UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, et al.

Plaintiffs,

v. Case No. 10-C-910

NCR CORP., et al.,

Defendants.

DECISION AND ORDER

Plaintiffs have moved for an order declaring that this action, at least as it pertains to Defendant Newpage Wisconsin Systems, Inc., does not violate the automatic stay imposed by the Bankruptcy Code. They assert that this action falls within the "police and regulatory power" exception to the automatic stay.

In brief, this is a lawsuit brought by the United States and the State of Wisconsin under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act, better known as CERCLA. 42 U.S.C. §§ 9606-07. The Plaintiffs seek a ruling that the Defendants must perform cleanup work in the Fox River. They also seek damages for costs they have incurred in cleaning up the site themselves, as well as natural resources damages. Against Defendant NewPage, which filed for Chapter 11 bankruptcy in September 2011, Plaintiffs seek cost recovery and natural resources damages.

At issue here is the automatic stay's exception for proceedings brought by governmental units "to enforce such governmental unit's . . . police and regulatory power." 11 U.S.C. § 362(b)(4).

In determining whether a given action is within the ambit of the "police and regulatory power" exception, courts look to the purpose of the proceedings to determine whether they relate to public health or safety or whether they are directed at protecting the government's pecuniary interest in the debtor's property.

The fact that money is sought in a proceeding does not necessarily mean the purpose of the litigation is purely pecuniary. Here, although the governments seek payment of funds, it is obvious that the overarching purpose of these CERCLA proceedings is to get the Lower Fox River Site cleaned up, and the remediation of the Site obviously requires money. Seeking reimbursement for past and future costs of cleanup is well within the public health function of the governmental plaintiffs. For example, in *In re Phillips,* the bankruptcy court rejected an argument that a city's attempt to collect ordinance fines was a purely pecuniary interest. 368 B.R. 733, 741 (Bankr. N.D. Ind. 2007).

> The City's purpose in issuing the ordinance violations was to remove all materials—garbage, trash, waste water, rubbish, waste, appliances, furniture in the yard—detrimental to public health. The fines issued to the debtor were not money judgments; they were the costs of reimbursing the City for the clean-up work (such as clearing garbage) and safety repairs (such as boarding up a window and door). The City did not attempt to enforce a money judgment or to create a pecuniary advantage for itself ahead of other creditors. Instead, the City charged fines to cover its expenses and placed financial liability on the property owner, the debtor, in the enforcement of its police power.

Id.

The same holds true here. Not surprisingly, other courts have had little trouble concluding that the automatic stay is not applicable to CERCLA proceedings like these. *See, e.g., United States v. Nicolet, Inc.,* 857 F.2d 202, 209 (3d Cir. 1988) ("In pressing this lawsuit, the United States is not seeking redress for private wrongs or a remedy for a private contract breach. It is not suing in its role as a consuming participant in the national economy. . . . Rather, the government brought

suit against Nicolet in compliance with its explicit mandate under CERCLA 'to remove or arrange for the removal of ... [any] hazardous substance, pollutant, or contaminant.'")

Accordingly, I conclude that the automatic stay does not apply to the Plaintiffs' claims against Defendant NewPage.

SO ORDERED this 23rd day of January, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC. et al.,

Defendant.

CASE MANAGEMENT ORDER

The parties have submitted a joint report and discovery plan pursuant to Fed. R. Civ. P. 26(f). They have agreed that the case should proceed in phases, with the first being devoted to the Plaintiffs' fifth claim for relief. The parties disagree as to how Phase I should proceed. API and NCR believe that Phase I should initially focus on the question of divisibility. The other parties argue that there should be subphases, with a Phase 1*a* focusing not on divisibility but on whether the response action required by the UAO was arbitrary, capricious, or otherwise not in accordance with law. Any other issues would be put off into a Phase 1b.

I am satisfied that it makes sense to allow simultaneous discovery on both of the issues described above during Phase 1. To the extent there are significant costs involved in discovery on the divisibility question, these are costs that would likely be incurred at a future date in any event. Although I will grant API's and NCR's request to allow discovery on these other issues during Phase 1, I agree with Plaintiffs and certain of the Defendants that we should begin with a Phase 1a involving the response action required by the UAO. This subphase should not require significant

or any discovery. Any motion challenging the completeness or of the administrative record or seeking to supplement it shall be filed on or before May 4, 2012. In all other respects, I adopt the proposal of the parties contained in the joint report. If the parties have not already done so, they shall complete their required initial disclosures pursuant to Rule 26(a)(1) relating to Phase 1a issues (including divisibility) on or before April 1, 2012, unless otherwise stipulated. All Defendants who are non-UAO recipients are exempt from this requirement. If further scheduling is required, the parties should contact the Court.

SO ORDERED this 21st day of March, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

DECISION GRANTING MOTION FOR RECONSIDERATION

On July 5, 2011, this Court denied the government's motion for a preliminary injunction against Defendants NCR and Appleton Papers Inc. ("API") on the basis that the government was unlikely to prove Appleton Papers was a liable party. In a December 19, 2011 decision, I denied API's motion for summary judgment on that point and instead accepted the government's argument that it appeared API had in fact agreed by contract to assume CERCLA liability when it purchased the Appleton Papers Division from NCR. API soon moved to reconsider, citing several points of error. For the reasons given below, I agree with API to the extent that the purchase agreement in question was not drafted broadly enough to encompass API's direct liability for the CERCLA liability at issue in this case. The motion for reconsideration will therefore be granted in part.

To recall, the result reached in my December 19, 2011 Decision and Order was based on two discrete conclusions. First, I concluded that NCR's continued existence did not *per se* preclude an agreement to create liability to a third party such as the government. Although it was not a traditional "successorship" liability situation (because NCR did not go out of business), I found that

there was nothing within CERCLA that would preclude parties, as a matter of contract, from effectively creating additional liability under CERCLA (although presumably that would be a rare scenario). The second aspect of my decision required interpretation of the purchase agreement, between NCR and API's predecessor, for NCR's Appleton Papers Division. I concluded that the language and matters disclosed in Schedule A to that agreement were broad enough to encompass the CERCLA liability at issue in this case. Because I now conclude otherwise, I do not address the first prong of that decision, which is now moot.

I. The 1978 Agreement

In 1978 NCR sold its Appleton Papers Division to API's predecessor, which for ease of understanding will be referred to simply as API. A key clause in that agreement provided that API agreed to "assume, pay, perform, defend and discharge . . . all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any state of facts, matter, event or disclosure set forth on an attachment to the agreement that was designated as Schedule A." (Section 1.4.4; Dkt. # 139, Ex. 3 at 19.)

Schedule A contains the following clause:

> Seller has reason to believe that the facilities of Appleton Papers Division located in Pennsylvania and Wisconsin may be operating; in violation of applicable federal, state, local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.
>
> APD receives and has received notices from time to time from various federal, state, local and other governmental authorities claiming violation of environmental and pollution control laws, ordinances, regulations, rules and standards (collectively "laws"). These claims may result, and have resulted in fines and corrective action.

(Dkt. # 195, Ex. 3 at 4.)

In my previous decision, I concluded that because NCR had disclosed that the Appleton Papers Division "receives" (present tense) notice of various environmental violations, which "may

result" (in the future) in corrective action, the buyer was accepting liability for the Division's "proclivity" for environmental violations. In other words, the buyer was on the hook not just for specific past violations but for any future environmental issues as well.

A. The present liability does not arise from any "violation" of law or any "compliance" issue

I am now convinced that there are at least two problems with the approach taken at the summary judgment stage. First, the clauses that trigger liability require notice of the "violation" of environmental laws and standards, as well as past and potential fines for those violations. API notes that no one has argued that the PCB pollution at issue in this case was the product of any legal or regulatory violations. CERCLA did not yet exist in 1978, of course, and the PCBs were released into the environment primarily in the 1960s before they were regulated. In fact, as noted in the parallel contribution action, No. 08-C-16, in more recent years PCBs were released in smaller quantities at least partly with governmental acquiescence due to the difficulty in separating them from recyclable paper.

In response, the government now attempts to bolster my earlier ruling by citing, for the first time, the federal Refuse Act, as well as Wisconsin law barring the unauthorized disposition of refuse into waterways. 33 U.S.C. § 407. It also cites the Clean Water Act, 33 U.S.C. § 1311(a), which regulates discharge of pollutants. Because the Appleton Papers Division may have been operating in violation of those laws, the government argues, that should trigger the liability clause in Schedule A.

API notes that these are new arguments and, as such, are waived. Even if the argument is not waived, however, the violations of various environmental laws now alleged would not be enough to create CERCLA liability under the terms of the 1978 agreement. To recall, Schedule A discloses that the Division may have been operating in violation of various environmental laws and

regulations, and thus the buyer would be assuming any liability arising out of those violations. Here, the massive CERCLA liability at issue, which is based on the discharge of PCBs, does not "arise out of" any Clean Water Act, Refuse Act or other state or federal statutory or regulatory violations. First, for the period in question the release of PCBs was not known to be environmentally toxic, and so their release would not have given rise to any statutory or regulatory violations.[1] Second, violations of laws like the Clean Water Act are not a precondition to CERCLA liability, which is strict. Put another way, the liability that CERCLA creates does not depend on any "violations" of, or compliance with, then-existing environmental laws. Thus, even if the Division had been operating in violation of, say, the Refuse Act, that does not mean that CERCLA liability "arises out of" those violations. CERCLA liability is its own creature.

Moreover, Schedule A appears to premise liability on receipt of a "notice" of a violation. Schedule A tells the buyer that the Division has received notices of noncompliance with laws and regulations and might receive similar notices in the future. This creates liability for those "claims" and anything "arising" from them. The clause underscores the fact that the liability being assumed is not open-ended environmental liability but is instead linked to specific claims and notices of environmental violations. Needless to say, the Appleton Papers Division had never received a "notice" that it was "violating" CERCLA. Had the parties wanted to draft a broader clause, it would have been much easier to simply say so in the text of the agreement itself. Instead, by drafting a schedule, the parties were clearly limiting liability to the particular circumstances disclosed therein.

The government also cites other sections of the purchase agreement (§§ 1.4.3 and 1.4.9) that create liability arising out of "compliance" with applicable environmental laws. It argues that the

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[1]With the exception that certain insiders began to appreciate the risks of PCBs in the late 1960s.

present CERCLA enforcement action is itself an action to assure "compliance" with CERCLA's requirement that liable parties clean up pollution sites. That is, the government appears to argue that this lawsuit is *itself* a trigger for liability because it is being brought to ensure compliance with CERCLA.

The claim that the government, simply by bringing a lawsuit, has the power to trigger the very liability it is seeking to enforce is a wholly circular argument. That is, the government's argument begs the question of API's liability: this is only an action to enforce "compliance" with CERCLA to the extent API is actually *liable* under CERCLA, and of course that is one of the centerpiece questions being adjudicated in this lawsuit. It makes little sense to argue that the very act of suing someone *under* CERCLA makes a defendant "non-compliant" with CERCLA. Accordingly, I cannot find that liability exists on the basis of any compliance issues.

In sum, even if the Appleton Papers Division were operating in violation of certain environmental laws, I am unable to conclude that CERCLA liability "arises out of" such laws. The various environmental laws now cited by the government have their own provisions for liability and their own remedies, none of which are integral to a CERCLA action. The government has not explained how, for example, violating the Clean Water Act could make a party liable to pay for the billion-dollar cleanup of a large river. Because liability under CERCLA is distinct from these other provisions, it does not arise out of (or even relate to) those alleged violations. And, as API points out, had the parties wanted to include all environmental liability, it would have been simple enough to do so.

B. At a Minimum, the Contractual Language is Silent, Which Means No Liability

Ultimately, perhaps the most important point is that the 1978 agreement is silent about CERCLA liability and lacks a broad "catch-all" environmental liability clause. The question of

API's liability has a long history. In 1995 NCR sued API in the Southern District of New York to resolve liability for the PCB cleanup. In a brief ruling, the district court concluded that it was unable to determine from the 1978 asset purchase agreement whether API had, in fact, assumed liability for PCB cleanup expenses. (Dkt. # 208, Ex. 2 at 8.) It found that the contract was negotiated before CERCLA came into existence and that none of the clauses in the asset purchase agreement was conclusive as to liability. The parties agreed to arbitrate the matter, and an arbitration panel also concluded that the agreement was unclear. The arbitration panel concluded that API pay 60% and NCR 40% of any expenses in excess of $75 million. The panel found, like the district judge, that the contractual language "is not sufficiently clear and unambiguous with respect to the issue of responsibility for the environmental costs at issue to permit an award based solely on the contract language." (Dkt. # 208, Ex. 1 at 4.) Thus, three judicial bodies (including this one) have now concluded that there is no clear language indicating that API's successor agreed to assume liability *to the government* for any CERCLA claims. At most, as the arbitrators found, API agreed to indemnify NCR for a *portion* of such liability.

The contract's silence on the point is enough to support a finding that API did not agree to assume direct CERCLA liability. In *Olin Corp. v. Consolidated Aluminum Corp.,* the Second Circuit noted that indemnification agreements are interpreted strictly under New York law (which applies here at the agreement of the parties). 5 F.3d 10, 15 (2d Cir. 1993). If an arbitration panel and another district court could not even conclude that API had agreed to *indemnify* NCR for its CERCLA liability, it should go without saying that the notion that API had agreed to become liable to a *third* party is even more tenuous. In *Olin*, where the Second Circuit found an assumption of liability, the district court had noted that "One would be hard pressed to draft broader or more inclusive indemnification provisions than those entered into by Conalco and Olin." 807 F.Supp.

1133, 1142 (S.D.N.Y. 1992). Here, the opposite is true. The parties drafted a number of indemnification and liability clauses, but each of those clauses contains limitations linking liability to Schedule A or compliance with applicable regulations and the like. They are not the narrowest of clauses, but neither are they the "extremely broad language" at issue in *Olin.* 5 F.3d at 15. Ultimately, API's overarching point remains salient: if the parties had wanted to make the buyer liable for all future unknown environmental liabilities, it would have been much easier to simply use the kind of broad language used in *Olin* and the other cases. That lawyers and courts have spilled so much ink on the question for more than seventeen years is itself suggestive of an intent *not* to create CERCLA liability.

C. Given NCR's continued viability, the negating clause precludes the creation of additional CERCLA liability to third parties

API has also cited what it describes as the purchase agreement's negating clause, which in its view bars the government from seeking to enforce the contract as a third party beneficiary. That clause provides that "Nothing in this Agreement, express or implied, is intended to confer upon any other person not a party to this Agreement any rights and remedies hereunder." (Dkt. # 139, Ex. 4 at § 10.10.) The government asserts that this is not a true negating clause and, in any event, it could not operate to bar the federal government from suing a party under CERCLA.

I agree with the government in part. Specifically, I conclude that a negating clause (or "no third parties" clause) cannot be dispositive of the issue of successor liability in cases in which the seller ceases its existence. Otherwise, a simple negating clause could leave both the seller and the buyer off the hook for CERCLA liability, even if the buyer would otherwise be deemed a successor. Clearly that would not be a satisfactory result, as private parties cannot simply "contract out" of CERCLA liability to the government.

But where, as here, the seller remains in existence, we are not dealing with successorship in an equitable sense, we are dealing with successorship in a contractual sense, which means we must explore the question of the parties' contractual intentions. In that context, a negating clause is dispositive. Ultimately, the clause underscores the point made above: if the parties had intended to create liability to the government, surely they would have done so more clearly. They would not have transferred very specific environmental liabilities referenced in Schedule A and then used a negating clause to make clear that they wanted no third parties to be able to benefit from the contract. Thus, even though a negating clause could not be determinative of the issue in a traditional successorship context, I conclude here that it precludes any reading of the Agreement that would make API directly liable to the government for CERCLA-type liability.

