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May 13, 2008

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Colorado Building
1341 G. Street, N.W.
Suite 600
Washington, DC 20005

Ref: Higman Barge Lines, Inc., CERCLA 106(b)
Petition for Reimbursement.

Dear Clerk of the Board:

I enclose the original and five complete copies of the Petition for Reimbursement of Higmen Barge Lines, Inc. I also enclose a copy of the Petition without Exhibits which I would appreciate being file-marked and returned to me via the enclosed stamped, self addressed envelope.

Please contact me at the above phone number if you have questions.

Thank you.

Sincerely,

Harless R. Benthul

Enclosures

cc with enclosures:

Mr. Mark Peycke
Chief, Superfund Branch
Office of Regional Counsel
U.S. E.PA. Region 6

Stevens Baldo Freeman & Lighty, L.L.P.
Mr. Marl Freeman
Mr. David James
550 Fannin Street, 7th Flooor
P.O> Box 4950
Beaumont, TX 77704-4950.

Mr. Kyle Shaw
Higman Marine Services, Inc.
1980 Post Oak Blvd., Suite 1101
Houston, TX 77056

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

	)	**CERCLA 106(b)**
	)	
In re: Petitioner Higman Barge Lines, Inc.,	)	**Petition**
	)	
Petitioner	)	**No._____**
	)	
	)	
	)	

PETITION FOR REIMBURSEMENT OF COSTS

I. INTRODUCTION

Petitioner Higman Barge Lines, Inc. ("Petitioner"), submits this petition for reimbursement pursuant to Section 106(b) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §9602(b). Petitioner requests reimbursement of $75,000.00 in costs incurred in complying[1] with an Administrative Order ("AO" or "UAO") issued by the United States Environmental Protection Agency Region 6 ("Region 6") pursuant to §106(b), on May 7, 2007, requiring Petitioner and others to perform a response action at the Palmer Barge Site in Port Arthur, Jefferson County, Texas (AO attached as Exhibit 1). The last act of physical remediation required by the AO was performed on March 14, 2008, when the last load of hazardous sludge was incinerated.[2] As explained below, Petitioner is entitled to reimbursement under CERCLA §106(b) because Petitioner is not a liable party under CERCLA §106(b)

Petitioner meets the statutory and regulatory threshold requirements for reimbursement:

1. Petitioner has fully complied with the AO;
2. This petition is being filed within sixty days after completion of the response action, as required by CERCLA §106(b)(2)(a); and
3. Petitioner has incurred response cost in complying with the AO.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following site description and related material is taken from the site Record of Decision dated September, 2005, pages 7-9. (Exhibit 2):

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[1] Petitioner contributed the sum of $75,000.00 to the PRP group that performed the remediation require by the AO.

[2] See Draft Remedial Action Report, Palmer Barge Superfund Site, April 16, 2008, Ex. IA

PALMER BARGE LINE SUPERFUND SITE
PORT ARTHUR, JEFFERSON COUNTY, TEXAS
RECORD OF DECISION
PART 2: DECISION SUMMARY
SITE NAME, LOCATION, AND BRIEF DESCRIPTION

The Palmer Barge Line Superfund Site is located on Pleasure Islet on the western shore of Sabine Lake, in Jefferson County, Texas. The site is located approximately 4.5 miles east-northeast of the City of Port Arthur. A site location map is provided in Figure 1-1. The Palmer Barge Site encompasses approximately 17 acres and is located on Old Yacht Club Road on the South Industrial Islet. The Site is bounded to the north by vacant property, to the west by Old Yacht Club Road, to the south by the State Marine Superfund Site, and to the east by Sabine Lake. There is very little topographical relief to the Site. The Site is located approximately 0.5 miles southwest of the confluence of the Neches River and the Sabine Neches Barge Canal.

SITE BACKGROUND AND ENFORCEMENT ACTIVITIES

Site History

The Site, along with the adjacent properties to the north and south, were used as a Municipal Landfill for the City of Port Arthur from 1956 to 1987. Although disposal at the landfill has long since ceased and the landfill contents have been covered with dredged sediments, the contents are still present on the Site in the subsurface soils.

