

In the Matter of Cyprus
Amax Mineral Co., CERCLA
106(b) Petition No. 95-4
Order Dismissing Petition
June 24, 1996

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

In the Matter of:)
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Cyprus Amax Mineral Co.)

CERCLA 106(b) Petition No. 95-4

Petitioner)
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ORDER DISMISSING PETITION

On October 23, 1995, Cyprus Amax Minerals Company ("Cyprus") filed a petition under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(2), for reimbursement of costs incurred in complying with a unilateral administrative order ("UAO") issued by U.S. EPA Region VI. The petition was subsequently revised on October 30, 1995 ("First Revised Petition"), and January 16, 1996 ("Second Revised Petition").¹ By motion received January 11, 1996,² the Region moved to deny

¹The First Revised Petition added certain citations to supplemental exhibits, and amended certain dates contained in the original petition. It was otherwise unchanged from the original petition. The Second Revised Petition withdrew an argument made in the original petition that Cyprus was entitled to reimbursement pursuant to CERCLA § 106(b)(2)(C) because it was not liable for the costs incurred in responding to the UAO. Cyprus withdrew that argument because of a federal District Court ruling that Cyprus was responsible for the operations of two companies that operated at the site. Second Revised Petition at 1, n.1. In addition, the Second Revised Petition added a response to a pending motion (Second Revised Petition at 5, n.2) filed by the Region asking the Board to deny the petition; it is the Region's motion which gives rise to the instant ruling of the Board.

²The Region submitted its motion on December 19, 1995, during the recent shutdown of EPA due to lack of appropriations.

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the petition on the ground that Cyprus had not "completed" the action required under the UAO, and therefore did not meet a necessary threshold to seeking reimbursement. For the reasons discussed below, we are dismissing the petition as premature, without prejudice to refileing once the action required under the UAO is complete.

The facts relevant to this order are not in dispute. On February 2, 1994, Region VI issued a UAO to Cyprus and other parties requiring them to conduct a removal action at the National Zinc Superfund Site in Bartlesville, Oklahoma. The required action included excavation and removal of soil contaminated with lead and cadmium. Cyprus acknowledges that the UAO included an obligation to file certain reports with Region VI before, during, and after the removal action, including "draft and final work plans, a health and safety plan, monthly written progress reports, and, within forty-five days after completion of the Removal Action, a final report summarizing the actions taken to comply with the UAO." Second Revised Petition at 6. The aforementioned final report (the "Final Removal Response Report") is the subject of the pending motion.³

The motion was therefore not docketed by the Board until January 11, 1996, following resumption of activities.

³Cyprus alleges that the requirements of the UAO were incorporated into a Remedial Action Plan for the site, pursuant to a Record of Decision issued by the Oklahoma Department of Environmental Quality ("ODEQ") in December 1994. The Remedial Action Plan was incorporated into the terms of a Consent Agreement and Final Order ("CAFO") entered into between Cyprus and ODEQ on August 7, 1995. Second Revised Petition at 4-5. Cyprus does not argue that the CAFO affected its obligation to

In accordance with the Board's Guidance on submitting CERCLA § 106(b) petitions ("Guidance")⁴, on October 20, 1995, Cyprus requested that the Region confirm that the action required by the UAO was completed on August 23, 1995.⁵ On November 17, 1995, Region VI denied that request. In a letter to counsel for Cyprus, Region VI stated that the removal action was not complete because a preliminary review of Cyprus' 22-volume Final Removal Response Report indicated that the report was incomplete. Letter from Region VI to Susan H. Ephron at 2 (Nov. 17, 1995). The Region stated that "[s]ince the reporting requirements are part of the Removal Action, the Removal Action is not complete." *Id.* at 3-4. The Region stated that once final review of the report was completed, it would provide Cyprus with a "list of deficiencies" setting forth the actions that must be taken in order to complete the requirements of the UAO. *Id.* at 2-3.

Subsequently, the Region filed its motion to deny the petition. In its memorandum in support of the motion, the Region states that the UAO included a requirement that Cyprus "create a data management system which include[s] Global Positioning Satellite (GPS) coordinates (*i.e.*, latitude and longitude) for each [soil] sample taken, and * * * report that data in the Final

submit the reports required in the UAO.

⁴"Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of those Petitions" (June 9, 1994).