D. No estoppel applies

The government and some of the other Defendants in this action argue that the arbitration order, which was confirmed by the New York district court, means that API is estopped from arguing that it is not liable under CERCLA. Yet the arbitration panel, like the district court, was not persuaded that API had actually assumed CERCLA liability through the asset purchase agreement. Instead, the arbitration was the product of a settlement between NCR and API, a settlement made advisable for the principal reason that API's actual liability was *not* crystal clear (as the district court found). In dividing responsibility 60/40 between the parties, the panel was not concluding that API was directly liable under CERCLA or that it had become a successor to NCR's liability. Instead, the 60/40 division appears to have been the result of a number of quasi-equitable factors that pointed to requiring API to bear a larger share of responsibility.

More importantly, the arbitration and the award itself were an assessment of how much each party should *pay*, which is an entirely different question than whether API had assumed direct

CERCLA liability. No one ever posed that question to the arbitrators, and in fact it is doubtful that private arbitration could ever resolve a question involving one party's liability to the federal government. Accordingly, it would be improper to view the arbitration award as having any kind of estoppel effect on API's ability to argue that it never agreed to become directly liable under CERCLA.[2]

II. Conclusion

For the reasons given above, I conclude that the terms of the 1978 assumption agreement are not broad enough to encompass the CERCLA liability at issue here. Accordingly, the motion for reconsideration is **GRANTED** in part, and API is entitled to summary judgment that it is not a liable party under CERCLA. All claims against API are **DISMISSED**.

SO ORDERED this 10th day of April, 2012.

/s William C. Griesbach
William C. Griesbach
United States District Judge

[2]In previous briefing, the other Defendants opposing API's motion argued (the government does not join this argument) that summary judgment would have been improper because there are countless documents and witnesses that have not been produced in discovery. But these Defendants do not explain how additional discovery would shed any light on any terms in the 1978 agreement. Most importantly, they do not even identify any of the terms they believe to be ambiguous. The Rule 56(d) declaration lists numerous categories of information that have not been subject to discovery, but that is irrelevant if the contract not ambiguous.

Here, I am not concluding that any specific term is "ambiguous," I am simply concluding that because the contract is silent as to CERCLA liability, because it lacks a broad enough liability assumption provision, and especially because it contains a negating clause, API did not assume direct liability under CERCLA. Thus, I do not believe additional discovery could shed light on the question of the parties' intent, particularly given that CERCLA had not even been enacted at the time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. et al.,

Defendants.

DECISION AND ORDER

Defendant P.H. Glatfelter moves to dismiss the government's fifth claim for relief in this action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., on the ground that there is no case or controversy between the parties on that count. The government's fifth claim for relief "seeks a judicial determination that each UAO Respondent is required to comply with all provisions of the UAO applicable to such UAO Respondent other than" the obligation to reimburse certain costs. (ECF # 30, ¶ 132.) Glatfelter argues that under the UAO, Glatfelter is not required to do anything except to contribute to the costs of cleanup that NCR is undertaking in OU2-5. Because this Court has already ruled in a related case, *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 8-C-16, 2009 WL 5064049 (E.D. Wis. Dec. 16, 2009), that Glatfelter's share of those costs is "zero" (in Glatfelter's view), the government's fifth claim seeks relief that will have no practical effect. Glatfelter argues that this Court should not issue a declaration of liability for "nothing."

The Constitution gives the federal courts jurisdiction over "cases" and "controversies." U.S. Const. Art. III § 2, cl. 1. "When circumstances change during litigation such that there is no longer any case or controversy, the case is moot." *Ovadal v. City of Madison, Wis.,* 469 F.3d 625, 628 (7th Cir. 2006). Glatfelter's motion is premised on the fact that NCR continues to be available to pay its share of the OU2-5 cleanup costs and Glatfelter's share has been deemed to be zero. It thus asserts that ordering it to comply with the UAO, which simply would require Glatfelter to pay, would have no effect at this time because its share of payment is zero. Although it concedes that things could change—NCR could stop paying, or this Court could revisit its allocation decision (or be reversed on appeal)—for the time being a government victory on Claim 5 would have no effect. Thus, we should wait for a change in circumstances (which may never come) before adjudicating that claim.

But the fact that a judgment for the government on Claim 5 might not have any practical effect *now* does not mean there is no case or controversy. This Court's decision on allocation is a non-final ruling in an open civil action, and is vigorously protested by NCR and API. It is difficult to conclude that such a ruling in a case between PRPs should have any impact on the government's own claim for compliance with the UAO. This is particularly true given the nature of a contribution ruling. It would be one thing if Glatfelter had been found not *liable* under CERCLA. Instead, however, it is merely that Glatfelter's liability has been determined to be *secondary* to that of NCR. It is still on the hook, in some sense, for that liability. The government's claim against it thus remains live.

Much of Glatfelter's argument is based on a creative reading of its consent decree for OU1. That decree, approved by Judge Adelman, settled liability for OU1 and recognized that the settling parties were "entitled to full credit, applied against their liabilities for response costs and natural

resource damages at the Site" for the funds they had paid under the settlement. (ECF # 276, Ex. 13 at 89-90.) In a nutshell, Glatfelter argues that it has overpaid for OU1 and that the amount it overpaid constitutes this "credit." Even if Glatfelter is made to pay anything for OU2-5 (which it believes is only a remote possibility), the amount it would pay would be less than the "credit" it has built up. Thus, there would never be any scenario in which it would have to pay, which means the dispute is moot.

The government vigorously asserts that the "credits" described in the OU1 settlement have nothing to do with OU2-5, and they certainly do not create some sort of defense. Given the government's strong disagreement with Glatfelter's characterization of the credit described in the OU1 settlement, it would seem that Glatfelter is asking this Court to resolve a controversy in order to determine that no controversy exists. In any event, even if Glatfelter is entitled to some kind of credit based on its payments for OU1, that does not mean there is no case or controversy in this case. As just noted, the government has a dispute with Glatfelter over the very nature of the credit it seeks to assert, and that dispute would have to be resolved before a court could determine that Glatfelter's share is actually "zero." Having a sort of right to a setoff (if that is what it is) does not moot a claim, it merely means that one has a defense in the event it becomes relevant. Thus, as with Glatfelter's reliance on the *Whiting* decision, there is simply nothing set in stone that means Glatfelter will not have to pay under any reasonable circumstance. Glatfelter's liability may be secondary, but that does not mean it is not liable at all. The dispute is thus not moot.

Accordingly, the motion to dismiss is **DENIED**.

SO ORDERED this 27th day of April, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. et al.,

Defendants.

ORDER DENYING MOTION FOR STAY PENDING APPEAL

This matter came before the Court for a hearing on a motion for stay pending appeal. The Court addressed the motion over the course of a telephone hearing held on May 3, 2012. For the reasons set forth at that time, the motion for a stay is denied with the following qualification: NCR is to continue to make arrangements to begin the dredging ordered by the Court, but need not begin actual dredging until May 17, 2012.

SO ORDERED this 4th day of May, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. et al.,

Defendants.

DECISION AND ORDER

In 2010, the United States and the State of Wisconsin (the Governments) sued NCR Corporation and several other potentially responsible parties to enforce compliance with a Unilateral Administrative Order issued by the EPA in 2007. Although much has happened already in this lawsuit on that score, until now the remedy ordered by the Governments—a remedy that favors dredging and removal of contaminated material rather than capping or other, less aggressive, measures—has not been subject to judicial review. Certain of the Defendants have now filed a motion seeking summary judgment against the Governments on the ground that the administrative record is fatally incomplete due to the destruction of certain computer model data and programs that were instrumental in developing the remedy imposed. In the alternative, these Defendants ask that they be allowed to provide additional evidence to supplement the administrative record. For the reasons given below, the motion will be denied.

I. Background

"The purpose of the remedy selection process is to implement remedies that eliminate, reduce, or control risks to human health and the environment." 40 CFR § 300.430(a). The Governments' basic theory is that after fish are exposed to PCB-laden Fox River sediment, the PCBs flow to humans, posing an unacceptable risk to humans' health. This is not especially controversial as a basic premise; however, the *extent* of the risk based on given concentrations and locations of PCBs within river sediment is very controversial. The Defendants believe (in short-hand) that many areas of the River did not need to be dredged because capping, a less-expensive undertaking, would control the release of PCBs into the River and would not stir them up in the way that dredging might.

As suggested earlier, however, the actual merits of the remedy selected by the Governments are not presently before me. Instead, the question is whether that remedy may be reviewed meaningfully when certain parts of the computer model that guided selection of that remedy are absent from the record. Thus, although the particulars of the remedy imposed are not before me, the *process* of selecting that remedy is, and understanding that process requires an assessment of what kinds of data and assumptions were used in crafting the remedy.

Because the flow of PCBs from a riverbed into humans is such a complex process, the data and assumptions were incorporated into various computer models that could predict long-term PCB concentrations over a hundred years. The fundamental model at issue here is called the wLFRM (Whole Lower Fox River Model, or, to economize on abbreviations, just "the Model"). The Governments used this model to simulate the movement of PCBs within the river, or what people in the aquatic modeling business call "fate and transport." The results of this model were then

plugged into three other models, including two "food chain" models that simulated the accumulation of PCBs in the aquatic food chain in the river and in Green Bay. With these models, the Governments could then test different remedial alternatives (including *no* remedy at all) to see which ones were the most efficacious and cost-effective in mitigating the environmental danger. (Zhang Decl., ¶ 9-10.)

The models were developed over several years, based on field studies and calibration based on known data. For instance, the DNR could compare the model's predictions to actual data in the River, which allowed its scientists to calibrate the model to achieve more accurate results. (Zhang Decl., ¶ 17-18.) It is essentially undisputed that the wLFRM formed the basis of many of the predictions the Governments used to select the remedy.

A computer model, of course, is not a physical "thing" in the traditional sense—it is more akin to a process. The Model in this case includes a computer program known as IPX, input files for that program, and the data ultimately generated from that program based on those inputs. (Zhang Decl. ¶ 26.) The inputs, in turn, were created with other computer programs called "pre-processors." These programs calculated such things as river flow and rates of particle suspension. These pre-processors then generated the data files that became the inputs into the Model.

Once the IPX program ran the inputs, it produced data files predicting the concentration of PCBs in the River at various times. These data files were then processed by "post-processor" programs, which in turn produced files that were used as inputs in the additional models described above. As one of the Defendants' experts succinctly summarized things, "The wLFRM is a series of preprocessors, models and postprocessors designed to work in concert with one another in order to model the PCB fate and transport in the river and to pass these results to the FRFood Model."

(Dkt. # 449 ¶ 11.) In short, all of these components could reasonably be called part of "the" Model: "Similar to an automobile, the IPX model is the engine, an important component, but it will not run if does not have a fuel pump or spark plugs (preprocessors) and the wheels will not turn and make the automobile move forward without the transmission and axles (postprocessors)." (*Id.*)

As noted at the outset, some of the files just described are *not* part of the administrative record. In particular, the input files for the pre-processor programs are absent, as are the output files from the IPX program. Similarly, one of the two post-processor programs, called Exposure.f, is also absent. The Wisconsin DNR's Dr. Zhang states that because the *input* files do exist, however, anyone with the IPX program could re-create the results by simply running the existing input files through it. (Zhang Decl., ¶ 40.) And, because the heretofore missing post-processor program "Exposure.f" has recently been provided to the Defendants, the input files for the additional models may also be generated.

> Thus [Dr. Zhang argues], because the Defendants have a copy of the input files for the final model runs, a copy of the IPX computer program code, and a copy of both post-processors, it is possible for them to run the model using the inputs from the model runs that formed the basis of EPA's and WDNR's selection of PCB cleanup levels for the Site, assuming they use a computer capable of running the IPX 2.7.4 program. Based on those model runs, they can also use the post-processors to reproduce the table files and subsequently the *.rr files from the model runs that were used as input files for the other models.

(Zhang Decl. ¶ 43.)

There are two central problems with Zhang's statement, the Defendants believe. First, even if the record contains the files input into the IPX program, and even if all the preprocessors have been provided, the record remains devoid of information about the input files that went into the preprocessor programs. A second problem is that the Exposure.f program that was recently

provided to the Defendants (which is not in the record) does not appear to be the same as the one used to generate the final Model. At least, according to the Defendants' expert Dr. Annear, there are discrepancies in the input files used for Exposure.f that prevent the Defendants from processing the Model and recreating the Governments' results.

II. Analysis

The Defendants argue that they are entitled to summary judgment because the incompleteness of the administrative record means that this Court will not be able to meaningfully review the remedy the Governments selected. In the alternative, they ask that they be allowed to supplement the record by taking further discovery and providing expert testimony.

A. Summary Judgment

The Defendants argue that the absence of a complete Model in the record precludes the Governments from demonstrating that the Model is scientifically viable, which means this Court cannot determine whether the remedy selected is reliable, risk-based or cost-effective, as required by CERCLA. The Court must be able to "satisfy [itself] that the agency 'examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Bagdonas v. Dept. of Treasury,* 93 F.3d 422, 426 (7th Cir. 1996) (citations omitted).

If this Court were an independent laboratory charged with reproducing the Governments' model results, the Defendants would be on firmer footing. But of course that is not the charge that Congress has given to the courts in CERCLA cases. For a variety of sensible reasons, courts are asked merely to determine whether the remedy selected was arbitrary and capricious, that is,

whether the remedy was the product of bad faith or other improper motives, or whether there are glaring errors and omissions in the record. "Ours should not be the task of engaging in a *de novo* review of the scientific evidence pro and con on each proposed remedy in the hazardous substance arena. The federal courts have neither the time nor the expertise to do so, and CERCLA has properly left the scientific decisions regarding toxic substance cleanup to the President's delegatee, the EPA administrator and his staff." *United States v. Akzo Coatings of Am., Inc.,* 949 F.2d 1409, 1424 (6th Cir.1991). As the Supreme Court has held, "[i]t is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 105 (1983). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Id.* at 103.

That the administrative record does not allow complete replication of the results of one of the Governments' models does not, *per se,* mean a court is unable to determine from the *rest* of the record whether the Governments' action was arbitrary or capricious. As Dr. Zhang describes in great detail, the Model was developed over more than ten years of field studies and calibrated to known PCB concentrations in the River. The Model was not a secret program run in a mysterious back room in some nameless government building, but was instead the product of years of work and interaction with several interested parties, including some of the Defendants.

The Defendants take issue with a number of Dr. Zhang's explanations, but ultimately their objections go to the *correctness* of the remedy far more than the pro cess. Here, for example, the

Defendants note that the Governments tested 0.125 ppm, 0.25 ppm, 0.5 ppm, 1 ppm and 5 ppm, but did not test remedies at levels between 1 and 5 ppm. "Without a working copy of the model [they argue] it is impossible to verify that a remedial action level of 1 ppm is appropriate." (Def. Br. at 20.) But "appropriate" is not the question here, because "appropriate" suggests a focus on whether the result is the best possible result (assuming that is even knowable). The question, instead, is whether the Government was reasonable in its method of choosing that remedy and whether the remedy has a rational (rather than arbitrary or capricious) basis. That is, did it consider relevant evidence and viewpoints, or did it rush through the process? To show that the remedy was arbitrary and capricious, the Defendants will need to show not just that the remedy was not the best one, or the "appropriate" one, but that the remedy was so erroneous as to be an arbitrary one.

