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

ENVIRONMENTAL APPEALS BOARD

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In the Matter of:	)	<b>CERCLA § 106(b) Petition No. 05-01</b>
	)	
Grand Street Mercury Site,	)	<b>Unilateral Administrative Orders</b>
General Electric Company, Petitioner	)	<b>Docket No. II-CERCLA-97-0108</b>
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**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**

The General Electric Company ("GE") submits this response to the April 6, 2005, Order of the Environmental Appeals Board directing GE to show cause why its petition for reimbursement should not be dismissed in part, without prejudice. The basis for the Board's Order is that, as to one of the two unilateral administrative orders ("UAOs") at issue – the Remedial Action UAO – GE had not yet submitted, and the Environmental Protection Agency ("EPA") has not approved, GE's Remedial Action Report. *See* Order at 3.<sup>1</sup>

First, to update the current status of this matter, on March 29, 2005, GE submitted the Remedial Action Report required by paragraph 57 of the Remedial Action UAO. *See* Declaration of Samuel I. Gutter, dated April 20, 2005, at ¶ 3. EPA has not yet approved the Remedial Action Report.

<sup>1</sup> As to the other unilateral administrative order at issue, the Site Maintenance UAO, the Board appears to agree that GE's petition is ripe. *See* Order at 2.

Second, GE appropriately filed its petition for both unilateral administrative orders on March 1, 2005, because GE has completed the work required by the Remedial Action UAO. Moreover, even if the Board does not agree with that conclusion, there is no purpose served by dismissing GE's petition in part. The stay that the Board has already granted will allow EPA adequate time to review and approve GE's Remedial Action Report. *See* Order at 3-4.

**A. GE Has Completed Its Work Under The Remedial Action UAO.**

The primary elements of the remedial action in this matter were demolition of a building and removal of soils to cleanup levels prescribed by EPA. *See* Remedial Action UAO, No. II-CERCLA-98-0108, Statement of Work at 1. As shown in GE's petition, those actions have been completed. *See* Petition for Reimbursement at iii & n.2; *see also* Letter from Margaret A. Carillo-Sheridan to Jack Harmon, dated Dec. 31, 2004, encl. at 1-1 ("The response actions required by the UAO for Removal Response Activities and the UAO for Remedial Design and Remedial Action were completed on December 31, 2004") (Ex. 1).

Moreover, despite the statements in the Board's Order, GE respectfully submits 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.

To begin with, CERCLA itself offers no definition of the phrase "completion of the required action," nor does this Board's guidance on the procedures for submitting petitions for reimbursement. *See* Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions ("Revised Guidance"), Nov. 10, 2004, at 3 (stating only that "[a] petitioner may seek reimbursement only after having completed the action

required by the order”). In addition, the other relevant authorities suggest at least three possible answers.

In one decision, this Board found that the 60-day period began “upon completion of the review of the analytical data, with no further excavation being required.” *In re: Findley Adhesives, Inc.*, 5 E.A.D. 710, 718 (Feb. 10, 1995). *Findley* thus implies that the “required action” is complete for purposes of Section 106(b) when the actual work on the ground is finished. Moreover, *Findley* determined that “completion of the required action” occurred when the petitioner was informed by its contractor that the work was done, *not* when EPA sent confirmation of that fact. *See id.* at 717, 715 (construing the date of completion as July 19, 1991, when “Findley received a Site Remediation Summary and Soil Analysis Report *from the PRPs’ contractor*”) (emphasis added). This interpretation is supported by *In re. CoZinco*, 7 E.A.D. 708 (July 7, 1998), where EPA’s counsel acknowledged that “we would count completion when the *capital portion of a project is complete, when implementation is done.*” *Id.* at 735 n.24 (emphasis added).

But in *CoZinco*, the Board also noted that “the analysis will usually focus on the actual work that is required, which ordinarily is described in the order’s Statement of Work.” *Id.* at 735. Because GE’s final responsibility under the Statement of Work was its submission of the Remedial Action Report, *CoZinco* can be read as suggesting that the date of completion was March 29, 2005, when GE submitted the Remedial Action Report to EPA. *See* Letter from Margaret A. Carrillo-Sheridan to Farnaz Saghafi, dated March 29, 2005 (Ex. 2). This interpretation is supported by *Employers Insurance of Wausau v Bush*, 791 F. Supp. 1314 (N.D. Ill. 1992), which noted that after “complet[ing] the on-site actions,” petitioner “submitted to the

EPA a Response Action Report . . . *thereby completing its obligations.*” *Id.* at 1319 (emphasis added).

