# IN RE FINDLEY ADHESIVES, INC.

CERCLA §106(b) Petition No. 94-10

***FINAL DECISION***

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Decided February 10, 1995

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Syllabus

Findley Adhesives, Inc. has petitioned pursuant to CERCLA § 106(b) for reimbursement of the response costs it incurred pursuant to orders issued by EPA Region IX on March 17, 1989, and February 14, 1991, that required Findley to participate in the cleanup of hazardous substances at the Reno Barrel Recycling Site in Cold Springs, Nevada.

Held: The petition is denied because Findley did not comply with the cleanup orders and therefore has not met a statutory prerequisite for reimbursement.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge Reich; Judge McCallum filed a concurring opinion, post p. 14:***

U.S. EPA Region IX issued an order on March 17, 1989, under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), requiring 23 potentially responsible parties ("PRPs") to abate a threat of harm to the public health or welfare or the environment caused by deteriorating drums containing hazardous substances at the Reno Barrel Recycling Site in Cold Springs, Nevada.[1] The orders named the petitioner, Findley Adhesives, Inc. ("Findley"), as a PRP. Findley, a manufacturer of adhesives used in food packaging, had sent drums containing wastes from its manufacturing operations to the site for disposal. On February 14, 1991, Region IX issued an amended order after the PRPs failed to comply fully with the March 1989 order.

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[1] CERCLA § 106(a), 42 U.S.C. § 9606(a), authorizes the President to issue orders "necessary to protect public health and welfare and the environment" when "an actual or threatened release of a hazardous substance from a facility" poses "an imminent and substantial endangerment to the public health or welfare or the environment." The President has delegated the authority to issue such orders to EPA. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987).

Findley has petitioned, pursuant to Section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A), for reimbursement of $102,369.74, plus interest, for response costs it incurred pursuant to both orders.[2] As discussed below, Findley's petition is denied because Findley did not comply with the Agency's cleanup orders[3] and therefore did not satisfy a statutory prerequisite for obtaining reimbursement.

## I. *BACKGROUND*

### A. *Statutory Background*

CERCLA was enacted "to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties." *Dico, Inc. v. Diamond*, 35 F.3d 348 (8th Cir. 1994). The statute requires responsible parties either to conduct, or contribute to the cost of, cleanup at sites where the release or potential release of a hazardous substance[4] threatens public health or welfare or the environment. The statute establishes two procedures for response actions. The Federal government may respond to a release or threatened release and then seek reimbursement from PRPs pursuant to CERCLA §§ 104 and 107, 42 U.S.C. §§ 9604 and 9607. Alternatively, where there is an immediate and substantial threat of harm to the public health or welfare or the environment, the Federal government may order PRPs to respond to the threat pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a).[5]

Petitions for reimbursement from the Hazardous Substance Superfund for reasonable response costs incurred pursuant to an Agency order are authorized by CERCLA § 106(b)(2)(A), 42 U.S.C.

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[2] Findley filed a Petition for Reimbursement on August 8, 1991, seeking $81,832 and a Supplemental Petition for Reimbursement on September 19, 1991, seeking an additional $26,870 (totalling $108,702). It subsequently reduced the amount it requests to $102,369.74. *See* Letter from Findley to Region IX, November 11, 1991.

[3] As a recipient of the Agency's cleanup orders, Findley was responsible for performing all of the response actions required by those orders. We recognize that Findley joined with other PRPs in arranging for the carrying out of these obligations and our references to "Findley's" non-compliance in this decision apply equally to all the PRPs subject to the orders.

[4] The term "hazardous substance" includes any substance identified as a hazardous substance under CERCLA § 101(14) and any other substance identified as a hazardous substance by Agency regulation. *See* CERCLA § 102, 42 U.S.C. § 9602. A list of substances EPA has designated as hazardous substances appears at 40 C.F.R. § 302.4.

[5] CERCLA § 106 does not identify specific classes of persons who may be subject to administrative orders issued pursuant to its authority. It is uncontested, however, that any person who arranges for disposal of a hazardous substance and is otherwise liable under CERCLA § 107 can be issued an order under CERCLA § 106. In this case, Region IX identified Findley as a PRP based on the Region's determination that Findley had sent hazardous waste to the RBR site.

§ 9606(b)(2)(A), which provides that:

> 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.

CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C) states that:

> [T]o obtain reimbursement, a petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section [107(a)] and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

The statute also allows a petitioner who is liable for response costs to recover those costs if it can demonstrate on the administrative record that the President's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with law. 42 U.S.C. § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D).

The authority to make determinations on petitions for reimbursement has been delegated by the President to the Administrator of EPA, and re-delegated to the Environmental Appeals Board.[6]

B. *Factual Background*

The Reno Barrel Recycling ("RBR") Site was initially used solely to receive and resell empty drums. By the late 1980's, it had also begun to accept drums containing hazardous substances for disposal.[7] An EPA Region IX Site Inspection Team inspected the site on October 20, 1988, and found more than 3300 55-gallon drums "in various states of deterioration," of which approximately 2500 contained hazardous substances.[8] The drums were precariously stacked and were exposed to the elements. Some were in "direct contact with wet soil."[9] The EPA team sampled 20 representative drums and conducted field hazard

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[6] *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987), and EPA Delegation of Authority 14-27 ("Petitions for Reimbursement"), June 1994.

[7] *See* Final Report, EPA Technical Assistance Team, November 8, 1991.

[8] *See* Administrative Order 89-06, March 17, 1989, at 4.

[9] *Id.*

categorization testing of their contents.[10] According to Region IX, test results indicated the presence of hazardous substances, including "acids, oxidizers, cyanides, and ignitable liquids." Order at 4. In addition, container labeling revealed the presence of the hazardous substance perchloroethylene. *Id.*

EPA Region IX issued Administrative Order 89-06 ("the Order") on March 17, 1989, effective March 27, 1989, requiring 23 potentially responsible parties, including Findley,[11] to clean up the site. The Order required the PRPs to:

> (1) Provide 24 hour a day security service for the duration of the removal, starting within two days of the Order's effective date [*i.e.*, by March 29, 1989];
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> (2) Submit a work plan and schedule for completing the required work within nine days after the Order's effective date [*i.e.*, by April 3, 1989];
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> (3) Complete the required work "to the satisfaction of EPA" within 127 days after the Order's effective date [*i.e.*, by August 1, 1989].

*See* Order at 8 and Appendix 1 (Site Remediation Scope of Work). Findley denied liability for the cleanup,[12] but entered into an agreement with the other PRPs to comply with the Order. Since the time frame within which the response action was completed is critical to the disposition of Findley's petition, a brief chronology follows.

The PRPs did not complete the cleanup by August 1, 1989, the deadline set in the Region's Order. In response to their July 31, 1989

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[10] Final Report, EPA Technical Assistance Team, Nov. 8, 1991, at 1.

[11] An inventory of the cans and drums at the site identified over 30 of them as having been received from Findley. The Region maintains that the contents of one of Findley's drums was tested and found to meet RCRA ignitability criteria. *See* Letter from Region IX to the Office of Waste Programs Enforcement (OWPE), Feb. 26, 1992, at 6. CERCLA § 101(14) defines "hazardous substance" to include "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of [RCRA] * * *." RCRA regulations at 40 C.F.R. § 261.21 identify the characteristic of ignitability.

[12] Findley filed a Statement of No Legal Liability with Region IX on March 31, 1989. The crux of Findley's argument was that the Region did not properly test for ignitability and that the waste it sent to the RBR site was not hazardous. *See infra* n.19 and accompanying text.

request for an extension of the deadline, Region IX established a revised schedule for removal activities. *See* Letter from Region IX to PRP Group, August 17, 1989. The new schedule required the PRPs to remove all containers and visibly contaminated soil from the site by September 15, 1989, and to implement a soil sampling plan by September 22, 1989. It required "site completion" by October 13, 1989, if no additional soil removal were required after analysis of the samples, and by November 10, 1989, if additional soil removal were required.

