IN RE B & C TOWING SITE
THE SHERWIN-WILLIAMS COMPANY

CERCLA §106(b) Petition No. 94-7

FINAL DECISION

Decided October 12, 1995

Syllabus

Sherwin-Williams Company has petitioned for reimbursement under Section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of response costs incurred in cleaning up 80 drums of waste found in a trailer leased by Barone Hazardous Waste Management. Sherwin-Williams seeks full or partial reimbursal on a number of different bases. First, Sherwin-Williams asserts that none of the wastes in the drums at issue originated at its facility, even though 36 of the drums bore its labels. While Sherwin-Williams admits sending wastes to Barone, it asserts that all of its wastes were sent to a treatment, storage and disposal facility and thus could not have been in the drums. To support its claim, Sherwin-Williams points to two hazardous waste manifests showing the shipment of paint wastes from Barone to a Browning-Ferris Industries facility in Glen Burnie, Maryland. Sherwin-Williams claims that the wastes covered by these manifests are those that it had sent to Barone. In addition, Sherwin-Williams asserts that testing of the wastes shows that they could not have been Sherwin-Williams' wastes. Therefore, Sherwin-Williams argues that it is entitled to full reimbursal of its clean-up costs. Alternatively, Sherwin-Williams argues that even if it were found to be liable, it should be held responsible only for the 36 drums bearing its label and thus is entitled to reimbursement of costs associated with the clean-up of the other 44 drums. Finally, as an alternative basis for relief, Sherwin-Williams argues that issuance of the order to it requiring the clean-up was "arbitrary and capricious" because no "imminent and substantial endangerment," which is a prerequisite for a clean-up order, existed at the time the order was issued.

Held: Based upon a review of the administrative record, the briefs filed by the parties and their comments on the Board's Preliminary Decision, the Board concludes that Sherwin-Williams has not met its burden of proof in showing that it is entitled to any reimbursement under Section 106(b) of CERCLA. More specifically, the Board concludes that Sherwin-Williams has failed to demonstrate that none of its wastes were in the drums found in the Barone trailer. The manifests are inconclusive in this regard and the testing showed merely that other wastes may have been mixed with Sherwin-Williams' wastes in the drums. They did not establish that *none* of the wastes were from Sherwin-Williams. In addition, the condition of the wastes and the drums themselves shows the unreliability of the labels as an indication of the source of the wastes within the drums. As such, Sherwin-Williams claim of divisible harm, with apportionment based solely on whether a drum bore a Sherwin-Williams label or not, cannot be sustained. Finally, the Board concludes that the administrative record is clearly sufficient to support the Region's finding of an "imminent and substantial" endangerment.

Before Environmental Appeals Board Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

This matter comes before the Environmental Appeals Board on review of Sherwin-Williams Company's Petition for Reimbursement of Costs under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(b)(2). Pursuant to an order issued to it by U.S. EPA Region II, Sherwin-Williams performed a clean-up involving 80 drums of waste found in a trailer leased by Barone Hazardous Waste Management, t/a Barone Barrel and Drum ("Barone"). While Sherwin-Williams admits that it sent paint wastes to Barone, it asserts that all of its wastes were then sent for disposal to a Browning-Ferris Industries ("BFI") facility in Glen Burnie, Maryland. As such, Sherwin-Williams argues that it was not responsible for any of the waste in the trailer and thus should be fully reimbursed for the costs of the clean-up. Sherwin-Williams argues further that even if it were held liable, it should only be responsible for the costs associated with the 36 drums which bore its labels. Finally, as an alternative basis for relief, Sherwin-Williams argues that issuance of the order to it requiring the clean-up was "arbitrary and capricious" because no "imminent and substantial endangerment," which is a prerequisite for a clean-up order, existed at the time the order was issued.

The Board has reviewed the administrative record, as well as the supplemental briefs and responses filed by the parties. For the reasons discussed below, the Board concludes that Sherwin-Williams has not met its burden of proof in showing that it is entitled to any reimbursement under Section 106(b) of CERCLA.

I. *BACKGROUND*

A. *Factual History*

Beginning in 1980 through much of 1982, the New Jersey State Department of Environmental Protection ("NJDEP") investigated Barone and its owners Al Tarrats ("A. Tarrats") and his brother Daniel Tarrats ("D. Tarrats") for allegedly operating an illegal storage and disposal facility for hazardous chemical waste. Memorandum to Spill File from Terry Ostrander, dated October 13, 1981. It was alleged, among other things, that Barone was using a warehouse at the Sky Port Industrial Park in Newark, New Jersey to store hazardous waste with the intention of later abandoning the building. *Id.*

In August 1981, Barone leased a trailer from V & W Sales Company ("V & W"). Petition for Reimbursement of Costs ("Petition") at 3, ¶3. On that same date, Sherwin-Williams obtained the service of

Barone to transport hazardous waste materials from its Newark plant. Petition at 3, ¶2. A shipment of drums containing combustible solvent waste and 20 used empty drums was sent from Petitioner's Newark plant to a Barone facility in Patterson, New Jersey on August 27, 1981. NJDEP Hazardous Waste Manifest, Document No. NJ 0066061.[1] A second shipment of combustible solvent waste paint and an additional 20 used empty drums was manifested to Barone's Patterson facility on September 23, 1981. NJDEP Hazardous Waste Manifest, Document No. NJ 0066065.

One month later, NJDEP - Division of Criminal Justice, armed with search warrants, entered Barone's Newark facility pursuant to its investigation of Barone's activities and found approximately 200 55-gallon drums. Memorandum to Spill File from Terry Ostrander, dated October 13, 1981 at 2. One group of stacked drums was labeled as non-hazardous and identified as holding mineral oil. *Id.* Another group was found on the other side of the warehouse; most were labeled with Sherwin-Williams' hazardous waste labels. *Id.*

State officials informed Sherwin-Williams that its waste was found at Barone's Newark facility, so Sherwin-Williams' representatives and local counsel made arrangements to meet with A. Tarrats and D. Tarrats to discuss the proper disposal of its waste. Greer Memorandum at 1. Prior to that meeting, Sherwin-Williams' representatives met briefly with Barbara Greer of NJDEP at the request of Sherwin-Williams' representatives. *Id.* at 2. Greer informed Sherwin-Williams' counsel that NJDEP believed that Sherwin-Williams' waste was presently stored at Barone's Newark facility. *Id.* Sherwin-Williams explained that Barone had informed it that its waste would be buried in drums at a secure landfill in Ohio. *Id.*[2]

On January 25, 1982, NJDEP official Terry Ostrander went to Barone's Newark facility to conduct an inspection. Memorandum to Spill File from Terry Ostrander, dated January 28, 1982. During the course of the investigation, D. Tarrats led Ostrander to a Gindy trail-

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[1] The empty drums were sent along with the waste for use in accommodating the expansion of the waste which would occur during the solidification of the waste by Barone. Memorandum to File from Barbara Greer, NJDEP, dated November 13, 1991 ("Greer Memorandum") at 2.

