

On August 22, 2011, Precision Environmental commenced cleanup at the Site on behalf of Petitioner.

On October 3, 2011, Petitioner requested a modification of the completion date in the Work Order from September 27, 2011 to October 12, 2011. (Ex. 71.)

On October 12, 2011, the EPA approved extension of the Work Plan completion date to October 26, 2011. (Ex. 72.)

On October 31, 2011, the EPA extended the completion date to November 14, 2011. (Ex. 73.)

On November 1, 2011, Precision Environmental submitted an invoice to Petitioner in the amount of \$295,620.00 along with waste manifests. (Exs. 74, 75.) Precision Environmental notified Petitioner that it would forward Air Monitoring Reports when they were completed.

On November 11, 2011, the EPA requested that Petitioner attend a final inspection once the EPA determined that the remediation and removal was completed. (Ex. 76.)

On November 17, 2011, Petitioner received the Asbestos Monitoring Report from Precision Environmental. (Ex. 75.)

On November 23, 2011, the EPA conducted a final Site inspection. The EPA informed Petitioner that all cleanup requirements for friable asbestos under the AO had been completed to the satisfaction of the EPA. (Ex. 77.)

On November 29, 2011, the EPA issued its Final Pollution Report. The Final Pollution Report was not made available to Petitioner until December 12, 2011. (Ex. 78.)

On December 15, 2011, Petitioner submitted its Final Report to the EPA, pursuant to Section 3.5 of the AO. (Ex. 75.)

On January 9, 2012, the EPA advised Petitioner that its Final Report was deficient and advised that it required increased specificity regarding action performed under the Work Plan.

The EPA also advised Petitioner that approval of the Final Report and the EPA's Notice of Completion were required prior to Petitioner's submission of its CERCLA §106(b) petition. Petitioner advised the EPA that while it would address its deficiencies and submit a revised Final Report, Petitioner disagreed that EPA approval of the Final Report or the EPA's Notice of Completion were "required actions" under the AO that determined commencement of the sixty day statute of limitations for purposes of a CERCLA §106(b) petition. Petitioner asserted that submission of the Final Report itself was completion of the "required action" thereby commencing the statute of limitations. Petitioner and the EPA discussed the possibility of a tolling agreement to address the statute of limitations issue.

On January 12, 2012, the EPA advised Petitioner that it would not enter into a tolling agreement to address the "required action" and the statute of limitations issues due to jurisdictional restriction. Petitioner informed the EPA that in the absence of a tolling agreement, Petitioner would be required to consider submission of the Final Report, regardless of approval, as completion of the required action. (Ex. 79.)

On January 17, 2012, the EPA advised Petitioner that the EPA would not consider the required action under the AO to be complete until a Final Report met the requirements of the AO and 40 C.F.R. §300.165 and that the sixty-day time statutory period for a CERCLA § 106(b) petition is not triggered until such requirements are met. (Ex. 80.)

Also on January 17, 2012, Petitioner sought Precision Environmental's assistance in preparing a revised Final Report pursuant to the EPA's January 9, 2012 requested modifications. (Ex. 81.)

On January 19, 2012, Petitioner requested that the EPA issue an amended AO stating that approval of the Final Report was a "required action" under the AO.

On February 3, 2012, in a discussion with Petitioner's attorney, Chow advised that the EPA, after having considered an amendment to the AO, declined to issue an amendment. The EPA maintained its position that a Final Report meeting the requirements of 40 C.F.R. § 300.165 is a "required action" under the AO. (Ex. 82.) Petitioner's attorney advised Chow that it expected to have an amended Final Report submitted to the EPA in the near future but that absent an amended AO or a tolling agreement, Petitioner was obligated to file its CERCLA § 106(b) Petition within the statute of limitations.

C. Response Action

On behalf of Petitioner, Precision Environmental undertook decontamination, removal and disposal of asbestos contaminated material at and from the Site between August 22, 2011 and November 14, 2011. Precision Environmental followed the Work Plan submitted on July 26, 2011, and approved by the Agency on August 5, 2011. Under the Work Plan, Precision Environmental removed and disposed of asbestos-containing pipe insulation, hanging roof materials and debris piles, and decontaminated the interior building structures and exterior concrete slabs located throughout the Site. Removed material included steel, concrete, brick, wood, roofing material, plastic, insulation, fireproofing, and other undetermined building components. During the removal period, Precision Environmental maintained Ohio License AC1154. Precision Environmental complied with ODH and Ohio EPA regulations. (Ex. 75.)

