IN RE ATLANTIC RICHFIELD COMPANY (ALSCO ANACONDA SUPERFUND SITE)

CERCLA § 106(b) Petition No. 96–1

FINAL DECISION

Decided June 21, 1999

Syllabus

Atlantic Richfield Company ("ARCO") seeks reimbursement, pursuant to section 106(b)(2)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for costs incurred in connection with the excavation and removal of aluminum wastewater sludge (RCRA hazardous waste code F019) and contaminated soil from the Alsco Anaconda Superfund Site ("Site") in Gnadenhutten, Ohio. The Site was formerly owned by ARCO, and ARCO conducted a remedial investigation and feasibility study, under a consent order with U.S. EPA Region V and the Ohio EPA, for use in decision making concerning a cleanup of the sludge and contaminated soil. Based on the information submitted by ARCO, Region V proposed a cleanup plan involving excavation of the sludge and contaminated soil, its removal for off-site treatment and disposal, and RCRA "clean closure" of the contaminated areas. ARCO submitted comments strongly endorsing the Region's proposed plan, and it was adopted by Region V in a Record of Decision ("ROD") for the Site. The Region then issued an order, pursuant to CERCLA § 106(a), directing ARCO to implement the excavation, removal, and clean closure remedy set forth in the ROD.

ARCO had conducted only limited sampling during the remedial investigation, and the sludge volume estimates that ARCO presented in its Remedial Investigation Report — and that the Region noted in the ROD — turned out in retrospect to be too low. ARCO discovered this during its implementation of the section 106(a) order, when it encountered greater volumes of sludge and contaminated soil than expected. The monthly progress reports that ARCO submitted during the cleanup included waste volume data, but ARCO did not, based on those data, urge Region V to reexamine the clean closure remedy or to consider some other remedy for the Site. During the time periods relevant to its claim for reimbursement, ARCO did not raise any objection concerning the volume of solid waste that its contractors were encountering at the Site, even though ARCO representatives were meeting with Region V personnel at least monthly.

After the solid waste cleanup was finished, ARCO filed a Petition for Reimbursement pursuant to CERCLA § 106(b). The Petition argues that Region V acted arbitrarily and capriciously by failing to halt the remedial action and reexamine the remedial plan sua sponte, in the middle of the plan's implementation. The Region should have done this, ARCO contends, on the basis of waste volume information set forth in ARCO's monthly progress reports. Citing information in the progress reports, ARCO argues that EPA must reimburse

ARCO for all response costs that ARCO incurred in connection with the cleanup after such time as Region V, according to ARCO, should have been aware of a significantly greater volume of solid waste than ARCO had originally estimated. ARCO relies on 40 C.F.R. § 300.435(c)(2), which addresses the issuance of an Explanation of Significant Differences ("ESD") in response to "significant" post-ROD changes in remedial actions (§ 300.435(c)(2)(i)) and the amendment of the ROD in response to "fundamental" post-ROD changes in remedial actions (§ 300.435(c)(2)(ii)). ARCO claims that, pursuant to § 300.435(c)(2)(i), Region V was required to halt the cleanup and issue an ESD when the Region should have been aware of a 50 per cent waste volume increase over ARCO's original estimate. Because the Region did not do so (although it did issue an ESD for the solid waste cleanup after the cleanup was finished), ARCO claims that the Region acted arbitrarily and capriciously and that ARCO is entitled to recover all costs of solid waste cleanup that it incurred after June 10, 1992. ARCO also argues that, pursuant to § 300.435(c)(2)(ii), when Region V should have been aware of a 100 per cent waste volume increase over ARCO's original estimate, the Region should have halted the cleanup and amended the ROD. Once again, because the Region did not do so, ARCO claims that the Region acted arbitrarily and capriciously and that ARCO is entitled to recover all costs of solid waste cleanup that it incurred after July 22, 1992.

Held: The Petition for Reimbursement is denied.

The Region's alleged failure to timely issue an ESD does not provide a basis for ARCO's claim for reimbursement. There is no legal basis for ARCO's suggestion that a remedial action must stop once the Region becomes aware of a potentially significant difference in volume. Nothing in CERCLA § 117 or in section 300.435(c)(2)(i) of the National Contingency Plan suggests such a requirement, and Agency guidance states that an ESD only provides notice of a remedial change and that the remedy can continue to be implemented while an ESD is prepared and issued. Accordingly, even if ARCO were correct in arguing that issuance of an ESD would have been warranted much earlier (a question that the Board need not address), there would nonetheless have been no requirement for an interruption of the cleanup at that time.

The Region's alleged failure to amend the ROD also does not support ARCO's claim for reimbursement. A ROD amendment is to occur only if an enforcement action "fundamentally alter[s]" the basic features of the remedy selected in the original ROD. The remedy described in the ROD for the Alsco Anaconda Site was defined in terms of the "clean closure" performance standard, and no basic feature of that remedy ever changed. The Board rejects ARCO's suggestion of a *per se* rule whereby a 100 per cent volume increase over a responsible party's original waste volume estimate is necessarily a "fundamental" remedial change. The characterization of a remedial change is a site-specific determination, and the remedy for this Site was never limited in terms of waste volume. The fundamental approach for managing wastes at the Site (excavation and removal) remained the same throughout the cleanup. Because in these circumstances and for this particular Site no basic feature of the cleanup was ever fundamentally altered, no ROD amendment was required.