Arbitrary and capricious are terms that describe the *manner* of remedy selection more than anything else. Arbitrary means the Government simply threw darts or flipped a coin, selecting the remedy without a basis in reason or science. Capricious means it rushed through the process or made a sudden, knee-jerk decision without hearing enough evidence. The existence of a perfectly reproducible model is not necessary to determine whether the Government's actions were arbitrary or capricious.

For example, it is well-known that many scientific questions do not have perfect, settled answers, despite countless studies and millions of dollars in research: the age of the universe, the origin of language, the causes and / or existence of climate change, or even the widespread use of statins to control cholesterol—these questions are the subject of countless scientific studies and ongoing, sometimes heated debates. These studies often lead to diametrically opposite conclusions, despite being undertaken by eminent scientists using well-accepted and rigorous methods. A panel

of experts asked to review a given study might well want to look at every model used to achieve the result; they might even want to replicate the study in all material respects before declaring the result sound. By contrast, if the question is limited to whether the result achieved by the study was arbitrary and capricious, a reviewing body may look at the methods used and other testimonial evidence to determine whether the process was undertaken using appropriate scientific methods *without* needing to subject the actual models to re-testing. It could review a lengthy record detailing the deliberative process and hear from those involved in the study to reach a conclusion that the process was duly serious and based on sound scientific principles. The fact that certain aspects of the process may be open to debate would rarely undermine the validity of the process itself.

For these reasons, I conclude that a reviewing court may undertake a meaningful arbitrary-and-capricious review of the remedy process even if significant parts of a key model are absent from the administrative record. Accordingly, the Defendants are not entitled to summary judgment.

B. Supplementation of the Record

In the alternative, the Defendants ask that they be allowed to supplement the administrative record by taking discovery and offering expert testimony. This, they argue, would allow them to explain and fill in any gaps that exist in the administrative record due to the absence of a full Model. Although ostensibly an attractive solution, supplementation of the record would be an unusual remedy under these circumstances. To review, the complaint is that the Government destroyed certain files that were used in running its fate and transport model. In the typical case, the party asking for supplementation seeks to add missing documents into the administrative record. *See, e.g., Kent County, Delaware Levy Court v. U.S. E.P.A.,* 963 F.2d 391 (D.C. Cir. 1992) (internal EPA documents added to the administrative record). But here, the missing files apparently no

longer exist. They *cannot* supplement the record. The Defendants propose to conduct discovery and provide expert testimony, but none of that will bring back the files they say they need. Accordingly, the remedy sought does not solve the problem the Defendants have identified.

The Defendants also suggest that supplementation is required because expert testimony is necessary to explain the problems with the models the Governments used. If the Model no longer exists (at least in its most complete form), the Governments are simply asking the Court to take their word for the fact that their "black box" produced viable results. But once again, testimony from additional experts will not bring back the missing files. Moreover, any problems in the Model would have existed *regardless* of whether the missing files were destroyed or not. If the files still existed, expert testimony would *not* be available to question the Model along the lines the Defendants now propose. It is thus unclear why additional inquiry should be allowed simply because certain files might be missing. In other words, the expert testimony proposed by the Defendants does not address anything pertaining to the loss of the files, nor does it propose to fill in any of the missing gaps or explain anything that might now be unclear because the files have been lost. (Def. Br. at 23, Dkt. # 388.) As noted earlier, the proposed remedy of supplementation is not correlated to the problem the Defendants have identified because expert testimony and further discovery would not remedy any gaps in the record that might exist.

A final problem with the Defendants' proposal is that it overlooks an important aspect of judicial review, which was highlighted in Part A above. Although it is clear that the administrative record does not have every single data file in it, that does not mean the record is hopelessly incomplete for purposes of review in federal court. If the goal in this Court were to analyze every

conclusion and assumption to test their scientific merit, the Defendants might have a point, because it seems clear that reproducing the Model in exactly the same fashion as it was originally run will now be difficult or impossible. But of course that is not the goal of review at this stage. The question is not whether the Governments arrived at the perfect, scientifically demonstrable, solution to the PCB problem—it is whether they arrived at a solution that was neither arbitrary nor capricious. Arbitrary and capricious review applies whether the record is supplemented or not. *Kent County, Delaware Levy Court,* 963 F.2d at 398 (applying arbitrary and capricious standard after supplementing record).[1]

In short, determining whether the remedy was arbitrary or capricious does not require reproducing a Model that has already been run, at least under these circumstances. The Model was not prepared in a dark room by an unnamed graduate student but was developed over several years with public input. A 124-page summary report on the Model was prepared by the DNR in 2001, replete with data and graphs. (Dkt. # 439, Ex. 15.) The Governments provided a 300-plus page report of *twenty* case studies from other dredging sites. (*Id.* at Ex. 1-3.) The record also contains other ample evidence explaining the Governments' methods and assumptions in developing the Model and, more generally, the remedy. I am satisfied that the record is ample enough to allow a reviewing court to determine if the remedy selected fails the arbitrary and capricious standard.

[1]Although in some cases supplementation of the record would mean *de novo* review of the materials added to the record (because they had not been considered by the agency), that does not mean that the entire remedy is subjected to *de novo* review merely by virtue of the supplementation of additional information. The purpose of supplementing the record is to explain gaps or provide technical guidance—not to undo the entire administrative scheme and eliminate the deference that the EPA is owed in selecting the remedy.

Accordingly, the Defendants' motions for summary judgment [Dkt. # 386, 402] are **DENIED**.[2] The motion for leave to file a sur-reply [458] is **GRANTED**.

SO ORDERED this 30th day of August, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

[2]NCR asks that it be allowed to supplement the record on the so-called "6/10 Rule," but I am satisfied that such a rule has not been adopted thus far. As such, it would be premature to incorporate a review of a rule whose existence is not even certain.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

DECISION AND ORDER

Defendant NCR has filed a motion to enforce a consent judgment registered in this Court. The consent judgment confirmed an arbitration award that had found Defendant API liable for 60% of the share of Fox River remediation costs attributable to NCR and API. NCR states that API has recently begun refusing to reimburse NCR for such costs, despite repeated demands, in violation of the consent judgment. In response to NCR's motion, API has moved to strike or stay the motion, arguing that the matter is subject to binding arbitration and is otherwise improper. For the reasons given below, NCR's motion will be denied on its merits, and API's motion will be denied as moot.

The history of NCR and API is set forth elsewhere; for present purposes it is enough to state that NCR and API had a dispute as to how much each would be liable for the activities of a predecessor company called Appleton Coated Paper Company, which was sold by NCR to API in 1978. After litigation failed to resolve the dispute, the parties entered into a settlement agreement in 1998. Pursuant to the 1998 agreement, the parties agreed to submit to binding arbitration the

question of liability for any funds expended in excess of $75 million. In a 2005 decision, the arbitrators determined that NCR would be liable for 40% and API 60% of any such expenditures.

NCR argues that the 2005 arbitration answered the question of liability once and for all, and that all it needs to do to force API to pay is to have the judgment confirming that award enforced against API. NCR is correct that the arbitration award set in stone the 60% figure, making API liable for 60% of the total. But the scope of the 2005 arbitration was somewhat limited. The panel noted that the intent of the parties in entering into arbitration was to determine the "allocation" of liability between the parties. (Dkt. # 144, Ex. 2.) Thus, in determining the allocation of liability, the 2005 arbitration was limited to deciding what the *ratio* of liability would be. API is not disputing that ratio in this action. In refusing to pay, it is not stating that it does not owe 60%, or that the 60/40 ratio is incorrect. Instead, it is disputing the *amount* of liability, that is, the amount of money *subject to* the ratio the arbitrators determined. That is a separate question entirely, a question about which the 2005 arbitration decision is silent. The arbitration award creating the 60/40 ratio does not mean that API simply has to write a check for 60% of whatever NCR says it owes; it means that *whatever* the legitimate total is (a different question), API is on the hook for 60% of it. Here, the dispute (as chronicled in NCR's own filings) is over what amount is legitimately subject to the 60/40 ratio—not the 60/40 ratio itself. Thus, although API is liable for 60% of *something*, that something must be determined through agreement of the parties or some other means. Thus, "enforcing" the judgment in this case would merely require API to pay 60% of a given amount, but it would not say anything about what that amount might be.

API argues that the settlement agreement contains a separate arbitration provision governing disputes over payment, and that because the parties have not been able to reach agreement on the amount to be divided, the matter must be submitted to arbitration in New York, pursuant to the

settlement agreement. Although that may be true, API has recognized that that question is a matter for a New York court to determine, not this one. Accordingly, I will not order the matter to arbitration. For present purposes, it is enough to state that the judgment confirming the previous arbitration does not give rise to an obligation on API's part to pay any given sum of money; as such, "enforcing" the judgment would not obligate API to pay any specific figure. The motion to enforce the judgment is therefore **DENIED**. To the extent API's motion sought to compel arbitration, it is **DENIED** as well. Denial of NCR's motion renders the rest of the relief sought by API moot.

SO ORDERED this 11th day of September, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC. et al.,

Defendant.

ORDER DENYING MOTION TO COMPEL

Certain Defendants in this CERCLA enforcement action, led by Defendant Menasha Corporation, have filed a motion to compel production of documents from Plaintiffs. Despite the fact that this is what the Defendants describe as a $1.5 billion CERCLA action, the Plaintiffs refuse to turn over, or even search, thousands of electronically stored documents ("ESI," with the "I" standing for "information") that are responsive to the Defendants' discovery requests. Defendants also sought documents from the National Archives containing responsive information that has not been searched by the Plaintiffs, but this aspect of the motion to compel has now been dropped.

As is common in such disputes, the parties opposing discovery argue that producing the documents in question would be unduly burdensome and expensive, especially in light of their limited level of relevance. Moreover, it is not just a matter of turning over documents known to be responsive to the Defendants' request; the very act of searching for such documents is itself costly and burdensome. The governments have already produced a staggering four million pages of documents from 25 government offices, devoting some 2,500 hours of attorney and paralegal time to privilege review. They note that they have identified hundreds of thousands of potentially

responsive emails from state, federal and contractor sources, which total in the millions of pages. Review of all of these documents would take a colossal effort lasting years and requiring thousands of man-hours.

The Defendants scoff at the governments' claims of burden and expense, noting that the Department of Justice is the largest organization of lawyers in the world and surely has the staffing capability to handle such a chore. Given the fact that this is a massive Superfund action involving more than a billion dollars (an action the governments started), they should not be heard to complain about burden or expense.

I am satisfied that it would indeed be a major, almost prohibitive, undertaking if the governments were ordered to review and produce all of the ESI responsive to the Defendants' discovery requests. But more importantly, I am also satisfied that the information sought would be of limited relevance to the issues in this action. The Defendants' initial brief does not explain in much detail why such information would be relevant to the upcoming trial, but in a reply brief they state that the documents are relevant for a few key purposes. I address these below.

First, the Defendants argue that the ESI speaks to the question of whether releases in OU1 caused the incurrence of response costs in OU4, the portion of the River now subject to the cleanup action. This is, in essence, a liability issue. This Court denied the Defendants' motion to expand the administrative record on the grounds that review of the remedy is to be limited to the record itself. Here, the Defendants argue that they are not so much challenging the remedy as they are challenging liability in the first place. That is, if the governments are going to be using this type of evidence to establish liability by showing movement of PCBs in the river, then the Defendants should be entitled to discover this evidence as well. Although ostensibly a reasonable request, the Defendants do not explain what more any *further* discovery could possibly provide on liability. As

noted elsewhere, the voluminous administrative record stands on its own and is replete with data that was the subject of public comment and input from some of the Defendants themselves. The Defendants vaguely argue that the governments will be using such data in their case-in-chief, but nowhere do they suggest that the governments will be using data that has been kept secret and hidden from discovery. If there is any indication of such prejudice during the trial, the matter may be taken up at that point.

The Defendants also argue that the information regarding sediment movement is relevant to their divisibility defense. To recall, the Defendants believe that the harm at the Site is capable of being divided in such a manner that joint and several liability need not apply. They note that the dredging activities of the Army Corps of Engineers in OU4 and OU5 are relevant to demonstrating the locations and quantities of various PCB deposits in the riverbed. Even if that is true, however, there has already been extensive discovery on these points, including 23 depositions of current and former Corps employees, and the Defendants have not explained what any additional information would bring to bear on these issues. As noted elsewhere, the divisibility question is a messy one involving deposits of PCBs by multiple entities into a dynamic riverbed. The Corps dredged shipping channels in the Site and disposed of that sediment in the River until the 1960s. It is difficult to envision how documents or ESI (e.g., emails from the 1990's) would be able to shed much useful light on those activities, especially given that much of the information about dredging is already known through other discovery and FOIA requests.

Finally, the Defendants believe that the information is relevant to the equities of the case. To grant the injunction the governments request, that relief must be in the public interest and must be required by the equities of the case. 42 U.S.C. § 9606(a). Because the Army Corps' activities of dredging and dispersing the riverbed sediment may render the Corps liable itself, the Defendants

argue they need to conduct discovery on the dredging issues to determine the Corps' own culpability in this action. Once again, however, the relevance of such discovery is left to the imagination. No one has credibly suggested that there is any strong *equitable* reason to find the Corps liable for the cleanup here; if anything, its potential liability is (like some other Defendants') simply a matter of happenstance. After all, it was simply doing its job of dredging shipping channels, and the dredged material happened to have toxic PCBs in it, a fact which was not known until later. There are suggestions that the government knew at some point that open water disposal of dredged sediment was questionable (e.g. Dkt. # 519, Ex. 2 at 2) but I have not seen anything that would suggest that the Corps has some sort of culpability here, at least in the sense that would undermine the federal government's ability to get an injunction. More importantly, there is no suggestion that such an argument requires additional discovery. The facts underlying the equitable argument are already before us, and the Defendants have not adequately explained what *additional* discovery would yield. Accordingly, I cannot envision how electronic documents regarding long-ago dredging and dispersing activities would be relevant to the equities in this action.

For these reasons, the motion to compel is **DENIED**. The Defendants remain free to object on an *ad hoc* basis to the use of any evidence that they had no opportunity to consider in preparing their defense.

SO ORDERED this 17th day of October, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC. et al.,

Defendant.

DECISION AND ORDER GRANTING PARTIAL JUDGMENT ON THE PLEADINGS AND DENYING MOTION *IN LIMINE*

The United States has moved for partial judgment on the pleadings in order to obtain dismissal of several of the Defendants' affirmative defenses. Other Defendants have filed a somewhat related motion *in limine* asking for a pretrial ruling that the government must prove certain "elements" in order to obtain the injunctive relief it seeks. For the reasons given below, the United States' motion will be granted and the motion *in limine* will be denied.

I. Dismissal of Affirmative Defenses

The Defendants have alleged a number of affirmative defenses positing that because the United State Army Corps of Engineers is itself a PRP in this action, the United States is precluded from issuing a Unilateral Administrative Order ("UAO") or obtaining specific performance or an injunction due to its own "unclean hands." For decades the Army Corps dredged the navigational channel in the Fox River, which disturbed sediments on the river bottom and resulted in the dispersal of PCB-containing sediment that then moved into other areas of the river and into Green

Bay. The United States has apparently conceded that this activity qualifies as a discharge of pollutants under CERCLA. In addition, some of the defendants allege that some of the PCB-containing paper received and recycled by recycling mills in the River came from federal agency office recycling programs and federal printing shop recycling operations. These defendants allege that EPA itself was therefore one of the agencies that recycled paper containing PCBs at mills that discharged wastewater to the Site.

The United States, in its role as the enforcer of the nation's environmental laws, seeks enforcement of its 2007 UAO. CERCLA § 106(a) provides that "the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." 42 U.S.C. § 9606(a). The Defendants argue that these clauses require the United States to prove certain "elements," including that an injunction would be in the public interest and would be consistent with the "equities" of the case. Given the language of § 106(a), the Defendants argue, their affirmative defenses involving the government's own activities speak directly to the equities of the case and should not be dismissed.

