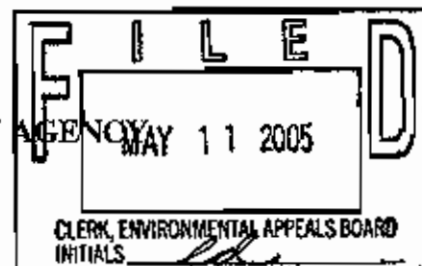


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ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In the Matter of:

Grand Street Mercury Site,
General Electric Company, Petitioner

CERCLA § 106(b) Petition No. 05-01

ORDER DISMISSING PETITION IN PART WITHOUT PREJUDICE

By petition filed on March 1, 2005, the General Electric Company ("GE") seeks reimbursement of costs incurred in complying with two unilateral administrative orders ("UAO") issued by U.S. EPA Region 2 (the "Region") regarding the Grand Street Mercury Superfund Site, Hoboken, New Jersey. The petition refers to the first UAO, which was originally issued on February 24, 1997, U.S. EPA Docket No. II-CERCLA-97-0108, as the "Site Maintenance UAO." The petition refers to the second UAO, which was originally issued on April 1, 1998, U.S. EPA Docket No. II-CERCLA-98-0108, as the "Remedial Action UAO."

The petition requests reimbursement under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, 42 U.S.C. § 9606(b)(2). This section states, in part:

Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days *after completion of the required action*, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A) (emphasis added).¹ GE recognizes in its petition that “completion of the required action” is one of four statutory prerequisites that a petitioner must satisfy before the Board will consider a request for reimbursement. Petition at iii. Indeed, “[c]ompletion of the action required by the EPA is an express statutory condition for seeking reimbursement.” *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995).

It is evident, however, from GE’s petition that it has not achieved the same degree of completeness under both UAOs. For example, GE’s petition clearly demonstrates that it has submitted, and the Region has approved, the “Final Report” required by the Site Maintenance UAO, and that the Region has provided GE notice of completion under that UAO. Petition at iii-iv, n. 2 & Ex. 4 (Letter from Jack D. Harmon, U.S. EPA On-Scene Coordinator, to Roy S. Blickwedel, GE Remedial Project Manager (Feb. 9, 2005)). In contrast, with respect to the Remedial Action UAO, GE states that it has submitted its “petition now because of the uncertainty about which specific event ‘complet[es] the required action’ and thus triggers the 60-day petition period.” Petition at iv n.2. GE suggests in its petition that, although it had not yet submitted the final report for the Remedial Action UAO, the statutory prerequisite nevertheless is satisfied because GE has completed “the actual work that is required.” Petition at iii-iv n.2.

Consistent with our prior practice, the Clerk of the Environmental Appeals Board sent a letter to the Region requesting that, on or before April 4, 2005, the Region file a certified index to the administrative record and a response to GE’s petition. On April 1, 2005, the Region filed an unopposed motion requesting a stay until July 15, 2005, of the time for the Region to file its response and certified index. See Unopposed Motion to Stay EPA’s

¹ Executive Order 12580 (January 23, 1987) delegated the President’s authority to implement section 106(b) of CERCLA to the EPA Administrator. The Administrator has delegated to the Environmental Appeals Board the authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b). See Delegation of Authority 14-27 (“Petitions for Reimbursement”).

Response to the Petition for Reimbursement of General Electric Company Pending EPA's Determination of Completion of Response Actions Required to be Performed by Petitioner (Mar. 31, 2005) (the "Motion for Stay"). In the Motion for Stay, the Region stated that the Region "has not yet made a determination, pursuant to the procedure established in [the Remedial Action UAO] that GE has completed the response actions required under the Remedial Action UAO." Motion for Stay at 2. The Region stated further that "[i]t is EPA's position that until GE submits, and the EPA reviews and approves, the Remedial Action Report required under the Remedial Action UAO, and notifies GE that the response actions have been fully performed, the matter is not ripe for review." *Id.* To address its concern that GE's petition with respect to the Remedial Action UAO is not ripe for review, the Region requested that this proceeding be stayed until July 15, 2005, to afford GE the opportunity to submit, and the Region the opportunity to review, the referenced report. The Region's motion reflected an agreement worked out by the Region and GE and, thus, was not opposed by GE.