[2] A. Tarrats and D. Tarrats later amplified on this information in the subsequent meeting by stating that Sherwin-Williams' two shipments of waste had been transported to a Barone facility in Patterson and that the first load had been sent to Ohio. *Id.* D. Tarrats then explained that paint sludge from various generators was being solidified with vermiculite and "mixed in the roll-off" for disposal by Browning-Ferris Industries ("BFI") in Glen Burnie, Maryland. *Id.* at 3.

er, license plate number NJ 108-TAF. *Id.* at 1. As he inspected the Gindy trailer, Ostrander found 80 55-gallon drums aligned in four rows. *Id.* at 3. He recorded drum markings/stickers from NL Industries and Sherwin-Williams.[3] *Id.* He then drew samples from four drums, two of which bore labels with Sherwin-Williams' name. *Id.*

On March 3, 1982, Ostrander reported that while analysis of the four drums indicated the presence of hazardous substances, the waste posed no immediate danger since the drums were not leaking and were secured in a locked trailer. Memorandum to Barbara Greer from Terry Ostrander, dated March 3, 1982.

Throughout much of the spring of 1982, the trailer remained at the Barone Newark facility. *See* Memorandum to Spill File from Terry Ostrander, dated May 17, 1982. However, in early June 1982, NJDEP inspectors learned the trailer had been removed from the Barone Newark facility sometime in early May. Hazardous Waste Investigation Memorandum from Inspectors D. Dawson/S. Carfora, dated July 8, 1982.

On August 30, 1982, a trailer was found abandoned on a road between the Sky Port Industrial Park and Pacific Street. Memorandum to Spill File from Terry Ostrander, dated September 1, 1982 at 1. When Ostrander arrived at the location to inspect the trailer, he was met by Mel Veenema, owner of V & W, who explained that this was the second of two trailers leased to Barone; he had recovered the first trailer from a police impoundment lot several months earlier. *Id.*

Ostrander inspected the trailer; it was the trailer he inspected at the Barone Newark facility in January 1982. *Id.* The trailer held 80 55-gallon drums partially filled or completely filled with waste. *Id.* Most of the drums were covered with lids; eight loose tops and 18 loose, unfastened rings were observed. *Id.* None of the drums were leaking. *Id.* A "high percentage" of the drums bore Sherwin-Williams' hazardous waste label. *Id.* at 2.

In late October 1982, Ostrander and two representatives from Sherwin-Williams arrived at the trailer to conduct tests on the materials found in the drums. Memorandum to Spill File through Charles Krauss from Terry W. Ostrander, dated October 22, 1982. The trailer had its right side door open, exposing a drum with part of a yellow hazardous waste label affixed to it. *Id.*; *see also* Petition, Exhibit F.

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[3] Ostrander also noticed a group of drums outside the trailer with labels from "Sybron." *Id.* at 2.

Sherwin-Williams' inspectors identified 36 drums marked with their labels interspersed with unmarked drums and drums containing labels from other companies; they also observed numerous drums with removed drumheads, headrings and/or ringbolts. *See id.*; *see also* Petition, Exhibit F.[4]

Sherwin-Williams' inspectors took a total of six samples from five drums, both drums with and without Sherwin-Williams' labeling.[5] *Id.*; *see also* Petition, Exhibit F. The results of Sherwin-Williams' testing revealed that two samples were typical of material sent to Barone for disposal, three samples were characterized by Sherwin-Williams as questionable as its waste, and one sample was considered highly questionable. Petition, Exhibit F. Meanwhile, the trailer and its contents were towed to the B & C Towing Site, an impoundment lot run by the City of Newark. *Id.*

In September 1986, NJDEP personnel were at the B & C Towing lot to perform a site assessment of the trailer. *Id.* Inspectors observed a hole had been cut in the side of the trailer, presumably to aid in access to the drums. *See id.* A slight odor was detected; a vapor analyzer registered organic vapors from the trailer. *Id.* B & C Towing operators said that on occasion the odor from the trailer was very strong. *Id.*

In late January 1987, an NJDEP official met with representatives from Sherwin-Williams; as per the discussions, Sherwin-Williams agreed to handle the clean-up of the trailer site. See Memorandum to File through Robert Zollner from David Beeman, dated January 29, 1987. In March 1987, Sherwin-Williams was ready to begin the preliminary stages of the clean-up, but it could not gain access to the drums because the trailer doors were blocked by debris in the lot. Letter to D. Beeman, NJDEP from E. Cass Krakowski, Sherwin-Williams Company, dated March 27, 1987.

In January 1989, unable to obtain compliance from Sherwin-Williams, Barone or the Tarrats brothers, NJDEP submitted the B & C Towing Site to the U.S. Environmental Protection Agency - Region II for CERCLA removal action consideration. Letter to Stephen Luftig, Director Emergency and Remedial Response Division, Region II from John J. Trela, Ph.D, Director, dated January 30, 1989; *see also* OWPE

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[4] In addition, Sherwin-Williams' inspector identified one drum type as a type not used by it at its Newark plant. Petition, Exhibit F.

[5] *See infra* n.25.

Preliminary Decision at 4. EPA decided to visit the site to conduct a Removal Assessment. *See* Letter to John J. Trela, Ph.D., Director, Division of Hazardous Waste Management, NJDEP from Richard C. Salkie, Associate Director for Removal and Emergency Prepardeness [sic] Programs, dated March 2, 1989.

EPA, through several site visits, discovered several potential hazards: drums in poor condition holding ignitable material, the presence of organic vapors, and evidence of staining on the underside of the trailer.[6] U.S. EPA Initial Pollution Report submitted by Nick Magriples, Response and Prevention Branch, dated March 20, 1989.

In May 1989, Region II issued notice letters to Sherwin-Williams, B & C Towing, Barone and the Tarrats brothers. Petition at 5, ¶11. On September 22, 1989, the Region issued a Unilateral Administrative Order ("Order") to Sherwin-Williams pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), requiring that Sherwin-Williams remove and properly dispose of the 80 drums found in the trailer at the B & C Towing site. Petition at 5, ¶12.

Following the Order, Sherwin-Williams and its subcontractor began the removal on January 9, 1990. U.S. EPA Initial Pollution Report submitted by Nick Magriples, Response and Prevention Branch, dated January 9, 1990. During the removal action, Sherwin-Williams observed that two drums held hazardous waste labels from two other companies, NL Industries, Inc. and NALCO Chemical Company. Petition, Exhibit I. Sherwin-Williams took 12 composite samples from the 80 drums for analyses. U.S. EPA Initial Pollution Report submitted by Nick Magriples, Response and Prevention Branch, dated January 16, 1990. A flammability test of the 12 composite samples was done on site and each sample but two tested positive for flammability. *Id.* Sherwin-Williams also took several pictures that showed drums with miscellaneous debris and small amounts of disposed waste. Petition, Exhibit I; Comments to Preliminary Decision at 3.

The entire removal action was complete on March 28, 1990. U.S. EPA Initial Pollution Report submitted by Nick Magriples, Response and Prevention Branch, dated April 2, 1990. In April 1990, Sherwin-Williams submitted a Removal Action Report outlining the details of the disposal. Petition, Exhibit I. There is no dispute as to Sherwin-

[6] A manager at the B & C Towing site told EPA officials that the trailer leaked at one time. Removal Assessment and Funding Request for Removal Action Memorandum, dated May 25, 1989.

