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

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| IN THE MATTER OF<br><br>Southern Iowa Mechanical Site,<br>Ottumwa, Iowa<br><br>Titan Tire Corporation<br><br>and<br><br>Dico, Inc.,<br><br>Petitioners.<br><br>Petition for Reimbursement Under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(b)(2) | Docket No. CERCLA-07-2009-0006<br><br>Petition No.<br>CERCLA 106(b) 09-01 |

PETITIONERS' BRIEF IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS THE PETITION
ON THE BASIS OF "RIPENESS"

On October 23, 2009, following completion of the required action under a CERCLA § 106(a) Administrative Order, Petitioners Titan Tire Corporation and Dico, Inc. (collectively, "Petitioners") timely submitted a Petition for Reimbursement pursuant to Section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2) (the "Petition"). On November 25, 2009, the United States Environmental Protection Agency, Region 7 ("EPA"), filed a motion to dismiss the Petition on the basis of "ripeness." EPA asserts: "Only if EPA notifies Petitioners that the response actions have been fully performed will a Petition for Reimbursement be ripe for EAB review." (EPA's Motion at 2). In other words, EPA argues that a person's statutory right to petition for

reimbursement is not dependent on "completion of the required action" (as provided in CERCLA § 106(b)(2)), but rather on EPA's notification of its approval of the Final Report – an approval which EPA can withhold for however long it chooses, effectively denying the rights conferred under CERCLA § 106(b)(2) for an indefinite period. For each of the reasons stated herein, EPA's motion should be denied.

## A. BACKGROUND

Petitioners received and complied with the terms of the Order for Removal Response Activities, Docket No. CERCLA-07-2009-0006 ("Order"), issued pursuant to CERCLA § 106(a) and transmitted to Petitioners by letter dated December 30, 2008. (Petition, pp. 1, 16). The Order required Petitioners to perform various response actions in connection with structural building components which Titan Tire, on behalf of Dico, Inc., had sold as commercially useful products to Southern Iowa Mechanical ("SIM") on various dates between 2004 and 2007. (Petition, p. 7). SIM disassembled the buildings and transported them to SIM's property in Ottumwa, Iowa, for re-assembly and use in its business operations. (*Id.*).

In 2008, EPA alleged that it sampled some of the building components that were being stored in a staging area on SIM's property, and detected PCPs in adhesive backing on insulation fragments found among some of the steel beams. (Petition, pp. 11-12). EPA designated this staging area as the "Southern Iowa Mechanical Site," and issued the Order requiring Petitioners to perform specified actions to remove hazardous substances from the Site. (Petition, p. 14).

Although Petitioners disputed any liability and reserved all of their rights, Petitioners complied with the Order. (Petition, p. 16; Petition Ex. 25, p. D0947). Petitioners' contractors completed physical work at the Site on August 28, 2009, and submitted to EPA the Report of PCB Sampling Activities prepared by independent contractor 21st Century Resources, Inc., on

September 2, 2009. (Petition, p. 17; Petition Ex. 25, p. D0942). EPA's project manager, DeAndré Singletary, scheduled a "final walk through" of the Site on August 25, 2009, but then called on August 24 to advise that no need existed for a final site evaluation. (*Id.*).

On October 21, 2009, Petitioners timely submitted their Final Project Report (the "Final Report"), as required by ¶ 46 of the Order. (Petition, p. 17). The Final Report, prepared by Petitioners' independent contractor, Greenleaf Environmental Services, LLC, is attached to the Petition as Exhibit 25. (*Id.*). The Final Report certifies that Petitioners completed the action required by the Order on October 12, 2009, and that Petitioners complied with the Order. (*Id.*; Petition Ex. 25, p. D0947).

EPA does not dispute any of the facts recited above, and each of those facts should be accepted as true for purposes of EPA's Motion.

### B. EPA'S "RIPENESS" ARGUMENT RELIES ON A PURPORTED PREREQUISITE WHICH APPEARS NOWHERE IN THE STATUTE OR IN THE BOARD'S REVISED GUIDANCE ON PROCEDURES FOR SUBMISSION OF CERCLA § 106(b) REIMBURSEMENT PETITIONS

EPA asserts that the Petition is not "ripe," and therefore should be dismissed, because EPA has failed or refused to review the Final Report and notify Petitioners that the Final Report is approved. EPA refused to perform a "final walk through" of the Site on August 25, and Petitioners have certified that the action required under the Order has been completed for nearly two months. EPA does not dispute that the required action was completed on October 12, 2009. EPA offers no explanation as to why it has not yet reviewed and approved the Final Report, or when it intends to do so. However, EPA "approval" is not a prerequisite to a person's statutory right to petition for reimbursement under CERCLA.