The PRPs did not meet the revised deadlines, and hazardous substances remained at the site throughout 1990. In January 1991, all response activities at the site ceased.[13] Region IX and its Technical Assistance Team conducted a site inspection on January 22, 1991, and found approximately 227 drums containing hazardous substances. Letter from EPA Region IX to Findley, Feb. 14, 1991. No security guard was present and access to the site was unrestricted. Moreover, the site run-off containment system had been breached, providing a route whereby hazardous substances could migrate to a nearby lake. *Id.* The Region notified all PRPs that releases of hazardous substances were continuing to occur and that "[t]he site continues to pose a threat to public health or welfare or the environment." *Id.*

The Region determined that "the removal action compelled by [the March 17 Order] never was completed."[14] It issued an amended order on February 14, 1991 ("the Amended Order"), effective February 18, 1991, "specify[ing] the tasks required to complete the removal action directed by the original order" and new deadlines for performing them.[15] The Amended Order emphasizes that:

> Each of the tasks described in this Amended Order is within the scope of the removal action compelled by the original Order. Therefore, until the work required by the Amended Order is completed, each Respondent remains in violation of the original Order.

Amended Order at 3.

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[13] *See* Letter from Region IX to OWPE, February 26, 1992, at 3; Final Report, EPA Technical Assistance Team, November 8, 1991.

[14] Amended Order, February 14, 1991.

[15] The Amended Order requires "each Respondent" [*i.e.*, each PRP] to provide security service by February 19, 1991; remove all containerized hazardous substances and all visibly contaminated soil within 45 days of the effective date of the Order; implement a post cleanup sampling plan within 60 days of the effective date of the Order; and remove residual contamination within 90 days.

Cleanup activities resumed during the early months of 1991. On April 18, 1991, the PRPs collected soil samples for analysis. On April 23, 1991, they removed the last containers of hazardous waste.[16] On July 19, 1991, Findley received a Site Remediation Summary and Soil Analysis Report from the PRPs' contractor stating that post-remediation soil testing had "demonstrated no significant chemical contamination of the ground surface thus completing the remediation process."[17] Report at 2.

C. *The Petition*

Findley filed a petition for reimbursement on August 13, 1991, which it supplemented on September 11, 1991, with an additional claim for reimbursement for attorneys' fees as response costs.[18] Findley does not deny that it sent waste to the RBR Site. Findley argues instead that it is not liable for response costs because the waste it sent to the site was not hazardous. Petition for Reimbursement at 2. It asserts that it "may" have sent "kettle flush" to the site, which is the waste that is generated when its kettles are purged with mineral oil to prevent remnants of adhesive from one run from mixing with adhesive from a subsequent run. *See* Statement of No Legal Liability at 4. Findley maintains that kettle flush is not a hazardous waste. Findley challenges the Region's claim that Findley sent ignitable materials to the site, arguing that the Region did not test the contents of Findley's drums for ignitability using procedures that meet the requirements of RCRA regulations at 40 C.F.R. § 261.21.[19]

Region IX responded to the petition on February 26, 1992.[20] The Region contends that the EAB should either not consider Findley's

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[16] Letter from Region IX to OWPE, February 26, 1992, Appendix 2.

[17] The Report is dated July 15, 1991, and date stamped "July 19, 1991." We take the latter date to be the date Findley received it.

[18] *See supra* n.2. Findley had actually filed an earlier petition for reimbursement on April 11, 1991, which contained the statement that "[t]he bulk of the cleanup has now been completed." *Id.* OWPE denied Findley's petition without prejudice, stating that Findley has not completed the required response action and therefore it "fail[ed] to meet the threshold statutory requirement for filing a petition." Letter from Bruce Diamond, Director, OWPE, to Godfrey & Kahn, S.C., May 10, 1991.

[19] *See* Findley Statement of No Legal Liability at 3. We note that Findley raised two additional issues in its Statement of No Legal Liability which it does not raise in its petition. It claimed that the March 17, 1989 order is "fatally defective" because "it fails to apportion the clean up responsibility among the named respondents." *Id.* at 7. It also claimed that Findley was prejudiced because the Region failed to give it written notice of its potential liability before issuing that order. *Id*

[20] Letter from Region IX to OWPE, February 26, 1992.

petition, or should reject it, for three reasons. First, the Region contends that the petition was untimely, not having been filed within sixty days of the "completion of the required action," as § 106(b) requires. The Region asserts that the required action was completed on April 23, 1991, the date "the transportation and disposal of the containerized waste was completed," and therefore Findley was required to file its petition within 60 days of that date, by June 23, 1991.