Williams' compliance with the Order or with the fact that the response action has been completed.

B. *Procedural History*

On June 1, 1990, Sherwin-Williams filed a timely petition, pursuant to Section 106(b)(2)(A) of CERCLA, seeking reimbursement of $161,870.25, plus additional costs.[7] On April 16, 1993, the Office of Waste Programs Enforcement ("OWPE") issued a Preliminary Decision ("OWPE Preliminary Decision") proposing to deny the Petition. OWPE determined that Sherwin-Williams had not demonstrated by a preponderance of the evidence that it is not liable for the response costs, or that the Agency action in issuing the Order was "arbitrary and capricious or otherwise not in accordance with law."

Sherwin-Williams filed Comments to the OWPE Preliminary Decision on April 18, 1993, which challenged the conclusions in the OWPE Preliminary Decision. In June 1994, authority to review CERCLA petitions was transferred to the Board.[8] The Board issued an Order on November 28, 1994, directing Region II to file a response to the Petition, as well as Sherwin-Williams' Comments to the OWPE Preliminary Decision. Region II filed a Response to Petition on February 25, 1995, in which it concurred with the conclusions drawn in the OWPE Preliminary Decision. Sherwin-Williams then filed its Reply to EPA's Response to Petition ("Reply to Response to Petition") on April 27, 1995. Region II filed a Reply to Sherwin-Williams Company's Response of April 27, 1995 ("Reply to Petitioner's Reply of April 27, 1995") on May 30, 1995.

The Board issued a Preliminary Decision on July 25, 1995. Both the Region and Sherwin-Williams filed comments on the Preliminary Decision on October 2, 1995. After due consideration of all comments received and making such changes as are appropriate, the Board issues this Final Decision.

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[7] Sherwin-Williams indicates that "additional costs" are those costs "which will be quantified in a supplemental document when that information has been compiled." Petition at 2.

[8] Authority to make determinations on CERCLA petitions for reimbursement was delegated by the President to the Administrator of EPA in 1987, and initially re-delegated to the Director of OWPE. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987). In June 1994, the Board received authorization to issue final decisions granting or denying such petitions. *See* EPA Delegation of Authority 14-27 ("Petitions for Reimbursement") (June 1994).

C. *Statutory Framework*

"In response to widespread concern over the improper disposal of hazardous wastes, Congress enacted CERCLA, a complex piece of legislation designed to force polluters to pay for costs associated with remedying their pollution." *United States v. Alcan Aluminum Corp.* (*"Alcan I"*), 964 F.2d 252, 257 (3rd Cir. 1992); *see also In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 711 (EAB 1995). (CERCLA is largely a remedial statute designed "to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties.") Courts have traditionally construed CERCLA's liability provisions "liberally with a view toward facilitating the statute's broad remedial goals." *United States v. Shell Oil Co.*, 841 F. Supp. 962, 968 (C.D. Cal. 1993); *see* the cases cited therein.

CERCLA grants broad authority to the Federal government to provide for such cleanups. Specifically, the government may respond to a release or a threatened release[9] of hazardous substances[10] at a facility[11] by itself undertaking a cleanup action under Section 104(a), 42 U.S.C. § 9604(a), and then bringing a cost recovery action against the responsible parties under Section 107(a), 42 U.S.C § 9607(a). Alternatively, where there is imminent and substantial endangerment of harm to public health or welfare or the environment, the Federal government may issue such administrative orders, pursuant to Section 106(a), 42 U.S.C. § 9606(a), as may be necessary to protect public health and welfare and the environment. This includes orders directing potentially responsible parties ("PRPs") to clean up the hazardous waste site. This is the course the Region chose to follow in this case.

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[9] Section 101(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) * * *." 42 U.S.C. § 9601(22).

[10] CERCLA defines a "hazardous substance" as any substance identified as such by the statute itself or EPA regulation. *See* CERCLA §§ 101(14) & 102, 42 U.S.C. §§ 9601(14) & 9602.

[11] Section 101(9) defines a "facility" as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located * * *

42 U.S.C. § 9601(9).

Those who comply with the administrative order may, under Section 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A), petition the Agency for reimbursement of reasonable costs incurred during the cleanup, as Sherwin-Williams has done here.

In order for a petitioner to receive a reimbursement for its response costs, Section 106(b)(2)(C) provides that the petitioner:

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

42 U.S.C. § 9606(b)(2)(C).

A petitioner may also recover response costs expended to the extent that under Section 106(b)(2)(D):

> * * * it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law.

42 U.S.C. § 9606(b)(2)(D).

In a Section 106(b) proceeding, the petitioner bears the burden of proof, which includes both the burden of initially going forward with the evidence and the ultimate burden of persuasion. *See In re William H. Oliver*, 6 E.A.D. 85, 94 (EAB 1995); *see also Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995); *Dico, Inc. v. Diamond*, 35 F.3d 348, 351 (8th Cir. 1994). The Board, in *In re Nello Santacroce & Dominic Fanelli d/b/a Gilroy Associates*, 4 E.A.D. 586, 595 (EAB 1993), ("*Gilroy Associates*"), elaborated on the obligation associated with having the burden of proof:[12]

> The term "burden of proof" is ambiguous. *See* McCormick, Handbook of the Law of Evidence, §336 (1972). It encompasses two separate concepts. *Ambrose v. Wheatly*, 321 F.Supp. 1220, 1222 n. 6 (D. Del. 1971); Wigmore, Evidence §§2485-87(3rd ed.). One is the burden of going forward with the evidence, which is a

[12] *See also In re New Waterbury, Ltd.*, 5 E.A.D. 529, 537-39 (EAB 1994).

> procedural device for the orderly presentation of evidence. It may shift back and forth as the trial progresses. Once a party having the burden of going forward with the evidence has satisfied that burden by making out an affirmative case in favor of its position, the burden of going forward with the evidence then shifts to the opposing party to rebut that evidence with evidence in favor of its own position. The other "burden of proof" is the burden of persuasion, which is a matter of substantive law. It never shifts from one party to the other at any stage of the proceedings. It has also been described as the risk of non-persuasion. Wigmore, Evidence §2486 (3rd ed.) In other words, the party having the burden of persuasion must bear the risk of not having his position sustained if the opposing party's evidence is as persuasive as his own on any disputed issue of fact. Which party bears the burden of persuasion (or the risk of non-persuasion) therefore becomes a significant question only where the evidence on an issue is evenly balanced or if the trier is in doubt about the facts.

Gilroy Associates at 595 (citing *In re 170 Alaska Placer Mines, More or Less*, 1 E.A.D 616, 623-24 (Adm'r 1980). These concepts become particularly important where, as here, the evidence is contradictory and subject to varying interpretation. *Id.*

Hence, Sherwin-Williams can establish its right to reimbursement in this case if it can prove by a preponderance of the evidence that it did not generate the waste disposed of at the B & C Towing Site. In addition, Sherwin-Williams can obtain partial reimbursement even if it is liable if it can prove that the harm associated with its waste is divisible and there is a reasonable basis for apportionment. *See In re William H. Oliver*, 6 E.A.D. at 103. Sherwin-Williams may also receive reimbursement for costs incurred in the clean up of the B & C Towing Site to the extent that it can demonstrate based upon the administrative record that the selection of the response action in the Administrative Order was "arbitrary and capricious or was otherwise not in accordance with law."

