BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re:	)	
Appleton Papers, Inc. (Lower Fox River & Green Bay Site)	)	CERCLA § 106(b) Petition No. 12-04

ORDER DISMISSING PETITION FOR REIMBURSEMENT WITHOUT PREJUDICE

On November 13, 2007, the United States Environmental Protection Agency ("EPA"), Region 5 ("Region") issued a unilateral administrative order ("UAO") under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675 ("CERCLA"). The UAO required Appleton Papers, Inc. ("API") and other potentially responsible parties ("PRPs") to conduct remedial action, including dredging, capping and covering of contaminated sediments, and long-term monitoring and maintenance, to address polychlorinated biphenyl-contaminated sediments at the Lower Fox River and Green Bay Superfund Site ("Site") in northwestern Wisconsin. When the remedial actions have been completed, the UAO requires certain procedures to be followed, including notification by respondents and certification by the Region, for determining that respondents have performed the required actions at the Site in full satisfaction of the UAO.

On June 8, 2012, API filed a petition with the Environmental Appeals Board ("Board") for reimbursement in the above-captioned matter seeking to recover approximately $174 million in costs API had incurred in complying with the UAO. Petition for Reimbursement of Costs (June 8, 2012) ("Petition") at 2. Although it is undisputed that all of the cleanup actions contemplated by the UAO have not been completed, API nevertheless asserts that it is entitled to reimbursement under CERCLA § 106(b), 42 U.S.C. § 9606(b), because in an ongoing enforcement action initiated by the United States and the State of Wisconsin in the U.S. District Court for the Eastern District of Wisconsin,[1] the District Court ruled that API is not a liable party under CERCLA. The District Court's order is attached as Exhibit 4 to API's Petition. *See* Decision Granting Motion for Reconsideration (Apr. 10, 2012) ("District Court Order"). API asserts that due to the District Court Order ruling that API is not liable under CERCLA, all of API's required actions under the UAO should be deemed completed for purposes of its reimbursement petition. Petition at 4.

The Region filed a response seeking dismissal of the petition on the ground that API has not completed the actions required by the UAO. In the alternative, the Region moves for a stay of the proceedings because the issue of API's liability currently is being litigated in the United States District Court for the Eastern District of Wisconsin. *See* Motion to Dismiss the Petition of Appleton Papers Inc. or in the Alternative Motion to Stay Proceedings (July 13, 2012) ("Motion to Dismiss"). API filed a reply to the Region's response, in which API urges this Board to deny the Region's Motion to Dismiss. *See* Memorandum of Appleton Papers Inc. In Opposition to

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[1] The enforcement action is captioned: *United States and State of Wisconsin v. NCR Corp., et al,* Case No. 10-CV-910 (E.D. Wis.).

EPA's Motion to Dismiss Petition for Reimbursement (Aug. 1, 2012) ("API's Reply"). API asserts that even though the work required by the UAO has not been completed, CERCLA's reimbursement provisions must be interpreted flexibly where, as here, a recipient of a UAO "was adjudicated by a federal court to have no CERCLA liability." API's Reply at 2. API states further that the Region has failed to articulate any basis for staying this matter.

By order dated August 16, 2012, the Board sought clarification from the Region on three issues raised in the Petition and in the Region's Motion to Dismiss: the status of the District Court Order and the timing of the appeals process; whether API is entitled to reimbursement if the District Court Order is affirmed on appeal; and the relevance of a cost sharing arrangement between API and other PRP's. *See* Order for Clarification (Aug. 16, 2012). The Region filed a response to the Order for Clarification on October 11, 2012. *See* EPA's Response to Order for Clarification. API filed a reply on November 1, 2012. *See* Memorandum of Appleton Papers Inc. in reply to the Board's Order for Clarification ("API Clarification Reply").

Section 106(b)(2) of CERCLA allows any person who has complied with an administrative order issued by EPA or another federal agency under section 106(a) of CERCLA to petition for reimbursement of the reasonable costs incurred in complying with the order, plus interest. 42 U.S.C. § 9606(b)(2). To establish a claim for reimbursement, a petitioner must demonstrate it was not liable for response costs under CERCLA section 107(a), 42 U.S.C. § 9607(a), or that EPA's selection of the ordered response action was arbitrary and capricious or was otherwise not in accordance with law. CERCLA § 106(b)(2)(C) - (D), 42 U.S.C. § 9606(b)(2)(C) - (D). As this Board previously has stated, completion of the required action is

one of four express statutory conditions for seeking reimbursement.[2] CERCLA § 106(b), 42 U.S.C. § 9606(b); *see In re Glidden Co.*, 10 E.A.D. 738, 746 (EAB 2002); *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 other grounds*, 146 F.3d 1107 (9th Cir. 1998). The "required action" refers to the specific cleanup actions required by the terms of the UAO. Once a party completes these actions, it can seek reimbursement for the costs under CERCLA § 106(b), 42 U.S.C. § 9606(b). *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 663 (7th Cir. 1995).

