, should be submitted in a manner consistent with the electronic format specifications currently used for RD/RA work at the Site.
 - (c) Spatial data submitted by NCR does not, and is not intended to, define the boundaries of the Site.
- 6.5 Certification.** All deliverables that require compliance with this ¶ 6.5 must be signed by the NCR's Project Coordinator, or other responsible official of NCR, and must contain the following statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system,

or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

6.6 Approval of Deliverables. Under the CD and the SOW, some deliverables require approval by the Response Agencies collectively and other deliverables require approval by EPA only, after a reasonable opportunity to review and comment by the State. For the purpose of this ¶ 6.6 the term “Response Agencies” is used throughout to cover either situation, notwithstanding the use of the plural term, with the recognition that EPA will be the only agency exercising formal review and approval authority for deliverables that require EPA approval only.

(a) **Initial Submissions**

- (1) After review of any deliverable that is required to be submitted for approval by the Response Agencies under the UAO, the CD or the SOW, the Response Agencies shall: (i) approve, in whole or in part, the submission; (ii) approve the submission upon specified conditions; (iii) disapprove, in whole or in part, the submission; or (iv) any combination of the foregoing.
- (2) The Response Agencies also may modify the initial submission to cure deficiencies in the submission if: (i) the Response Agencies determine that disapproving the submission and awaiting a resubmission would cause substantial disruption to the Work; or (ii) previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

(b) **Resubmissions.** Upon receipt of a notice of disapproval under ¶ 6.6(a) (Initial Submissions), or if required by a notice of approval upon specified conditions under ¶ 6.6(a), NCR shall, within 21 days or such longer time as specified by the Response Agencies in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, the response Agencies may: (1) approve, in whole or in part, the resubmission; (2) approve the resubmission upon specified conditions; (3) modify the resubmission; (4) disapprove, in whole or in part, the resubmission, requiring NCR to correct the deficiencies; or (5) any combination of the foregoing.

(c) **Implementation.** Upon approval, approval upon conditions, or modification by the Response Agencies under ¶ 6.6(a) (Initial Submissions) or ¶ 6.6(b) (Resubmissions), of any deliverable, or any portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and enforceable under the CD; and (2) NCR shall take any action required by such deliverable, or portion thereof.

The implementation of any non-deficient portion of a deliverable submitted or resubmitted under ¶ 6.6(a) or ¶ 6.6(b) does not relieve NCR of any liability for stipulated penalties under Section XIII (Stipulated Penalties) of the CD.

6.7 Supporting Deliverables. The Response Agencies have previously approved the following supporting deliverables for the OU2-5 remedy, among others:

- (a) a Final Site Health and Safety Plan (2012 Tr. Ex. 2011);
- (b) a Construction Quality Assurance Project Plan (2012 Tr. Ex. 2007);
- (c) an Operation and Maintenance Plan for the Water Treatment Plant (2012 Tr. Ex. 2013);
- (d) a Cap Operations, Maintenance, and Monitoring Plan (2012 Tr. Ex. 2009);
- (e) a Long-Term Monitoring Plan (2012 Tr. Ex. 2010);
- (f) an Institutional Controls Implementation and Assurance Plan (2012 Tr. Ex. 2008); and
- (g) an Adaptive Management and Value Engineering Plan (2012 Tr. Ex. 2006).

NCR shall update each of these supporting deliverables as necessary or appropriate during the course of the Work, and/or as requested by the Response Agencies. Pursuant to ¶ 6.6(c), NCR shall perform all Work that NCR is required to perform under the UAO and the CD in accordance with these previously-approved plans (as updated and modified).

7. SCHEDULES

7.1 Applicability and Revisions. All deliverables and tasks required under this SOW must be submitted or completed by the deadlines or within the time durations listed in the RD/RA Schedule set forth below. NCR may submit proposed revised RD/RA Schedules for the Response Agencies' approval. Upon the Response Agencies' approval, a revised RD/RA Schedule supersedes the RD/RA Schedule set forth below, and any previously-approved RD and/or RA Schedules.