D. *The Petition*

In its Petition, Sherwin Williams makes two arguments. Sherwin-Williams contends that the Order directing the removal action was "arbitrary and capricious or otherwise not in accordance with the law"

because the trailer and its contents presented no "imminent and substantial endangerment" to the public or environment. To support this argument, Sherwin-Williams points to several reports that state that the trailer presented no immediate danger.

Sherwin-Williams also argues that it is not liable for the response costs because it did not generate the waste contained in the drums at the B & C Towing Site. It claims that according to waste manifests, the two shipments for which Sherwin-Williams contracted with Barone were transported to the BFI waste disposal facility in Glen Burnie, Maryland. As such, Sherwin-Williams labels affixed to drums found at the site are not proof that the waste contained in the drums was generated by it.

Furthermore, according to Sherwin-Williams' 1982 sampling results of waste from five drums, some of the material in the drums was generally not typical of material sent from its Newark plant. In addition, the presence of certain chemicals detected in the waste during composite sampling of all 80 drums in 1990 exonerates Sherwin-Williams because those chemicals were not used in any process at its Newark plant, and thus could not be present in its waste stream.

Sherwin-Williams also argues that even if the Region could establish that the 36 Sherwin-Williams labeled drums contained material generated by Sherwin-Williams, there is no evidence of liability for the 44 drums that were either unmarked or marked with another company's label. Of the 1982 samplings taken from drums without Sherwin-Williams labels, each sample showed material that was not typical of material generated by Sherwin-Williams' Newark plant. Moreover, during the removal action in 1990, Sherwin-Williams removed some drums that bore labels from other companies. Sherwin-Williams also asserts that since the costs of removal for each drum are divisible, the imposition of joint and several liability is inappropriate.

II. *DISCUSSION*

A. *Arbitrary and Capricious*

Sherwin-Williams argues that the Region's decision to order a response action was "arbitrary and capricious or otherwise not in accordance with law" because the administrative record does not show that an "an imminent and substantial endangerment" existed at the B & C Towing site. Petition at 10.[13] To support its claim, Sherwin-

[13] While Sherwin-Williams challenges the basis for the finding of an imminent and substantial endangerment, it does not challenge the selection of the remedy itself. In its Preliminary
Continued

Williams relies on a March 1982 NJDEP report that noted the presence of hazardous substances in the trailer, but stated that no immediate danger existed. Petition, Exhibit D. Sherwin-Williams contends that the fact that the Region waited until May 1989 to act supports its claim that no imminent and substantial endangerment was present at the site. Petition at 11.

Sherwin-Williams cites an Agency guidance memorandum that addresses the legal threshold the Agency must meet in ordering a removal action. The guidance provides, in part:

> The [A]gency must be able to properly document and justify both its assertion that an *immediate and significant risk of harm to human health or to the environment exists* and its choice of the ultimate response action at a site in order to be able to oppose a challenge to the order and to successfully litigate any subsequent cost recovery action.

Petition at 10-11 (citing EPA Guidance Memorandum On Issuance of Administrative Orders For Immediate Removal Actions, February 21, 1984 from Lee M. Thomas, Assistant Administrator, to Regional Administrators).[14] Sherwin-Williams asserts the Region did not meet the legal threshold of finding an imminent and substantial endangerment at the B & C Towing site.

While the phrase "imminent and substantial endangerment" is not specifically defined in CERCLA, the phrase has been scrutinized by the courts. "Endangerment means a threatened or potential harm and does not require proof of actual harm." *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985). The "endangerment" need not be an emergency, nor does it have to be immediate to be "imminent." *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 193 (W.D. Mo. 1985). Given the importance of any threat to pub-

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Decision, OWPE indicated that even if there were no basis for the finding of imminent and substantial endangerment, that would not support a petition for reimbursement since Section 106(b)(2)(D) provides for reimbursement where the selection of the remedy is arbitrary and capricious and the finding of an imminent and substantial endangerment is not an element of that selection. OWPE Preliminary Decision at 13, n.46. Since we conclude that the Region's finding is fully supported, we need not reach this issue and express no opinion on it.

[14] Note that this guidance discusses the basis for the Agency's issuing an order under Section 106(a). As previously noted, in an action for reimbursement under Section 106(b), it is the petitioner who must demonstrate that the Agency's action was "arbitrary and capricious." Section 106(b)(2), 42 U.S.C. § 9606(b)(2).

lic health and the reality that implementing a corrective plan might take years, "imminence" must be considered in light of the time that might be needed to sufficiently protect the public health. *See B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D.Conn. 1988).[15] Thus, an "endangerment" is "imminent" "if factors giving rise to it are present even though the harm may not be realized for years." *Conservation Chemical Co.*, 619 F. Supp at 194.

Furthermore, the word "substantial" does not require quantification of the endangerment; "an endangerment is 'substantial' if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Id.*

In light of the case law and the Board's review of the administrative record, the Board finds that Sherwin-Williams has failed to demonstrate that the Region's finding of an "imminent and substantial endangerment" at the B & C Towing Site was "arbitrary and capricious."

Sherwin-Williams' argument that the March 1982 tests reported the hazardous substances in the drums posed no immediate risk in 1982 is of no consequence, given the Region's findings in 1989 when the case was referred to it.[16] Given the potential for leakage, it would not be surprising to find a heightened risk of danger or "imminent and substantial endangerment" as time passed.

When this matter was referred to EPA for CERCLA consideration in January 1989, the drums had already been in the trailer for seven years.[17] Through a series of EPA assessment inspections of the trailer throughout 1989 and 1990, EPA determined that some of the drums

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[15] *B.F. Goodrich* notes that "the time it may take to prepare administrative orders or moving papers to commence and complete litigation and to permit issuance, notification, implementation, and enforcement of administrative or court orders" must be factored into the urgent need to remedy the problem. 697 F. Supp. at 96.

[16] The OWPE Preliminary Decision provides:

> * * * a site assessment conducted by EPA's Technical Assessment Team on March 10, 1989, confirmed staining of the facility. This indicates that materials had leaked from the drums by that time, regardless of whether there were leaks as early as 1982.

OWPE Preliminary Decision at 12.

[17] Ostrander discovered the trailer on an NJDEP inspection in January 1982.

were open or partially sealed and holding flammable hazardous waste, presenting a risk of fire or explosion. U.S. EPA Pollution Report submitted by Nick Magriples, Response and Prevention Branch, dated March 20, 1989. Furthermore, organic vapors were detected in the trailer, and the drums, which were in poor condition, showed evidence of leaking since stains were found on the underside of the trailer. *Id.*; Memorandum from James Tseng and Carl Kelley to Nick Magriples dated March 5, 1990. Given the nature of the chemicals involved, exposure to leakage through inhalation or direct contact presented significant health risks.[18]

These documented facts, along with the knowledge that the trailer was housed at an active towing lot located along the New Jersey Turnpike, close to other industrial parks, three schools and densely-populated residential areas amply support and justify the Region's call for an Order directing an immediate cleanup of the site. Community and environmental exposure to a release associated with a fire or explosion was a major concern, given the flammable nature of the waste and the fact that the stability of the trailer was questionable. Removal Assessment and Funding Request for a Removal Action; B&C Towing, City of Newark, Essex County, New Jersey - ACTION MEMORANDUM dated May 25, 1989.