There are several problems with this approach. First, as discussed in Section II below, this is not a § 106(a) case in which the government comes to court seeking emergency relief. Instead, it is seeking to enforce the UAO. Although the first sentence of § 106(a) uses the word "equities," that section is reserved for cases in which the government comes *directly* to court seeking emergency relief. By contrast, the *second* sentence of § 106(a) states that "The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment."

That is what happened here. The EPA issued an order and is now seeking to enforce it after the administrative process has been completed. Section (b) provides the mechanism for an "action brought in the appropriate United States district court to enforce such order," and that is what this action is. 42 U.S.C. § 9606(b). This is thus not a direct action to obtain injunctive relief of an "independent" nature but an action to enforce an existing UAO that was the result of an extensive administrative process. There is no basis to conclude that "equities" would play a role in a situation like this, where the review is limited to the administrative record.

Second, CERCLA § 120 indicates that although the government may indeed be a liable party itself under CERCLA, that does not "affect the liability of any person or entity under sections 9606 and 9607." 42 U.S.C. § 9620(a)(1). In other words, even if the government is itself a PRP, that does not give rise to a "defense" (equitable or otherwise) under the statute. And § 107(b) makes that perfectly clear, stating that liability is "subject only to the defenses set forth in subsection(b) of this section," which include "(1) an act of God; (2) an act of war; [and] (3) an act or omission of a third party." 42 U.S.C. § 9607(b)(1)-(3). Thus, § 107 excludes any kind of equitable defense along the lines of what the Defendants are now proposing. "CERCLA does not permit equitable defenses to § 107 liability," *Town of Munster, Ind. v. Sherwin-Williams Co., Inc.,* 27 F.3d 1268, 1270 (7th Cir. 1994). "[W]e conclude that the three statutory defenses are the only ones available, and that traditional equitable defenses are not." *California ex rel. California Dept. of Toxic Substances Control v. Neville Chemical Co.,* 358 F.3d 661, 672 (9th Cir. 2004). Thus, although the government's conduct as a polluter might play a role in the equitable apportionment of expenses through contribution, it does not on its own provide some sort of "defense" to liability in the first place.

The Defendants suggest that these restrictions do not apply because the government is seeking equitable relief under § 106(a) which, as noted above, indicates that relief should be granted only when the equities of the case may require. 42 U.S.C. § 9606(a). Although they have cited a district court case on the subject, the case is from the Jurassic period (in CERCLA years) and has not been followed elsewhere. *United States v. Hardage,* 116 F.R.D. 460 (W.D. Okl. 1987). Moreover, the *Hardage* decision did not consider the 1986 amendments to CERCLA, which added the clause from § 120 indicating that even if there is federal liability, that does not affect the liability of any other entity. Thus, I agree with the United States that the entire enforcement system of CERCLA is premised on the government's ability to enforce its orders in appropriate cases, regardless of its own liability. Its own contribution to a polluted site plays a role in other aspects of the case (contribution), but it does not impact any defendant's liability or provide an affirmative defense to the issuance of injunctive relief. And of course none of this matters if the government is indeed proceeding under the second sentence of § 106(a), not the first. That kind of relief, as discussed in Section II below, does not involve equitable factors at all.

Finally, some of the Defendants also suggest that § 106 is not the proper enforcement mechanism for administrative orders. Defendants rely on § 106(b)(1), which provides that the government may obtain a fine of as much as $25,000 or more per day upon a showing that a defendant has willfully violated an administrative order. This, they argue, is the extent of the government's right to obtain compliance with its UAO. But § 106(b)(1) merely lists the elements required for the government to obtain a civil fine; it does not suggest that a civil fine is the *only* remedy the government has at its disposal. The United States has not even alleged that the Defendants are "willfully" violating the UAO. Instead, as discussed below, the United States is

merely attempting to enforce an order. As such, even if § 106(a) involves the sorts of equitable considerations discussed above, that is not relevant to an enforcement proceeding like this one.

For the reasons given above, I conclude that the United States' motion to dismiss the Defendants' affirmative defenses should be granted.

II. The "Elements" of Injunctive Relief

Relatedly, some of the Defendants have filed a motion *in limine* seeking to clarify exactly what the United States must prove in the upcoming trial to obtain injunctive relief. They argue that although liability is a predicate to such relief, liability *per se* is not enough. Instead, the United States must demonstrate the § 106 factors discussed above. CERCLA § 106(a) provides as follows:

> when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9606(a).

The clause just cited contains essentially two sections. First, it states that when the President determines that there is a danger to public health, he may direct the Attorney General to "secure such relief as may be necessary." *Id.* Second, it states that the district court shall have jurisdiction to grant such relief if the relief is in the public interest and "the equities of the case" require the particular injunction being sought. As noted in Section I, the Defendants argue that the United States will be required to prove each of these "elements" against each Defendant and that this Court

is not to act as a "rubber stamp" on the government's remedy selection. They also argue that the United States must prove these elements as of the present day rather than as of the issuance of the UAO in 2007. They note that much has changed since 2007 (including the economic downturn), which has dramatically shifted the equitable considerations that come into play.

The United States strongly opposes the Defendants' attempt to turn the upcoming trial into a series of equitable mini-trials. In its view, what's important is whether the remedy selected passes muster under the arbitrary-and-capricious level of judicial review. If it does, then the UAO will be enforced. After all, the UAO was issued following an extensive investigation into the problem and the remedy. If the remedy is deemed to be appropriate, then it does not make sense to have a whole secondary trial just to see if *enforcing* the remedy is also appropriate. In other words, if the remedy is appropriate, then it is *ipso facto* appropriate to enforce it.

The government's position accurately reflects the policies underlying CERCLA and the language of the statute itself. Section 113 governs the timing and means of judicial review of UAOs, and it makes clear that review of response actions or orders "shall be limited to the administrative record." 42 U.S.C. § 9613(j)(1). As has been noted extensively throughout this action, that review is limited to an arbitrary-and-capricious standard. *Id.* at (j)(2). It would not make sense to undertake this level of review of the administrative record, which is "fixed" in both time and evidence, and then have a wholly separate inquiry into the "equities" of the situation as they might happen to exist at the time of trial. The challenge allowed to a PRP does not say that the PRP will win if it can show that the remedy is arbitrary and capricious *or* that the equities do not warrant it; the statute simply says it may challenge the remedy imposed by arguing that it is arbitrary and capricious. The Defendants have cited no precedent suggesting that equitable considerations

are to be considered in such review.

In 1990, then-Judge Breyer explained that there were essentially four paths the EPA could choose to get a site cleaned up. *United States v. Ottati & Goss, Inc.,* 900 F.2d 429, 433 (1st Cir. 1990). Among them are a direct action in federal district court, under the first sentence of § 106(a), where the EPA seeks an injunction. In that event, the "district court ... shall have jurisdiction to grant such relief as the public interest and the equities of the case shall require." 42 U.S.C. § 9606(a). Another option, based on the *second* sentence of § 106(a), gives EPA "the power to 'take other action ... including ... issuing such orders as may be necessary to protect public health and welfare and the environment.' Subsection (b) provides that EPA may bring an action in 'district court to enforce such order' (and to obtain a fine for its violation)." 900 F.2d at 433 (quoting 42 U.S.C. § 9606(a)).

In the *Ottati & Goss* case, the EPA brought an action in district court seeking an injunction, and then, while the case was pending, it commenced administrative proceedings that resulted in a remedy selection and a UAO. The government argued that once the UAO was issued, the district judge in the pending civil action was bound to order compliance with the UAO unless he found it arbitrary and capricious. The First Circuit disagreed. In doing so, it noted that the EPA had "expressly said that it had not issued an 'order;' and, in asking the court to model its injunctive remedy on EPA's 'Record of Decision,' it was not asking the court to 'enforce an order.'" *Id.* Thus, the EPA in that case was proceeding solely under the *first* sentence of § 106(a), which allows only "such relief as the public interest and the equities of the case shall require." The fact that an ROD had issued during the pendency of the case did not mean that the district judge was left only to either enforce the ROD or to find it arbitrary and capricious. Instead, because the case was brought under

the first sentence of § 106(a), the judge was free to consider equitable and other considerations.

Here, by contrast, the government is specifically asking that this Court enforce the UAO, which was issued prior to the filing of this action. The *Ottati & Goss* court observed that in such circumstances, the court's options are indeed more limited: "When the EPA asks a court . . . to enforce a lawful (nonarbitrary) EPA order, the court must enforce it." *Id.* at 434. The question in a case where the government asks the court to enforce an order is simply whether the remedy is arbitrary and capricious, and as such it does not make sense to import principles of equity into the analysis. Judge Breyer observed this disconnect:

> The first sentence of § 9606(a) does not foresee a court reviewing, say, "final agency action." Cf. 5 U.S.C. § 704. It seems more plausibly applicable to an emergency situation, where the agency has not yet had time to compile a thorough record and to issue an "order." In such a case, the court is not a "reviewing court," as, ordinarily, there would not be much of an agency decision or record to "review." Indeed, how would an "arbitrary/capricious" standard work under the first sentence of § 9606(a)? Precisely what, in the ordinary case, would a court be expected to review? EPA's decision to ask the Attorney General to bring the action? The Attorney General's decision to file suit? Is EPA supposed to win automatically as long as its decision to bring the action was reasonable? These questions suggest why it does not make much sense to apply standards for APA-type review of an agency's final decisions in the context of the first sentence of § 9606(a).

Id.

This case does not present the "emergency situation" in which the government runs to court to show an immediate risk of harm to the public health under § 106(a). Instead, this is a case where there is a fully developed administrative record establishing the remedy and a UAO. The government is not asking for emergency injunctive relief under § 106(a), it is simply asking the Court to enforce its UAO. Accordingly, the equitable and other "elements" the Defendants have identified have no role in these proceedings.

For the reasons given above, the United States' motion for partial judgment on the pleadings (ECF No. 430) is **GRANTED**. The Defendants' motion *in limine* on the elements of the Fifth Claim (ECF No. 520) is **DENIED**.

SO ORDERED this 16th day of November, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. and
APPLETON PAPERS INC. et al.,

Defendant.

DECISION AND ORDER ON THE PROPRIETY OF THE REMEDY

In this CERCLA enforcement action, the United States and State of Wisconsin have moved for summary judgment on the question of the propriety of the remedy they imposed in a Unilateral Administrative Order issued with respect to the Lower Fox River Superfund site. This Court has already ruled that the administrative record pertaining to the remedy is sufficient to allow the deferential review required by statute. Although other rulings have found that limited additional trial testimony could be relevant, I am persuaded that summary judgment in favor of the Plaintiffs is appropriate at this time. Accordingly, the Plaintiffs' motion for summary judgment will be granted. The Defendants have also filed motions for summary judgment; these will be denied.[1]

[1] Several of the documents referred to herein have several page numbers and/or Bates stamp numbers on them. Where possible, citations in this opinion are to the ECF page number added by the Court's computer system.

I. Background

As recounted elsewhere, the Lower Fox River Site has been the subject of intense governmental scrutiny since it was revealed that significant quantities of sediment containing PCBs exist in the riverbed in both Little Lake Butte des Morts and in the Fox River itself. Because PCBs are now known to cause significant health problems for those who are exposed to the water or who eat fish caught in the river, the Site has been selected for remediation; a herculean and expensive cleanup effort has been underway for several years.

A companion case has focused on a struggle between the various potentially responsible parties ("PRPs") over which of them should bear the brunt of the cost of cleaning up the River. By contrast, this case is not about money so much as it is about action: here, the United States and the State of Wisconsin have sought to enforce the selected remedy against the PRPs.

The remedy—a combination of dredging and capping the riverbed—was selected as the result of a partnership between the Environmental Protection Agency and the Wisconsin Department of Natural Resources ("WDNR"), which was designated as the lead agency in developing the remedial project. The WDNR began investigating the Site in 1998. During its Remedial Investigation, the WDNR noted (among many other things) that the risks to human health relating to PCB's arising out of the consumption of fish were greater than the acceptable levels (despite the fact that eating fish has other health benefits). (ECF No. 507-2 at 5-6.) An extensive feasibility study considered all of the conceivable options. These included everything from "no action" and active monitoring to dredging and capping. (ECF No. 507-5 and 6.) Each alternative was assessed based on a number of criteria, which included key considerations such as effectiveness, feasibility, and cost. The agencies did not rely exclusively on paper analyses,

however: they also undertook two studies of the River and removed some 88,000 cubic yards of sediment to determine whether the sediment could be dredged safely.

In addition to the feasibility and health studies, the governments also created models of what they call "fate and transport" of PCBs within the river system. In brief, the PCBs were introduced into the river in a number of different locations, and the vicissitudes of the River's current, dams, weather, and proximity to release sites all played (and continue to play) a role in where the PCBs ultimately ended up. The governments' models were used in an effort to establish how the PCBs were transported throughout the river and Green Bay. The result was a 2,500-page report explaining the models, their use, and the conclusions drawn therefrom. (ECF No. 439-14 at 8.) A summary of the model's use is also part of the administrative record. (ECF No. 439-15.)

The remedy ultimately selected is documented in a number of lengthy public documents, including two Records of Decisions ("RODs"), two ROD Amendments, and an Explanation of Significant Differences. These decisions followed health assessments and feasibility studies designed to link resource expenditures with measurable public impact results. For example, the ROD issued in June 2003 addressed the remedy for areas known as OU3 through OU5, or roughly the part of the Fox River between Little Rapids and Green Bay. (ECF No. 404-2.) The ROD, a 154-page document that is typical of the other public documents addressing the remedy, explains that the remedy selected was the culmination of several years of study, remedial investigations and feasibility studies, many of which were subjected to public comment and input from the PRPs themselves. The ROD concluded that the remedy for OU3-5 would involve dredging some 6.5 million cubic yards of contaminated sediment and taking it to a landfill for disposal. This is what the parties refer to as an "all-dredging" remedy.

The "remedial action level" ("RAL") that would trigger the need for sediment removal was established at 1 part per million, meaning that sediment containing that amount or more would be targeted for removal. (*Id.* at 14.) Other action levels considered were 0.125 ppm, 0.25 ppm, 0.5 ppm, 5 ppm, and, of course, the "no action" alternative that would leave the PCBs untouched. Naturally, the action level would dictate how much sediment needed to be removed—a higher action level would require much less dredging than a more stringent threshold. The governments determined that 1 ppm was an appropriate benchmark. For example, at a concentration of 1 ppm, walleye would be safe for consumption within one year, whereas at the 5 ppm level they would not be safe to eat for 29 years. (ECF No. 439-12 at 98-100.) On the other side of the coin, the ROD observed that concentrations *lower* than 1 ppm would have only marginal reductions on PCBs in fish tissue, and thus concluded that "there is limited risk reduction achieved by selecting an RAL of less than 1 ppm." (*Id.* at 99; ECF No. 404-2 at 155.)[2]

The 2003 ROD estimated that the cost of the dredging remedy would be approximately $325 million, with an understanding that the estimate could be off by as much as minus-30 percent and plus-50 percent. (ECF No 404-2 at 151.) On a per-unit basis, this figure was actually lower than might otherwise be expected. In response to public comments, the agencies explained that the lower-than-expected costs would arise out of economies of scale; the theory was that a project as large as this one would produce efficiencies not present in smaller dredging projects, and of course almost *every* other project had been smaller than this one. (ECF No. 439-5 at 24.)