CERCLA § 106(b)(2)(A) states, in relevant 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.

42 U.S.C. § 9606(b)(2)(A) (emphasis added). Contrary to EPA's "ripeness" argument, CERCLA § 106(b)(2)(A) does not state that EPA approval of the Final Report is a prerequisite to petitioning for reimbursement, or that EPA may delay or deny a party's right to petition for reimbursement by withholding its approval of the Final Report.

Similarly, section III.B. of the Board's Revised Guidance on Procedures for Submission and Review of CERCLA § 106(b) Reimbursement Petitions, dated November 10, 2004 ("EAB Guidance") explains that "CERCLA establishes four prerequisites for obtaining review, and the petitioner must demonstrate that it satisfies all four of them." These prerequisites are: (1) compliance with the order; (2) completion of the required action; (3) timeliness of the petition; and (4) incurrence of costs. *Id. See also In re Solutia Inc.*, 10 E.A.B. 193, 203 (EAB 2001). Under "Completion of the Required Action," the EAB Guidance states: "A petitioner may seek reimbursement only after having completed the action required by the order. The reimbursement petition must state that the action has been completed, and be accompanied by evidence supporting that statement." EAB Guidance, § III.B. Again, contrary to EPA's "ripeness" argument, EPA approval of the Final Report is not mentioned anywhere among the prerequisites for obtaining review.

EPA's "ripeness" argument has been rejected repeatedly by the courts. Most recently, in *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865 (9th Cir. 2009), Goodrich Corporation attempted to assert a "pre-enforcement" action against EPA for engaging in a pattern and practice of issuing unilateral administrative orders beyond its statutory authority and routinely delaying issuance of certificates of completion of work required under its orders for the purpose

of thwarting judicial review. Although ultimately determining that Goodrich's claim was not yet ripe, because Goodrich admitted that it had not completed the work required by the UAO, the Court observed:

> [O]nce Goodrich believes that it has completed the work, Goodrich has a claim under a standard reimbursement action brought under § 9606(b)(2)(B) and can argue in that action that the EPA's refusal to certify completion is in error. Critically, § 9606(b)(2)(A) authorizes a PRP to petition the government for reimbursement "60 days *after completion of the required action*" (emphasis added), not 60 days *after the EPA certifies completion.* **The EPA's certification is not a prerequisite to bringing suit.**

581 F.3d at 878-79 (italics supplied by Court; bold emphasis added).

Similarly, in *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662-63 (7th Cir. 1995), *cert. denied,* 516 U.S. 1042 (1996) (quoted in *City of Rialto*, 581 F.3d at 879), EPA argued that it could "block" a petition for reimbursement by refusing to acknowledge compliance with the order, and limit judicial review to an action for declaratory judgment by a party aggrieved by a final agency action. The Court rejected this argument, noting that EPA's acknowledgment of completion of the work is not required before a petition for reimbursement can be submitted. The Court explained:

> If the party ordered to clean up a contaminated site claims to have completed the work, he has a claim for reimbursement, the reimbursement provision being available to "any person who receives and complies with the terms of any" Superfund clean-up order. § 9606(b)(2)(A). If the EPA turns down the claim on the grounds that the clean-up has not been completed . . ., the party has a right to sue and the agency can defend by showing that the clean-up has not been completed and thus that a condition of maintaining such a suit has not been fulfilled. The district court will adjudicate this ground for dismissal.

*Id.* at 662.

In its Motion, EPA cites two cases, neither of which supports, or even mentions, EPA's argument that a petition for reimbursement cannot be submitted until EPA grants its "approval" of the final report. The two cases cited by EPA are *In re Findley Adhesives Inc.*, 5 E.A.D. 710

(EAB 1995), and *In the Matter of Cyprus Amax Mineral Co.*, CERLCA 106(b) Petition No. 95-4, Order Dismissing Petition, June 24, 1996 (attached to EPA's motion). Each of these cases is readily distinguishable.

*Findley Adhesives* does not support EPA's Motion. In *Findley*, EPA asserted that the petition for reimbursement should be denied for three separate reasons, arguing that: (1) the petition was not timely filed; (2) Findley failed to comply with the order; and (3) Findley failed to meet its burden of proof that that it was not liable for response costs. *Id.* at 716. The Board rejected EPA's argument that the petition was not timely filed. *Id.* at 716 – 18. However, the Board agreed that Findley had failed to substantially comply with the order, and denied the petition. *Id.* at 718 – 20. In the present case, EPA does not contend that Petitioners failed to comply with the Order – in fact, Petitioners' averment that they complied with the Order is uncontroverted for purposes of this motion – and *Findley* does not support EPA's argument that the Petition in this case was not timely filed.