By order dated April 6, 2005, the Board granted a stay of this proceeding until July 15, 2005, and directed GE to show cause as to why its petition should not be dismissed without prejudice insofar as it seeks reimbursement of costs with respect to the Remedial Action UAO. The Board explained that dismissal of a petition as premature is appropriate where a petition has been filed before completion of the remedial action. *See, e.g., In re CoZinco, Inc., CERCLA § 106(b) Petition No. 95-2* (EAB, Sept. 11, 1995) (Order Dismissing Petition). The Board also noted that, in the present case, the Remedial Action UAO provides that the Region shall give GE notice when the Region has determined that GE has completed the action required by the Remedial Action UAO. Remedial Action UAO at 14, ¶ 58.

On April 21, 2005, GE filed its response to the Board's order to show cause. In its response, GE argues that its petition should not be dismissed, first, because the "primary elements" of the remedial action were completed before GE filed its petition and, second,

because GE contends that “there is no purpose served by dismissing GE’s petition in part.” See General Electric Company’s Response to the Environmental Appeals Board’s Order to Show Cause Why Petition for Reimbursement Should Not Be Dismissed in Part As Premature at 2 (Apr. 21, 2005) (“GE’s Response”). GE also states that it submitted its Remedial Action Report on March 29, 2005, but that the Region has not yet approved that report. *Id.* at 1.

Upon consideration, we reject GE’s contention that its petition was filed “within 60 days after completion of the required action” within the meaning of section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A). We recently observed that “[g]enerally, this 60-day period will commence on the date EPA confirms that the required actions have been completed.” *In re Glidden Co.*, 10 E.A.D. 738, 747 n.7 (EAB 2002) (citing numerous examples). Indeed, in an early case, the Board stated the general proposition that while “future remediation was still possible, the [potentially responsible parties] clearly continued to be subject to the obligations of the [UAO],” and therefore the required action would not be complete. *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 717-18 (EAB 1995). Consistent with the examples cited in *Glidden*, the Remedial Action UAO at issue in the present case provides that the Region shall provide notice to GE when the remedial action has been completed. Remedial Action UAO at 14, ¶ 58 (“If EPA concludes, following the initial or any subsequent certification of completion by Respondent that all phases of the Work required by the Remedial Action have been fully performed in accordance with this Order, that the Performance Standards have been attained, and EPA has approved the Draft Remedial Action Report, EPA shall notify Respondent that the Remedial Action has been fully performed.”).

As noted above, GE acknowledges that it filed its petition without first having received notice from the Region that the required actions have been completed under the Remedial Action UAO. Indeed, GE filed its petition before it had submitted the final report required by the Remedial Action UAO at 14, ¶ 57, which the Region must review before it can provide notice under paragraph 58 that the remedial action is complete. Moreover, the Region, which

issued the Remedial Action UAO and has overseen its implementation, has clearly stated its view that “until GE submits, and the EPA reviews and approves, the Remedial Action Report required under the Remedial Action UAO, and notifies GE that the response actions have been fully performed, the matter is not ripe for review.” Motion for Stay at 2. We have previously noted that the determination whether the required action has been completed usually will focus on the order’s terms, *In re CoZinco*, 7 E.A.D. 708, 735 (EAB 1998), and courts have recognized that the agency that issued an order is normally given deference in interpreting the order’s requirements, *Employers Ins. of Wausau, v. Browner*, 52 F.3d, 656, 666 (7th Cir. 1995). Thus, the clarity of the order’s language in the present case, GE’s acknowledgment regarding the absence of the key factual predicate (*i.e.*, notice from the Region), and the Region’s clearly stated interpretation that the matter is not ripe for review would appear to dictate that GE’s petition be dismissed in part as premature insofar as it relates to the Remedial Action UAO.