[2] The selection of the remedy was immensely complicated and data-intensive, and it varied in different portions of the Site. This background section is merely a thumbnail sketch of the process, which is explained in much more detail in the RODs and other record documents themselves.

Circumstances changed after NCR and Georgia-Pacific (two of the key PRPs) undertook extensive sampling work, the upshot of which was that the governments determined that a much larger volume of sediment would need to be removed in order to achieve the PCB reductions set out in the earlier RODs. The two companies proposed a new remedy that incorporated a hybrid approach to the problem, namely, a mixture of dredging, sand covering, and capping. Their proposal indicated that the new cost estimate would reach some $432 million (in 2009 dollars). Following public comment, the agencies issued a ROD Amendment in 2007 that incorporated the proposed changes. (ECF No. 404-3.) A hybrid remedy for OU1 was also adopted in a later ROD. In response to comments questioning the viability of capping, the agencies observed that capping could effectively contain sediments and would improve water quality.

By 2009, however, it became clear that even the recently-increased cost estimates had been overly optimistic. New estimates, based on "real world" bids from contractors, showed that the remedy would now cost some $701 million dollars, roughly 62 percent more than estimated in the 2007 ROD. Estimates prepared by defense expert Jeffrey Zelikson demonstrate how the cost estimates of capping-versus-dredging remedies changed over time. (ECF No. 501-1 at 21.) By 2009, it had become clear that capping, which was estimated to cost $484 million, would have been much cheaper than the $701 million hybrid remedy. (Had the agencies pressed for the full dredging remedy, that cost had now skyrocketed to $957 million, or almost one billion dollars.)

Despite the 62 percent cost increase, the agencies decided not to issue an ROD amendment, as they had in 2007. An ROD amendment is a formal process requiring reevaluation of circumstances and opening up the process to public comment; it is required when a new approach fundamentally changes a remediation project. Instead of issuing an ROD, the agencies issued an

"Explanation of Significant Differences" ("ESD"), which is a more streamlined approach. *See* 40 C.F.R. § 300.435. The 2010 ESD noted the large increase in cost, but found that because the increase was close to the 50 percent overrun already built into the original estimate, the cost increase did not pose a "fundamental" change to the project and thus did not require an ROD amendment. (ECF No. 147-1 at 15.) The ESD, along with a Criteria Analysis Memorandum, explained several areas on which the original estimates proposed by Georgia-Pacific and NCR understated the actual costs. These included increased costs for site support costs, residual dredging, and shoreline caps. (*Id.* at 13-14.) The ESD also noted the complexities inherent in such a project, given the lengthy time span and the combination of capping, dredging and sand covering. (*Id.* at 14.) The remedy described in the 2010 ESD is the essence of the remedy the governments are now seeking to impose.

II. Analysis

At issue are four separate motions for summary judgment: one filed by the United States and the State of Wisconsin, and three filed by the Defendants. Because the burden is on the Defendants, I concentrate my focus on their arguments.

A. Arbitrary and Capricious Standard

Section 113(j) of CERCLA provides that judicial review of response actions is based on the administrative record and is limited to determining whether the response action is arbitrary and capricious. 42 U.S.C. § 9613(j). Specifically, it provides that "the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." *Id.* at (j)(2). This means that the government's selected response action is

presumed valid unless the Defendants can meet their burden to demonstrate otherwise. *United States v. Burlington Northern R. Co.,* 200 F.3d 679, 692 (10th Cir. 1999).

As I concluded in a previous ruling, arbitrary and capricious are terms that describe the *manner* of remedy selection more than they do the result, although the two are often intertwined. "Arbitrary means the Government simply threw darts or flipped a coin, selecting the remedy without a basis in reason or science. Capricious means it rushed through the process or made a sudden, knee-jerk decision without hearing enough evidence." (ECF No. 498 at 7.) Of course no one expects that government officials are actually flipping coins or throwing darts; the point is that courts give the government agency significant discretion to select a remedy and will only overturn that remedy if it appears to be outside the bounds of what is reasonable. Moreover, the statute requires the challenging party to show that the remedy is arbitrary *and* capricious. This is perhaps a technical point, as the two often go hand-in-hand, but it underscores Congress' sensible policy of leaving decisions like remedy selection to agencies that have the technical expertise and experience to render them. As this particular administrative record reveals, no court in the land has the ability or expertise to even scratch the surface of the detail and study needed to craft a remedy in the first instance. Instead, judges are asked merely to provide a check on what would otherwise be the largely unrestrained power of the executive agency. I now turn to the motions filed by three separate groups of defendants.[3]

[3] Although NCR filed a motion on its own, there is substantial overlap between those joining the briefs supporting the other two motions. The arguments are divided in part because some parties participated in the remedy selection process and thus have a somewhat compromised ability to effectively challenge it.

B. NCR

Defendant NCR focuses its remedy challenge on the process the agencies used to impose its most recent remedy changes. Specifically, it argues that the changes imposed in 2010 were "fundamental" changes that required the issuance of a formal ROD amendment rather than the Explanation of Significant Differences the agencies used.

As suggested above, the applicable regulations provide for two alternatives when a remedy requires significant changes:

> (2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency shall consult with the support agency, as appropriate, and shall either:
>
> (i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:
>
> (A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under §300.815 and the information repository; and
>
> (B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or
>
> (ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost.

40 C.F.R. § 300.435.

Thus, under subsection (ii), an amendment to the ROD is required if the differences "fundamentally alter the basic features of the selected remedy." *Id.* In a previous decision and order

addressing the governments' motion for a preliminary injunction, I agreed with the governments that the cost increases adopted in the ESD likely did not amount to a fundamental change in the basic features of the remedy and thus found that the Defendants had a low likelihood of success on that argument. Little has changed since then.

NCR argues that a 62 percent increase over prior estimates—more than a quarter of a billion dollars—is a fundamental enough change to require issuance of a ROD amendment. In fact, the cost of the *increase* is itself greater than the cost for almost every CERCLA cleanup ever undertaken, and, according to NCR's expert, the increase exceeds that of *all* cost increases combined on Superfund sites between 2004 and 2005. (ECF No. 501-1 at 10 n.25.) In Mr. Zelikson's opinion, based on more than 25 years at EPA, a cost increase of this magnitude would require an ROD amendment, public comment, and review of other remedial options. The EPA's own guidance suggests that an amendment would be required when there was "an appreciable change or changes, in the scope, performance, and/or cost."[4] In fact, he suggests, the governments implicitly conceded as much when they issued an ROD amendment in 2007, which had the same 62 percent cost increase.

Although the experts Jeffrey Zelikson and Paul Fuglevand add more context to the issue, I remain satisfied than an ROD amendment was not required and that genuine issues of material fact do not exist. (ECF No. 501-1; 519-2.) First, the key language in the regulation uses not one but two stark and related terms: "fundamental" and "basic." For an amendment to "fundamentally alter the

[4] "A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents"; EPA 540 R 98 031, July 1999, at 7.2, available at http://www.epa.gov/superfund/policy/remedy/rods/pdfs/guide_decision_documents_071999.pdf (last visited November 16, 2012).

basic features" of a remedy, the change must be so drastic that the *essence* of the remedy—its *basic* features—has been "fundamentally" changed. Such a change is not just significant or even crucial, but must go to the very core or definition of what the remedy is. When something is merely more expensive than predicted, it does not change the "basics" of the remedy unless the change is truly a drastic one.

Second, the EPA's own guidance document, relied on by Zelikson, does not suggest that the recent changes were fundamental. In a non-exclusive set of examples, the document lists only as "significant" a situation involving a "large increase in cost." *Id.* (*see* footnote 2) at Highlight 7-1. For example, if "[s]ampling during the remedial design phase indicates the need to significantly increase the volume of contaminated waste material to be incinerated . . . thereby increasing the estimated cost of the remedy," that would constitute a "significant" but not "fundamental" change. By contrast, the guidance lists a number of examples of "fundamental" changes, but none of these are based solely on cost overruns. Instead, the examples of fundamental changes tend to involve changes to the *nature* of the remedy, for example, from a soil-washing or natural attenuation remedy to an excavation remedy. *Id.* Thus, when in 2007 the EPA decided to issue an amendment rather than an ESD, it likely did so because it had changed from a purely dredging remedy to a hybrid remedy employing capping as well. The fundamentals of the remedy *were* changed in 2007. Here, by contrast, there were no material changes to the nature of the remedy, the changes only went to estimates of what the remedy would cost. Thus, the very guidance NCR relies on does not support its argument that the cost increase was *per se* a fundamental change. Ultimately, it is doubtless true that the *cost* of the remedy is everything if you're the one paying for it, and 62 percent is undeniably a very expensive change. But cost is hardly dispositive of the triggers set forth in the applicable

regulations, which consider many things other than cost, including the method of remediation, the public impact, feasibility, and the like. After all, these are the sorts of other factors that might be amenable to public comment, which is the very purpose of the ROD amendment procedures in the first place. Public comments on increased cost are likely to be limited to the predictable and well-known protests from the companies who have to shoulder the burden.

United States v. Burlington Northern is not to the contrary. There, the Tenth Circuit determined that a cost overrun of roughly 60% fundamentally altered the remedy and that the EPA should have issued an ROD amendment. 200 F.3d 679, 694 (10th Cir. 1999). But once again, the remedy change there was not a "mere" cost increase but a change in the nature of the remedy itself. For example, instead of remediating tar sludge, the sludge was incinerated at an increased cost of roughly one million dollars. Incineration had been part of the original ROD, but it was eliminated in an amendment after it proved too costly. Thus, the change to the incineration remedy that had already been rejected, was, in the district court's words, a "significant deviation from the selected remedy." *Id.* at 692. The Tenth Circuit agreed: "[t]he EPA acted arbitrarily and capriciously by failing . . . to propose an amendment regarding the significant cost increase associated with the additional boxes of liners and the tar heels and by failing to propose an amendment regarding the decision to incinerate rather than remediate a significant amount of the impoundment sludge." *Id.* Thus, the change in *Burlington Northern* involved not just cost but a fundamental change in the nature of the remedy itself—just as in 2007, when the agencies in this action issued a ROD amendment.

Finally, as I found in a previous decision, the 62 percent cost increase does not stand in a vacuum. Recall that the original estimates had already built in a very large "fudge factor" that

would account for as much as a 50 percent cost overrun. The original 2007 estimate was $432 million in 2009 dollars. (ECF No. 501-1 at 18, Table 1.) Adding 50 percent onto that figure results in a maximum estimate of $648 million. In the 2010 Explanation of Significant Differences, the new estimate was $701 million, "only" $53 million more than the original estimate, or about eight percent.[5] Thus, when we include the original fudge factor into the comparison, the 2010 cost increase was only eight percent higher than originally proposed. NCR has not cited any cases or guidance that would even come close to suggesting that an eight-percent overrun constituted a "fundamental" change in the project.

Perhaps recognizing that the math is against it, NCR argues that by 2007 the remediation process had become much more concrete and thus it was not reasonable to build such a large amount of wiggle room into the estimates. The estimate, in its view, should have only included a +15 percent figure, not +50 percent. But that is nothing more than Monday morning quarterbacking. The fact is that, by NCR's own admission, this is a project of unique scale and complexity, and the +50 percent range *was* built into the 2007 estimates. The question in 2010 was not what the estimate range in 2007 *should* have been, it was whether the new estimates were fundamental changes to the estimate that *had* actually been provided in 2007. When we are reviewing changes to estimates to determine how large the change is, it does not make sense to go back and reexamine the original estimate to determine what it should have been. The only salient question is what that original estimate *was*. In sum, the language of the regulations and the EPA's own guidance suggests

[5] NCR is correct in some sense that a 62 percent increase is 24 percent higher than a 50 percent increase, but the salient comparison here is not between the two percentages of increase but between the increases *plus* the original amounts. Thus, we compare 162% (the actual estimate) to 150% (the original estimate) to find that the 2010 figure was only eight percent higher than the estimate (12 divided by 150).

that a cost increase, even a "significant" one, does not necessarily trigger the need to issue a ROD. And the fact that the applicable estimate included a very large amount of flexibility brings the changes proposed in 2010 much closer to that estimate. In sum, I conclude that the EPA did not err in issuing an ESD rather than an amendment to the ROD.

C. Glatfelter and Other Defendants

1. Delegation to the WDNR

Some Defendants, led by Glatfelter, argue that the EPA failed to properly delegate authority to the Wisconsin DNR to conduct the remedial investigation and feasibility study ("RI/FS"). CERCLA itself allows the EPA to designate a state to take the lead in a remediation project like this one, but in this case the EPA did not formally do so. "Absent an express delegation by the EPA, a state has no CERCLA authority." *W.R. Grace & Co.-Conn. v. Zotos Intern., Inc.,* 2005 WL 1076117, *4 (W.D.N.Y. 2005). Section 104(d)(1) of CERCLA provides:

> A State or political subdivision thereof or Indian tribe may apply to the President to carry out actions authorized in this section. If the President determines that the State or political subdivision or Indian tribe has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 9605(a)(8) of this title and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the State or political subdivision or Indian tribe to carry out such actions. The President shall make a determination regarding such an application within 90 days after the President receives the application.

42 U.S.C. § 9604(d)(1).

Because there is no formal contract or cooperative agreement in the administrative record, Glatfelter argues that the State of Wisconsin lacked the authority to conduct the remedial investigation and feasibility study. Without a formal delegation of authority, state officials answered to the Governor, not to the President, and it was thus arbitrary and capricious for EPA to

have relied on the state's RI/FS in selecting the remedy. Although CERCLA grants a great deal of authority and deference to the EPA in such matters, Glatfelter argues that it does *not* do so to state agencies that have no formal contractual relationship with EPA.

The agencies argue that there was, in fact, a cooperative agreement in place. In 1998, the WDNR submitted s "Superfund Fox River Cooperative Agreement Application" to the EPA, and it was quickly approved in February 1998. The agreement provided as follows:

> The purpose of this Superfund Cooperative Agreement is to develop a scientifically sound and defensible risk assessment (RA), remedial investigation / feasibility study (RI/FS) and to afford the appropriate levels of public participation for this part of the federal Superfund process. . . . The goal is to compile the data necessary to select an approach for site remediation and then to use this information in a well-supported Record of Decision (ROD).

(ECF No. 620-1 at 21.) Among other things, the Cooperative Agreement noted that "CERCLA section 104(c) requires that CERCLA-funded actions provide a cost-effective response, balancing the need for protection of public health, welfare, and the environment against the availability of amounts from the fund to respond to other sites." (*Id.* at 11, ¶ 6.) It further provided that "[a]ll activities conducted under this Agreement shall not be inconsistent with the revised National Contingency Plan (NCP)." (*Id.* at 12, ¶ 13.) The agreement was signed by George Meyer, DNR Secretary, and William Muno, Director of the EPA Superfund Division, Region 5. (ECF No. 620-2.)

The Defendants argue that this "Cooperative Agreement" is not actually a cooperative agreement. A number of their arguments apparently resulted from some confusion in the record, however, which a corrective letter from the government has now explained. (*See* ECF No. 621.)

The Cooperative Agreement refers to CERCLA's requirements and was signed by appropriate government officials. All of the correspondence refers to the document as a cooperative agreement, and the cover letter from the DNR Secretary describes it as a "Superfund Fox River Cooperative Agreement." (ECF No. 620-1 at 1.) The agreement refers to the "goal" of producing a Record of Decision by conducting a feasibility study and risk assessment. (*Id.* at 21.) The fact that the DNR was motivated to become the point agency on the project by certain local political considerations does not change the fact that this was a cooperative agreement. Presumably in every case in which a state agency takes the lead, it does so because its governor has determined that his state's public is best served if the state is involved. That the governor might not have the specific nine CERCLA criteria in mind when directing his DNR to take the lead is hardly surprising.[6]

The Defendants also argue that even if the agreement is considered a proper cooperative agreement, its absence from the administrative record means that it cannot be considered at this stage of review. But a cooperative agreement between a state and the federal government is not part of the decision-making process that a court reviews. It is a legal precursor to that process, perhaps, but its substance will be reviewed (if at all) *de novo*, rather than with "deference" to the agency. If a proper agreement exists, it does not need to be part of the administrative record in order for a court to conclude that the lead agency actually had the authority to conduct the remedial project.