EPA's reliance upon *Cyprus Amax Mineral Co.*, is also misplaced. In *Cyrpus*, after EPA filed a motion to dismiss, Cyprus filed a Second Revised Petition in which it acknowledged that GPS data required by the UAO was absent from the final removal response report, and that additional data required under the order would be available within the week following submission of the revised petition. *Id.* at pp. 4 – 5. In other words, Cyprus admitted that work required under the UAO had not been completed at the time the Second Revised Petition was submitted. Based on this admission, the Board determined that the Second Revised Petition was premature, because Cyprus admitted that it had not completed the "required action" – a statutory prerequisite. *Id.* at pp. 5 – 6.

In the present case, the Petition does not contain any similar admissions that the action required by the order is incomplete. On the contrary, the Petition avers that Petitioners completed the action required by the Order on October 12, 2009, as certified in the Final Report. (Petition, p. 17; Petition Ex. 25, p. D0947).

Because EPA's Motion is based on a purported prerequisite which is not required by CERCLA or the EAB Guidance, and which has been repeatedly rejected by the courts – and because EPA cites no cases or other authority which support its argument that EPA "approval" is a prerequisite to submitting a petition for reimbursement, EPA's motion to dismiss should be denied. EPA should not be permitted to arbitrarily thwart or delay Petitioners' statutory right to seek reimbursement simply by refusing to participate in the final site "walk through" and to promptly review and approve the Final Report.

### C. IF THE BOARD DETERMINES THAT THE ACTION REQUIRED UNDER THE ORDER WAS NOT COMPLETE AT THE TIME THE ORIGINAL PETITION WAS SUBMITTED, PETITIONERS' REQUEST LEAVE TO SUBMIT THE AMENDED PETITION ATTACHED AS EXHIBIT "A" TO THIS BRIEF

Petitioners maintain that all action required under the Order was completed at the time they submitted the original Petition. However, EPA has attached to its Motion an e-mail message which Petitioners' counsel sent to EPA on November 6, 2009, attaching 5 pages of documents relating to the disposal of 4 drums of non-hazardous materials which had previously been removed from the Site. (*See* EPA Ex. 1). EPA does not assert that these documents demonstrate that any actions required under the Order were not completed at the time that the Petition was submitted; nor does EPA assert that it has disapproved in any manner the activities described in these documents.

Attached as Exhibit B to this Brief is an affidavit of Jeffrey Brown, Petitioners' Project Coordinator (the "Brown Afft"), explaining the activities reflected in the 5 pages of documents

attached to EPA's Motion as EPA Ex. 1. These documents relate to the disposal of 4 drums of non-hazardous waste debris which were removed from the Site in accordance with the Order on August 27, 2009 – long before the Petition was submitted. (Ex. B, Brown Afft, ¶ 2).

However, before accepting the drums, the disposal facility previously approved by EPA – Metro Park East Sanitary Landfill – required additional sampling and analysis of the contents of the drums to verify that the drums did not contain any lead-based paint chips exceeding regulatory limits. (Ex. B, Brown Afft, ¶ 3). The drums, which primarily contained paint chips from the steel beams at the Site, were temporarily stored at a secured off-site location in Des Moines, pending completion of the analysis. (Ex. B, Brown Afft, ¶ 4). The laboratory results, which were reported on September 9, 2009, confirmed that the contents of the drums did not exceed any regulatory limits for lead or any other RCRA-regulated metals. (*Id.*)

The additional analysis of the contents of these four drums required by the disposal facility caused additional delays for the Iowa Department of Natural Resources ("IDNR") to issue its special waste authorization for the disposal of these drums. This special waste authorization was issued by IDNR on October 29, 2009. (Ex. B, Brown Afft, ¶ 6 & Afft Ex. 3). The disposal facility agreed to accept the drums on October 30, 2009, pursuant to special waste permit number 905. (Ex. B, Brown Afft, ¶ 7 & Afft Exs 4 and 5). The drums were shipped from the secured off-site location to Metro Park East Sanitary Landfill for final disposal on November 4, 2009. (Ex. B, Brown Afft, ¶ 8 & Afft Exs 6 and 7).