Grounds supporting a request for revision to the RD/RA Schedule may include, without limitation, a substantial increase in the remediation quantities above the amounts that can feasibly be remediated in 2017 and 2018 using the equipment and resources described in the draft RA Work Plan for 2017/18, submitted in October/November 2016.

7.2 RD/RA Schedule

	Description of Deliverable / Task	¶ Ref.	Deadline
1	Final RA Work Plan for 2017/2018 and Beyond	4.1	January 31, 2017
2	Draft Updated RA Work Plan for 2017/2018 and Beyond	4.1	October 31, 2017
3	Final Updated RA Work Plan for 2017/2018 and Beyond	4.1	January 31, 2018
4	Initial submission of Annual Remedial Action Summary Report	5.2	By no later than June 1 of each year (for the remedial action work performed during the preceding year)
5	Resubmission of Annual Remedial Action Summary Report	5.2	Due within the time allowed by § 6.6(b)
6	Completion of all dredging, capping, and sand covering work specified by the RA Work Plan	4.1	December 15, 2018
7	Completion of RA Work (including demobilization)	4.5(a), 4.5(b)	June 30, 2019
8	Initial RA Completion Inspection	4.5(c)	Within 180 days after Completion of RA Work
9	RA Report	4.5(d)	Within 90 days after final RA Completion Inspection

7.3 Other Coordination. In addition to the other coordination efforts described in the CD and this SOW, if a dispute is invoked pursuant to Section XII of the CD that NCR contends would have a major impact on the expected cost of the Remedial Action, then prior to the issuance of a final administrative decision by the EPA Region 5 Superfund Division Director, NCR may request a senior level meeting with EPA Region 5 to discuss the dispute, and NCR's request for a meeting will not be unreasonably refused. Any such senior level meeting would be attended by NCR's General Counsel (or another member of NCR's Executive Leadership Team) and EPA Region 5's Regional Counsel, Deputy Regional Administrator, or Regional Administrator.

8. REFERENCES

8.1 The following regulations and guidance documents, among others, apply to the Work. Any item for which a specific URL is not provided below is available on one of the two EPA Web pages listed in ¶ 8.2:

- (a) A Compendium of Superfund Field Operations Methods, OSWER 9355.0-14, EPA/540/P-87/001a (Aug. 1987).

- (b) CERCLA Compliance with Other Laws Manual, Part I: Interim Final, OSWER 9234.1-01, EPA/540/G-89/006 (Aug. 1988).
- (c) Guidance for Conducting Remedial Investigations and Feasibility Studies, OSWER 9355.3-01, EPA/540/G-89/004 (Oct. 1988).
- (d) CERCLA Compliance with Other Laws Manual, Part II, OSWER 9234.1-02, EPA/540/G-89/009 (Aug. 1989).
- (e) Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties, OSWER 9355.5-01, EPA/540/G-90/001 (Apr. 1990).
- (f) Guidance on Expediting Remedial Design and Remedial Actions, OSWER 9355.5-02, EPA/540/G-90/006 (Aug. 1990).
- (g) Guide to Management of Investigation-Derived Wastes, OSWER 9345.3-03FS (Jan. 1992).
- (h) Permits and Permit Equivalency Processes for CERCLA On-Site Response Actions, OSWER 9355.7-03 (Feb. 1992).
- (i) Guidance for Conducting Treatability Studies under CERCLA, OSWER 9380.3-10, EPA/540/R-92/071A (Nov. 1992).
- (j) National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule, 40 C.F.R. Part 300 (Oct. 1994).
- (k) Guidance for Scoping the Remedial Design, OSWER 9355.0-43, EPA/540/R-95/025 (Mar. 1995).
- (l) Remedial Design/Remedial Action Handbook, OSWER 9355.0-04B, EPA/540/R-95/059 (June 1995).
- (m) EPA Guidance for Data Quality Assessment, Practical Methods for Data Analysis, QA/G-9, EPA/600/R-96/084 (July 2000).
- (n) Operation and Maintenance in the Superfund Program, OSWER 9200.1-37FS, EPA/540/F-01/004 (May 2001).
- (o) Comprehensive Five-year Review Guidance, OSWER 9355.7-03B-P, 540-R-01-007 (June 2001).
- (p) Guidance for Quality Assurance Project Plans, QA/G-5, EPA/240/R-02/009 (Dec. 2002).
- (q) Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls (Apr. 2004).