The Board cannot minimize the real threat of harm to the public and environment. The facts of this case reveal evidence of a leakage of highly toxic chemicals, as well as the real possibility of a life threatening release or explosion. That possibility was clearly sufficient to support the Region's finding of "imminent and substantial endangerment."[19] Accordingly, the Board finds that Sherwin-Williams has not

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[18] Sherwin-Williams submits with its comments on the July 25, 1995 Preliminary Decision an Affidavit from Gordon Kuntz, its Senior Environmental Project Manager, stating among other things that he observed the underside of the trailer at the start of the removal action and did not observe any evidence of staining. He further indicates that during the removal action, a PID detector was used to monitor the work area and no organic vapors were detected. However, even if true, this would not eliminate the *potential* for leakage, which itself would have been sufficient to support the Region's finding. In any event, both evidence of staining and the presence of organic vapor readings, above background, *were* detected by personnel from EPA's Removal Action Branch and the Technical Assistance Team ("TAT") during an inspection on March 10, 1989. Removal Assessment and Funding Request for a Removal Action; B&C Towing, City of Newark, Essex County, New Jersey - ACTION MEMORANDUM dated May 25, 1989 at 5; Memorandum from James Tseng and Carl Kelley of the TAT to Nick Magriples dated March 5, 1990 at 2.

[19] The Board notes that Sherwin-Williams did not comment on OWPE's conclusion in the OWPE Preliminary Decision that an "imminent and substantial endangerment" existed at the B & C Towing Site nor did it address this issue in any of its briefs since the filing of the Petition prior to filing comments on the July 25, 1995 Preliminary Decision.

met its burden of proof of demonstrating that the Region's actions at the B & C Towing Site were "arbitrary and capricious" because there was no "imminent and substantial endangerment at the site.

B. *Petitioner's Liability*

In view of the Board's finding that Sherwin-Williams has not satisfied its burden of establishing that the Order was "arbitrary and capricious," the Board now turns to the issue of whether Sherwin-Williams is liable, in whole or in part, for the response costs. To understand this issue, it would be useful to review briefly the elements of liability under CERCLA. Liability for clean-up costs attaches under § 107 of CERCLA where the following four elements are established: (1) the site in question is a "facility" as defined in § 101(9); (2) the defendant or petitioner is a responsible person under § 107(a); (3) a release or threatened release of a hazardous substance has occurred; and (4) the release or threatened release has caused the plaintiff or government to incur response costs. *See United States v. Alcan Aluminum Corp.* (*"Alcan II"*), 990 F.2d 711, 719 (2d Cir. 1993); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989). One of the classes of responsible persons under § 107(a) is any person who "arranged for disposal" of a hazardous substance. § 107(a)(3). This class is commonly referred to as "generators."

As applied to this case, there is no dispute as to whether the trailer at the B & C Towing lot is a "facility," whether a release occurred, or whether the release caused the incurrence of response costs. The only element of liability that remains at issue is whether Sherwin-Williams is the generator of waste disposed of at the B & C Towing Site. In brief, the Board finds, for the reasons set forth below, that Sherwin-Williams has not established by a preponderance of the evidence that it is not liable as a generator of at least some of the waste found at the site.

1. *The Manifests*

Sherwin-Williams first asserts that none of the waste found in drums at the B & C Towing Site could be waste generated by it because manifests document that two waste shipments were sent from Sherwin-Williams to Barone, and another set of manifests document Barone's shipment of this waste to BFI at Glen Burnie, Maryland for disposal. Petition at 7; Petition, Exhibit B.

One set of waste manifests documents that in August and September of 1981, Barone transported two shipments of Sherwin-Williams' combustible solvent waste paint to Barone's Patterson facil-

ity. NJDEP Hazardous Waste Manifests, *supra* at 2. A second set of manifests records Barone's transport of non-combustible solid paint to BFI several months later. Of the second set, one of the manifests listed Barone as the generator (NJDEP Hazardous Waste Manifest, Document No. NJ 0057832), and the other listed the generator as "Barone Barrel & Drum c/o Sherwin Williams" (NJDEP Hazardous Waste Manifest, Document No. NJ 0057858). Petition, Exhibit B. According to Sherwin-Williams' record of its Newark manifests for 1980 and 1981, no other materials were manifested from its Newark plant to Barone.[20] Comments to OWPE Preliminary Decision at 5. Sherwin-Williams thus asserts that the wastes manifested to BFI are the same wastes manifested to Barone.[21]

In response, the Region maintains that the description of the waste shipped to Barone as "combustible solvent waste paint" is inconsistent with waste reported in the manifest to BFI as "non-combustible" and "solid paint." Response to Petition at 17-18. In addition, the Region contends that the fact that only one manifest to BFI mentions Sherwin-Williams as the generator, while the other merely lists Barone as the generator without a reference to Sherwin-Williams, is strong evidence that at the very least, some of Sherwin-Williams' waste did not go to BFI. *See id.*

Sherwin-Williams counters by arguing that the discrepancies in how the waste was characterized in the two sets of manifests are due to the solidification process applied to its waste by Barone. *See* Comments to OWPE Preliminary Decision at 4. It asserts "[i]n solidifying the manifested materials, the 'combustible' materials would become 'non-combustible' before they were transported to B.F.I." *Id.* Sherwin-Williams believes its receipt of a price quotation from Barone demonstrated Barone's practice of solidifying waste with vermiculite and then repackaging it. *See id.* at 5.

To the contrary, the Region argues that treating Sherwin-Williams' solvent waste with vermiculite would fail to render the solvent waste non-combustible. *See* Reply to Petitioner's Reply of April 27, 1995 (referring to Affidavit of Thomas Budroe, CHMM). Thus, even with

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[20] The Region has never disputed this particular point.

[21] Furthermore, Sherwin-Williams suggests the fact that it "only approved the Barone Invoice for Payment after receipt of the two Maryland manifest documents which reflected the two New Jersey manifests," Comments to OWPE Preliminary Decision at 5, also proves that its waste was sent to BFI in Maryland.

solidification, the waste would not correspond to the "non-combustible" waste manifested to BFI.

On the whole, the Board finds that these sets of manifests are insufficient to support Sherwin-Williams' claim that all of its wastes went to BFI. There is conflicting expert testimony in the administrative record on the issue of whether the wastes, once solidified, could have been accurately described as non-combustible, as were the wastes in the manifests to BFI. Even more important is the designation of Sherwin-Williams as generator on only one of the manifests to BFI. On balance, given that Sherwin-Williams bears the burden of proof, these manifests are not sufficient to demonstrate that the wastes covered by the manifests to BFI correspond to all of the wastes manifested to Barone by Sherwin-Williams.

Moreover, Sherwin-Williams' assertions that it received confirmation from Barone that Sherwin-Williams' waste went to BFI,[22] or even that it was billed by Barone for disposal at BFI, are of questionable value.[23] The record is filled with evidence strongly inferring irresponsible business practices by Barone.[24] Consequently, it is hard to know with any degree of certainty whether any of Sherwin-Williams' waste is properly represented through the manifests in the waste that went to BFI and if so, how much.