The Order does not specifically address the disposal of non-hazardous waste materials from the Site, or waste debris with analytical results below applicable threshold limits. Paragraph 29.a. of the Order states, in relevant part, that "[a]ll materials removed from the beams by the scarification process and spent scarifying agents shall be **containerized and transported**

**offsite** for disposal in accordance with 40 C.F.R. § 761.62." (Emphasis added). Non-hazardous waste debris was "containerized" in the four drums discussed above and was "transported offsite for disposal in accordance with 40 C.F.R. § 761.62" before the Petition was submitted. Once the "containerized" non-hazardous waste debris was "transported offsite" for the purpose of disposal in accordance with the specified regulation, the specific action required under the Order was completed. The fact that the final disposal was delayed for a few weeks after the drums were "transported offsite" – in order to conduct additional analysis and to obtain required disposal authorizations and permits – does not diminish the completion of the specific action required under the Order.[1]

However, in the event that the Board disagrees with Petitioners, and believes that the action required under the Order was not completed until the four drums were accepted by the disposal facility on November 4, 2009, then Petitioners request leave to submit an Amended Petition which incorporates these activities. The disposal of the non-hazardous waste debris – which was containerized and transported offsite for disposal before the petition was submitted – has now been completed and Petitioners should be permitted to proceed with their statutory right to petition for reimbursement. Petitioners' Amended Petition is attached as Exhibit A. Petitioners' request that this Amended Petition be deemed filed as of the date of filing this Brief, which is less than 60 days after the disposal facility accepted the drums described above. The only substantive changes made in the Amended Petition are: (1) footnote 1 on page 1 has been added to explain that Exhibits 1 through 27 to the original Petition are incorporated by reference into the Amended Petition; (2) three paragraphs have been added, beginning at the bottom of

[1] EPA has not argued that the petition should be dismissed because any action required under the Order was not "completed" at the time the petition was submitted. The sole basis for EPA's motion is that no petition for reimbursement can be filed before EPA has issued its "approval" of the Final Report – a requirement which is found nowhere in the statute or EAB Guidance.

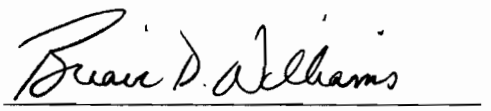
page 17 and continuing onto the top of page 19, describing the disposal of the four drums of waste debris discussed above; and (3) additional descriptions of work for which legal fees are being sought have been added at the bottom of page 19 and the top of page 20. Exhibits 1 through 27 to the original Petition are incorporated by reference into the Amended Petition. Exhibit 28 to the Amended Petition, which is the Brown Affidavit and attached exhibits, is attached to the Amended Petition.

**CONCLUSION**

For each of the reasons stated herein, EPA's motion to dismiss the Petition should be denied. The action required under the Order was completed on October 12, 2009, and Petitioners timely submitted their petition for reimbursement. EPA's argument that EPA approval is a prerequisite to submitting a petition for reimbursement is without merit. However, in the event that the Board determines that the action required under the Order was not completed until November 4, 2009, when 4 drums of non-hazardous waste debris previously containerized and transported offsite for disposal in compliance with the Order were shipped from a secure off-site location to the EPA-approved disposal facility, then Petitioners request leave to submit the Amended Petition attached hereto which describes these additional activities. This Amended Petition has been submitted within 60 days after the disposal of these drums on November 4, 2009.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By: 

Mark E. Johnson
Brian D. Williams
1201 Walnut
Suite 2900
Kansas City, Missouri 64106
816-691-2724
Fax 816-412-1208
mjohnson@stinson.com
bwilliams@stinson.com
Attorneys for Petitioners Titan Tire Corporation and Dico, Inc.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original of this Brief in Opposition and exhibits (including the Amended Petition) have been mailed, postage prepaid, via certified mail, return receipt requested, this 11th day of December, 2009, to the following:

Clerk of the Environmental Appeals Board
MC 1103B
U.S. EPA
Ariel Rios Building
1200 Pennsylvania Avenue, N.W
Washington, D.C. 20460-0001

In addition, on this same date true copies of this Brief in Opposition and exhibits were sent by e-mail and by U.S. mail to the following:

DeAndré Singletary
USEPA, Region VII
Remedial Project Manager
Iowa/Nebraska Remedial Branch
Superfund Division
901 North Fifth Street
Kansas City, KS 66101

Daniel Shiel, Esq.
Regional Counsel
USEPA, Region VII
901 North 5th Street
Kansas City, KS 66101

In addition, the Brief in Opposition and exhibits were electronically submitted to the Environmental Appeals Board on the same date as stated above.

Brian D. Williams

Attorney for Petitioners