- (r) Quality management systems for environmental information and technology programs -- Requirements with guidance for use, ASQ/ANSI E4:2014 (American Society for Quality, February 2014).
- (s) Uniform Federal Policy for Quality Assurance Project Plans, Parts 1-3, EPA/505/B-04/900A through 900C (Mar. 2005).
- (t) Superfund Community Involvement Handbook, SEMS 100000070 (January 2016) available at <https://www.epa.gov/superfund/community-involvement-tools-and-resources>.
- (u) EPA Guidance on Systematic Planning Using the Data Quality Objectives Process, QA/G-4, EPA/240/B-06/001 (Feb. 2006).
- (v) EPA Requirements for Quality Assurance Project Plans, QA/R-5, EPA/240/B-01/003 (Mar. 2001, reissued May 2006).
- (w) EPA Requirements for Quality Management Plans, QA/R-2, EPA/240/B-01/002 (Mar. 2001, reissued May 2006).
- (x) USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis, ILM05.4 (Dec. 2006).
- (y) USEPA Contract Laboratory Program Statement of Work for Organic Analysis, SOM01.2 (amended Apr. 2007).
- (z) EPA National Geospatial Data Policy, CIO Policy Transmittal 05-002 (Aug. 2008), available at <https://www.epa.gov/geospatial/geospatial-policies-and-standards> and <https://www.epa.gov/geospatial/epa-national-geospatial-data-policy>.
- (aa) Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER 9283.1-33 (June 2009).
- (bb) Principles for Greener Cleanups (Aug. 2009), available at <https://www.epa.gov/greenercleanups/epa-principles-greener-cleanups>.
- (cc) USEPA Contract Laboratory Program Statement of Work for Inorganic Superfund Methods (Multi-Media, Multi-Concentration), ISM01.2 (Jan. 2010).
- (dd) Close Out Procedures for National Priorities List Sites, OSWER 9320.2-22 (May 2011).
- (ee) Groundwater Road Map: Recommended Process for Restoring Contaminated Groundwater at Superfund Sites, OSWER 9283.1-34 (July 2011).
- (ff) Recommended Evaluation of Institutional Controls: Supplement to the "Comprehensive Five-Year Review Guidance," OSWER 9355.7-18 (Sep. 2011).

- (gg) Construction Specifications Institute's MasterFormat 2012, available from the Construction Specifications Institute, <http://www.csinet.org/masterformat>.
- (hh) Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach , OSWER 9200.2-125 (Sep. 2012)
- (ii) Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012).
- (jj) Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012).
- (kk) EPA's Emergency Responder Health and Safety Manual, OSWER 9285.3-12 (July 2005 and updates), https://www.epaossc.org/_HealthSafetyManual/manual-index.htm.
- (ll) Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned, OSWER 9200.2-129 (Feb. 2013).
- (mm) Guidance for Evaluating Completion of Groundwater Restoration Remedial Actions, OSWER 9355.0-129 (Nov. 2013).
- (nn) Groundwater Remedy Completion Strategy: Moving Forward with the End in Mind, OSWER 9200.2-144 (May 2014).

8.2 A more complete list may be found on the following EPA Web pages:

Laws, Policy, and Guidance: <https://www.epa.gov/superfund/superfund-policy-guidance-and-laws>

Test Methods Collections: <https://www.epa.gov/measurements/collection-methods>

For any regulation or guidance referenced in the CD or SOW, the reference will be read to include any subsequent modification, amendment, or replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after NCRs receive notification from EPA of the modification, amendment, or replacement.