In April 1982, John Palmer, President of Palmer Barge Line, Inc., purchased approximately 17 acres from the City of Port Arthur, for the purpose of servicing and maintaining barges and marine vessels. In July 1983, Barker Phares, a trustee of Jefferson County, placed a lien on the Palmer Barge Line Property. In October 1994, Wrangler Capital assumed all claims from the Palmer Barge Line, Inc. In July 1997, Wrangler Capital purchased Palmer Barge Line from receivership, and the company ceased operations on the property. The current owner is Mr. Chester Slay. At present, the Site is used by Mr. Slay for industrial purposes. Metal structures on-Site are being salvaged, and the salvaged metal is being used by the current owner to construct marine equipment on the Site.

During operation, the typical activities pertained at the Site included cleaning, degassing, maintenance, and inspection of barges and other marine equipment. Cleaning operations included the removal of sludge and other residual material by pressure steaming the vessel holds, engines and boilers. Engines were degreased, and accumulations of sludges were removed. Degassing activities involved the removal of explosive vapors from vessel holds using nitrogen or boiler exhaust. Maintenance and inspection activities included the replacement and/or repair of valves, engine repairs, and line leak repairs followed by pressure tests. A flare

was located on-site to burn excess gases and liquids produced during facility operations.

History of Federal and State Investigations

Previous investigations of the Site include the following:

December 1996: Texas Natural Resource Conservation Commission (TNRCC, now named the Texas Commission on Environmental Quality, or TCEQ) Region 10 Field Office personnel conducted a multi-media investigation. The purpose of this study was to determine the compliance status of the facility.
March 1998: TNRCC Region 10 Field Office with EPA Region 6 conducted an investigation to identify potential sources and to sample soil and sediment. Five areas of stained soil were identified on-site, which included the following: stained soils near sumps, stained soil near the boiler house, stained soil near the flare, stained soil near aboveground storage tanks, and stained soil near wastewater tanks. Sample results indicated the presence of inorganic constituents such as metals, semi-volatile organic constituents (SVOCs), and pesticides in on-site soil. Metals and SVOCs were detected in offshore sediment adjacent to the Site.

July 1999: TNRCC Region 10 Field Office sampled aboveground storage tanks, roll off-boxes and "slop" tanks to characterize materials stored.

October 1999: EPA Region 6 conducted an Expanded Site Inspection (ESI; Weston 2000) to determine the presence and nature of constituent occurrence on-site and off-site and to determine migration routes and routes of exposure of site related constituents. Results of the inspection indicated the presence of volatile organic constituents (VOCs), SVOCs, pesticides, polychlorinated biphenyls (PCBs), and metals.

In 2000, the Site was ranked and was placed on the National Priority List (NPL). The Hazard Ranking concluded that constituents present in Sabine Lake sediments adjacent to the Site were a potential threat to human health primarily via the fish consumption exposure pathway (USEPA, 2000).

2003: URS Corporation (URS), on behalf of the Potentially Responsible Parties (PRPs), conducted a remedial investigation (RI) at the Site in July 2003, which characterized the nature and extent of constituents present in environmental media at the Site and in adjacent Sabine Lake surface water and sediments (URS, 2004d).

History of CERCLA Removal Actions

In August 2000, EPA Region 6 conducted a Removal Action to remove source materials stored on-site. Activities included waste removal, water treatment, oil/water separation, and sludge stabilization. Approximately 250,000 gallons of

water were treated on site; 500 cubic yards of sludge stabilized; and 100,000 gallons of oil/styrene were separated and removed from the site. All of the above-ground storage tanks were removed except for a 25,000 gallon AST on the northern portion of the site that contains sludge. Several of the concrete AST foundations remain along with gravel throughout the Site.