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[6] There has been some late wrangling about the Cooperative Agreement, due to its very recent inclusion in *this* record (ECF No. 620-1) by the United States. Some Defendants have protested the new document the government filed. (ECF No. 623.) Given the flurry of activity in advance of trial and the lateness of the submission, the Defendants may take any additional discovery on the document they reasonably need after the trial. If it appears that there is some basis to question the document's legitimacy, they may ask for reconsideration on this point as part of their post-trial submissions.

Any other result (for which there is no precedent) would needlessly elevate technical minutiae over substance.[7]

2. WDNR's Assumptions About Dredging and Reliance on WDNR's RI/FS

Glatfelter and some of the Defendants also argue that the WDNR made overly optimistic assumptions about the efficacy and cost of dredging. For example, the WDNR assumed that the cleanup would result in a SWAC (surface weighted average concentration) of 0.25 ppm, a level that had never been obtained in river dredging projects. When assumptions about the effectiveness of a given remedy are overly optimistic, it skews that remedy selection process by placing too much weight on that remedy, regardless of cost. These Defendants also argue that the cost estimates were optimistic as well. Thus, when the remedy is deemed more effective and less expensive than it actually is, the resulting selection is doubly skewed.

The government argues that the SWAC estimates were reasonable. Although the initial estimates of a 0.25 ppm have proved unattainable, that was one of the reasons the ROD was amended in 2007. The ROD Amendment explained:

> Recent experience with dredging in OU1 and other projects has shown that dredging equipment cannot completely remove contaminated sediment from dredged areas. Thus, residual contaminant concentrations often remain after dredging is completed in an area. For that and related reasons, the dredging remedy selected by the 2003 ROD probably would not achieve the PCB Surface Weighted Average Concentration (SWAC) goals established by the 2003 ROD.

(ECF No. 404-3 at 8, ¶ 5.)

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[7] Even if such a document *were* required to be part of the administrative record, that would present a suitable opportunity to supplement the record to include it. Unlike the "supplements" proposed by the Defendants, which consisted of *new* information and opinions, this document was actually in existence and is a proper candidate for supplementation.

The ROD Amendment further explained that experience had shown that, even if the dredging had been done down to the 1.0 ppm level, the dredging process re-deposits some PCB-containing sediment in a this layer on top of the dredged area. That amount of residual PCBs would increase the SWAC calculation. In addition, experience had shown that there would remain a small amount of PCBs on the surface of *un*dredged areas (areas with less than the 1.0 ppm RAL). This small amount of residual PCBs, which had not been expected, would also impact the final SWAC estimate. (ECF No. 404-3 at 16.) These factors influenced the governments' decision to adopt the amended remedy, which included a significant use of capping (3.3 million cubic yards) and no longer relied exclusively on dredging. (ECF No. 404-3.)

The Defendants also argue that in 2007 the governments should have gone back to the drawing board and reevaluated the remedy from a fresh perspective. Although they determined that the new hybrid remedy was more efficacious than the 2003 all-dredging remedy, they failed to consider a more extensive capping remedy once they learned, through experience, that their estimates about the virtues of dredging had proven overly rosy. This is especially true given that the Plaintiffs acknowledged in 2010 that capping, sand covering and dredging would all meet minimum requirements for long-term protectiveness and permanence.

Yet even if the governments took a more favorable view towards capping in 2010 than they did in 2003, it does not show that the dredging-plus-capping remedy was arbitrary and capricious. As the 2010 Criteria Analysis Memorandum explains, there were other considerations. Primary among these is the fact that dredging actually *removes* the toxic PCBs from the River for all time and places them in a secure off-site facility. (ECF No. 147-2 at 3.) Even if caps provide an adequate solution, they will require maintenance in the long-term, and these long-term costs are less

certain than dredging (although OU1 capping costs might have provided some guidance). Caps can also affect the navigability of the River in shallow areas or shipping channels, which adds further uncertainty especially if the water levels would decline. The CAM further explained that sand covering, like capping, reduces PCB concentrations but does not remove the PCBs from the River. Finally, as the original ROD noted, capping could be susceptible to catastrophic events like floods. (ECF No. 404-2 at 124.)

Ultimately the Defendants do a convincing job of showing that capping was not as unfavorable an option as it seemed in 2003. They also have explained that dredging was not as effective at lowering PCB levels as had been hoped. But that is a far cry from showing that the remedy actually imposed was arbitrary and capricious. The documents cited above reveal that the agencies conceded that their original SWAC estimates had not borne out, and they show that they adapted by choosing a remedy that included more capping in order to save costs. The agencies also conceded throughout this process that dredging was not a panacea: it could disrupt long-dormant PCBs and redistribute them, which would result in some resuspension of the PCBs. (*See, e.g.,* ECF No. 404-2 at 142.) Similarly, the agencies found that many of the risks of capping could be mitigated. (*Id.* at 124.) The Defendants have suggested throughout that the agencies had an irrational bias in favor of dredging, but the documents show that the agencies frankly and extensively considered the costs and benefits of *both* methods of remediation. It was not as though the agencies believed dredging was an "A+" solution and capping was an "F"—instead, it was clear that they adopted a mild preference for the benefits of dredging and viewed these as being worth their added expense. It is of course natural that those who have to bear the expense would disagree, but the agencies explained that the hybrid remedy selected was the most cost-effective because it

balanced the permanence of dredging with the cost savings of capping and sand covering in places that were more amenable to those remedies, such as areas with deposits of sediment covered by clean sediment. (ECF No. 147-2 at 4-5.) Their explanations are common-sense ones: removal of PCBs is inherently better than trying to contain them, even if the dredging solution is not perfect. This solution speaks to more than the mechanical cost-benefit ratio that the Defendants rely on. That is, although the Defendants can cite the virtues of capping versus dredging, these cannot overcome the inherent advantages of dredging, namely the "permanence" of the solution, which has not just a scientific but common-sense appeal as well. The "insurance" provided by actually removing the toxic PCBs from the River is not an insignificant consideration. The NCP says that the "purpose of the remedy selection process is to implement remedies that *eliminate*, reduce, or control risks to human health and the environment." 40 C.F.R. § 300.430(a). That the agencies chose a remedy that eliminates much of the risk in some parts of the river and reduces it in others is not irrational.

3. Reliance on 1 ppm Remedial Action Level

Finally, Glatfelter argues that reliance on the 1 ppm RAL was arbitrary and capricious because it adopted a "one size fits all" approach to the River. PCBs are harmful only inasmuch as humans are exposed to them. Exposure risks differ depending on which part of the River we are talking about. For example, sediment that is buried deep in the riverbed is much less risky to humans than sediment near the surface because the buried sediment is less likely to be ingested by fish. As such, the Defendants argue that requiring a 1 ppm level for each type of PCBs is arbitrary because it treats differing risks in an identical manner.

This objection was raised and addressed ten years ago. In a White Paper, the DNR explained that the RAL is only one factor used in achieving an appropriate "healthy" level of PCBs in the water. (ECF No. 578-9.) It was not as though the government actually believed all PCBs were equally dangerous; instead, it used the 1 ppm level as a metric that would impact the other thresholds such as sediment quality and SWAC. In other words, removing sediments that had 1 ppm or greater was deemed crucial in achieving the sediment quality and SWAC numbers the government deemed important for public health. (*See, e.g.,* ECF No. 439-12 at 96.) "Studies conducted as part of the Lower Fox River and Green Bay RI/FS indicate that a 1 ppm RAL shows the greatest decrease in projected surface water concentrations relative to the other action levels." (*Id.* at 97.) Nowhere does any agency suggest that it believed all PCBs, wherever buried, were equally dangerous. Accordingly, Glatfelter's motion will be denied.

D. Menasha and Other Defendants

1. Assumptions about River Temperature

Menasha and some of the other Defendants argue the remedy was arbitrary and capricious because the agencies used an average water temperature of 20 degrees (Celsius) in their model, called the FRFood model. In warmer months, the River might be that warm or even warmer, but in the colder months temperatures are near-freezing and bring the average temperature down much lower than 20 degrees.

Menasha argues that this is not an academic point about water warmth but about the danger of the PCBs as a toxin. As noted above, PCBs are dangerous to humans primarily because fish consume the PCBs and then humans consume the fish. In warmer temperatures, fish consume more food than they do in colder months, which means they ingest more of the PCBs that are lingering

in the River sediments. According to Menasha, if the temperature is overstated in the model, the model will also overstate the amount of food fish eat and thus the amount of PCBs they ingest. In short, Menasha believes the assumption about a higher river temperature improperly boosted the level of fish toxicity and thus exaggerated the dangers of PCBs overall. And when the dangers are exaggerated, so is the response.

The agencies argue that their FRFood model was tested and provided accurate results of PCB accumulation, and they suggest that the Defendants' focus on a single data point misses the boat entirely given the deferential level of review to be applied here. The agencies note that the model was based on a model developed for Lake Ontario, which has been successfully applied to predicting PCB concentrations in fish elsewhere. The 2002 Final Model Documentation Report explains that, although the Lake Ontario model was developed for use in lake systems, "the mathematical relationships have been successfully applied to predicting fish tissue concentrations in some river systems." (ECF No. 578-13 at 4-5.) "Applications of this model in other systems include derivation of bioaccumulation factors, bioconcentration factors, and food chain multipliers in the development of the Great Lakes Water Quality Initiative criteria." (*Id.*) The Report further explained that although the model had overpredicted PCB concentrations in some fish, in other fish it had underpredicted. Ultimately, the model was deemed suitable based on its prediction of observed fish tissue concentrations in the Fox River as well as the Sheboygan and Hudson Rivers. (*Id.* at 4-6.)

Although the Defendants are undoubtedly correct that 20 degrees is not the actual average temperature of the Fox River, I am satisfied that the figure is not so far off that it materially impacted the choice of remedy. If the summer months are 20 degrees or warmer, that means the

model actually under-predicted PCB consumption for those months, which would partially balance out any error that occurred during the winter. More importantly, the agencies have explained adequately how the entire model has been used elsewhere in similar climates with success. It cannot be overstated that when a reviewing court is viewing these sorts of issues through arbitrary-and-capricious lenses, it is typically not enough to argue that a single data point or assumption was erroneous or that it could have been more accurate. And when the matter is as complex as predicting fish toxicity based on releases of PCBs into a dynamic river system decades earlier, it will require more to show that the governments' approach was so unreasonable as to render it arbitrary and capricious.

2. Octanol-Water Partitioning Coefficient

Relatedly, Menasha argues that the agencies used an improper value to measure the toxicity of the PCBs in OU1-OU4. In short, not all PCBs are equally harmful. In OU5, for example, the WDNR used an approach to remedy selection that was tailored to the PCBs that were actually in the Site. This produced what is known as a "log K_{ow} value" of roughly 5.6 to 5.7. By contrast, for OU1-OU4, the agencies adopted a log K_{ow} value of 6.6. These values are measured on a logarithmic scale, meaning that an increase in 1 is actually a 10-fold increase.

The log K_{ow} value, according to Menasha, is one of the most important factors affecting how PCBs move through the environment. (ECF No. 557, ¶ 89.) The figure measures a chemical's tendency to dissolve in water, which can be indicative of how the chemical accumulates in the fatty tissue of fish. The 6.6 figure appears to have come from one of the models used in the remediation of Lake Ontario (described above), and because the makeup of PCBs at that Site is different from that of the Fox River Site, the Defendants argue that the figure should not have been used to create

a remedy. Practically speaking, according to Menasha, the difference in the 5.6 versus 6.6 log K_{ow} values resulted in a dredging remedy for OU1-OU4 but a "monitored natural attenuation" remedy (no dredging) for OU5.

The agencies explain that the 6.6 log K_{ow} value they used in some of the model runs did not exaggerate PCB accumulation in fish tissue. Log K_{ow} values between 4.4 and 8.2 were found in the River, and thus 6.6 was well within the range actually observed. (Aroclor 1242 is listed at 6.3.) (ECF No. 578-15.) And the fact that a 5.6 figure was used in some applications while 6.6 was used in others is not dispositive of anything because the lower value was used to determine the transfer rate of PCBs between blood and water in fish gill tissue, and that value was specific to the species of fish.

I am satisfied once again that the Defendants have not adequately explained why a figure of 6.6 would have been improper, much less arbitrary and capricious. As the agencies note, there is little science behind their argument, and the suggestion that the 6.6 figure actually impacted the remedy selected is wholly speculative. Put another way, there is little scientific basis to conclude that a different figure would even have been more appropriate, and as such it is impossible to find that the use of 6.6 was arbitrary and capricious.

3. Model Calibration

Menasha also argues that the model was not calibrated properly (or at all) because it had failed a key test in the calibration process. According to the 1998 Technical Memorandum 1 (the "Tech Memo"), the model had to be within plus or minus 30 percent of the conditions actually observed in the Fox River. (ECF No. 557-60.) Moreover, the model had to be able to be "hindcast"

to compare its predictions to the conditions actually observed over time. According to the Defendants, the model failed these calibration tests.

The agencies note, however, that the calibration methods detailed in the Tech Memo were not an exhaustive series of pass-fail tests. That is, the methods and metrics described were to be viewed *in toto* in order to determine whether the model would be adequately predictive. (ECF No. 568-1 at 2-3.) The Tech Memo did not say, in other words, that "failing" a single metric would necessarily disqualify a model.

Even so, according to the Model Development Report, the model did meet the 30 percent threshold for data within the water column, even if it did not do so for data derived from sediment. (ECF No. 568-2 at 1.) The Report elaborates:

> Relative differences for the sediment column were much larger [than plus or minus 30 percent]. Nonetheless, the wLFRM was able to capture the trend and magnitude of inferred PCB concentration changes over time in surface sediments. Given these considerations, the wLFRM calibration was judged to adequately meet the criteria identified in Technical Memorandum 1.

(*Id.*)

The Report further explained that quantification of PCB concentration trends in sediment was a "complex process." (*Id.* at 63.) Addressing the failure to achieve much success with sediment, the Report notes that the sediment samples were not collected with an eye towards estimating PCB trends over time. Moreover, the Report identified a number of "caveats" with sediment data, including "[d]ifferences attributable to spatial heterogeneity, temporal variability, and analytical bias confound direct analysis and makes clear identification of possible trends challenging." (*Id.*)

The report as a whole indicates that the agencies considered the problems of sediment data and concluded that the prospect of *ever* having adequate results with such data was dim, given the complexities and caveats the Report identified. In actuality, given the obvious complexity of the task, the process was the opposite of arbitrary and capricious. Instead of pretending the problem didn't exist or attempting to obscure it, the agencies explained the issue and further articulated why it wasn't fatal to their adoption of the model. The Report evidences not arbitrariness but care and concern that a record be made identifying the problem and the agencies' response to that problem. And of course the very metrics the Defendants now cite were never intended to be disqualifying in the fashion they suggest. Calibration means running the model through a series of tests and then determining whether the final result warrants approval; it does not mean that performance on a single test would throw the entire model out the window, particularly given the inherent difficulties the agencies identified at the time with that particular metric. The calibration described in the Report could be analogized to a job posting in which the employer identifies a number of criteria it is looking for in a candidate. In some cases a given criterion could be disqualifying, for instance if the applicant lacks a needed license or certification. But others are more flexible and, depending on the circumstances, a weak performance in one area could be overcome by stronger performances in others. The Defendants portray calibration as though it were a pre-launch NASA safety punch list, in which the slightest discrepancy will ground the shuttle. Instead, calibration, as the administrative record itself explains, is a more nuanced process designed to deal with a very complex issue. Focusing very narrowly on a single criterion—which the agencies themselves did not view as disqualifying—does not under these circumstances suffice to generate a genuine issue

of material fact. Viewing the model calibration as a whole, it is clear that the agencies had ample reasons for believing it to be adequately predictive.