Precision Environmental transported all asbestos containing material to Minerva Enterprises, Inc., 9000 Minerva Rd., Waynesburg, OH 44688 ("Minerva") between September 6, 2011 and October 16, 2011. Minerva is licensed to accept asbestos-contaminated waste by the Ohio EPA through Permit No. P0104984. Precision Environmental removed one thousand six hundred thirty-seven and fourteen one-hundredths (1,637.14) tons of material from the Site to Minerva for disposal. Asbestos removal was monitored by RCS. RCS conducted its monitoring

by employing a support zone and a decontamination facility, a personal protective equipment protocol, an air sampling plan, a daily perimeter air monitoring plan, a daily personal air monitoring plan and a final clearance evaluation. Air Monitoring Reports include (1) transmission electronic microscopy air monitoring data sheets; (2) polarized light microscopy data sheets; (3) daily field logs; and (4) certifications. Analytical results for all data are contained in each respective section. On October 31, 2011, RCS prepared an Asbestos Monitoring Report.

On November 23, 2011, Petitioner appeared at a Site Inspection at which time the EPA advised that removal and remediation actions had been completed to the EPA's satisfaction. At that time the EPA provided Petitioner with requirements for the Final Report. Petitioner submitted its Final Report on December 15, 2011.

IV. SUMMARY OF ARGUMENT

Petitioner is not liable under CERCLA §107(a) (42 U.S.C. § 9607(a)) and is entitled to reimbursement of costs and attorney fees under CERCLA § 106(b)(2)(A) and (C) (42 U.S.C. § 9606(b)(2)(A) and (C)) for its compliance with the AO. The EPA's determination that Petitioner is liable resulted from the single, uncorroborated affidavit statement of Amaya that Amaya received "full permission and authority from Petitioner to 'use' Petitioner's Ohio License for a "small job in Ohio." Subsequent to the EPA's reliance on Amaya's statement, Amaya withdrew his statement when he was deposed by Petitioner. He also testified in his deposition that he never had personal contact with Paganelli when he obtained Petitioner's Ohio License, and then lied to the EPA and said Paganelli was present. He testified that he purposely forged Specialist information to ODH for Asbestek's abatement at the Site, which by itself establishes Amaya's proclivity for lying and strips him of any credibility. The multiple, inconsistent and

contradictory statements by Amaya make him completely unreliable and no reasonable fact finder could find that Petitioner had any liability under CERCLA 107(a) based on his statement. All other evidence, including statements by Vadas, Collins, Bonilla, Paganelli and Lovelace, and phone records of Amaya and Petitioner, invalidate Amaya's claim that Petitioner's ever provided its Ohio License for work at the Site.

Furthermore, it is uncontested by the EPA, ODH, the Ohio EPA, and all witnesses, including Amaya, Vadas, Collins, Thomas, and Piscazzi that: (1) Petitioner lacked any knowledge of the Site, including its name, location, work Asbestek was to perform there, prior estimates, parties involved or even that Asbestek existed; (2) Petitioner did not provide workers, equipment, assessments, estimates, inspections, payments, or insurance to any effort at the Site; (3) Petitioner did not prepare, review, or submit notifications, applications, payments, or any documents to any State agency regarding any effort at the Site; and (4) Petitioner did not engage in any contracts, verbal or written, with Amaya, Asbestek, Nationwide, Thomas or Piscazzi.