History of CERCLA Enforcement Activities

On September 30, 2002, EPA Region 6 issued an Administrative Order on Consent to conduct the remedial investigation and feasibility study (RUES) for the Palmer Barge site. Voluntary respondents to the Order were: E. I. du Pont de Nemours and Company, Chevron/Texaco Inc.; Kirby Inland Marine, LP; Kirby Inland Marine, Inc. of Louisiana; and Ashland Inc.

National Priorities List

The EPA published a proposed rule on May 11, 2000, to add the Palmer Barge Line Site to the National Priorities List (NPL) of Superfund sites. The Site was added to the NPL in a final rule published on July 27, 2000 [Federal Register Listing (FRL-6841-3), Volume 65, Number 145, Pages 46096 - 46104].

(End of quote from Record of Decision)

C. SUBSEQUENT ENFORCEMENT HISTORY

The EPA subsequently entered another round of activity including issuance of a Special Notice to an additional group of PRP's, including Petitioner. The EPA sent Petitioner a Notice Letter on August 18, 2000 for removal action conducted at the site and on September10, 2001, sent Petitioner a Special Notice Letter for the Remedial Investigation/Feasibility Study at the site. (*See* Exhibit 4, EPA letter dated July 25, 2002.). Petitioner responded by letter of November 12, 2001, asserting the petroleum exclusion defense, supported by two affidavits. *See* Exhibit 3, Petitioner's November 12, 2001 letter and attached affidavits). The EPA concurred with Petitioner's defense as evidenced by EPA's letter of July 25, 2002 (Exhibit 4). At this point, Petitioner reasonably believed it was free of demands by EPA for response costs liability associated with the Palmer Barge site.

Nonetheless, EPA subsequently asserted PRP liability against Petitioner based upon a change of position regarding applicability of the petroleum exclusion. Petitioner again asserted the defense by letter of May 22, 2007. (*See* Exhibit 6). EPA continued to reject Petitioner's position and, in addition, failed to explain the basis for its change of position regarding applicability of the petroleum exclusion.

Petitioner filed a request under the Freedom of Information Act, seeking records that might explain the change in position. The EPA's response led Petitioner to appeal EPA's response to the FOIA request on January 16, 2008. A copy of that appeal ("FOIA Appeal") is attached hereto as Exhibit 5. The FOIA appeal sets forth in more detail, the history of

Petitioner's dealing with EPA Region 6 in attempting to resolve, or at least understand, applicability of the petroleum exclusion to Petitioner. The FOIA appeal has not been decided as of the submission of this Petition for Reimbursement. Petitioner continued to assert the petroleum exclusion defense (Ex, 7, letter of June 7, 2007, but Petitioner agreed, by letter of June 11, 2007 (Exhibit 8) to comply with the UAO and to participate in the remediation demanded by the UAO through cooperation with the PRP group that lead the effort. Petitioner subsequently entered into a written agreement with the PRP group whereby it agreed to contribute the sum of $75,000.00 in cash towards the cost of remediation in accordance with the UAO. A copy of the check representing Petitioner's contribution and related documentation) is attached as Exhibit 8A.

In the course of implementing the remedy, the PRP group to which Petitioner contributed has incurred substantial expenditures, some of which are listed on Exhibit 9.

III. SELECTED REMEDY

The selected remedy, as defined in the UAO is as follows:

- Excavation of approximately 1.204 cubic yards of the upper two feet of soil that exceed human health and ecological risk based levels at each of the response areas:
- Confirmation sampling at each of the response areas (remaining identified "hot spots"), Confirmation samples would be collected from each response area and analyzed for COPCs.
- Backfilling of excavated areas with clean soil;
- Off-site disposal of the excavated soils at a permitted disposal facility;
- Implementation of Institutional Controls to restrict future land use to industrial purposes only. The Institutional Control shall be a restrictive covenant by the property owner. to the benefit of the State of Texas and the United States Government and recorded in the real property records of Jefferson County, Texas;
- Abandonment of existing monitoring wells-five (5) existing monitoring wells at the Site will be abandoned: and
- Wastewater Aboveground Storage Tank (AST) sludge removal and decontamination- Sludge contained within the remaining wastewater AST will be removed and disposed of off-site. The tank will be dc-contaminated and re-used as scrap metal by the property owner.

