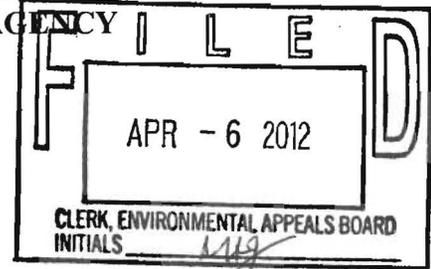


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



In re:)
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)

Safe Environmental Corporation of Indiana)
(Cleveland Trencher Site))
)
)
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)

CERCLA § 106(b) Petition No. 12-01

ORDER GRANTING MOTION TO DISMISS

On February 23, 2012, Safe Environmental Corporation of Indiana (“Safe Environmental”) filed a petition with the Environmental Appeals Board (“Board”) seeking reimbursement of costs Safe Environmental incurred in responding to an amended unilateral administrative order (“UAO”) issued under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986.¹ The UAO, issued on June 21, 2010, and amended on July 27, 2010, required that Safe Environmental conduct removal activities at the Cleveland Trencher Site located in Euclid, Ohio, “to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site.”

¹ The President delegated his authority to decide claims for reimbursement under section 106(b) to the EPA Administrator, Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and the Administrator has re-delegated that authority to the Board. U.S. EPA Delegation of Authority 14-27, Petitions for Reimbursement (June 27, 2000). The Board is also authorized, as appropriate, to authorize payments of such claims. U.S. EPA Delegation of Authority 14-27 § 2.a

Administrative Order Pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9606(a) at 1 (June 21, 2010) (“Administrative Order”).

On December 15, 2011, Safe Environmental submitted a Final Report pursuant to section V, paragraph 3.5 of the UAO, summarizing its asbestos removal actions at the cleanup site. Motion to Dismiss at 2. On January 9, 2012, the Region informed Safe Environmental that the Final Report was deficient, and the Region requested a revised report. *Id.* Safe Environmental submitted a revised report on March 2, 2012, and supplied additional revisions on March 12, 2012. *Id.* As of the date of the Region’s motion, the Region had not given notice that the asbestos response action has been fully performed. *Id.*; *see also* Petition at 2 (“The EPA has not issued a Notice of Completion of the response action as of this Petition”).

Pursuant to CERCLA section 106(b)(2), 42 U.S.C. § 9606(b)(2), Safe Environmental seeks reimbursement of costs incurred in complying with the UAO. That section provides that “[a]ny person who receives and complies with the terms of any [administrative order] * * * may, within 60 days after completion of the required action, petition the [EAB] for reimbursement * * * for the reasonable costs of such action, plus interest.” CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). According to the Petition, Safe Environmental is entitled to reimbursement of reasonable costs incurred in compliance with the UAO because Safe Environmental is not a liable party under CERCLA, has fully complied with the terms of the UAO, and has incurred response costs, attorney fees and other expenses in complying with the AO. Petition at 2-3. The U.S. Environmental Protection Agency (“EPA”), Region 5 (“Region”) responded to the Petition

on March 28, 2012, by moving to dismiss the petition for failure to meet the threshold requirements of obtaining reimbursement.

There are four prerequisites the petitioner must establish before the Board will consider the merits of a reimbursement request. *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996), *aff'd*, 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part & rev'd in part on other grounds*, 146 F.3d 1107 (9th Cir. 1998). Those prerequisites are that the petitioner: (1) complied with the order; (2) completed the required action; (3) submitted the petition within sixty days of completing the action; and (4) incurred costs responding to the order. *Id.*; *see also* Environmental Appeals Board, U.S. EPA, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* 5 (Feb. 23, 2012) (“2012 CERCLA Guidance”) (“The petition must state that the action has been completed and must be accompanied by evidence supporting that statement.”). “The failure to satisfy any one of these conditions justifies denial of the petition without any consideration of the merits of the petitioner’s claim.” *A&W Smelters and Refiners*, 6 E.A.D. at 315 (citing *Employers Ins. of Wasau v. Browner*, 52 F.3d 656 (7th Cir. 1995)).

At issue is whether Safe Environmental has demonstrated that it has completed the required action. Although Safe Environmental has submitted a Final Report (and revisions) to the Region, the Region has not completed its review or approved the report. Motion to Dismiss at 4. Nor has the Region issued a Notice of Completion. *Id.* Safe Environmental’s position is that “submission of the Final Report itself was completion of the “required action,” thereby commencing the statute of limitations. Petition at 23.

The Board disagrees. Generally, the sixty-day period during which a petition for reimbursement must be filed with the Board “will commence on the date that EPA confirms that the required actions have been completed.” *In re Glidden Co.*, 10 EAD 738, 747 n.7 (EAB 2002) (citing *In re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001) (Region issued Notice of Completion); *In re ASARCO, Inc.*, 6 E.A.D. 410, 419 (EAB 1996) (Region sent letter stating that work required by UAO had been completed)). At the time Safe Environmental filed the Petition, the Region had neither issued a Notice of Completion nor provided other confirmation that Safe Environmental had completed the required actions. In fact, Safe Environmental’s only evidence supporting its claim that the response action is complete is an email from the company’s counsel to the Region, which states: “[I]t is Safe Environmental’s understanding that all requirements of the [UAO] have been completed to the satisfaction of the EPA and that no further action for cleanup is required. Pursuant to Section 3.5 of the UAO, we will submit our Final Report in the near future.” Email from Patrick Thomas, Janik L.L.P., to Kevin Chow, Associate Regional Counsel, Office of Regional Counsel, U.S. EPA, Region 5 (Nov. 28, 2011 9:28:00 AM) (Pet. Ex. 77). Finally, as the Region reasons, “[u]ntil EPA issues a Notice of Completion on the basis of the revised Final Report, a possibility exists that additional response actions will have to be implemented at the Site.” Motion to Dismiss at 4. Given these facts, Safe Environmental has not persuaded the Board that the removal action has been completed.

Accordingly, the Board grants the Region’s motion to dismiss. The Petition is hereby dismissed without prejudice.²

² This Order addresses solely the timeliness of the Petition and in no way precludes Safe Environmental from re-filing a petition for reimbursement based on the same or similar grounds (continued...)

So ordered.

Dated:

April 6, 2012

ENVIRONMENTAL APPEALS BOARD³



Anna L. Wolgast
Environmental Appeals Judge

² (...continued)

after the Region has confirmed that the required actions have been completed. All document filings, including but not limited to motions for extensions of filing deadlines, must be submitted either electronically, by mail, or by hand delivery, as described in the 2012 CERCLA Guidance.

³ The three-member panel deciding this matter includes Environmental Appeals Judges Catherine R. McCabe, Anna L. Wolgast, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Motion to Dismiss in the matter of Safe Environmental Corporation of Indiana (Cleveland Trencher Site), CERCLA § 106(b) Petition No. 12-01, were sent to the following persons in the manner indicated.

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Dated: APR - 6 2012


Annette Duncan