Nevertheless, GE argues that its petition is not premature because the “primary elements” of the remedial action were completed before GE filed its petition and that “the precedent regarding what, exactly, qualifies as ‘completion of the required action’ under Section 106(b)(2)(A) of CERCLA is less than clear, but the balance of authority favors the conclusion that, in this case, GE’s work is done.” GE’s Response at 2. There is no indication, however, in the cases GE cites that the terms and procedures for determining completion under the orders at issue in those cases were similar to what is before us in the present case. The case law GE cites does identify the theoretical possibility that in some hypothetical circumstances it may be necessary to recognize “substantial” completeness where performance has become impossible or where EPA abuses its discretion by stretching what constitutes completion under a particular order’s terms beyond fair and natural meaning. *See, e.g., In re Glidden Co.*, 10 E.A.D. 738, 748-50 (EAB 2002) (discussing hypothetical circumstances identified by the Seventh Circuit in *Employers Ins. of Wausau, v. Browner*, 52

F.3d, 656, 662-64 (7th Cir. 1995)). In the present case, GE has not argued impossibility or that the Region is engaging in the type of hypothetical abuse discussed in *Glidden* and *Employers Insurance*. Moreover, as was the case in *Glidden*, the steps remaining under the Remedial Action UAO in this case "have been in plain view since the issuance of the UAO." *Glidden*, 10 E.A.D. at 750. Thus, we conclude that the cases cited by GE do not support the application GE argues in this case at this time.

GE also argues that "there is no purpose served by dismissing GE's petition in part" and that dismissal would "penalize GE unfairly" and that its petition "is not so neatly segregated." GE's Response at 2, 5. The practical considerations underlying these arguments, however, can be adequately addressed by means that do not violate the requirement that completion is "an express statutory condition for seeking reimbursement." *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995).

In the present case, we have already granted a stay through July 15, 2005, and we recognize that the Region's motion for a stay was premised on the parties' understanding that consolidated consideration of GE's requests for reimbursement under both UAOs is likely the most practical course. Dismissal of GE's petition to the extent it seeks reimbursement of costs under the Remedial Action UAO does not, by itself, demand that the parties alter this understanding. Indeed, partial dismissal at this time does not require the parties to take any action whatsoever in this proceeding until the stay expires. A subsequent petition by GE seeking reimbursement relative to the Remedial Action UAO may simply incorporate the present petition by reference.²


² In the event that either party subsequently believes that the two petitions should not be considered together, the Board will address those arguments when they are made and will fashion an appropriate remedy based on the circumstances as then exist.

Accordingly, GE's petition insofar as it seeks reimbursement of costs with respect to the Remedial Action UAO is hereby dismissed without prejudice.

So ordered.

Dated: 5/11/05

ENVIRONMENTAL APPEALS BOARD

By: 
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Dismissing Petition in Part Without Prejudice in the matter of Grand Street Mercury Site, General Electric Company, Petitioner, CERCLA § 106(b) Petition No. 05-01, were sent to the following persons in the manner indicated:

By First Class Mail
Postage Prepaid:

Samual I. Gutter
Samuel B. Boxerman
Sidley Austin Brown & Wood, LLP
1501 K Street, N.W.
Washington, DC 20005

James A. Moss
Herrick, Feinstein LLP
Two Park Avenue
New York, NY 10016

Kirk Macfarlane
Counsel, GE Corporate Environmental Programs
640 Freedom Business Center
King of Prussia, PA 19406

By Pouch Mail:

Sarah P. Flanagan
Office of Regional Counsel
U.S. EPA, Region 2
290 Broadway, 17th Floor
New York, NY 10007-1866

Interoffice Mail:

Clarence Featherson
Office of Compliance (MC 2272A)
Office of Site Remediation and Enforcement
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dated:

MAY 11 2005



Annette Duncan,
Secretary