UAO, Par. 15, p 4 (Exhibit 1).

IV. PETITIONER'S RELATIONSHIP TO THE SITE

A. Transactions

Petitioner's relationship to the Palmer Barge site arises from twenty transactions classified as either (1) steaming or cleaning of barges, or (2) repair of barges or tug boats.

Steaming of a barge is the process of forcing steam through heating coils inside the cargo tanks which heats the cargo and thereby makes it easier to remove by a pump. Steaming does not involve any removal of cargo or contact between cargo and steam. Cleaning of barges was performed by the Palmer Barge Line personnel under Petitioner's supervision and resulted in either recycling of removed material or placing it in containers for offsite disposal. *See* Exhibit 3, Affidavits of Petitioner's Secretary, Mr. John T. McMahan, and Maintenance Superintendent, Mr. Randy Laughlin. *See* also Exhibit 10. Mr. Laughlin was onsite at the Palmer Barge site regularly, supervised work being done on Petitioner's vessels and observed the collection and management of materials removed from the barges. The two repairs described by Mr. Laughlin (item 11 and 12 on his affidavit) would not have resulted in cargo being removed from the barge.

Barges taken to the Palmer site to be cleaned would, of economic necessity, first have the maximum amount of cargo removed, minimizing the residual material aboard. Petitioner's barges that were taken to the site for cleaning in every case had contained either crude oil or No. 6 oil. The sole exception involves a small volume of water, motor oil and diesel taken from the bilge of one of the tugs. *See* Exhibit 3.

Two realities of marine transportation of crude oil and diesel fuel distinguish it from storage of the same materials in stationary tanks. The sole reason for the crude oil or fuel being in the barge is transportation which consists of movement on the water. This motion is essentially constant from departure to arrival at the destination. Secondly, Petitioner's incentive is to deliver the cargo in the shortest possible time both to meet the customer's needs and to enable reuse of the barge. These distinguishing features from stationary storage strongly mitigate against formation of sediment and water in the barge. *See* Exhibit 10, Supplemental affidavit of Randy Laughlin.See also, Exhibit 10A, Unsworn Declaration of Preston Shuford.

B. Harm

The chemicals of concern ("COC") identified in the UAO which posed a threat as an actual release into the environment and upon which the remedy is justified are:

> Aldrin, benzo(a)pyrene, dieldren,heptachlor epoxide,benzo(a)anthracene and naphthalene, pentachlorophenol, lead, butyl benzyl thalate, 4,4-DDD, 4,4DDE, 4,4-DDT and methoxychlor.[3]

Most of these are synthetically formulated chlorinated hydrocarbons and therefore are not part of the residual crude oil or fuel that was removed from the Petitioner barges that were serviced at the site.[4] Lead is not expected to occur in crude oil in significant quantities. The remaining constituents, benzo(a)pyrene, benzo(a)anthracene and naphthalene may occur in crude oil but at such low levels as to approach impossibility of detection. The amount of crude oil that would have been necessary in the Petitioner barges to have caused the detected levels of the COC's would have been astronomical in comparison to the reality evidenced by Exhibit 10,

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[3] See ¶.9, UAO (Exhibit 1)

[4] In addition, production of some of these items has long since been suspended (e.g. aldrin and dieldren).

which is an estimate of the residual material that could have been present. The attached report of Dr. Paul Fahrenthold (Exhibit 11) illustrates the extraordinary unlikelihood that any of the COC's could be attributable to Petitioner.

The conclusion to be drawn is that harm at the site as evidenced by the presence of the COC's cannot be attributed to Petitioner, even *assuming* that somehow, crude oil or No. 6 fuel oil removed from Petitioner barges was released from containers onsite.

