

In the present case, EPA reviewed the Final Report submitted December 15, 2011, and requested revisions. EPA received the revised Final Report on March 2, 2012, a few days after the Board's February 28, 2012, letter to EPA, scheduling EPA's motion. EPA e-mailed comments to Safe on March 9, 2012, and requested further corrections and re-submission of the report by March 19, 2012. Safe re-submitted it on March 12, 2012. However, as of the date of this motion, EPA has not completed its review, and consequently has not issued a Notice of Completion. If EPA determines that any work has not been completed, EPA will notify Safe, and require any necessary modifications to the Work Plan and implementation of such. Until 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. EPA expects that it will issue a Notice of Completion or notice that more work is necessary by April 6, 2012.

EPA respectfully requests the dismissal of Safe's Petition, without prejudice, on the ground that it has been prematurely filed, because EPA has not yet issued a Notice of Completion for the removal action or for any portion of such.

Dated this 28th day of March, 2012,

Respectfully submitted,

By:



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss the Petition of Safe Environmental Corporation of Indiana in the matter of In re Safe Environmental Corporation of Indiana, Petition No. CERCLA 106(b) 12-01, was filed by electronic submission to the Environmental Appeals Board ("EAB") through the Central Data Exchange this 28th day of March, 2012.

I hereby certify that copies of the foregoing Motion to Dismiss the Petition of Safe Environmental Corporation of Indiana in the matter of In re Safe Environmental Corporation of Indiana, Petition No. CERCLA 106(b) 12-01, were served by United States First Class Mail on the following persons, this 28th day of March, 2012:

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March 28, 2012

Date

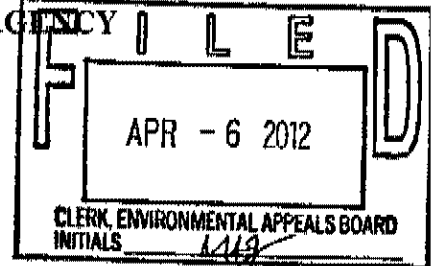


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CERCLA 106(b) Petition

EXHIBIT 95

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



In re:)

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

) CERCLA § 106(b) Petition No. 12-01
)
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)
)

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.

**By Facsimile and Certified Mail,
Return Receipt Requested:**

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Dated: APR - 6 2012


Annette Duncan

CERCLA 106(b) Petition

EXHIBIT 96



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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RESPONSE SECTION 1
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April 6, 2012

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RE: Notification of Completion - Unilateral Administrative Order, Docket No. V-W-10-C-950, for the Cleveland Trencher Site, Cuyahoga County, Ohio (Site ID #B5SJ).

Dear Mr. Thomas:

The U.S. Environmental Protection Agency (EPA) has completed its review of the "Section 3.5 Final Report of Respondent Safe Environmental Corporation of Indiana" (revised March 12, 2012), that you submitted on behalf of your client, Safe Environmental Corporation of Indiana. By this letter, EPA gives acknowledgement of completion of the requirements of the Unilateral Administrative Order (UAO) listed below.

EPA issued the UAO on June 21, 2010, and added Safe Environmental Corporation of Indiana ("Respondent") as a Respondent to the UAO under an amendment issued by EPA on July 27, 2010. The UAO was issued to conduct a time critical removal action at the Cleveland Trencher Site (Site), 20100 St. Clair Avenue, Euclid, Cuyahoga County, Ohio, which EPA determined presented an imminent and substantial endangerment to public health and the environment.

Specific factors considered in the determination were the presence of friable asbestos in building debris, the presence of transformers containing polychlorinated biphenyls, and the presence of abandoned drums and containers (containing D001, D008, and D035 wastes) at the Site. Releases of asbestos and other hazardous substances at the Site were documented by the Ohio Environmental Protection Agency and the Cleveland Department of Public Health, during various Site investigations. The asbestos and other hazardous substances posed potential threats through the following routes as outlined in the

National Oil and Hazardous Substances Pollution Contingency Plan (NCP) 40
Code of Federal Regulations (CFR) 300.415(b)(2):

- (1) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances, pollutants, or contaminants;
- (2) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers that pose a threat of release;
- (3) High levels of hazardous substances in soils largely at or near the surface, that may migrate;
- (4) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;
- (5) Threat of fire or explosion; and
- (6) The unavailability of other appropriate Federal or State response mechanisms to respond to the release.

On July 8, 2011, Respondent indicated in its Notice of Intent to Comply that it intended to perform cleanup of asbestos. Pursuant to the UAO, the Respondent in concert with the Joseph J. Piscazzi Revocable Living Trust submitted: (1) a document titled "Cleveland Trencher; Asbestos Abatement & Hazardous/Regulated Cleanup; Euclid, OH; Health & Safety Submittals" (Removal Action Work Plan) prepared by Precision Environmental Co. (Precision), dated July 26, 2011, and (2) a document titled "Site Specific Work Plan and Health and Safety Plan: Asbestos Abatement and Hazardous/Regulated Waste Cleanup" prepared by Precision and submitted to EPA on August 1, 2011, as a revision to the Removal Action Work Plan. On August 5, 2011, EPA approved the Removal Action Work Plan and its revision.

On March 12, 2012, the Respondent submitted, as required by the UAO, a revised Final Report on its activities at the Site pertaining to asbestos. Based on my oversight of the Respondent's activities at the Site, an inspection of the Site conducted on November 23, 2011, and my review of the revised Final Report, I have concluded that the Respondent has completed the following work required by the UAO:

- a. Development and implementation of a Site Health and Safety Plan, Field Sampling Plan, and a Removal Work Plan;
- b. Removal of asbestos and asbestos contaminated material from the Site;

- c. Disposal of asbestos and asbestos contaminated material at an EPA-approved off-Site disposal facility in accordance with the EPA Off-Site Rule (40 CFR ' 300.440); and,
- d. Decontamination of remaining structures and large concrete pads left on Site.

This letter merely reflects EPA's determination that the above-mentioned work performed by Respondent as required by the UAO was completed. This notice in no way releases the Respondent from any potential future obligations to perform additional work to address the same, or other, conditions at the Site.

This notice does not release the Respondent from any record keeping, payment, or other obligations under the UAO that extend beyond the date of this notice.

Please contact me at (440) 250-1718 if you have any questions concerning this letter.

Sincerely,



Stephen Wolfe
OSC, ERB-1, ERS-1

cc: Stephen Wolfe, OSC, ERS-1
Mark Durno, Section Chief, ERB-1, ERS-1
Kevin Chow, ORC
Carol Ropski, ESS