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

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

UNITED STATES' BRIEF IN REPONSE TO PETITIONERS' RESPONSE TO THE UNITED STATES' MOTION TO DISMISS

On December 23, 2009, the Respondent, the U.S. Environmental Protection Agency, Region 7 ("EPA"), by and through its Office of Regional Counsel, requested leave to file a response to Petitioners' Titan Tire Corporation and Dico, Inc. (collectively, "Petitioners") opposition to EPA's motion to dismiss Petitioners' CERCLA Section 106(b) Petition for Reimbursement ("Petition"). That motion was granted on January 6, 2010. The Petitioners' response introduced case law and other issues that EPA would like to address to assist the Environmental Appeals Board's ("Board") deliberations on the threshold issue of ripeness. See Petitioners' Brief in Opposition to Respondent's Motion to Dismiss the Petition on the Basis of "Ripeness" ("Petitioners' Response"), December 14, 2009 (amended December 17, 2009).

A. To Be "Complete," Work Must Be Reviewed and Approved by EPA

EPA issued an Order for Removal Response Activities, Docket No. CERCLA-07-2009-0006 ("Order") to Petitioners in connection with the Southern Iowa Mechanical Site ("Site"), effective January 23, 2009. Petitioners' Exhibit 1. Pursuant to CERCLA Section 106(b)(2), 42 U.S.C. § 9606(b)(2), Petitioners now seek reimbursement for costs they allegedly incurred in

complying with that Order. Completion of the required actions is a statutory prerequisite of obtaining reimbursement under CERCLA Section 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). Under the express terms of the Order, in order for the work to be "complete," EPA must review the Petitioners' Final Report and determine whether the work has been successfully completed. Petitioner' Exhibit 1, Paragraph 76.[1] EPA received the Final Report on October 21, 2009 and is currently reviewing the report. See Petitioner's Exhibit 25. Region 7 plans to complete the review of the Final Report by the end of January 2010.

A recent CERCLA Section 106(b) petition for reimbursement had similar facts as here in that under the terms of the UAO, EPA had not yet received and reviewed the Final Remedial Action Report and thus had not yet made a formal determination that the petitioner completed the response action. See In re: Higman Barge Lines, Inc., CERCLA 106(b) Appeal No. 08-01, Order Dismissing Petition for Reimbursement without Prejudice, August 11, 2008. EPA filed a motion to dismiss the petition without prejudice on the basis that because the work was not yet complete, the petition was not ripe for review. The Board found good cause for granting EPA's motion and dismissed the petition without prejudice. Id. After the Higman Barge petitioner submitted their final report and EPA formally approved the report, Higman Barge filed a timely petition with the Board and the matter proceeded on its merits. See In re: Higman Barge Lines, Inc., CERCLA 106(b) Appeal No. 08-02, Order Dismissing Petition for Reimbursement, June 4, 2009.

The Petitioners contend that EPA approval of the work required by the Order is not a prerequisite to their statutory right to petition for reimbursement and that the work was complete once they submitted the Final Report. Petitioners rely on the Ninth's Circuit recent opinion in City of Rialto v. West Coast Loading Corp., 581 F.3d 865 (9th Cir. 2009), but that reliance is misplaced here. In City of Rialto, the issue before the court was not a petition for reimbursement under CERCLA Section 106(b), 42 U.S.C. § 9606(b), but rather a constitutional challenge to EPA's pattern and practice of administration of Unilateral Administrative Orders ("UAOs"). In its analysis of the ban on pre-enforcement review found in CERCLA Section 113(h), 42 U.S.C. § 9613(h), the Ninth Circuit discussed the exceptions to that ban, including an action for reimbursement under Section 106(b)(2), 42 U.S.C. § 9606(b)(2). City of Rialto, 581 F.3d at 869-71. As the Ninth Circuit stated, a party may seek judicial review of the validity of the order "*after* the PRP has completed the work required by the order," (emphasis in original). City of Rialto, 581 F.3d at 870. Here, the Order requires that EPA review the Petitioners' Final Report. EPA cannot certify that the work is complete until it has reviewed that Report.