Second, the Region maintains that Findley did not "comply with the terms of the order," also a statutory requirement for reimbursement. According to the Region, "site remediation was sporadic, and was characterized by financial disputes between the responsible parties and their contractors, work stoppages, missed deadlines, procrastination and delays." Letter from Region IX to OWPE, February 26, 1992, at 4. Moreover, "there were extensive periods during the removal action when no security was provided at the site." *Id.* at 3.

Finally, the Region argues that Findley is not entitled to reimbursement because it has not established by a preponderance of the evidence that it is not liable for response costs. The Region maintains that Findley arranged for the disposal of hazardous waste, and thus is liable under CERCLA § 107(a)(3), since Findley's waste exhibits the characteristic of ignitability, based on a laboratory test that was conducted in accordance with RCRA regulations which Findley has not rebutted. *Id.* at 6.

The Board issued a Preliminary Decision on November 30, 1994. In accordance with a briefing schedule established by the Board, the Region and Findley both filed comments on the Preliminary Decision on February 6, 1995. After due consideration of all comments received, the Board issues this Final Decision. All comments not resulting in changes to the Preliminary Decision are hereby rejected as irrelevant, immaterial, or incorrect.

## II. *DISCUSSION*

For the reasons set forth below, we are denying Findley's April 13, 1989 petition. Contrary to Region IX's contention, we find that the petition was timely filed. However, we agree with the Region that Findley did not comply with the Agency's cleanup orders, and therefore is not eligible for reimbursement.

### A. *Timeliness of Petition*

The Region's orders required Findley to remove hazardous substances from the site; collect soil samples; perform a "residual con-

tamination appraisal" to determine whether the soil samples met EPA-approved cleanup criteria; and remediate any contamination that exceeded the criteria. *See* Site Remediation Scope of Work appended to the March 17, 1989 Order (Appendix 1). The PRPs developed a work plan[21] to implement the soil sampling and appraisal requirements of the Order which enumerated the following four activities:

— Removal of grossly contaminated soil

— Post cleanup confirmation sampling

— Review analytical data

— Further excavation (if required)

As of April 23, 1991, the last containers of hazardous waste and the grossly contaminated soil had been removed from the site. On that date, the PRPs' contractor collected soil samples for analysis. On July 19, 1991, Findley received notification that post-cleanup soil samples had been analyzed and found to be uncontaminated, and therefore that no further soil removal would be necessary. Therefore, as of July 19, 1991, no further work was required of Findley. Findley's petition was filed within sixty days of July 19, 1991, and is, therefore, timely.

Region IX contends that Findley completed the action required under the Order on April 23, 1991, the date on which the post-cleanup confirmation sampling was conducted. Therefore, it argues that Findley was foreclosed from filing a reimbursement petition after June 23, 1991.

We disagree. The Region's orders did not merely require Findley to collect soil samples but also required it to *analyze* the samples for contamination. The Scope of Work appended to the Order specifically required the PRPs to perform a "Residual Contamination Appraisal" and to remediate any contamination identified by the appraisal. *See* Reno Barrel Recycling Site Remediation Scope of Work, Appendix 1 to Order. The PRPs' sampling plan identifies both "post clean-up confirmation sampling" and "review analytical data" as required tasks.[22] While the analysis was proceeding and future remediation was still possible, the PRPs clearly continued to be subject to the obligations of the Order.

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[21] *See* Sampling QA/QC Work Plan, April 3, 1991, at 6, Appendix 4 to Technical Assistance Team Final Report, November 8, 1991.

[22] The Amended Order also refers to the analysis of soil samples, providing that "[a]ll sampling and analysis" shall be consistent with OSWER Directive 0360.4-01.

As of April 23, 1991, the samples had merely been collected and had not even reached the laboratory. Since Findley had not "appraised" the samples for contamination as of April 23, 1991, it had not completed the required action and the time period for filing a reimbursement petition had not started to run. Only upon completion of the review of the analytical data, with no further excavation being required, was Findley's cleanup obligation completed.