While it is possible that all of Sherwin-Williams' waste went to BFI, such a possibility is not enough. Sherwin-Williams has the bur-

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[22] Sherwin-Williams states:

> [D.] Tarrats, on behalf of Barone, confirmed in December 4, 1981 correspondence to Sherwin-Williams that the manifests [sic] materials were solidified. Barone further confirmed that the manifest which identified Barone as the generator represented materials that were picked up at Sherwin-Williams' facility on August 27, 1981.

Reply to Response to Petition at 10. The correspondence referred to was apparently sent to Sherwin-Williams by Barone to support its request for payment.

[23] This is especially true when it is considered that Barone first told Sherwin-Williams that the first shipment of its waste had been sent to a facility in Ohio. *See supra* n.2. Sherwin-Williams argues that the fact that Barone changed the intended disposal facility should not adversely affect Barone's credibility. This misses the point. What the Tarrats told Barbara Greer was that the first load ***had been sent*** to Ohio, which now even Sherwin-Williams argues is not true.

[24] It is certainly possible that the Tarrats were less than honest when they originally told Sherwin-Williams that its first load of waste was sent to Ohio. Aside from this declaration by the Tarrats, nothing in the record suggests the waste went to Ohio, and based on its argument before the Board, Sherwin-Williams does not believe its waste went anywhere other than BFI.

den of proving that this is true by a preponderance of the evidence; that is, to show that it is more likely true than not. On balance, given the conflicting waste descriptions and explanations, the Board finds that Sherwin-Williams has not satisfied its burden of establishing that the manifests prove the waste transported from its Newark plant to Barone was disposed of at the BFI facility.

2. *The Sampling Results*

Sherwin-Williams also argues that the results of sampling of the wastes demonstrates that they could not have come from its Newark plant. As proof, Sherwin-Williams cites the testing it did in October 1982 (six samples from five drums) and the composite tests performed in January 1990. We begin with a discussion of the factual contentions and then address the legal significance of those contentions.

a. *Sherwin-Williams 1982 Test Results*

As previously noted, as part of an inspection conducted in October 1982, Sherwin-Williams took six samples from five drums.[25] Sherwin-Williams Intra-Company Correspondence from R.A. Wavering, Manager, Resin Production to F. Gaugish, dated November 11, 1982 ("Wavering memo"). Sherwin-Williams asserts that only two samples, samples #4 and #5, are typical of materials that it sent to Barone for disposal. *Id.*; Petition at 8. Samples #2, #2A and #3 are considered "questionable" as products generated by it because the samples had a high water content. *Id.* Specifically, as to samples #2 and #2A, Sherwin-Williams maintains that water could not be the sole distillate for the combustible solvent waste it manifested to Barone. Comments to OWPE Preliminary Decision, Affidavit of Gordon S. Kuntz, Ph.D. Therefore, the high water content and the fact that no organic solvents or combustible material was found in the samples confirm that Sherwin-Williams did not generate the waste found in the drums. *Id.* at 2. Sample #1 is considered "highly questionable" because the "[p]roperties of the [s]ample were not typical to material submitted for disposal." Petition at 8.

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[25] Sample #1, taken from drum #65, was a neutral liquid and unidentified solid sample. Two samples were drawn from drum #66. Sample #2 was a liquid sample of approximately 100% water. Water was removed from sample #2 and sample #2A was comprised of solids identified as "possible [p]igment/[i]nerts used in [p]aints." Sample #3, taken from drum #48, was a paint and liquid stratified solution. 57% of the solid was paint; the liquid content was approximately 100% water. Sample #4, taken from drum #79, was another paint and liquid stratified solution. The liquid appeared to be a distillate typical of the kind used by Petitioner. Sample #5, taken from drum #34, was a liquid product that had a slight lacquer odor and a solid residue that was orange in color. Wavering memo at 1-2.

Region II argues that none of the above information shows that it is more likely than not that Sherwin-Williams did not generate the waste found in the trailer. Two of the samples correspond to Sherwin-Williams' waste. Even the presence of water as the only distillate and the absence of organic solvents or combustible material in other samples do not show that Sherwin-Williams is not liable for the waste. Analysis of several samples, namely samples #2A and #3, indicate a product generated from paint production. Response to Petition at 7-10.[26]

The parties appear to accept the validity of these tests but dispute what inferences can be drawn from them. In particular, the parties dispute whether the high water content of samples #2A and 3 prove that the waste could not have originated with Sherwin-Williams or rather could be accounted for by "mishandling" of Sherwin-Williams' waste by Barone. For our purposes, we need not get drawn into this debate. It is sufficient to note for our subsequent legal analysis that the samples of the five drums showed two drums consistent with Sherwin-Williams' waste (by its own admission).

b. *Carbon Tetrachloride*

Sherwin-Williams points to the results of a March 1982 NJDEP test used to support the Order that indicate that carbon tetrachloride was found in an analyses of the 80 drums. Petition at 9. According to Sherwin-Williams' review of its Raw Material Consumption Reports for 1979 through 1981, Sherwin-Williams' Newark plant did not use carbon tetrachloride in any plant production. Comments to OWPE Preliminary Decision, Affidavit of Gordon S. Kuntz, Ph.D; Reply to Response to Petition, Affidavit of Gordon S. Kuntz, Ph.D. Thus, Sherwin-Williams concludes that this could not be its waste.

The Region dismisses this argument, pointing out that Sherwin-Williams' own 1990 Removal Action Report finds no carbon tetrachloride in any of the samples taken from the drums. Response to Petition at 14.[27] Therefore, the Region asserts that Sherwin-Williams' own test results make the evidence on the presence of carbon tetrachloride in

[26] The Region does not dispute the results of sample #1 which state that the properties of the sample are not typical of material submitted for disposal.

[27] The Board notes Sherwin-Williams' assertion that the Accredited Laboratories, Inc. Report states carbon tetrachloride was detected in the waste. Comments to OWPE Preliminary Decision at 4. Upon review of the report, the Board found the report concluded carbon tetrachloride was not detected. See Accredited Laboratories, Inc.'s Analytical Data Report at 3-10.

the waste at the B & C Towing Site unclear, and that the evidence of the presence of carbon tetrachloride does not outweigh the evidence of its absence.

As previously discussed, Sherwin-Williams bears the burden of proof in this proceeding. Given the absence of carbon tetrachloride in Sherwin-Williams' own tests contemporaneous with the removal action, Sherwin-Williams has failed to meet this burden.

c. *Tetrachloroethane, Trichloroethane and Benzene*

Sherwin-Williams also refers to the 12 composite samples drawn from the drums in January 1990.[28] The results, which were analyzed by Sherwin-Williams' contractor, Accredited Laboratories, Inc., reveal the presence of tetrachloroethane (found in all 12 samples), trichloroethane (found in 3 samples) and benzene (found in 2 samples). *See* Comments to OWPE Preliminary Decision at 3. Sherwin-Williams states that its Raw Material Consumption Reports show that its Newark plant did not use these chemicals in any paint or resin production, laboratory processes, or in the rinsing and cleaning of equipment. Reply to Response to Petition, Affidavit of Gordon S. Kuntz, Ph.D.