Thus, under *Findley*, *CoZinco*, and *Wausau*, the 60-day time period has already begun. This conclusion is further buttressed by *CoZinco*’s observation that “the right to petition for reimbursement is ripe once the *action* required by the terms of an order is complete.” 7 E.A.D. at 734 (emphasis in original). Because GE has already completed the “action” required under the UAO, and is merely waiting for EPA’s confirmation, this statement suggests that the 60-day period has begun. Under these precedents, then, a petitioner who awaits notice *from EPA* does so at its own risk.<sup>2</sup>

Admittedly, this Board’s decision in *In re: Glidden Company & Sherwin-Williams Co.*, 10 E.A.D. 738 (Dec. 17, 2002), suggests that the statutory time period will not begin until EPA provides final confirmation to GE. *See id.* at 747 n.7 (“Generally, this 60-day period will commence on the date EPA confirms that the required actions have been completed”). But even *Glidden* implies that the time period could have begun when GE submitted the Remedial Action Report with its Notice of Completion. *See id.* (“Petitioners have not filed their petitions *within 60 days of submitting a Notice of Completion*, or within 60 days of any action on the Region’s part indicating that the requirements by the UAO had been completed”) (emphasis added).

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<sup>2</sup> The risk of an untimely petition is a serious one, given that the Agency has previously taken a position which would imply that the 60-day period already started. *See Findley*, 5 E.A.D. at 716 (outlining EPA’s argument that “the required action was completed on April 23, 1991, the date ‘the transportation and disposal of the containerized waste was completed.’”).

Given these circumstances, GE conservatively treated December 31, 2004, as the trigger date for the 60-day period under Section 106(b). GE properly filed its petition as to both unilateral orders.<sup>3</sup>

**B. Fairness And Judicial Economy Favor A Stay, Not Partial Dismissal, Of GE's Petition.**

In light of the ambiguity under the Board's decisions, it would penalize GE unfairly to require the company to dismiss a portion of that petition, even though the Board appropriately noted that dismissal would be without prejudice to GE to refile at a later date. GE's petition is not so neatly segregated – indeed, the arguments in sections I.B and II of GE's petition are equally applicable to both unilateral orders. Splitting these overlapping petitions into two actions would serve nobody's interest.

The proper approach – indeed, the one worked out between counsel for EPA and GE – is to stay EPA's response to GE's petition to allow the Agency time to review and approve GE's Remedial Action Report, which will resolve any lingering ambiguity about the ripeness of GE's petition. See EPA's Unopposed Motion to Stay, dated March 31, 2005, at 2 (requesting a stay, "rather than seeking dismissal of the Petition," because of "the interests of judicial economy and to promote the efficient use of resource"). Indeed, the Board granted EPA's unopposed Motion to Stay until July 15, 2005, in order to give EPA time to review GE's Remedial Action

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<sup>3</sup> In another context, the U.S. Court of Appeals for the District of Columbia Circuit has noted the appropriateness of a conservative approach to filing petitions that might otherwise be time-barred by statute. "As a general proposition, . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985) (challenge to regulation under Section 113(a) of CERCLA; emphasis in original). For that reason, the court has frequently "admonished petitioners of the wisdom of filing protective petitions for review during the statutory period." *Waste Management of Illinois, Inc. v. EPA*, 945 F.2d 419, 422 (D.C. Cir. 1991) (quoting *Eagle-Picher Indus.*, 759 F.2d at 912). Because of the ambiguity surrounding the date of completion, and the genuine risk of waiver, GE appropriately filed its petition within 60 days of December 31, 2004.

Report. If EPA has not approved the Remedial Action Report by that date, then the parties can propose a course of action to the Board at that time.<sup>4</sup>

### CONCLUSION

For the foregoing reasons, GE respectfully requests that the Board refrain from dismissing GE's petition for reimbursement as applies to the Remedial Action UAO.

Respectfully submitted,

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<sup>4</sup> If the Board nonetheless dismisses, without prejudice, GE's petition as to the Remedial Action UAO, then the Board should lift its stay and require the Region to respond promptly to GE's petition as it applies to the Site Maintenance UAO. The purpose of the unopposed motion for stay was to resolve any doubts about the ripeness of GE's petition with respect to the Remedial Action UAO. That purpose would disappear if the Board dismissed GE's petition as to the Remedial Action UAO; if dismissal occurs, then GE's petition should proceed in a timely fashion as to the Site Maintenance UAO.

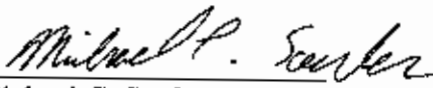
**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Response To The Environmental Appeals Board's Order To Show Cause Why Petition For Reimbursement Should Not Be Dismissed In Part As Premature, in the matter of Grand Street Mercury Site, General Electric Company, CERCLA § 106(b) Pctition No. 05-01, were sent to the following persons by first class mail, postage prepaid:

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