B. *Compliance with the Order*

CERCLA § 106(b) expressly limits the right of reimbursement to persons who receive *and comply with* an Agency cleanup order.[23] In fact, the addition of CERCLA § 106(b) was clearly intended as a specific means of *encouraging compliance* with an order. As stated in the House Committee on Energy and Commerce report on the legislation, CERCLA § 106(b) was intended to:

> [F]oster compliance with orders and promote expeditious cleanup, by allowing potentially responsible parties who agree to undertake cleanup to preserve their arguments concerning liability and the appropriateness of response action.[24]

Therefore, since compliance with an order is a prerequisite for petitioning for reimbursement,[25] and since, as discussed below, the record

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[23] "[T]he determination that a petitioner has 'receive[d] and complie[d]' with an Order is a necessary precursor to the EPA's consideration of a petitioner's liability and the scope of the response action." *Employers Insurance of Wausau v. Clinton*, 848 F. Supp. 1359, 1365.

[24] H.R. Rep. No. 99-253(I) at 83. *See also Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990) (In enacting § 106(b), Congress intended to encourage PRPs "to conduct a cleanup expeditiously and postpone litigation about responsibility to a later time * * *.")

[25] In his concurring opinion, Judge McCallum states that in instances where a petitioner's noncompliance is "trivial, amounting to no more than a technical violation," he presumes the statute should not be read as barring recovery under an otherwise meritorious petition. Judge McCallum states further that "the Agency will also have to keep open the issue of whether substantial but less than punctilious completion of a cleanup project" nevertheless justifies considering a cost recovery petition on its merits. We agree with Judge McCallum that the phrase "complies with the terms of any order" raises interpretive issues relative to substantial, but less than complete, compliance. However, since the facts of this case do not support a finding of substantial compliance, and since the issue of whether substantial compliance satisfies the statutory criterion was not briefed by either party, we find no reason or basis for addressing this issue, even as to allegedly "trivial" or "technical" violations.

clearly establishes that Findley did not comply with the Region's cleanup orders,[26] its petition is not entitled to consideration on the merits.

The three essential components of the Region's cleanup orders were (1) removing containers of hazardous waste from the site; (2) assuring that the soil was free of contamination after container removal had occurred; and (3) securing the site during the period when hazardous substances were still present. The orders imposed strict time frames for performance of each of these tasks. However, Findley did not comply with any of them. First, the Order initially required the disposal of all containerized waste by July 31, 1989, a deadline the Region extended to September 15, 1989. As noted *supra*, the Agency imposed a further deadline of April 4, 1991, in its Amended Order but made it clear that the new deadline was not intended to excuse the PRPs' violation of the earlier one. Disposal of the containerized waste was not completed until April 23, 1991, more than eighteen months after the September 15, 1989 deadline and several weeks after the April 4, 1991 deadline established by the Amended Order.

Second, the Order required the PRPs to excavate and dispose of visibly contaminated soil at the site by July 24, 1989, a deadline that the Region also extended to September 15, 1989. The Amended Order also imposed a deadline of April 4, 1991, for compliance with this requirement, again without excusing the PRPs' noncompliance with the earlier order. However, the PRPs did not remove visible contamination and perform soil sampling until April 23, 1991.

Third, the Order required the PRPs to maintain 24 hour a day security service at the site until all of the hazardous waste had been removed. The requirements for security at the site, and the Region's rationale for those requirements, were clearly spelled out in the administrative orders. The Order required "a licensed guard with appropriate communications equipment," "daily sign in/sign out logs" and documentation of any unauthorized access to the Site. Amended Order at 7. It characterized the site as an "attractive nuisance" and expressed concern that drums could be opened or spilled by vandals" unless access were restricted. Order at 4. Nevertheless, according to the Region, the site was without any security guard "for at least ten months" when hazardous waste remained at the site. Letter from Region IX to OWPE, February 26, 1992, at 4. Daily logs were submitted only for the period of March 24, 1989, through July 2, 1989. *Id.* at 3.[27]

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[26] Findley contends in its comments on the Preliminary Decision that it "satisfied the statutory threshold requirements for obtaining reimbursement" for its response costs because it "achieved substantial compliance" with the cleanup orders. Comments at 26. It argues that "*[t]o the best of Findley's knowledge at the time, the majority* of these requirements had been met as of March 1990" (emphasis added). Findley Comments on Preliminary Decision at 6. As noted in the previous footnote, we reject Findley's contention that its actions constituted "substantial compliance."