The Region argues in response that of the many volatile components found in the waste at the B & C Towing Site, Sherwin-Williams chose to concentrate on the chemicals representing the smallest percentage in the samples. *See* Reply to Petitioner's Reply of April 27, 1995 at 8. More specifically, the Region charged that Sherwin-Williams has not refuted the presence of xylene, toluene, ethyl benzene, and methylenchloride, chemicals which were detected in large amounts in the waste. Thus, concludes the Region, Sherwin-Williams' failure to show that the majority of material identified in the composite samples was not generated by it makes it liable for the removal costs. The Region also asserts that Barone may have added the suspect compounds to the waste, thereby altering the material originally submitted for disposal by Sherwin-Williams. *See id.*

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[28] Of the 12 composite samples, samples #5 and #12 were from drums not bearing Sherwin-Williams' hazardous waste labels and sample #7 was from drums which did bear Sherwin-Williams' hazardous waste label. The other nine samples were from both labeled and unlabeled drums. The following volatile organic compounds were common to all of the samples: Tetrachloroethane, Toluene, Ethyl benzene, m-Xylene, and op-Xylene. The following metals were common to samples #5, #12, and #7: Aluminum, Antimony, Barium, Calcium, Chromium, Cobalt, Iron, Lead, Magnesium, Potassium, Sodium, and Zinc. Toluene, m-Xylene, op-Xylene, and the metals listed are all typical of wastes associated with paint manufacturing.

We believe that Sherwin-Williams has shown that the trichloroethane and tetrachloroethane did not originate in Sherwin-Williams' waste. The affidavit of Sherwin-Williams' expert (Dr. Kuntz), unrefuted by the Region, proves that Sherwin-Williams never used such chemicals. The record as to benzene is less clear since, as the Region notes, Sherwin-Williams' Notification of Hazardous Waste Activity dated August 8, 1980 listed benzene ("UO19") as a "substance handled at its Newark facility." Reply to Petitioner's Reply of April 27, 1995 at 9. We now turn to a discussion of the significance to be attributed to the presence of such chemicals (as well as the detection of at least one drum of wastes in 1982 which could not be attributed to Sherwin-Williams).

d. *Legal Analysis*

There is an extensive body of law interpreting CERCLA as it relates to generators. All of this analysis takes as its starting point that CERCLA is a strict liability statute.[29] In light of this, it establishes a difficult burden for Sherwin-Williams.

In a recent case discussing what the government must prove to establish liability in a § 107 action, the U.S. Court of Appeals for the Third Circuit stated that:

> [V]irtually every court that has considered this question has held that a CERCLA plaintiff need not establish a direct causal connection between the defendant's hazardous substances and the release or the plaintiff's incurrence of response costs.

Alcan I, 964 F.2d at 265. It stated further that:

> [T]he Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the *release* caused the incurrence of response costs.

Id. at 266. In a subsequent decision, the U.S. Court of Appeals for the Second Circuit restated the issue as follows:

> [T]he government need only prove: (1) there was a release or threatened release, which (2) caused incur-

[29] *See Alcan I*, 964 F.2d at 259; *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988).

> rence of response costs, and (3) that the defendant generated hazardous waste at the clean-up site. What is *not* required is that the government show that a specific defendant's waste caused incurrence of clean-up costs.

Alcan II, 990 F.2d at 721.

These cases take on particular significance where there may have been multiple generators at a site, whose waste may have been intermixed. In one such case, the U.S. Court of Appeals for the Fourth Circuit discussed defendants' contention that the hazardous substances found at the site must be shown to be the specific substances they sent to the site. The court rejected this argument, stating:

> The district court held, however, that the statute was satisfied by proof that hazardous substances "like" those contained in the generator defendants' waste were found at the site. *SCRDI*, 653 F. Supp. at 991-92. We agree with the district court's interpretation.

United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988). The court elaborated on this point:

> As used in the statute, the phrase "such hazardous substances" denotes hazardous substances alike, similar, or of a like kind to those that were present in a generator defendant's waste *or that could have been produced by the mixture of the defendant's waste with other waste present at the site.*

Id. (emphasis added). In finding that liability had been established, the court held:

> In light of the uncontroverted proof that containers bearing each of the defendants' markings remained present at the site at the time of cleanup and the fact that hazardous substances chemically similar to those contained in the generators' waste were found, the generator defendants' affidavits and deposition testimony simply failed to establish complete removal as a genuine issue.

Id. at 171. We believe these cases establish a clear framework for analysis of Sherwin-Williams' claims.

At the outset, we would note that each party articulates a position which it cannot adequately support. Sherwin-Williams argues that *none* of its waste could be at the site, because the manifests show that all of its waste was sent to BFI. We have already rejected this argument. The Region, at least initially, indicated that *all* of the hazardous substances originated with Sherwin-Williams. However, the sampling results, particularly the presence of tetrachlorethane and trichloroethane, effectively refute this. The presence of certain chemicals that could not be in Sherwin-Williams' waste stream, no matter how small the amount, shows that the waste subject to the clean-up order cannot be fully accounted for by Sherwin-Williams' waste. Therefore, we reject the Region's contention as well.

A more credible explanation of what happened to Sherwin-Williams' waste can be found in the description of Barone's operations contained in the memo to file of Barbara Greer of NJDEP dated November 13, 1981. In describing the meeting between Sherwin-Williams' representatives and A. Tarrats and D. Tarrats of Barone, she indicates that:

> Dan Tarrats explained * * * that paint sludges from various generators were being solidified with vermiculite *and were being mixed* in the roll-off for disposal by Browning-Ferris Industries (BFI).

Greer Memorandum at 3 (emphasis added). This indicates that Barone would mix wastes from various generators prior to disposal.[30]

Looking at the sampling results with this in mind, we conclude that Sherwin-Williams has failed to meet its burden of proving that *none* of the waste originated from it.[31] It is uncontroverted that Sherwin-Williams sent waste paint to Barone. This waste is chemically similar to the waste found in the drums in the trailer. We have already rejected Sherwin-Williams' argument that none of this could

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[30] In a December 4, 1981 letter to Sherwin-Williams from Dan Tarrats, Mr. Tarrats stated that the "Sherwin-Williams waste material was not blended with other waste." Sherwin-Williams cites this letter in its comments on the July 25, 1995 Preliminary Decision as proof that Sherwin-Williams' waste was not mixed with the waste of other generators. However, as previously noted, there are substantial issues relative to Mr. Tarrats credibility. In any event, on balance, there is no reason to give greater credence to Mr. Tarrats' letter to Sherwin-Williams than to Ms. Greer's documentation of her conversation with Mr. Tarrats, which was more contemporaneous with the events at issue.

[31] The issue of divisibility, based on the argument that only a portion of the waste was Petitioner's, will be discussed in section II.C. *infra.*

be its waste because manifests show that all of Sherwin-Williams' waste went to BFI. As to the sampling results, we note that two of the five drums tested in 1982 were, by Sherwin-Williams' own characterization, "typical of materials submitted to Barone Barrel and Drum for processing." Wavering memo at 3. That one or more of the other drums contained waste that could not have been Sherwin-Williams' waste would not defeat Sherwin-Williams' liability; it would merely suggest one or more additional liable parties.

