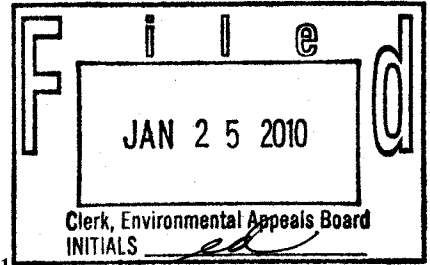


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
))
Titan Tire Corp.)
and Dico, Inc.)
_____))
_____)

CERCLA 106(b) Petition No. 09-01



ORDER DISMISSING PETITION FOR REIMBURSEMENT WITHOUT PREJUDICE

On October 23, 2009, the Titan Tire Corporation and Dico, Inc. (“Petitioners”) filed a petition for reimbursement in the above-captioned matter seeking to recover costs incurred in complying with the terms of an administrative order issued by U.S. EPA Region 7 (“Region”) pursuant to the Region’s authority under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).¹ *See* Petitioners Titan Corporation and Dico, Inc.’s Petition for Reimbursement of Funds Expended in Complying with United States Environmental Protection Agency CERCLA § 106(a) Administrative Order No. CERCLA -07-2009-0006 (“Petition”) (Oct. 23, 2009). The administrative order, issued on December 30, 2008, required that Petitioners conduct certain removal activities at the Southern Iowa Mechanical Site located in Wapello County, Iowa, “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.” Order for Removal Response Activities Southern Iowa Mechanical Site (“Administrative Order”) at 1 (Dec. 30,

¹ *See* 42 U.S.C. § 9606(a).

2008). Upon completion of the required work, the Administrative Order requires that Petitioners submit a final report “for EPA review and approval.” *Id.* at 11.

Pursuant to CERCLA section 106(b)(2), 42 U.S.C. § 9606(b)(2), Petitioners seek reimbursement of costs incurred in complying with the Administrative Order. 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, the actions required under the Administrative Order were completed on October 12, 2009, and Petitioners are entitled to reimbursement of reasonable costs incurred in compliance with the Order because “Petitioners are not liable under CERCLA, and because the decision to order the response action was arbitrary and capricious or was otherwise not in accordance with law.” Petition at 2 (citing CERCLA § 106(b)(2)(C), (D), 42 U.S.C. § 9606(b)(2)(C), (D)).

On November 25, 2009, U.S. EPA Region 7 (“Region”) filed a motion to dismiss the Petition on the basis of ripeness. Motion to Dismiss the Petition of Titan Tire Corporation and Dico, Inc. (“Region’s Motion”) (Nov. 25, 2009). The Region states that although Petitioners have submitted their Final Project Report stating that they have complied with the terms of the Administrative Order, the Region has not yet completed its review and approval of the report pursuant to the terms of the Administrative Order. Thus, the Region argues that the Board should dismiss the Petition as untimely.

Petitioners filed a response in opposition to the Region's Motion to Dismiss on December 14, 2009. Petitioners' Brief in Opposition to Respondent's Motion to Dismiss the Petition on the Basis of "Ripeness" ("Petitioners' Response") (Dec. 14, 2009 and amended on December 17, 2009). Petitioners argue that the Region's approval of the Final Project Report is not a prerequisite to filing a petition for review and that, in any case, the Region has unreasonably delayed its review of the Final Project Report. With the Board's permission, the Region filed a reply to the Petitioner's Response. United States' Brief in Response to Petitioners' Response to the United States' Motion to Dismiss ("Region's Response") (Jan. 8, 2010).

Upon consideration, we agree with the Region that the Petition is not ripe for review at the present time and must therefore be dismissed.² Under the express terms of the Administrative Order, within 60 days after completion of all required work, Petitioners must submit "*for EPA review and approval* a final report summarizing the actions taken to comply with th[e] order." Administrative Order at 11 (emphasis added). Petitioners submitted their Final Project Report on October 21, 2009. Rather than allowing the Region sufficient time to review the report, however, Petitioners filed their Petition for Reimbursement on October 23, 2009, two days after submitting the Final Project Report. The Region states that it is currently reviewing

² By submission dated January 19, 2010, Petitioners request that the Board supplement the administrative record in this matter. Petitioners Titan Tire Corporation and Dico, Inc.'s Motion to Correct and/or Supplement the Administrative Record ("Motion"). Because today's order dismisses the Petition without prejudice, the Motion is hereby denied as moot.

the Petitioners' Final Project Report and plans to complete its review by the end of January 2010. Region's Response at 2.

As this Board has previously stated, completion of the required action is an express statutory condition for seeking reimbursement. See *In re Glidden Co. and Sherwin-Williams Co.*, 10 E.A.D. 738, 746 (EAB 2002); *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). Where, as here, the Administrative Order contains a mechanism for determining when an action is complete, this Board will defer to that mechanism³ absent compelling evidence that the Region has unreasonably declined to certify completion.⁴ See *Glidden*, 10 E.A.D. at 746-54. No such evidence exists in this case.

³ As this Board noted in *Glidden*, CERCLA § 106(b)(2)(A) requires that a petition for reimbursement be filed within 60 days after completion of the required action. Generally, this 60-day period will commence on the date EPA confirms that the required actions have been completed. *Glidden*, 10 E.A.D. at 747 n.7 (citing *In re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001) (Region issued Notice of Completion); *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996) (Region acknowledged completion of work required), *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); *In re ASARCO, Inc.*, 6 E.A.D. 410, 419 (EAB 1996) (Region sent Petitioners a letter stating that work required by the UAO had been completed)).

⁴ As stated in *Glidden*, there may be circumstances where a petitioner claims "impossibility," "impracticability," or "frustration" in complying with the terms of the UAO and obtaining a notice of completion from the Agency. *Glidden*, 10 E.A.D. at 749 (quoting *Employers Ins. Or Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995)).

For good cause shown, the Board grants the Region's Motion. The Petition is hereby dismissed without prejudice.⁵

So ordered.⁶

Dated:

January 25, 2010

ENVIRONMENTAL APPEALS BOARD

By:

Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

⁵ This Order solely addresses the timeliness of the Petition and in no way precludes Petitioners from re-filing the Petition based on the same or similar grounds following the Region's review and approval of the Final Project Report.

⁶ The panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Dismissing Petition for Reimbursement without prejudice in the matter of Titan Tire Corp. and Dico, Inc., CERCLA 106(b) Petition No. 09-01, were sent to the following persons in the manner indicated:

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Dated: JAN 25 2010



Annette Duncan
Secretary