[27] In its comments on the Preliminary Decision, Findley does not deny that the site was without a security guard between April 30, 1990, and mid-February 1991, nor does it deny that daily logs

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Findley's failure to remove hazardous waste and failure to remediate soil contamination more than eighteen months after the deadlines imposed by the Region's order constitutes failure to "comply" with that Order. "Compliance, in part, requires that a petitioner correctly perform the required action within the appropriate time frame."[28] Moreover, Findley's failure to maintain the requisite security at the site for extended time periods constitutes further noncompliance of a significant nature. The Region correctly describes the lack of site security as "a serious violation of the Administrative Order because of the public health hazard associated with the drums." Letter from Region IX to OWPE, February 26, 1992, at 4.

We are aware that circumstances may arise during the course of a cleanup that make it difficult or impossible for the PRPs to adhere strictly to a prescribed work schedule or requirement. Under those circumstances, it is incumbent upon a PRP to make a timely request for an appropriate modification to the order so that it may remain in compliance.[29] In this case, we note that an extension *was* sought and received in 1989.[30]

The Board's decision denying Findley's petition is consistent with the Agency's denial of a petition for reimbursement filed by Employers Insurance of Wausau,[31] which was affirmed in *Employers Insurance of Wausau v. Clinton*, 848 F. Supp. 1359 (N.D. Ill. 1994). In that case, OWPE held that Wausau was not eligible for reimbursement under § 106(b) because it had not removed all of the hazardous waste from the

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were not provided except for the period from March 24 to July 2, 1989. It merely asserts that "security was provided at the site on a continuous basis from the inception of the work until approximately April 30, 1990." Findley Comments on Preliminary Decision at 7.

[28] Letter from Bruce Diamond, Director, OWPE, to Frederick S. Mueller, Johnson and Bell, Ltd., denying reimbursement petition submitted by Employers Insurance of Wausau, Jan. 28, 1993.

[29] Findley argues that "EPA repeatedly, both explicitly and implicitly indicated to the PRP Group that it was not overly concerned with the group's occasional inability to adhere to the rigid schedule set forth in the Section 106 Order." Findley Comments on Preliminary Decision at 10. However, Findley has not identified any EPA document in the administrative record which supports its contention.

[30] We note further that the Amended Order specifically provided a mechanism for seeking an extension, based on a showing of sufficient cause (Amended Order, § 8), and Findley did not seek any extensions under this provision. While this would not have affected Findley's ability to recover, since its noncompliance dates from the September 15, 1989 deadline, Findley's failure to seek an extension does illustrate its rather cavalier attitude toward its compliance obligations.

[31] *See* Letter from Bruce Diamond, Director, OWPE, to Frederick S. Mueller, Johnson and Bell, Ltd., Jan. 28, 1993.

site, and therefore had not "completed" the required action. However, OWPE stated, as an additional ground for denying the petition, that Wausau:

> [D]id not comply with the Order because many of the actions [required by the order] were incorrectly or partially performed. Further, Wausau did not even perform the actions it did within the allocated time-frame."[32]

The federal district court, in affirming OWPE's decision, stated that Wausau's failure to "finish its activities" at the site in a timely fashion provides "support for the EPA's conclusion" that Wausau failed to "comply" with the cleanup order. 848 F. Supp. at 1368.

## **III.** *CONCLUSION*

For all the reasons discussed above, Findley's petition is denied because Findley has not "complie[d] with an order," as required by CERCLA § 106(b) as a prerequisite for reimbursement.[33]

Concurring Opinion by Judge McCallum:

I join in the decision of the Board.[34] I write simply to clarify that while I regard Findley's noncompliance with the Region's order under Section 106(a) of CERCLA as sufficient reason to deny Findley's petition, it is because the noncompliance in this instance is significant. There may be instances where a petitioner's noncompliance is trivial, amounting to no more than a technical violation of an order. In those instances, I presume the statute should not be read as barring recovery of eligible costs under an otherwise meritorious petition. Moreover, the Agency will also have to keep open the issue of whether substantial but less than punctilious completion of a cleanup project nevertheless justifies considering the merits of a cost recovery petition. That also does not appear to be the case with Findley's noncompliance, which, as just noted, is significant, not merely less than punctilious.

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[32] *Id.* at 36.

[33] Since the Board has determined that Findley did not comply with the orders at issue and is therefore ineligible for reimbursement, we do not reach the merits of Findley's petition.

[34] By joining in the decision of the Board I naturally take no position on footnote 25 (commenting on this concurrence), which represents the views of Judges Reich and Firestone exclusively.