In sum, viewing the process through the narrow lenses Menasha proposes, it would be hard to imagine a remedy *ever* being satisfactory. Finding answers to problems as complex as the ones at issue here will be never be easy or without controversy. But, as I have emphasized repeatedly above, it is not enough to point out issues here and there that might be arguable—the challenger must point to fundamental flaws in the process that are suggestive of arbitrariness and caprice. The ones identified above do not even come close. In reviewing the administrative record, I have found an almost breathtaking level of scientific detail and careful analysis supported by palpable evidence of the incredible effort brought to bear by countless agency employees and hired scientific advisors.

4. Cost Contingencies and Estimates

Finally, Menasha argues that the remedy selection was arbitrary and capricious because it failed to include important cost contingencies and failed to account for certain dredging costs. Menasha's argument on cost contingencies is supported by little other than misquoted EPA guidance suggesting that cost contingencies may be appropriate in some circumstances. The "guidance" document it relies upon explains on the very first page that "it does not impose legally binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the specific circumstances." (ECF No. 536-6 at i.) Without citation, and despite this cautionary language (as well as the fact that the document is described merely as "guidance"), Menasha argues that the guidance document says that such contingencies are "required" (ECF No. 557 at ¶¶ 109-110) and "must be included." (*Id.* at 114.) I cannot find any

basis in law to conclude that a failure to include cost contingencies could be deemed arbitrary and capricious.

Defendants also argue that EPA and WDNR erred by failing to include a cost estimate associated with overdredging in the 2003 ROD. "Over-dredge" is the material dredged several inches below the sediment believed to actually contain PCBs. Several inches of over-dredge adds up to lots of material when we are talking about a massive riverbed. By failing to account for all of the costs associated with dredging this extra material, the 2003 ROD was off by some $176 million, according to the Defendants. In addition, Defendants argue that the agencies underestimated the per-unit costs of dredging in the 2003 ROD, which improperly tipped the scales in favor of a dredging remedy.

The agencies note, however, that the 2003 remedy is not the remedy that was actually adopted. Instead, a hybrid remedy was adopted after the 2007 ROD Amendment and 2010 ESD. When this replacement remedy was ultimately adopted, over-dredge costs were included. In fact, it was this information, along with other information learned about the nature of other PCB deposits, that led to the ROD Amendment in the first place. It is thus unclear how any errors in the original ROD, which was not imposed, could be deemed arbitrary and capricious. As discussed earlier, the point of ROD Amendments and ESDs is to modify earlier models and remedy selections, and as such an original ROD is simply an initial step in the process.

As for the cost estimates themselves, the Defendants argue that the agencies ignored the actual costs incurred for dredging at other sites, including the pilot projects undertaken on the Fox River itself. Other projects cost hundreds of dollars per cubic yard ("cy"), and the average cost per yard on the Fox River itself had been $318 in the pilot projects. Nevertheless, the agencies adopted

a cost estimate of only $44 per cubic yard. They explain that the vastness of this project would lead to large economies of scale not seen in other, smaller, projects.

Once again, however, it is unclear why any errors made in the earliest cost estimates would result in a finding that the ultimate remedy selected was arbitrary and capricious. Later estimates, which were adopted, accounted for the increased costs that experience had borne out. In fact, it was the increased dredging cost estimates (including large volume increases) that caused the agencies to adopt a hybrid remedy employing much *less* dredging than had originally been planned. (ECF No. 404-3 at 27.) Thus, to focus narrowly on an original estimate of cost on a per-cubic-yard basis does not make sense when the entire project was changing over time and when the ultimate remedy was not based on the offending estimate in the first place. For these reasons, Menasha's motion for summary judgment will be denied.

D. The Plaintiffs

Above I have addressed the reasons why the Defendants' motions for summary judgment will be denied. Although they argue that the governments' motion for summary judgment cannot be granted because genuine issues of material fact remain, they do not elaborate on what those facts might be. After all, the review at this stage is limited to the administrative record (i.e., paper), making the matter amenable to summary judgment (as their own motions on that score appear to concede).[8]

Having found that the Defendants have not met their burden to demonstrate that the remedy was arbitrary and capricious, it follows that the governments' motion for summary judgment will

[8] As noted earlier, I have reviewed the reports of the two experts I allowed to testify on a limited basis regarding costs and conclude they do not raise a genuine issue of material fact requiring a trial. (ECF No. 501-1; 519-2.)

be granted and the remedy must be upheld. Even so, it is worth fleshing out my conclusion that the governments are entitled to summary judgment. The discussion above only scratches the surface of the complexity involved in crafting a remedy for such a difficult problem and in meeting the demands of the public and the PRPs themselves, many of whom participated in the remedy selection process. The comments received during this process were answered and the concerns were addressed. That the PRPs did not win the day on many of their proposals is not surprising.

Many of the Defendants appear to view their failure in the debate over capping and dredging not as a product of an honest disagreement among professionals and public servants but as the result of some sort of nefarious government plot perpetrated by individuals who put their thumb on the scales in favor of dredging at the very earliest stages and then buried their heads in the sand to avoid coming to grips with dredging's costs and limitations. If there were evidence of such a phenomenon, I would certainly consider granting the Defendants' motions or at least holding a trial on the matter. However, as discussed above, the record is simply devoid of any such evidence. The remedies were crafted by countless individuals—not just in the government but at private environmental contractors—and of course the process spanned more than a decade and involved both state and federal officials. On that score alone, it is simply implausible to believe that so many different individuals could come up with a result that was based solely on an irrational prejudice in favor of dredging.

Of course we do not have to speculate about the agencies' motives because we have an extensive administrative record. Were results fudged? Was data hidden? Were shortcomings glossed over and were successes trumped up? No. The Defendants have cited a few instances where data input (e.g. temperature) was not perfect, or where a model did not perfectly calibrate,

but in a fantastically complex process like this perfection is unattainable. The record reveals that rather than some kind of irrational bias against capping, the agencies were readily admitting that capping had certain advantages and that dredging was not a perfect solution. The agencies frankly conceded that capping was a "feasible" solution that "can be effective in reducing the risks posed by PCB-contaminated sediments at the Site." (ECF No. 147-2 at 3.) The Defendants point to this clause as though it should end all discussion on the matter, but they ignore the fact that the agencies cited other reasons (on the very same page, in fact) why capping was *not* preferred and why dredging was superior. The record demonstrates that the governments gave an honest assessment of the pros and cons of the different types of remedy, and in fact they *agreed* with the remedy proposed by some of the Defendants when they adopted a remedy that included massive amounts of capping.

In short, the record demonstrates a colossal effort to "get it right" and to consider all options fairly and honestly—without prejudice, without arbitrariness and without caprice. And the Defendants have failed to acknowledge that their argument was always an uphill battle: no matter how one spins it, they were demanding that more poisonous chemicals be allowed to *stay* in the River. Although it is certainly conceivable that some of the Defendants' arguments might have carried the day during the remedy creation process (and some of them *did*), at this stage the only question is whether the governments were operating within the bounds of the law and whether their decisions and processes were rational ones given the array of choices they had to make and the complexity and scope of this unprecedented undertaking. I conclude that they were. For that reason, the governments' motion for summary judgment will be granted.

III. Conclusion

For the reasons given above, the Defendants' motions for summary judgment on the Fifth Claim for Relief (ECF Nos. 534 and 541) are **DENIED**. The Plaintiffs' motion for summary judgment as to propriety of the remedy (ECF No. 508) is **GRANTED**.

SO ORDERED this 21st day of November, 2012.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. et al.,

Defendant.

DECISION AND ORDER ON DEFENDANTS' LIABILITY

The United States has moved for partial summary judgment on the question of some of the Defendants' liability under CERCLA. (ECF No 549.) NCR has conceded liability under § 107(a), 42 U.S.C. § 9607(a), but other Defendants to whom the motion is addressed, P.H. Glatfelter, Inc. ("Glatfelter"); CBC Coating, Inc. ("CBC"); Menasha Corporation ("Menasha"); and WTM I Company ("WTM"), oppose. Although the liability of these Defendants (hereinafter collectively "the Defendants") has essentially been taken for granted throughout these proceedings, the Defendants at issue, all of whom had facilities in the upriver portion of the Site, have suggested that they might not be liable if their discharges did not give rise to response costs downstream of their facilities. It has been assumed throughout this action that although toxic PCBs did not flow *up*stream (at least very far), PCBs that were released in OU1 and OU2 were naturally carried *down*stream into OU4 and into Green Bay. Even if the amounts were small, it has been assumed that these releases rendered the upriver Defendants liable under CERCLA. The Defendants now

argue that only a minimal amount of PCBs were carried downstream, and these releases were not sufficient to cause the incurring of any response action in the lower portions of the Site. In other words, the amounts released from their facilities would not have been sufficient *on their own* to require a response. As such, they believe they cannot be liable under CERCLA for these downriver response costs.

As relevant here, liability under CERCLA § 107(a) requires (1) "release" of a "hazardous substance" from (2) a "facility," which (3) caused the incurrence of costs of response, and (4) the defendant owned, operated or arranged for disposal at that facility. 42 U.S.C. § 9607(a). Defendants argue that, read together, these elements require the government to prove that the release from a given defendant's facility specifically caused the incurrence of response costs. This "nexus" between the release from one location and the incurrence of response costs from another site is, the Defendants argue, part of the government's *prima facie* case. "In a 'two-site' case such as this, where hazardous substances are released at one site and allegedly travel to a second site, in order to make out a prima facie case, the plaintiff must establish a causal connection between the defendant's release of hazardous substances and the plaintiff's response costs incurred in cleaning them up." *Kalamazoo River Study Group v. Rockwell Intern. Corp.,* 171 F.3d 1065, 1068 (6th Cir. 1999).

The Defendants argue that their OU1 releases are neither necessary nor sufficient causes of the costs incurred in OU2 through OU5. Little Lake Butte des Morts (OU1) is a 1,200 acre reservoir of water that connects Lake Winnebago to the Lower Fox River. Water moves slowly within the Lake, and even within the Lake itself the portion that is downriver of the Defendants' paper mills did not need to be remediated. Thus, it should go without saying that a portion of the River that is

downstream by some 30 miles would not result in remediation costs that are attributable to the OU1 Defendants.

In a previous decision, I rejected the idea that PCBs released at Portage, Wisconsin into the *Upper* Fox River could give rise to liability in the *Lower* Fox River given the fact that the Lower Fox (the Site at issue here) is so far downstream and the fact that toxins released in Portage would have needed to travel a labyrinth of locks and dams, not to mention a large lake. Portage was simply not part of "the Site" as the government has defined it, just as Lake Huron is not part of the Site, even though technically the waters from the Fox flow into Green Bay and into the connected Great Lakes system. The OU1 Defendants note that PCBs can evaporate in the air and be carried by the jet stream to waterways all around the country, and yet no one would have the temerity to suggest that a polluter in California would be liable for the cleanup of the Hudson River in New York. So, too, they suggest, OU1 dischargers cannot be held liable for OU4 cleanup costs merely because some trace amounts of PCBs might have leaked into that section of the River. The government will not be able to show the required "nexus" between the OU1 PCB releases and the response costs incurred in OU4. For present purposes, Defendants argue that it is enough that there is a genuine issue of material fact as to whether their releases into OU1 resulted in the incurring of cleanup costs in OU4. As such, they believe the government's motion for summary judgment must be denied.

Indeed, Menasha even suggests that there is no evidence that it ever discharged PCBs at all. Menasha notes that the John Strange Paper Mill, which Menasha owned prior to 1983, never used NCR broke in its manufacturing process. In fact, NCR broke would have been a poor product to use to make the paperboard products the John Strange Paper Mill produced. But buy emphasizing

that it did not buy NCR broke, Menasha seems to concede, as Plaintiffs allege, that it would have released some amount of PCBs either to the lower Fox River or the Neenah-Menasha Sewerage Commission publicly owned treatment works ("NMSC POTW") as a result of recycling post-consumer mixed paper that would have contained some portion of NCR carbonless copy paper ("CCP"). (ECF No. 589, at 16-18.) More importantly, as Plaintiffs point out, Menasha has already admitted in its answer that it discharged PCBs and that it is liable under CERCLA sections 107(a)(2) and (a)(3). "Menasha admits that Menasha or its predecessor, the John Strange Paper Company, owned and operated JSPM which, in the manner discussed in its response to paragraph 82 above, inadvertently, unintentionally and/or unknowingly: (a) discharged waste water with very low levels of PCBs to the upper portion of OU-1 at the Menasha Channel; and, (b) arranged for treatment or disposal with the NMSC POTW waste water with very low levels of PCBs." (ECF No. 48, ¶ 84.) Given these admissions, Menasha's eleventh hour denial is insufficient to raise a factual issue as to whether it discharged PCBs directly or indirectly into the lower Fox River site.

Ultimately the Defendants' overall argument is unpersuasive. Holding an OU1 paper company liable for cleanup of the River is not the same as trying to hold it liable for cleanup of a distant waterway merely because some infinitesimal amount of PCBs evaporated into the air and was transported to, say, the Hudson River. Nor is it the same as a distant release in Portage, which no one has plausibly suggested was a source of the pollution at the Lower Fox River Site and is, in fact, *not* part of this Site. Here, the Defendants have admitted that some of their PCB-containing discharges made their way into OU4, but argue that the amounts were so small that they did not result in response costs. (*E.g.,* "WTM's direct discharges to OU1 are not enough to impose liability . . . for OU4." (ECF No. 596 at 7.); "A very great deal of solid material washes into the Fox River,

and those particles tend to contain very little PCB." (ECF No. 589 at 13.); "CBC will establish at trial that it did not independently contribute PCBs to the Fox River at anywhere near the level that would warrant remediation."))

The Defendants are essentially attempting to argue for a *de minimis* defense, which they concede does not exist in CERCLA. As the Eighth Circuit pointed out:

> at least at the liability stage, the language of the statute does not require the government to prove as part of its prima facie case that the defendant caused any harm to the environment. Rather, once the requisite connection between the defendant and a hazardous waste site has been established (because the defendant fits into one of the four categories of responsible parties), it is enough that response costs resulted from "a" release or threatened release-not necessarily the defendant's release or threatened release.

United States v. Hercules, Inc., 247 F.3d 706, 716 (8th Cir. 2001) (citation omitted).

In other words, there need be no "nexus" between a given defendant's release and a specific response cost incurred—it is enough that (a) the defendant released a pollutant and (b) response costs were incurred to clean up "a" release. If the defendant truly released a minimal amount, that speaks not to its own liability (for which there is no *de minimis* defense) but to whether that liability is divisible. It also plays a role in equitable contribution. In short, I agree with the United States that the arguments the Defendants now present are more of a "preview" of their divisibility arguments than an independent basis to conclude they are not liable.

CBC Coating is in a somewhat different situation. It argues that the governments did not plead a violation of CERCLA § 107(a)(2) (discharger liability) in their complaint and thus they cannot now obtain summary judgment on § 107(a)(2) liability. And even if they did plead it, CBC argues that there are outstanding issues of fact that would preclude summary judgment.