The results from the 1990 testing by Accredited Laboratories, Inc. also fails to show that none of the waste could have been Sherwin-Williams'. The testing involved 12 composite samples drawn from the 80 drums. Sherwin-Williams argues that the presence of tetrachloroethane in all such samples, and trichloroethane (and Sherwin-Williams would argue benzene as well) in a few samples proves that none of the waste originated with it. We disagree. It does show that *some* of the drums contained wastes not originating with Sherwin-Williams. It does not show that *none* of the drums contained wastes originating with Sherwin-Williams. For example, a composite sample of seven drums, six containing Sherwin-Williams' waste and one containing chemically distinct waste from another company, would still yield results containing substances not in Sherwin-Williams' waste even though the vast majority of the wastes are Sherwin-Williams'. Thus, these data are insufficient to meet Sherwin-Williams' burden of proof of establishing that it is not the generator of any of the wastes and thus not a responsible person under § 107(a).

This result is fully consistent with the previously cited cases indicating that CERCLA requires no proof of causation,[32] only proof that a defendant sent hazardous substances to a site that were "similar" to those found at the site or "that could have been produced by the mixture of defendant's waste with other waste present at the site." *Monsanto*, 858 F.2d at 169.

This is also the only logical reading of the statute. CERCLA is a strict liability, remedial statute. It is illogical to assume that liability for

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[32] The rationale for not requiring proof of causation was well-stated by the U.S. Court of Appeals for the Fourth Circuit as follows:

> In deleting causation language from section 107(a), we assume as have many other courts, that Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source.

Monsanto, 858 F.2d at 170.

all generators can be defeated by simply mixing wastes so that each generator can point to at least one substance in the mixed waste which could not have originated from it.

For all these reasons, we conclude that Sherwin-Williams has failed to meet its burden of proof, more particularly that it has failed to "establish by a preponderance of the evidence that it is not liable for response costs under section 107(a)" as required by § 106(b)(2)(C).

C. *Divisibility*

We now turn to Sherwin-Williams' claim as to divisibility. Sherwin-Williams asserts that even if it is liable, joint and several liability should not be applied to all 80 drums since it is (at most) liable for only a portion of the drums found at the site. More specifically, Sherwin-Williams insists it should not be required to pay for the removal of the 44 drums that did not bear its hazardous waste label because the harm caused is divisible, based upon the labels.

The Region contends that the labels are insufficient proof of divisibility because the composite samples from drums without Sherwin-Williams' label contained many of the same materials found in the composite samples of drums bearing Sherwin-Williams' label. The Region argues further that the fact that drums with Sherwin-Williams' label were interspersed in the trailer[53] with drums without the labels suggests that all of the drums came from the same shipment. Response to Petition at 19.

In *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983), the court held that CERCLA liability is joint and several in cases of indivisible harm. ("* * * where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.")[54] *See also In re William H. Oliver*, 6 E.A.D. 85, 103 (EAB 1995); *Alcan I*, 964 F.2d at 268- 69; *Alcan II*, 990 F.2d at 722. However, CERCLA liability can be apportioned in certain circumstances. "[W]hen two or more persons acting independently cause[] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the

[53] Map of Inside of the Box Trailer, Terry Ostrander, dated August 30, 1982.

[54] *Chem-Dyne* is the leading case on CERCLA joint and several liability. *Chem-Dyne* was endorsed by Congress when it amended CERCLA in the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 7401. *See* H.R. Rep. No. 99-253 (I), 99th Cong. 1st Sess. 74, 1986 U.S.C.C.A.N. 2835, 2856.

total harm that he has himself caused." *Chem-Dyne*, 572 F. Supp. at 810; *Monsanto*, 858 F.2d at 172; *Alcan I*, 964 F.2d at 268-69; *Alcan II*, 990 F.2d at 722. The burden of proof as to apportionment is upon the liable party. *Chem-Dyne*, 572 F. Supp. at 810; *Alcan II*, 990 F.2d at 722; *Alcan I*, 964 F.2d at 269. Courts have described this burden as "stringent," *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), and "substantial," *Alcan I*, 964 F.2d at 269.[35]

Here, the Board finds that Sherwin-Williams has not met its burden of proving that the harm at the B & C Towing Site can be apportioned. Sherwin-Williams' sole proposed basis for apportionment is whether a drum has a Sherwin-Williams label or not. However, in its attempt to disclaim liability for *any* of the drums, Sherwin-Williams has effectively demonstrated the unreliability of the labels as an indicator of the generator or generators of the waste within the drums. For example, Sherwin-Williams has pointed out that only 9 of the 80 drums had headrings and ringbolts intact even as early as 1982. Petition at 8. Thus, it argues that "[t]he existence of numerous loose drum seals indicates that the drums have been opened *and the original materials have been altered and removed.*" Comments to OPWE Preliminary Decision at 3 (emphasis added). This statement would appear to apply equally to those drums with a Sherwin-Williams' label and those without. This argument directly undercuts the argument that the labels provide a reliable basis for allocation.

While Sherwin-Williams is free to make alternative arguments, it has effectively *proven* the unreliability of the labels for this purpose.[36] It points out, and the Region now seems to concede, that sample #3 of the 1982 Sherwin-Williams' tests showed paint wastes but not as they would have been sent by Sherwin-Williams, even though the sample came from a drum bearing a Sherwin-Williams label. This, it argues, "is clear evidence that waste materials [in the drums] were previously removed." Reply to Response to Petition at 5. Perhaps even more telling, the presence of tetrachloroethane, which Sherwin-Williams did not use, in a 1990 composite sample taken only from drums bearing Sherwin-Williams' label (sample #7), further shows the unreliability of relying on labels to establish the source of the waste. Further, as the Region notes, the sampling results indicate that many

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[35] We note that it is the *harm* which must be shown to be divisible and capable of apportionment. We will assume, for sake of discussion only, that the volume of waste (as reflected by the number of drums) could be a surrogate for the harm caused by the waste.

[36] We reiterate that While Sherwin-Williams has proven the unreliability of the labels, it has not shown that *none* of its waste is in *any* of the drums.

of the materials found in drums with Sherwin-Williams' label and drums without Sherwin-Williams' label are the same.[37]

These data, reflecting the obviously altered condition of the wastes, the loose seals of the drums, and Barone's practice of repackaging and mixing waste, show that the labels do not provide a reasonable basis for apportioning the harm caused. Stated otherwise, Sherwin-Williams has not sufficiently demonstrated that the drums that do not bear its label do not hold any of its waste. Accordingly, the Board finds that Sherwin-Williams is jointly and severally liable for the entire harm caused at the B & C Towing Site.

III. *CONCLUSION*

In view of the foregoing, the Board concludes the Agency's Unilateral Administrative Order was not "arbitrary and capricious or otherwise not in accordance with the law." The Board further finds Sherwin-Williams has not proved by a preponderance of the evidence that it is not liable for the response costs under § 107(a). Accordingly, Sherwin-Williams' Petition for Reimbursement is insufficient to support reimbursal.

So ordered.

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[37] *See supra* n.28.