⁵Cyprus alleges that certain activities relating to the soil removal may, in fact, have continued beyond August 23, 1995. Second Revised Petition at 6, n.3.

Report." Motion to Deny Petition at 6. The motion avers that "the Final Report * * * does not include the GPS coordinates of each sample [and therefore the Region] cannot be completely sure of the location of the samples taken by Cyprus * * *." Id. The Region states that as a consequence it cannot determine whether the soil samples indicate that the lead and cadmium contamination identified by EPA were cleaned up to levels specified in the UAO. Id. The Region therefore claims that the action required by the UAO is not "complete," and that as a result Cyprus has failed to establish a statutory prerequisite to reimbursement. Id. at 4. The Region requests that the Board deny the petition, or alternatively that the Board allow the Region an additional 60 days to respond to the petition, calculated from the date the Region receives Cyprus' complete Final Removal Response Report. Id. at 8-10.

In its January 16, 1996 Second Revised Petition, Cyprus does not dispute that the GPS data were absent from the Final Removal Response Report, nor does Cyprus contend that the action required by the UAO is "complete" notwithstanding the lack of the GPS data. Cyprus acknowledges in the petition that "once the CAFO was executed and Cyprus completed removing excavated soil on August 23, 1995, as required in the UAO, Cyprus had fully complied with the terms of the UAO, with the exception of certain additional data that will be available within the next week." Second Revised Petition at 4-5 (emphasis added). Cyprus further states that "the physical removal action was completed on August

23, 1995, and according to EPA the action will be complete once the remaining GPS data is filed within the next week." Id. at 7 (emphasis added). Cyprus offers two reasons why the Board should deny the Region's motion. First, Cyprus argues that the "GPS data and final lot drawings for the approximately 30 residential lots that was unavailable in October will be available in the next week. According to EPA the removal action will then be complete." Id. at 5, n.2. Second, Cyprus contends that the Region is not entitled to the relief requested in the motion (denial of the petition), because the Board's Guidance on CERCLA petitions states only that the Board may return a premature petition and allow it to be refiled following completion of the action. Id. (citing Guidance at 5).

Both parties recognize that completion of the "required action" under the UAO is a statutory prerequisite to filing a petition for reimbursement. CERCLA § 106(b)(2); Employers Ins. of Wausau v. Browner, 52 F.3d 656, 662 (7th Cir. 1995), cert. denied ___ U.S. ___ (1996). As set forth above, Cyprus' petition plainly recognizes that the removal action required by the UAO is not complete, pending submission of the GPS data required by the UAO to be included in the Final Removal Response Report. The Board has explained in its Guidance that "[a]ny petition that does not demonstrate compliance with the threshold statutory requirements for reimbursement will be denied." Guidance at 4. The portion of the Guidance relied upon by the petitioner wherein the Board states that it "may return" a premature petition and

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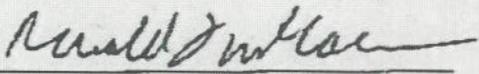
allow it to be refiled simply reflects that denial of a petition because it is premature (i.e. dismissal) should be without prejudice to refiling after the response action is in fact complete. See Guidance at 5.

We are not persuaded by the argument that the petition should not be dismissed because Cyprus intends to soon complete the required action by providing the Region with the missing GPS data. Until such "completion" occurs, the petition is premature. Moreover, until the Region receives the missing data and has an opportunity to review the data, it cannot make a determination as to whether the action is complete. Accordingly, the petition must be dismissed as premature, without prejudice to refiling it within 60 days after the missing GPS data are provided to the Region.

So ordered.

Dated: *Jan 24, 1996*

ENVIRONMENTAL APPEALS BOARD

By: 

Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition in the matter of Cyprus Amax Minerals Company, CERCLA § 106(b) Petition No. 95-4, were sent to the following persons in the manner indicated:

By First Class Mail
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B

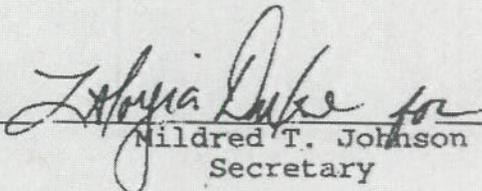
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Dated: JAN 25 1996


Mildred T. Johnson
Secretary