Furthermore, substantial evidence shows that Amaya and Vadas never had any authority, but in fact stole Petitioner's Ohio License and used it in order to perform work under Asbestek's contract with Nationwide. This evidence includes the following: (1) Amaya and Vadas are inconsistent in their versions of attempts to obtain an Ohio License; (2) Notification Forms were fraudulently prepared to avoid detection and thwart inspection by the Ohio EPA and ODH; (3) Amaya and Vadas admittedly supplied false information to ODH with respect to Bonilla; (4) Bonilla never authorized Amaya or Vadas to use his Supervisor License; (5) Vadas tailored his communications to conceal Asbestek's use of Petitioner's Ohio License from the Ohio EPA and to conceal Petitioner's contact information from ODH; (6) neither Vadas nor Amaya had any communication with Petitioner; (7) Vadas fraudulently obtained a bank check in Petitioner's name; (8) Vadas admittedly prepared a spurious envelope to deceive ODH; and (9) Amaya

provided the EPA with a version of obtaining Petitioner's Ohio License that is wholly controverted by his deposition testimony.

Not only did Amaya lie in his affidavit, in his deposition, and to the EPA, but Amaya was convicted of crimes related to his purposeful, improper abatement that Amaya, Vadas and Asbestek's crew performed at the very Site at issue in the AO. Yet the EPA disregarded this evidence. Petitioner unsuccessfully presented all the above arguments to the EPA in contesting the EPA's findings and determination that Petitioner was a responsible party. The EPA also denied Petitioner's offer of Settlement. Petitioner complied with the requirements of the AO to reduce the exorbitant financial risks associated with non-compliance. Having complied, Petitioner is entitled to reimbursement of costs, attorney fees and expenses associated with its compliance.

V. LAW AND ARGUMENT

A. Petitioner Complied with All Required Actions under the Administrative Order

CERCLA gives the EPA the authority to take direct responsive action to clean up hazardous waste sites or to require parties responsible for the hazardous waste to perform the cleanup themselves. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990). A party determined by the EPA through a unilateral administrative order ("UAO") to be a potentially responsible party ("PRP"), and therefore liable for hazardous conditions at a site, are subject to the EPA's "receive and comply" power granted by CERCLA, which restricts a PRP's ability to challenge its status as in District Court. 42 U.S.C. § 9613(h); *Employers Insurance of Wausau A Mutual Company v. Bush*, 791 F.Supp. 1314, 1320 (N.D.Ill. 1992); *General Electric Company v. Jackson*, 610 F.3d 110, 115 (C.A.D.C. 2010). Failure of a PRP to comply with a UAO subjects a PRP to costs that the EPA incurs in undertaking the responsive action, which

may include damages of up to three times the costs incurred by the EPA and fines up to \$37,500 per day. 42 U.S.C. § 9607(c)(3); 42 U.S.C. § 9606(b)(1); 73 Fed.Reg. 75,340–46 (Dec. 11, 2008). To avoid the risks associated with non-compliance, a PRP may comply with the UAO and then seek reimbursement of the costs associated with compliance under CERCLA § 106(b)(2)(A) and (C) (42 U.S.C. § 9606(b)(2)(A) and (C)).

CERCLA § 106(b)(2)(A) provides:

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. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

Reimbursement is available to a party who receives and complies with the terms of an administrative order. *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995) (right of petition ripens after completion of the required action, the required action being those actions required by the order). Here, Petitioner complied with the AO and completed the required action on December 15, 2011 when Petitioner submitted its Final Report. Compliance with the terms of an order includes the EPA's requirement of a Respondent's Final Report (*In re Higman Barge Lines, Inc.* EAB, CERCLA 106(b) Appeal No. 08-02, Unpublished Final Order of August 11, 2008). Petitioner complied with each of the terms of the AO, including submission of its Final Report, as follows.

1. Petitioner Complied with AO Section 1: Notice of Intent to Comply

Pursuant to the AO, Respondents were required to submit an Intent to Comply. Pursuant to a conference call on August 11, 2010, the EPA made the deadline for the Intent to Comply August 23, 2010. On August 20, 2010, the EPA extended Respondents' deadline for the Intent

