

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

IN RE:)	
)	
Southern Iowa Mechanical)	
Superfund Site)	
Ottumwa, Iowa)	Petition No.
)	CERCLA 106(b) 10-01
Titan Tire Corporation)	Docket No.
)	CERCLA-07-2009-0006
and)	
)	
Dico, Inc.,)	
)	
Petitioners)	
)	
Second 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))	

Petitioners' Opposition to Respondent's Motion to Stay Proceedings

Petitioners Titan Tire Corporation and Dico, Inc. ("Petitioners") oppose the Motion to Stay Proceedings ("Motion") filed by Respondent U.S. Environmental Protection Agency, Region 7 ("Respondent"). Petitioners respectfully state as follows:

I. Introduction

Petitioners object to the requested stay because a stay: (1) will deprive Petitioners of their procedural due process rights and exacerbate the violations of Petitioners' constitutional rights as described in the Second Petition for reimbursement; (2) will result in unnecessary hardship to Petitioners; and (3) will unreasonably and unnecessarily delay agency action on Petitioners' statutory right to pursue its remedies. In addition, Respondent's improper and impermissible

reliance on confidential settlement discussions should be struck under Rule 408 of the Federal Rules of Evidence. Therefore, Petitioners request the EAB to deny Respondent's Motion.

II. Background

Petitioners filed their original petition for reimbursement on October 23, 2009, CERCLA 106(b) Petition No. 09-01. On January 25, 2009, EAB dismissed the petition, without any prejudice, because EPA had withheld, and was refusing to provide, certification of Petitioners' completion of the work required by the UAO. On May 24, 2010, Petitioners filed their Second Petition for Reimbursement of Funds Expended by Petitioners Titan Tire Corporation and Dico, Inc. in Complying with United States Environmental Protection Agency CERCLA § 106(a) Administrative Order No. CERCLA-07-2009-0006 and Other Required Actions, and for Relief for Constitutional Violations ("Second Petition"). Respondent filed its response to the Second Petition on September 15, 2010.

Before the EAB would rule on the pending Second Petition, Respondent filed its complaint on October 26, 2010, in the United States District Court for the Southern District of Iowa. On October 28, 2010, Respondent moved the Environmental Appeals Board ("Board") to stay further proceedings on the Second Petition until liability issues are resolved either by settlement or litigation in federal district court. Motion at 1-2.

III. EAB's Granting of a Stay Would Deprive Petitioners' of their Constitutional Rights and Would Exacerbate the Violations of Petitioners' Constitutional Rights as Described in the Second Petition

In the Second Petition, Petitioners allege that the UAO in this case, or in the alternative, the CERCLA regime, violates the Constitution of the United States. Petitioners challenge Respondent's failure to provide procedural due process under the Fifth Amendment before

issuance of the UAO in this case and to recipients of UAOs issued pursuant to Section 106 of CERCLA. The UAO in this case and the CERCLA UAO regime subject targeted potentially responsible parties ("PRPs"), such as Petitioners, to immediate deprivations of property without any opportunity for pre-deprivation hearings to challenge the orders before a neutral decision-maker. The UAO in this case and the UAOs in general are not used in cases of emergency and, to the contrary, are generally not issued until a year or more after EPA becomes involved at the contaminated site, thus allowing ample time for due process review. This delay in issuing a UAO demonstrates that Section 106 is unconstitutional, as applied in this case, on its face and as implemented through Respondent's pattern and practice.

If the EAB proceeding is stayed, Petitioners will again be deprived of their procedural due process rights under the Fifth Amendment. Petitioners did not receive a hearing prior to issuance of the UAO. After the UAO was entered Petitioners were required to clean up the SIM site without the opportunity for a hearing to challenge the order. Staying this proceeding will continue to deprive Petitioners of procedural due process. They will again be denied an opportunity for a hearing to challenge the UAO and seek reimbursement of their costs, which is contrary to the protections afforded by the United States Constitution.

IV. Staying the Present Action will Result in Undue Hardship to the Petitioners

Petitioners filed the Second Petition seeking reimbursement under 42 U.S.C. § 9606(b)(2)(C)-(D) for the reasonable costs, plus interest, they incurred in connection with the action required by the December 30, 2008 Unilateral Administrative Order ("UAO") at the Southern Iowa Mechanical ("SIM") site in Ottumwa, Iowa. The action required under the UAO was completed on May 18, 2010 and the Second Petition was filed on May 24, 2010. Respondent now moves to stay any decision on Petitioners' reimbursement of costs under the Second Petition

so that Respondent may seek reimbursement of its costs, when the costs of both Petitioners and Respondent arise from the same cleanup at the SIM site.

Granting a stay at this time would result in undue hardship for the Petitioners who completed the required work over a year ago and are now following the statutory administrative steps for reimbursement. Allowing Respondent to delay this statutorily-prescribed process so that it may expedite its own cost recovery action will result in undue hardship for the Petitioners. Petitioners have already invested a substantial amount of money complying with the UAO. Delaying a decision on the Second Petition so that the District Court may rule on Respondent's petition for reimbursement would further deprive Petitioners of the money to which they believe they are entitled. Continuing to deprive Petitioners of such money results in reduced capital for business operations and therefore causes undue hardship. Respondent's Motion should be denied so that additional hardship can be avoided.

V. Staying the Present Action will Result in Unreasonable and Unnecessary Delay

In the present case, Respondent asks to delay the instant matter until liability issues are resolved in federal district court. Motion at 1-2. Respondent's request would result in a delay of the administrative proceedings while the federal case goes through the district court process. This cannot be considered a reasonable delay, particularly since these administrative proceedings have been before the Board for over a year. All briefing has been completed by the parties and the EAB case is ready for decision. Respondent's motion gives no indication of when the federal case will be resolved. A stay so extensive that it is "immoderate or indefinite" may be an abuse of discretion. *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citing *Landis*, 299 U.S. at 257, 57 S.Ct. at 167 ("The stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so

far at least as they are susceptible of prevision and description.”)); *see also Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir.1983) (holding that “stay orders will be reversed when they are found to be immoderate or of an indefinite duration”) (quoting *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir.1982)).

Respondent moves for an indefinite stay of the instant proceedings until liability is determined in the federal case. The Motion is contrary to federal law and will result in an unreasonable and unnecessary delay of the administrative proceedings. Therefore, Respondent's Motion should be denied.

VI. Respondent Improperly Relies on Confidential Settlement Discussions in its Motion

Contrary to the prohibition of Federal Rule of Evidence 408(a), and an explicit condition of confidentiality, Respondent now impermissibly advances, as a basis for staying the agency proceeding, confidential settlement negotiations between the parties. Respondent asserts: “[p]rior to filing the complaint, DOJ advised Petitioners that the United States hoped to resolve this matter amicably and, if they were willing to resolve this matter without resorting to litigation, the United States would consider a good faith settlement offer received by October 25, 2010. . . . When DOJ did not receive a good faith settlement offer by that date, the United States filed the necessary action to resolve its claims for cost recovery and penalties.” Motion at 2.

Petitioners respectfully submit that the Board should ignore the portions of Respondent's Motion that relies on confidential settlement negotiations as such discussions in the instant motion are impermissible, improper, and should never have been asserted. The Board's decision on the instant Motion should not consider prior settlement negotiations. Rather, it should focus on the following factors—(1) “whether the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort”;

(2) "the extent, if any of hardship resulting from the stay and of adverse effect on the judge's docket"; and (3) "the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing." *Environmental Protection Services, Inc.*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 25 (ALJ 2003).

VII. Conclusion

For the reasons state above, Petitioners respectfully request that the Board deny Respondent's Motion to Stay Proceedings and continue its consideration of Petitioners' Second Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2010, I served a true and correct copy of the above Petitioners' Opposition to Respondent's Motion to Stay Proceedings by mailing a copy via first class United States Mail to the following:

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