The other case cited by Petitioners, Employers Insurance of Wausau v. Browner, 52 F.3d 656 (7th Cir. 1995), can also be distinguished from the matter at hand. In Employers Insurance

[1] "When EPA determines, after EPA's review of the Final Report, that all removal actions have been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including retention of records pursuant to Section XV and payment of oversight costs pursuant to Section XXI of this Order, EPA will provide notice to Respondents. If EPA determines that any removal actions have not been completed in accordance with this Order, EPA will notify the Respondents, provide a list of deficiencies, and require that Respondents modify the Work Plan to correct such deficiencies. The Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Order," Order for Removal Response Activities, Southern Iowa Mechanical Site, paragraph 76 (Petitions' Exhibit 1).

of Wausau, the petitioner abandoned the cleanup required by the order and EPA later arranged for the completion of the work. Id. at 661. Contending that it was not a liable party, the petitioner sought reimbursement for costs incurred, and among the issues before the court was whether the order was unreasonably broad and whether EPA was improperly withholding certification. Id. at 662-664. In its analysis interpreting the terms of the order, the Seventh Circuit stated, "the agency does have statutory authority to issue cleanup orders, and that authority carries with it, we should think, the authority to interpret those orders." Id. at 666. Here it is EPA's position that until EPA reviews and approves the Final Report required pursuant to Paragraph 46 of the Order and notifies Petitioners that the response actions are complete, the matter is not ripe for review by the Board. As the Seventh Circuit noted, "[c]ompletion of the action required by the EPA is an express statutory condition for seeking reimbursement," Employers Insurance of Wausau, 52 F.3d at 662.

In City of Rialto and Employers Insurance of Wausau, the completion issue involved situations where EPA had allegedly refused to certify completion or improperly delayed certification. City of Rialto, 581 F.3d at 878-879, Employers Insurance of Wausau, 52 F.3d at 662-667. Here, EPA is not wrongfully withholding certification or approval of the work as described in the Final Report nor thwarting judicial review. EPA is currently reviewing the Final Report and will promptly inform Petitioners when that review is complete and whether EPA has approved the Report. Until EPA approves the Final Report, a possibility exists that additional work may have to be performed under the terms of the Order, including revising the Final Report. Petitioners are free to exercise their statutory right to seek reimbursement for costs incurred by complying with the UAO, but they must wait until the terms of the Order have been completed.

B. **Petitioners' Response Brief Mischaracterizes EPA Action**

In their response brief, Petitioners state that "EPA has failed or refused to review the Final Report" and that "EPA refused to perform a 'final walk through' of the Site." Petitioner's Response, p. 3. EPA has not failed or refused any of its obligations related to this Site, but has diligently pursued cleanup at the Site and is following the terms of the UAO by timely reviewing the Final Report. For this site, the Remedial Project Manager decided that a final walk through was not necessary based upon his previous oversight of the response actions and receipt of the soil sampling results. And as noted above, Region 7 plans to complete the review of the Final Report by the end of January. The Petitioners filed their petition for reimbursement on October 23, 2009 -- just two days after EPA received the Final Report. See EPA's Motion to Dismiss. EPA then timely filed its motion to dismiss on the threshold issue of ripeness on November 25, 2009, as required by the Board's Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Petitions, November 10, 2004 ("If the Region contends that one or more of the prerequisites for obtaining review . . . have not been met . . . the Region must raise those contentions by submitting a limited responsive pleading in the nature of a motion to dismiss the petition," pp. 6-7). Dico has offered no evidence that EPA is delaying the review of the Final Report. Instead, Dico wants to simply ignore the final reporting requirement as a prerequisite to filing its petition. As noted above, Dico filed its petition two days after submitting the Final Report to EPA for review.

EPA respectfully requests that the Board grant EPA's motion to dismiss the Petition, without prejudice, on the threshold issue of ripeness as the Petition was prematurely filed.

Dated this 8th day of January 2010.

Respectfully submitted:

By: Lee R. Tyner for

J. Scott Pemberton
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 7
901 N. 5th Street
Kansas City, KS 66101
913-551-7276
FAX 913-551-7925

(DAVID DOWTON) fs

Christina Skaar
Office of Enforcement and Compliance Assurance
U.S. E PA (2272A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
202-564-0895
FAX 202-501-0269

Lee R. Tyner

Lee R. Tyner
Office of General Counsel
U.S. EPA (2366A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
202-564-5524
FAX 202-564-5531

CERTIFICATE OF SERVICE

I hereby certify that on the 8th of January 2010, I served a true and correct copy of the above Motion for Leave by mailing a copy via first class United States Mail to Mark Johnson | Stinson Morrison Hecker LLP, 1201 Walnut, Suite 2900, Kansas City, MO 64106-2150.

David Dowton
Office of Enforcement and Compliance Assurance
U.S. EPA (2272A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
202-564-4228
FAX 202-564-0086