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By Email (Where Indicated) or U.S. Mail

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Subject: Consent Decree with NCR Corporation in *United States v. NCR Corporation*, No. 1:19-cv-01041-RJJ-RSK (W.D. Mich., entered Dec. 2, 2020); Notice of Dispute

Dear Ladies and Gentlemen:

We are writing in response to a February 9, 2024 letter from Paul Ruesch, in which EPA provides four “target design parameters” for the removal work plan and associated design for “Part 2” of the time-critical removal action (“TCRA”) in Area 4 of Operable Unit 5 of the Kalamazoo River Superfund Site. NCR Voyix Corporation¹ (“NCR Voyix”) objects to these target design parameters and notifies you of a dispute under the above-referenced consent decree.

The challenged design parameters direct NCR Voyix to create a design and work plan that provides the following: (1) a maximum cross-section velocity of 3.5 feet per second, averaged over cross-sections at bankfull flows throughout the entire TCRA area; (2) bank-height ratios for designed riverbanks in certain ranges defined by a particular book on “natural channel design”²; (3) entrenchment ratios for riverbanks in certain ranges defined by the same book; and (4) sediment transport modeling that “assumes” that scour will occur to the modeled alluvium. These parameters are neither necessary to complete the work described in EPA’s April 1, 2020 action memorandum that defines the scope of the TCRA, nor are they related to managing “time-critical” risks from PCBs. The fourth parameter additionally is not scientifically valid. As a result, the requirements are inconsistent with the National Contingency Plan and outside the scope to which NCR agreed when it signed the consent decree in 2019.

Adopting the challenged design parameters would also continue a disturbing trend of “scope creep” in the TCRA that undermines the time-critical nature of the work and threatens to cost NCR Voyix more than *three times* the cost estimate that the United States described as “reasonably certain” when asking the Court to approve the consent decree. (United States’ Reply Memorandum in Support of a Motion to Enter the Consent Decree with NCR Corporation (Aug. 13, 2020), Dkt. 34 at 5 and Dkt. 33 at 3.)

The tripling of cost itself is a fundamental change to the agreed scope of work in the consent decree. In addition, it is adding years of delay to a response action that EPA alleged was time-critical. NCR Voyix submitted a fully adequate work plan in August 2022, following an agreed schedule of pre-design investigation and design. When EPA directs new design parameters, particularly those that are not necessary to meet the requirements of the action memo as here, NCR Voyix must “go back to the drawing board,” revamp the design and modeling, refine its cost estimates, and re-configure planning and other measures anticipated to comply with the newly imposed parameters. These extra steps then undermine the “time critical” nature of the response action.

¹ In October 2023, NCR Corporation changed its name to NCR Voyix Corporation.

² Dave Rosgen, *Watershed Assessment of River Stability and Sediment Supply* (WARSSS) (2006).

Background

EPA's 2020 action memorandum directed a time-critical removal action to mitigate the risk that PCBs could migrate downstream in the event of a failure of the Trowbridge Dam. In the context of avoiding PCB migration from potential dam failure, the action memorandum directed that six particular tasks be performed:

1. Dredging and/or excavation of PCB-contaminated sediments and riverbank/floodplain soils to meet certain cleanup standards;
2. Removal of the Trowbridge Dam;
3. Cut-back and stabilization of riverbanks "to mitigate exposures to PCB-contaminated riverbank/floodplain soils and future erosion";
4. Dewatering and offsite disposal of the PCB-contaminated sediments and soils that are removed;
5. "Ensuring that a stable river channel exists post-removal, including backfilling as appropriate and re-vegetation with native plant species";
6. Conducting appropriate monitoring and maintenance both during and for a defined time period after completion of the work.

Critically, NCR Voyix agreed in the consent decree to perform all actions *necessary* to implement the action memorandum. (Consent Decree ¶ 17 (emphasis added).) NCR Voyix never agreed, nor did any party to the consent decree ever contemplate, that NCR Voyix would be obligated to engineer the river's overall design to serve more general natural resource goals, such as a "natural channel design."

While these tasks, of course, required further definition as the work is designed, the tasks were designed – and, therefore, were limited in their extent – to mitigate the risk of exposure to PCBs from a possible dam failure, and in the case of this time-critical action, to reduce exigent risk from such a failure. Addressing risk from hazardous substances is the purpose of the Superfund program. Neither the Superfund program, in general, nor the action memo aims to serve any other aim. Design parameters aimed at improving fish habitat, creating a new "natural" channel, or restoring the floodplain to a its condition before dams were built on the river many years ago are outside the scope of the Superfund program, the action memo, and NCR's consent decree.