In sum, none of the twenty Petitioner transactions would have resulted in hazardous substances being disposed at the site.

Petitioner believes and contends that no residual material from Petitioner vessels was improperly disposed onsite. However, in the event there were spills or accidental releases by the site operator *after* residual material was removed from Petitioner vessels, it is important to examine the basis on which Petitioner contracted those services.

Mr. Laughlin's affidavits (Exhibits 3 and 10) state that at all relevant times, the site operators engaged in a recycling operation where crude oil and petroleum from Petitioner's barges were placed into storage tanks for resale or recycling. He discussed the disposal and recycling activities with the site operators several times. This practice, coupled with the fact that Mr. Laughlin was on site when Petitioner's vessels were being serviced demonstrates a high standard of diligence in an effort to ensure appropriate and lawful disposition of any material removed from the tanks. Any residual material from Petitioner's vessels that *might* have been improperly disposed of would have been solely the result of site operator conduct that deviated from Petitioner's reasonable expectations.

V. SUMMARY OF THE ARGUMENTS

A. Petitioner is not liable for response costs under §107(a) of CERCLA because any material removed from petitioner's vessels and taken to the site are within the petroleum exclusion to the definition of hazardous substances; alternatively,

B. Petitioner is not liable for response costs under §107(a) of CERCLA because Petitioner did not contribute to the harm at the site as evidenced by the chemical of concern and no material at the site that might be associated with Petitioner contains a chemical of concern.

VI. ARGUMENT

A. The Petroleum Exclusion

Liability for response costs under the Comprehensive Response, Compensation and Liability Act ("CERCLA") requires that, among other things, the Defendant released a hazardous substance at the facility that caused the incurrence of response costs. 42 U.S.C.§9607(a), CERCLA §107(a). Petroleum and its fractions are excluded from the definition of hazardous

substance ("the exclusion or the petroleum exclusion"). 42 U.S.C. §9601(14), CERCLA §101(14). Petitioner has asserted from the beginning of this matter that any material from its vessels that might have been left at the site were covered by the exclusion.

Initially, in 2002, Region 6 agreed with Petitioner. *See* Exhibit 4. Subsequently, Region 6 changed its position and included Petitioner as a recipient of the UAO, allegedly because of a *recent federal court decision. See* Affidavit of David James, Exhibit 7 to Petitioner's FOIA Appeal which is attached hereto as Exhibit 5. As fully documented in Petitioner's FOIA appeal (Exhibit 5), this was illusory and the attorney who asserted it acknowledged he was in error. He then asserted that EPA and Office of General Counsel pronouncements were the basis of the change in position. Please refer to Exhibit 8 to Petitioner's FOIA Appeal, Exhibit 5 to this Petition. Petitioner unsuccessfully sought the documents under the Freedom of Information Act, was basically denied access and appealed that refusal. *See* Exhibit 5 of Petitioner's FOIA appeal, incorporated by reference herein as if set forth in full. The FOIA appeal has not been decided as of this submission.

In 2002, Region 6 accepted then rejected (detailed above) Petitioner's assertion of the exclusion based on a nonexistent court case, and attempted, after the fact, to justify its position based on agency policies and pronouncements that, under the guise of Exemption 5 have never been shared with Petitioner. This conduct is arbitrary and capricious. It is an attempt to obscure the basis for a change in position in order to sustain a completely erroneous and insupportable "after the fact" legal conclusion. This is no more than a *post hoc* rationalization. Exemption 5 has a laudable and necessary purpose of protecting legitimate governmental decision-making. The EPA should not allow its use here to avoid decision-making when Region 6 plainly relied on a non-existent court case when it issued the UAO to Petitioner in May, 2007.