to Comply to September 20, 2010. (Ex. 44.) On September 21, 2010, the EPA extended Respondents' deadline for the Intent to Comply to October 21, 2010. (Ex. 45.) On October 21, 2010, Petitioner submitted its Intent to Comply. On November 26, 2011, the EPA found Petitioner's Work Plan and Contractor Designation to be deficient and not in compliance with the AO but did not inform Petitioner that its Intent to Comply was not in compliance. The EPA advised that it would consider its options in order to enforce the AO. In March 2011, the EPA advised Petitioner that the result of the Richland County action may determine the EPA's enforcement actions. In June 2011, the EPA informed Petitioner that it would consider an Intent to Comply from Petitioner commensurate only with cleanup of friable asbestos at the Site. As a result of these discussions, on June 30, 2011, the EPA extended Petitioner's deadline for the Intent to Comply to July 8, 2011, based on EPA's requirements that Petitioner would only be responsible for asbestos remediation and removal (Exs. 58, 59 and 62.) On July 8, 2011, Petitioner submitted its Intent to Comply based on a Work Plan that addressed the removal and remediation of asbestos contamination at the Site. (Ex. 62.) On July 8, 2011, the EPA accepted Petitioner's Intent to Comply. Accordingly, Petitioner completed the requirement of Section 1 of the AO on July 8, 2011.

2. Petitioner Complied with AO Section 2: Designation of Contractor, Project Coordinator and On-Scene Coordinator

Petitioner contracted with Precision Environmental to perform the removal actions under the AO. Through Precision Environmental, Petitioner provided the EPA with qualifications of Precision Environmental and Precision Environmental's single sub-contractor for air sampling and monitoring, RCS (See Ex. 75.) Petitioner also provided qualifications of Precision Environmental and RCS to EPA, all of which were approved on August 5, 2011. Accordingly,

Petitioner completed the requirements of Section 2 of the AO on August 5, 2011 when all qualifications were formally approved.

3. Petitioner Complied with AO Section 3: Work to be Performed

Pursuant to the Work Plan and Health and Safety Plans, and the approved Intent to Comply with the AO in which petitioner only had to address asbestos removal and remediation, Petitioner performed all removal and remediation activities required under the AO, including:

- (1) Development and implementation of a Site Health and Safety Plan, Contingency Plan, and Air Monitoring/Sampling Plan;
- (2) Removal and disposal of asbestos-contaminated building debris; and
- (3) Taking necessary response action to address any release or threatened release of a hazardous substance, pollutant, or contaminant that the EPA determines may pose an imminent and substantial endangerment to the public health or the environment.

As the requirements for Petitioner were modified, Petitioner was not required to remove and dispose of PCB-contaminated transformers and PCB-contaminated surfaces, remove and dispose of any drums and other containers of hazardous materials, contaminants, or pollutants; transport and dispose of all hazardous material or contaminants at an EPA-approved disposal facility; render any large storage tanks unusable at the Site; or investigate for and remove contaminated surface soil due to leaking containers. The EPA extended the completion date to November 14, 2011 (Ex. 73.) Precision Environmental provided Petitioner with Waste Manifests and Air Monitoring Reports by November 17, 2011. The EPA required Petitioner to attend a Site inspection on November 23, 2011, at which time the EPA confirmed that cleanup requirements had been met. (Ex. 77.) Accordingly, Petitioner completed the requirements of Section 3 of the AO on November 23, 2011.

4. Petitioner Complied with AO Section 3.1: Work Plan and Implementation

Pursuant to Section 3.1 of the AO, Respondents were required to submit a Work Plan for performance of removal activities. Pursuant to a conference call on August 11, 2010, the EPA made the deadline for the Work Plan August 23, 2010. On August 20, 2010, the EPA extended Respondent's deadline for the Work Plan September 20, 2010. (Ex. 44.) On September 21, 2010, the EPA extended Respondents' deadline for the Work Plan to October 21, 2010. (Ex. 45.) On October 21, 2010, Petitioner submitted its Work Plan. On June 30, 2011, EPA extended Petitioner's deadline for the Work Plan to July 8, 2011, and advised Petitioner that the EPA would accept a Work Plan for purposes of providing guidance prior to the July 8, 2011 deadline. (Ex. 58.) On July 1, 2011, Petitioner submitted a Work Plan for review by the EPA. (Ex. 60.) On July 5, 2011, the EPA advised that it was in the process of reviewing the Work Plan. On July 8, 2011, with prior approval from the EPA, Petitioner submitted its Notice of Intent to Comply acknowledging the EPA's approval that a Work Plan would follow in a reasonable amount of time. On July 13, 2011, Petitioner submitted its Work Plan. On July 27, 2011, as a result of the EPA's collaboration with Precision Environmental, Petitioner submitted a revised Work Plan. On August 1, 2011, as a result of the additional EPA collaboration with Precision Environmental, Petitioner submitted a revised Work Plan, which was formally accepted by the EPA on August 5, 2011 and became fully enforceable under the AO. (Ex. 67.) Petitioner notified the EPA on August 10, 2011, that Precision Environmental and RCS would commence the Work Plan on August 22, 2011, which was at least forty-eight hours prior to commencement as required under the AO. The Work Plan was implemented on August 22, 2011. Work was concluded on November 14, 2011. Accordingly, Petitioner completed the requirements of Section 3.1 of the AO on November 14, 2011.