In compliance with the consent decree and the action memorandum, NCR Voyix designed a removal action and drafted a "Removal Work Plan" in August 2022 that met these requirements. EPA disapproved this workplan in January 2023. EPA and NCR Voyix discussed EPA's disapproval letter and agreed on a schedule under which NCR Voyix would provide additional information on certain key issues. NCR Voyix provided this information in

compliance with an agreed-upon schedule, culminating in two technical memoranda submitted on June 30, 2023.

NCR Voyix's August 2022 submission, combined with the additional information provided since, demonstrates that it is possible to construct riverbanks that will "mitigate exposures" to PCBs, "prevent future erosion," and "ensure that a stable river channel exists post-removal" without adopting the challenged design parameters. NCR Voyix has proposed to do so by ensuring that, following removal of PCB-contaminated sediment and riverbank soils, the riverbanks are sufficiently stabilized to withstand modeled stresses on the bank, even if river velocities in a few locations in the river exceed 3.5 feet per second and even if the bank is steeper than the ratios included in the second and third design parameter.

Inconsistency with the TCRA, Consent Decree, and the National Contingency Plan

In contrast, the February 9 letter requires that the TCRA reduce river velocity and widen the channel, lowering the riverbanks even though doing so is not necessary to protect them from erosion or protect the public and the environment from exposure to PCBs. As a result, the challenged design parameters exceed the scope of the 2020 action memorandum, exceed the scope of NCR Voyix's consent decree obligation, and are not consistent with the National Contingency Plan.

Not only are the challenged design parameters unnecessary to achieve legitimate Superfund goals, insisting on them would worsen a pattern of scope creep that already is delaying the project and increasing cost to such a degree that it is a fundamental change to the response action. Adopting these design parameters will require a wholly new design for "Part 2" of the TCRA. Even now, EPA has left key issues open for further discussion, which prevents NCR Voyix's design team from beginning the bulk of the design work. The design team estimates that, once these issues are decided, it will need 120 days to prepare a new design. This represents additional delay beyond August 2022, when NCR Voyix was ready with a complete design for the TCRA.

EPA's cost estimate for the TCRA at the time of the consent decree was approximately \$55 million, a figure that the United States described as "reasonably certain." (United States' Reply Memorandum in Support of a Motion to Enter the Consent Decree with NCR Corporation (Aug. 13, 2020), Dkt. 34 at 5 and Dkt. 33 at 3.) Even by the time NCR Voyix had submitted its design submission in August 2022, the cost had ballooned to approximately \$115 million – more than doubling the cost. A preliminary estimate suggests that these new design parameters will push the cost to between \$157 million and \$181 million. These figures are approximately *three times* EPA's original estimate. A cost increase of this magnitude represents a fundamental change that warrants re-examination of the response action. However, the cost increase is particularly intolerable because the design parameters simply are not necessary to achieve the TCRA goals.

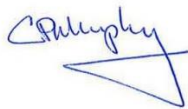
Conclusion

NCR Voyix has no doubt that EPA or the State of Michigan may prefer a natural channel design for non-Superfund reasons and, therefore, may seek to achieve that goal as part of a long-term effort to improve the natural resource values of the Kalamazoo River basin. But because the design parameters are not necessary to achieve Superfund goals, they are not appropriate in a TCRA and not within the scope of NCR's consent decree. If desired, EPA should pursue these goals through other programs, such as the Great Lakes Legacy Act / Great Lakes Restoration Initiative or natural resource restoration funds. Indeed, NCR Voyix already has contributed substantial funding for natural resource restoration as part of its consent decree obligation.

For these reasons, NCR Voyix objects to the direction to use the challenged design parameters in designing Part 2 of the TCRA. Paragraph 62 of the consent decree provides that, when one party sends the other a notice of dispute, the parties will negotiate informally for up to 20 days. NCR Voyix requests that EPA meet with us by video conference or in person to discuss this dispute. Please contact John Jolly to arrange a discussion.

If we are unable to resolve this dispute, NCR Voyix will submit a statement of position to take the dispute to the next stage of resolution. However, we are open to, and frankly prefer, a fair and informal resolution of this matter that respects both the requirements of the Area 4 TCRA action memo and the burdens placed on NCR Voyix, all consistent with the consent decree NCR Voyix signed in 2020.

Sincerely,



Christopher Murphy