Region 6 has never put forth evidentiary or legal analysis demonstrating that the crude oil and No. 6 fuel oil removed from Petitioner's vessels are not petroleum or fractions thereof because they cannot do so. Region 6 made the bald assertion on July 12, 2007 (Exh. 9 to the FOIA Appeal) that the excluded material was commingled with other CERCLA hazardous substances at the site. Mr. Laughlin's affidavit and supplemental affidavit (Exh. 3 and 10, respectively) establish that the residual material remaining in the barges (after being emptied prior to cleaning) was within the petroleum exclusion. He also established that the material removed during cleaning was containerized for shipment offsite or recycling onsite. Thus, when the exempt material was removed from Petitioner's barges, it was contained and managed so as to prevent release and thereafter was outside the control of Petitioner.

Region 6 has never refuted the fact that the material removed from Petitioner's vessels was exempt.

This case is notably distinguishable from *Cose v. Getty Oil Company*, 4 F.3d 700 (9th Circ. 1993) which held that the accumulation over time of sediment and water in a stationary crude oil storage tank removed the crude oil tank bottoms from coverage under the petroleum exclusion. Mr. Laughlin's Affidavits (Exhibit 3 and especially Exhibit 10) establish the critical factual differences that crude oil or fuel oil hauled in a barge has a limited residence time and is in motion during transit, thereby preventing the settlement of sediment (if any) in the cargo.

In short, Petitioner established that petroleum exclusion material was left at the site in a secure condition awaiting recycling or offsite shipment for proper disposal. Region 6 has never refuted that nor credibly questioned it, despite its clumsy effort to do so.

B. Petitioner Did not Contribute to the Harm Posed by the Site.

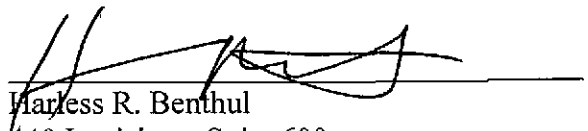
Petitioner did not contribute to the harm posed by the site because (1) there is no proof of any release of hazardous substances by Petitioner and (2) even had there been a release of the material removed from Petitioner's vessels, the quantity of hazardous substances contained therein could not have contributed to the presence of benzo(a)pyrene, benzo(a)anthracene and naphthalene, the only COC's present in the residual crude oil and fuel removed from Petitioner's vessels. Dr. Fahrenthold's report establishes that, had it been spilled or released, the material from Petitioner's vessels could not, as a practical matter, have resulted in the existence of benzo(a)pyrene, benzo(a)anthracene and naphthalene onsite in levels used to support the remedy, if detectable at all, and therefore did not cause the incurrence of response costs. Under these circumstances, Petitioner is within the rule of *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 183 (2d Cir. 2003). Alcan stands for the proposition that a defendant who might be facially liable under CERCLA § 107(a) is entitled to show that, on an apportionment basis, he did not contribute to the harm. Here that harm is attributable to the COC's which, as discussed above, could not have happened insofar as Petitioner is concerned.

Mr. Laughlin's affidavits (Exhibits 3 and 11) establish that Petitioner had agreements with the site operator that, if followed, ensured that residual material taken from its barges would not be released but would be recycled and /or shipped offsite for legal disposal. Moreover, Mr. Laughlin's affidavits (Exhibits 3 and 11) further establish that Petitioner maintained an onsite presence in the person of Mr. Laughlin to ensure that the agreements would be implemented. These arrangements and the implementation of them reinforce the proposition that Petitioner sought to avoid any release of anything attributable to the Petitioner, thereby specifically bringing itself within the rule of *Alcan*. But for the agreement with the site operator, Petitioner would be entitled to establish a "third party" defense pursuant to CERCLA § 107(b). The existence of that agreement serves however to reinforce Petitioner's *Alcan* defense.

VII. CONCLUSION

For the foregoing reasons, Petitioner requests reimbursement of $75,000.00, its costs, and attorneys' fees.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2008, I served a true and correct copy of the above Petition for Reimbursement by mailing a copy via first class United States Mail to Mr. Mark Peycke, Chief, CERCLA Branch, Office of Regional Counsel, U.S.E.P.A. Region 6, 1445 Ross Avenue, Dallas, Texas 75002.

Harless R. Benthul