The governments referred to § 107(a)(2) in their amended complaint and specifically alleged

that CBC "owned an operated a facility at the time of disposal of hazardous substances at that facility, and there were releases from that facility to the Site." (ECF No. 30 at ¶¶ 58, 59.) Further, the governments inquired through the discovery process about direct discharges from CBC's facility (then known as Riverside Paper). Although the amended complaint also alleges discharges CBC made to the Appleton Publicly Owned Treatment Works ("POTW") (ECF No. 30, ¶ 57), the allegation of direct discharge is in the amended complaint. Even if it were not, I would allow an amendment to conform the amended complaint to the evidence.

The real question is whether summary judgment on liability may be granted to the governments even assuming it did plead § 107(a)(2) liability in its amended complaint. The Plaintiffs argue that the evidence is indisputable that CBC's wastewater contained PCBs and that it was discharged to the River, which seems quite plausible since CBC used recycled paper in its production process and did not connect to the Appleton POTW until 1972. Before then, and even after, CBC discharged into the Lower Fox River, consistent with its WDNR-issued discharge permit. (ECF No. 605, ¶ 6.) CBC focuses on the fact that only trace amounts of PCBs have been found in the wastewater it discharged to the POTW since it began testing for them in 1974. (*Id.* ¶¶ 7-9.) But this is hardly surprising since NCR stopped using PCBs in its CCP emulsion in April 1971. (*Id.* ¶ 3.) CBC also asserts that it did not start buying broke from NCR until about six months after NCR stopped using PCBs, but again, as with Menasha, a recycler did not need to buy NCR broke in order to discharge PCBs into the River. By the height of the NCR CCP production period, it presumably would have been difficult to avoid NCR paper if a company was recycling post-consumer mixed paper as CBC apparently was. Summary judgment cannot be based on presumptions and appearances, however, and the cited support for Plaintiffs' proposed findings of

fact leave me unconvinced that, as to CBC's liability, they are undisputed on the issue of whether CBC discharged PCBs either directly or indirectly through the Appleton POTW into the River. Nor has CBC conceded the point, unlike other Defendants. I am thus satisfied that CBC has shown the existence of material facts that preclude entry of judgment at this time on both the § 107(a)(2) and (a)(3) claims.

Finally, both WTM and CBC, somewhat inconsistently in light of the previous discussion, raise arranger liability issues. They argue that they cannot be held arrangers because they did not know their discharges to the POTWs were hazardous and thus they did not "arrange" for the disposal of hazardous materials. It is undisputed that WTM's discharges contained PCBs, and for purposes of addressing the argument, I will assume that CBC's did as well.

WTM analogizes this case to the companion *Whiting* action, where I concluded that the Appleton Coated Paper Company did not arrange to dispose of hazardous substances when it sold bales of seemingly harmless paper scraps for profit. But a key verb at issue in that case was the word "dispose." 42 U.S.C. § 9607(a)(3). Selling a valuable product (paper scraps, or "broke") is not readily described as a "disposal," particularly if the seller did not realize the product was hazardous in the first place. That is, if the product is worth something and is not considered dangerous, there is no reason for someone to "dispose" of it—they *sell* it. But here, there is no question that the matter "disposed" of was wastewater, which is, by definition, something that someone intends to "dispose" of. Accordingly, knowledge about the specific nature of the matter disposed of is far less relevant. I am satisfied that discharging wastewater qualifies as "arranging for disposal" under § 107(a)(3). *Burlington N. and Santa Fe Ry. Co. v. United States,* 556 U.S. 599, 610-11 (2009). Accordingly, the governments' motion for summary judgment on arranger liability

will be granted as to all Defendants except CBC.

In sum, the Plaintiffs' motion for partial summary judgment [549] is **GRANTED** in all respects, except that it is **DENIED** as to the issue of Defendant CBC Coating's liability under CERCLA § 107(a).

SO ORDERED this 23rd day of November, 2012.

/s William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. et al.,

Defendant.

DECISION AND ORDER ON RECONSIDERATION

Some Defendants have moved for partial reconsideration of my Decision and Order denying their motion to supplement the administrative record. (ECF No. 527.) A recent decision granting summary judgment to the Plaintiffs (ECF No. 666) has essentially mooted this motion, but I explain herein why the motion is denied.

The Defendants first ask that they be allowed to offer limited evidence from within the administrative record itself to argue that the models were not calibrated. I considered and rejected these arguments, based on the administrative record, in granting the Plaintiffs' motion for summary judgment. Accordingly, this request is moot. They further argue that Plaintiffs misrepresented the fact that the model was calibrated. Again, this turns on what the definition of "calibrated" is, a question I addressed in granting the Plaintiffs' motion for summary judgment. (ECF No. 666 at 23-26.)

Defendants also note that I cited extra-Record evidence in Dr. Zhang's declaration in my order denying their motion to supplement the record and suggest that this is inconsistent with the rejection of the extra-Record evidence they seek to offer. But I cited Dr. Zhang's declaration to explain what the record contains and why it is sufficient; not to add material that is not already part of the record. I likewise cited the arguments and evidence of Defendants' experts as to what the record was missing and why they thought supplementation was needed. (ECF No. 428 at 5.) Indeed, in an earlier order, I granted NCR's motion for reconsideration of the same decision and agreed to consider the expert opinion for the limited purpose of evaluating whether the U.S. Environmental Protection Agency and the Wisconsin Department of Natural Resources considered all relevant factors when they made their remedy decisions. (ECF No. 522.)

Finally, the crux of the Defendants' assertion is that the governments *knew* that the model was imperfect but went forward with it anyway. They have cited extensive amounts of emails among the key players that discuss, in sometimes frank terms, the model's strengths and shortcomings. The emails suggest that creating a complex model is a lot like making sausage, but ultimately they merely underscore what the administrative record already shows, which is that the model was an admittedly imperfect predictor of sediment. The documents *in* the administrative record explained these shortcomings, however. More importantly, the record also makes clear that calibration of the model was not a pass-fail type of arrangement. The Model Development Report explains in some detail how the calibration process was viewed and concluded that the model was deemed satisfactory despite the shortcomings the Defendants highlight. (ECF No. 569-2 at 86.) That there are some extra-record exchanges among the various scientists involved does not change any of these facts. For example, the Defendants cite a portion of the emails in which Mark Vellaux,

of the DNR, states that calibration of the model was "poor," but they leave out the portion indicating ways to improve it and indicating optimism about the model as a whole. (ECF No. 529-14 at 7.) Moreover, Vellaux' statement was not a final opinion about the model but merely a status update during the development process.

The rest of the emails evidence a thorough review of the problem by the DNR scientists and, if anything, underscore just how complex this entire process actually was. There is no suggestion that data are being fudged or covered up; instead, one gets the impression that this kind of decision is exactly the sort of technical, scientific decision to which courts are to defer. The scientific experts hashed out solutions to the various problems and even "harangued" each other. (*Id.* at 19.) As discussed in the Decision and Order granting the Plaintiffs' motion for summary judgment, the process was open and frank, and the limitations of the model with respect to sediment were not deemed to be a significant enough problem to hold up the calibration. Vellaux admitted that the "river model is not a perfect representation," and that subsequent analysis will "focus on those aspects of the model where performance is least strong." (*Id.* at 18.) But he believed the present model was a "good step forward" from previous efforts ands was usable for its intended purposes. (*Id.* at 19.) Snippets of private emails removed from their context in the development stage of the process do not overcome the whole picture, which shows that the key players were satisfied that the model was adequate despite the obvious challenges it faced. Their reasons for reaching that conclusion were neither arbitrary nor capricious.

In sum, although the emails are (naturally) more candid and casual in tone than the public documents, there are no "smoking guns" in the emails or other evidence now cited that suggest the result was the product of an arbitrary or capricious decision. Instead, the impression is that the

senders and recipients of the emails took the matter extremely seriously (the opposite of arbitrary) and engaged in extensive and deliberate efforts (the opposite of capricious). Accordingly, I conclude that there is no basis to supplement the record with any of the information or additional expert testimony the Defendants now propose. The motion for reconsideration [527] is therefore **DENIED**.

SO ORDERED this 27th day of November, 2012.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP. et al.,

Defendant.

DECISION AND ORDER ON MOTIONS IN LIMINE

1. Motion to Exclude Testimony of Mark Travers [533]

The Defendants named Mark Travers as a rebuttal expert to counter the expert testimony offered by the government's witness, Michelle Watters. The topic of testimony appears to be the dangers of PCBs to the environment and public health and involves means of abating that problem. These are largely questions of the proper remedy, a topic that has already been addressed through summary judgment. Accordingly, it appears that much this motion is now moot because the testimony which Travers would have rebutted will likely not be relevant (or will be less relevant). The government has not indicated that Watters will not testify, however, so I will reserve ruling until the scope of the testimony and rebuttal is more clear.[1]

[1]As I have noted already in another context, these rulings are subject to change in the event circumstances warrant revisiting the matters involved.

2. Motion to Exclude Testimony of John Butler [636]

Some Defendants have moved to exclude the testimony of NCR's expert John Butler on the grounds that his opinions are improperly based on the scientific work of others. They assert that Butler, who is not an expert in geostatistical modeling, used a geostatistical model to calculate the remediation that would have been required had NCR been the only discharger of PCBs. This model was crafted by a consulting firm whose employees are not disclosed experts in this litigation.

The Defendants argue that parties cannot incorporate scientific testimony into a case through the testimony of someone who is not an expert in that scientific field. In *Dura Automotive Sys. of Ind., Inc. v. CTS Corp.,* the Seventh Circuit held that the Supreme Court's *Daubert* test cannot be satisfied by one who is purporting to be "the mouthpiece of a scientist of a different specialty." 285 F.3d 609, 614 (7th Cir. 2002) (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)). It is common for an expert to incorporate the work of other experts into his own opinions (for example, a surgeon relying on a radiologist's opinion), but the testifying expert must limit himself to his own area of expertise. Thus, while the surgeon could use a radiologist's opinion in forming his own opinion, the surgeon could not testify about whether a radiologist committed malpractice; the substance and methods of the radiologist are outside the surgeon's area of expertise. *Id.*

In *Dura Automotive,* the proposed expert sought to testify that a facility was within the "capture zone" of a contaminated well field. Although the expert was a hydrogeologist, he admitted that he was not an expert in mathematical modeling, and the models upon which he relied for his opinion were created by other employees of his consulting firm. *Id.* at 611-612. Those employees were not disclosed as experts in a timely fashion, and thus their opinions were stricken. The Seventh Circuit found that it was obvious from the stricken affidavits that the models involved

significant technical expertise—expertise that the proposed expert lacked. Because the expert was not competent to opine about the model, and because the model was crucial to his opinion, he could not testify about his conclusions either. The court noted that the underlying models involved significant amounts of professional discretion and "tinkering," and so without testimony from the model-makers themselves, the expert's opinion would have "rested on air." *Id.* at 615.

NCR argues that the assistance Butler received was more ministerial than expert. The consulting firm's employees simply used existing data and software to produce a geostatistical map. I am satisfied that the matters raised in the motion *in limine* can be raised through cross-examination and are not sufficient to warrant exclusion of an expert outright, at least at this point, which would be a drastic remedy under the circumstances. This is a bench trial, and thus danger of prejudicing the jury is not present. I may either exclude the testimony based upon a more complete record or apply any objections to the expert's testimony in deciding the proper weight to give it. The motion will therefore be denied.

3. Motion to Exclude Undisclosed Expert Opinions of Dr. Craig Jones [641]

Some of the Defendants object in advance to what they fear will be new testimony offered by NCR's expert, Dr. Craig Jones. During a recent deposition, Jones indicated several times that, in response to the rebuttal report, he and his team had been continuing to modify his opinions and had been running additional tests to bolster his expert opinion. The Defendants argue that it would be unfair to allow surprise expert testimony offered so long after the expert reports were filed. And even though we are on the eve of trial, they still do not know what Jones' new work and / or testimony will comprise.

Although these objections are no doubt based on real concerns, I will refrain from ruling in

advance that any portion of this expert's testimony should be excluded. If it becomes clear that the expert is changing his opinions in a way that prejudices the other parties, the objection may be renewed at such time. For now, however, the motion is denied.

4. Motion as to the Admissibility of Certain Exhibits [645]

Plaintiffs seek admission of certain exhibits in advance of trial, but it appears that the parties are continuing to work together to produce an exhibit list and explore any objections that have arisen. Accordingly, I will deny the motion as premature.

5. Motion to Exclude Testimony Regarding John Strange Paper Mill [653]

Menasha has moved to exclude what it describes as speculative testimony regarding its mill's use of NCR paper in its production efforts. It states that it has substantial amounts of testimony from live witnesses who will explain that the mill never used NCR broke in its production process, and in fact it would not have made sense to do so. In contrast, the experts who have suggested otherwise are relying merely on speculation and have no inside knowledge of the John Strange mill's internal operations.

Once again, I am satisfied that the objection raised goes to the weight of the evidence rather than its admissibility. If the evidence is truly "speculative," that can be the subject of cross-examination, particularly in a bench trial. NCR is correct that the relief sought essentially seeks a ruling on the merits of the issue, and I conclude that such relief would be premature. The motion will therefore be denied.

6. Motion to Exclude Expert Testimony of Gary Kleinrichert [656]

NCR moves to exclude the testimony of an expert proffered by other Defendants on the question of NCR's ability to pay any remediation required by the Unilateral Administrative Order.

This line of testimony is potentially relevant in the context of the granting of a permanent injunction. Although I have ruled that equitable factors do not play the same role in an enforcement proceeding as they might in a traditional equitable action, even the United States has conceded that equitable factors do play a role to the extent that enforcement of the UAO involves a permanent injunction. Accordingly, the motion to exclude Kleinrichert's testimony will be denied.

7. Motion to Exclude the Testimony of Dr. John Wolfe [658]

NCR and Glatfelter move to exclude the testimony of Georgia-Pacific's expert, Dr. John Wolfe. They argue that because GP has settled with the Plaintiffs (waiving all defenses and accepting full liability), it no longer has a role to play in the upcoming trial on divisibility.

Although GP may have settled with the government, the divisibility question—whether and how to divide the environmental harm— involves all of the PRPs, including GP. I am satisfied that it retains a legal interest in this action, and its proposed expert will take only two hours, which will come out of the governments' time allotment. I therefore see no reason to exclude his testimony.

8. Motion to Strike Phase I Pre-Trial Stipulations Between the Plaintiffs and U.S. Paper [660]

Finally, NCR has moved to strike the pre-trial stipulations between the Plaintiffs and U.S. Paper Mills Corp. In the stipulation, U.S. Paper admitted its liability under CERCLA and waived all defenses. In exchange, the governments promised to seek performance of the UAO from NCR or other parties, but not from U.S. Paper. NCR argues that this stipulation is, in effect, a settlement between the government and U.S. Paper, and, as such, a consent decree needed to be filed and formal approval procedures need to be followed.

U.S. Paper suggests that NCR's objection is much ado about nothing. The stipulation is simply a mechanism of streamlining issues prior to trial and is not a functional consent decree.

Importantly, the stipulation contains a clause allowing the government to seek injunctive relief against U.S. Paper in the event circumstances warrant it. In sum, the stipulation is not the kind of formal settlement that requires additional procedures, and as such it will not be stricken.

In sum, all of the motions *in limine* [636, 641, 645, 653, 656, 658, 660] are **DENIED**, with the exception that I will reserve ruling on the motion to exclude the testimony of Mark Travers [533].

SO ORDERED this 28th day of November, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge