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OFFICE OF REGIONAL COUNSEL

U.S. EPA REGION 6

1445 Ross Avenue, Ste. 1200
Dallas, Texas 75202-2733Telephone No. (214) 665-2134
Telefax No. (214) 665-6460

2008 JUN 17 PM 12:47

DIVISION OF APPEALS BOARD



FACSIMILE TRANSMISSION

FROM:

Joseph E. Compton, III

TO:

Ms Erika Durr, Clerk of the Board

SUBJ:

Motion to Dismiss // Higman Petition

COMMENTS:

TOTAL NO. PAGES: 9

SENT BY:

jcomptoniii

DATE/TIME

6/16/08 3:22 CST



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY RECEIVED
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ENVIR. APPEALS BOARD

June 16, 2008

Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

RE: In the Matter of the Palmer Barge Superfund Site
Higman Barge Lines, Inc., Petitioner
Petition Number: 106(b) 08-01

Dear Ms. Durr:

Per your letter of May 16, 2008, to Sam Coleman, Director, Superfund Division, U.S. Environmental Protection Agency, Region 6, please find enclosed for filing in the above-referenced matter, one original and five copies of a Motion to Dismiss the Petition of Higman Barge Lines, Inc., with exhibits inclusive of the Site's Administrative Records, and a certificate of service. Please file the original and the copies of the motion.

A sixth copy of the motion, without the exhibits, is also enclosed. Please stamp the sixth copy and return it to me at the address below:

Joseph E. Compton, III
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas. 75202.

Thank you for your kind assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Joseph E. Compton, III". The signature is written in a cursive style with a large initial "J" and a stylized "C".

Joseph E. Compton, III
Assistant Regional Counsel

Enclosures

cc (w/encl.): Harless R. Benthul, Attorney
Lyric Centre
440 Louisiana, Suite 600
Houston, Texas. 77002

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY JUN 17 PM 12:43
 WASHINGTON, D.C.

ENVIR. APPEALS BOARD

IN RE:

Palmer Barge Superfund Site
 Jefferson County, Texas

Higman Barge Lines, Inc.,
 Petitioner

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)

Petition No.
 CERCLA 106(b) 08-01

MOTION TO DISMISS THE PETITION OF HIGMAN BARGE LINES, INC.

The Respondent, the U.S. Environmental Protection Agency, Region 6 ("EPA"), by and through its Office of Regional Counsel, hereby moves this Board pursuant to Sections II.I.1 and V.B of the Board's Practice Manual dated June, 2004, ("EAB Manual") and Section IV.A.1 of the Board's Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions dated November 10, 2004 ("EAB Guidance"), to dismiss the Higman Barge Lines, Inc.'s Petition for Reimbursement ("Petition") dated May 14, 2008, on the basis of ripeness in that said required action has not been formally completed.

Higman Barge Lines, Inc., ("Higman") has filed the Petition seeking to recover the costs the company allegedly incurred in complying with the terms of a Unilateral Administrative Order issued by the EPA in connection with the Palmer Barge Superfund Site ("Site") under Section

106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §9606(a). Completion of the required actions is a statutory prerequisite for obtaining reimbursement under Section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2). However, EPA has not yet made a determination, pursuant to the procedure established in EPA's Unilateral Administrative Order for Remedial Design/Remedial Action, Docket No. 06-12-07, ("UAO"), issued on May 7, 2007, that Higman has completed the response actions required under the UAO. It is EPA's position that until the EPA formally approves the final version of the Palmer Barge Line Superfund Site Remedial Action Report (the draft of which is dated April 16, 2008, and was submitted for EPA review by the Palmer Barge PRP ("Potentially Responsible Party") Committee pursuant to the UAO), and thereafter, notifies Higman that the response actions have been fully performed, the matter is not ripe for review by the EAB. See Findley Adhesives, Inc., 5 E.A.D. 710 (EAB1995), and In the Matter of Cyprus Amax Mineral Co., CERCLA 106(b) Petition No. 95-4, Order Dismissing Petition, June 24, 1996 (attached).

Section IX ("Work To Be Performed"), Paragraph 44 of the UAO provides the mechanism for notifying Higman that the remedial actions at the Site have been completed. Under that Section, when EPA determines, after its review of the Remedial Action Report, that all work has been fully performed in accordance with the UAO, the EPA may provide written notice to the PRPs. As defined in Section VI of the UAO, "work" shall mean all activities UAO Respondents are required to perform under said Order, including Remedial Design, Remedial Action, Operation and Maintenance (as needed), and any activities required to be undertaken pursuant to Sections VII through XXIV, and XXVII of this Order. The EPA has not completed the review of the draft Remedial Action Report, and therefore has not yet provided its approval

or disapproval to Higman. The finalized version of the Report has yet been to be submitted for formal EPA approval. In the event that EPA does determine that work has yet to be completed in accordance with the UAO, the EPA will so notify the PRPs and require that said parties modify the work plan, if necessary, and implement any additional work required under the UAO. Until the EPA formally approves the final Remedial Action Report for the Site, a possibility exists that additional remedial actions may have to be implemented at the Site.

The EPA therefore respectfully requests the dismissal of Higman's petition, without prejudice, on the grounds that it is not yet ripe, and has been untimely filed.¹ The EPA has contacted the attorneys representing Higman, who indicated that they may wish to oppose this motion.

Dated this 16th day of June, 2008.

Respectfully submitted,

By:



Joseph E. Compton, III
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202
214.665.8506
FAX 214.665.6460

¹EPA also notes that were the EAB to accept Higman's view on the completion of the work—the March 14, 2008, date referenced on page one of the petition—the petition should be dismissed a timely because it was not filed within 60 days of that date. The petition was filed on May 14, 2008, and the sixty-day period ended on May 13, 2008. EPA does not view the March 14 date, as the date of completion of the work for the reasons stated in the body of this motion.

Christina Skaar *by Joseph E. Compton, III*

Christina Skaar

Office of Enforcement and Compliance Assurance

U.S. EPA (2272A)

1200 Pennsylvania Ave., NW

Washington, D.C. 20460

202.564.0895

FAX 202.501.0269

Lee R. Tyner *by Joseph E. Compton, III*

Lee R. Tyner

Office of General Counsel

U.S. EPA (2366A)

1200 Pennsylvania Ave., NW

Washington, D.C. 20460

202.564.5524

FAX 202.564.5531

CERTIFICATE OF SERVICE

I hereby certify that on the 16th of June, 2008, I served a true and correct copy of the above Motion to Dismiss by mailing a copy via first class United States Mail to Mr. Harless R. Benthul, 440 Louisiana, Suite 600, Houston, Texas, 77002.

Joseph E. Compton, III

Joseph E. Compton, III.

Assistant Regional Counsel



DRAFT

Palmer Barge Line Superfund Site

Remedial Action Report

Port Arthur, Texas

TXD068104561



Prepared For

Palmer Barge PRP Committee

April 16, 2008

Prepared By

URS