API does not dispute that completion of the required action is a statutory prerequisite to seeking reimbursement. Rather, API asserts that the Board should hold that the required action is complete in this case because, pursuant to the District Court Order, API is not a liable party under CERCLA. According to API, "while the remediation itself is not yet complete, it is undisputed that all of the 'required action' by API under the [UAO] is now complete. The 'completion of the required action' was on April 10, 2012," upon issuance of the District Court Order. Petition at 10. Although API does not cite to any case law, nor is the Board aware of any case law, explicitly holding that a prior determination of non-liability constitutes "completion of the required action" for purposes of CERCLA § 106(b)(2)(A), 42 U.S.C. section 9606(b)(2)(A), API asserts that such a holding is consistent with the Seventh Circuit's reasoning in *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 663 (7th Cir. 1995). *See* Petition at 9-10. In *Wausau*, the Seventh Circuit made clear that a party can seek reimbursement only when it completes the

[2] The other prerequisites the petitioner must establish before the Board will consider the merits of a reimbursement request are that the petitioner: 1) complied with the order; 2) submitted the petition within sixty days of completing the action; and 3) incurred costs responding to the order. CERCLA § 106(b); 42 U.S.C. § 106(b); *see In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996).

actions required by the terms of the UAO. *Wausau*, 52 F.3d at 663. Under certain circumstances, however, the court opined that something less than completion of the actions required by the UAO may be sufficient for purposes of seeking reimbursement, where, for example, a party cannot complete the required action for reasons beyond its control, where the agency takes steps to postpone completion or unreasonably refuses to certify completion, or where the UAO is overly broad. *Id.* at 663-65. Under such circumstances, the court suggested the need for flexibility in interpreting CERLCA's reimbursement provisions. *Id.* at 665. API urges this Board to exercise such flexibility in this case given the District Court's liability determination.

The issue of whether a prior determination of non-liability constitutes "completion of the required action" for purposes of CERCLA 106(b) is one of first impression and one that deserves thorough review and analysis at the appropriate time. However, as the Region points out in its Motion to Dismiss, and as API has conceded, *see* API Clarification Reply at 1, the District Court's liability determination is not a final order and is subject to appeal. It would be highly inefficient for this Board to issue an Agency final ruling on this issue when the District Court Order is subject to revision before entry of final judgment [3] or reversal on appeal. *See, e.g., In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 18 (EAB Sept. 24, 2009) (stating that it would be highly inefficient for the Board to issue a ruling on a permit where the Agency was contemplating changes to the permit), 14 E.A.D. ___; *In re Titan*

[3] *See* Fed. R. Civ. Pro. 54(b) (absent entry of a final judgment, an order or decision "that adjudicates fewer than all claims or the rights or liabilities of fewer than all parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.").

Tire Corp., CERCLA § 106(b) Petition No. 10-01, at 4 (EAB Dec. 10, 2010) (Order Granting Stay of Proceedings) (staying CERCLA 106(b) proceedings before the Board on judicial economy grounds where liability issue central to the Board's deliberations is concurrently being litigated in federal district court). Under these circumstances, the Board has determined that the Petition is not ripe for review at the present time.[4] At a minimum, Board consideration of API's petition must be delayed until final judgment is entered and the time for filing an appeal has passed.

In its reply to the Region's Motion to Dismiss, API asserts that the delay resulting from the dismissal of its Petition in this matter would result in "gross injustice" to API. API's Reply at 2. However, the Board notes that API could have moved for certification of the District Court Order as a final judgment and thereby potentially avoided or minimized this delay. *See* Fed. R. Civ. Pro. 54(b) ("When an action presents more than one claim for relief * * * or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.").[5] Had API filed such a motion, the District Court would have had the opportunity to

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[4] The Region also has asserted that API failed to comply with certain requirements of the UAO during 2011 and 2012. *See* Motion to Dismiss at 11-14. As API points out, however, it was during this time period that API was challenging its liability in the enforcement action, an action which resulted in the district court's liability determination. Because any Board review of the merits of this assertion might be affected by a final judgment on liability, the Board does not reach this issue at the present time.

[5] The purpose of rule 54(b) "is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until a final adjudication of the entire case by making an immediate appeal available. 10 Charles A. Wright et al., *Federal Practice and Procedure* § 2654 at 33 (3d ed. 1998). "The rule attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multi-party or multi-claim situations at a time that best serves the

weigh the equities and determine if entry of a final judgment was appropriate.[6] *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, (1980) (the task of weighing and balancing contending factors regarding certification under Rule 54(b) is peculiarly one for the trial judge; a trial judge's determination on certification is entitled to substantial deference on review). By failing to seek certification of the District Court Order as a final judgment under Federal Rule of Civil Procedure 54(b), API bears at least partial responsibility for any delay in the Board's review of the Petition for Reimbursement under CERCLA § 106(b). Further, API has failed to convince the Board that API will suffer any "gross injustice" from today's dismissal without prejudice.

For the reasons stated above, API's Petition is hereby dismissed without prejudice as premature. *In re Cozinco, Inc.*, 7 E.A.D. 708, 724-25 (EAB 1998) (remedy for prematurely filed petition for reimbursement is dismissal without prejudice). This order solely addresses the timeliness of the Petition and in no way precludes API from re-filing the Petition based on the same or similar grounds when the matter is ripe for Board review.

So ordered.[7]

Dated: Dec. 18, 2012 ENVIRONMENTAL APPEALS BOARD

By: Leslye M. Fraser
Leslye M. Fraser
Environmental Appeals Judge

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needs of the litigants." *Id.* at 35.

[6] In responding to the Board's August 16, 2012 Order for Clarification, the Region stated, and API has not disputed, that no party sought certification under Rule 54(b). *See* EPA's Response to Order for Clarification at 1 (Oct. 11, 2011).

[7] The two-member panel deciding this matter includes Environmental Appeals Judges Leslye M. Fraser and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Dismissing Petition for Reimbursement Without Prejudice in the matter of Appleton Papers, Inc., CERCLA § 106(b) Petition No. 12-04, were sent to the following persons in the manner indicated:

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Dated: DEC 18 2012

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