5. Petitioner Complied with AO Section 3.2: Health and Safety Plan

Pursuant to Section 3.2 of the AO, Respondents were required to submit a Health and Safety Plan to ensure health and safety during performance under the Work Plan. Pursuant to a conference call on August 11, 2010, the EPA made the deadline for the Health and Safety Plan August 23, 2010. On August 20, 2010, the EPA extended Respondent's deadline for the Health and Safety Plan to September 20, 2010. (Ex. 44.) On September 21, 2010, the EPA extended Respondents' deadline for the Health and Safety Plan to October 21, 2010. (Ex. 45.) On October 21, 2010, Petitioner submitted its Health and Safety Plan. On June 30, 2011, EPA extended Petitioner's deadline for the Health and Safety Plan to July 8, 2011. On July 1, 2011, Petitioner submitted a Health and Safety Plan for review by the EPA. (Ex. 60.) On July 5, 2011, the EPA advised that it was in the process of reviewing the Work Plan and Health and Safety Plan. On July 13, 2011, Petitioner formally submitted its Health and Safety Plan. On July 27, 2011, as a result of the EPA's collaboration with Precision Environmental, Petitioner submitted a revised Health and Safety Plan. On August 1, 2011, as a result of the additional EPA collaboration with Precision Environmental, Petitioner submitted its Health and Safety Plan, which was formally accepted by the EPA on August 5, 2011 and became fully enforceable under the AO (See Ex. 67.) Accordingly, Petitioner completed the requirements of Section 3.2 of the AO on August 1, 2011.

6. Petitioner Complied with AO Section 3.4: Reporting

The EPA suspended requirements of monthly reporting under Section 3.4 of the AO. (Ex. 83.)

7. Petitioner Complied with AO Section 3.5: Final Report

Pursuant to Section 3.5 of the AO, Petitioner was required to submit a Final Report for EPA review within sixty days of after completion of all removal actions required under the AO.

Final removal actions were completed on November 14, 2011 and confirmed by the EPA on November 23, 2011. Petitioner timely submitted its Final report on December 15, 2011, which was within sixty days of all removal actions required under the AO. (Ex. 77.) On January 9, 2012, the EPA informed Petitioner that its Final Report was deficient and requested additional specificity regarding action performed under the Work Plan. Petitioner and the EPA are in disagreement as to whether the EPA's approval of the Final Report is a "required action" under the AO. The EPA maintains that approval of the Final Report is a required action, but have refused to amend the AO to expressly state this requirement. Absent an amendment, Petitioner believes that submission of the Final Report completes the requirements of Section 7. Accordingly, Petitioner completed the requirements of Section 3.5 of the AO on December 15, 2011.

8. Petitioner Complied with AO Section 4: Access to Property and Information

Pursuant to Section 4 of the AO, Respondents were to obtain and provide access to the Site and all records and documentation related to the conditions at the Site and activities conducted at the Site. On October 20, and November 11 and 18, 2010, Petitioner provided the EPA with all known documentation it had relating to the Site and activities performed by Thomas, Piscazzi, Nationwide, Asbestek, Euclid, and ODH and Ohio EPA. (See Exhibits 46, 51, 52.) On August 10, 2011, Petitioner provided the EPA with executed access agreements from all Site owners. (Ex. 69.) On December 15, 2011, Petitioner provided the EPA with Waste Manifests and Air Monitoring Samples. (Ex. 75.) Accordingly, Petitioner timely completed the requirements of Section 4 of the AO by December 15, 2011.