After advocating the clean closure remedy during the public comment period, ARCO subsequently urged no reconsideration of that remedy during its implementation, either in a manner consistent with 40 C.F.R. § 300.825(c) or otherwise. Having remained silent throughout the period when remedial changes were still possible, ARCO cannot now challenge the Region for failure to consider a change that it was never asked to consider. During the post-ROD, post-section 106(a) order period, the Region properly focused on expeditiously implementing remedial decisions that already had been formally adopted in accordance with proper statutory and regulatory procedures. In the absence of any comment from ARCO or from any other interested person, the Region was under no obligation in this case to consider amending the ROD on its own initiative.

Irrespective of the alleged errors claimed by ARCO, the Board is in no position to grant the relief requested in the Petition. The Board's authority under CERCLA § 106(b)(2)(D) is to review a challenged "decision in selecting the response action ordered." No such decision is challenged by ARCO. ARCO does not dispute the validity of the clean closure remedy as of the time of issuance of the ROD (in September 1989) or as of the time of issuance of the § 106(a) order (in December 1989). ARCO seeks to criticize the Region's conduct in June and July of 1992, but the Region did not engage in remedial decision making during that time and was not requested to do so by ARCO. (Nor was the Region required to amend the ROD *sua sponte*.) Because the Region did not make a remedy selection decision during June or July of 1992, ARCO's challenge is not directed at any "decision in selecting the response action ordered," and the challenge is not one that is authorized under CERCLA § 106(b)(2)(D). Accordingly, having failed to identify any arbitrary and capricious "decision in selecting the response action ordered" that it seeks to challenge, ARCO has failed to articulate a valid claim for reimbursement under § 106(b)(2)(D).

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

The Atlantic Richfield Company ("ARCO") seeks reimbursement, pursuant to section 106(b)(2)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(b)(2)(D), of certain costs incurred in connection with a remedial action at the Alsco Anaconda Superfund Site in Gnadenhutten, Ohio (the "Site"). ARCO does not dispute that it is a "responsible person," within the meaning of CERCLA section 107, with respect to the contamination of the Site. In an administrative order issued in December, 1989 pursuant to CERCLA section 106, U.S. EPA Region V directed ARCO to excavate and remove wastewater treatment sludge[1] generated by an aluminum processing plant located at the Site, as well as any soil contaminated by that sludge, "to levels meeting clean closure requirements of 40 CFR 264.228 and [Ohio Admin. Code] 3745–66–11 for treatment and disposal or reclamation/reuse at an off-site facility." Administrative Order Appendix A (Record of Decision for the Alsco Anaconda Site (Sept. 1, 1989)) at 10.[2]

[1] The sludge in question is listed as a hazardous waste (F019) under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, and is therefore a "hazardous substance" for purposes of CERCLA. *See* CERCLA § 101(14)(C).

[2] "Clean closure" of a surface impoundment pursuant to 40 C.F.R. § 264.228(a)(1) involves removal or decontamination of "all waste residues, contaminated containment system components * * *, contaminated subsoils, and structures and equipment contaminated with waste and leachate." If clean closure is not implemented and waste residues or contaminated materials are allowed to remain in an impoundment, the impoundment is subject to extensive, long-term post-closure maintenance and monitoring requirements pursuant to 40 C.F.R. § 264.228(a)(2); *see also* §§ 264.228(b), 264.117-264.120. Closure in accordance with 40 C.F.R. § 264.228(a)(1) is typically referred to simply as "clean" closure.

Excavation and removal of the F019 sludge and contaminated soil "to levels meeting clean closure requirements" specified under federal and State law was the cleanup alternative recommended by ARCO itself, from among seven distinct alternatives that the Region considered in developing a remedial action plan for the Site. Specifically, ARCO submitted comments to Region V pursuant to CERCLA §§ 113(k)(2)(B) and 117(a)(2)[3] in which ARCO endorsed "Alternative 3" of the Region's proposed remedial action plan, involving excavation and removal of "source material" (i.e., F019 sludge and contaminated soil) from the Site to a standard of RCRA clean closure.[4]

As the cleanup proceeded, ARCO discovered that there was more F019 sludge and contaminated soil at the Site than ARCO's contractor had originally estimated. Consequently, compliance with the Region's administrative order became more costly than ARCO had anticipated when it endorsed the cleanup strategy outlined in that order. ARCO, however, did not raise any objection to the clean closure remedy while cleaning up the F019 sludge and contaminated soil, nor did ARCO request Region V to amend the Record of Decision ("ROD") or to consider any alternative cleanup strategy based on a standard less stringent than RCRA "clean closure."

ARCO's only objection to the Region's conduct in implementing the section 106 order involved a "black material" first encountered by ARCO's contractor in late August 1992 (AR 9533; Petition at 13). The black material emitted a hydrocarbon odor (AR 9533) and, according to initial sampling results (AR 9536), was believed to include sludge and soil mixed with organic contaminants such as benzene, ethylene, toluene, and xylene. Very little of ARCO's claim for reimbursement arises, however, from excavation or removal work associated with the black material. Rather, ARCO's claim arises principally from the excavation and removal of admittedly hazardous F019 sludge and contaminated soil.[5]

---

[3] These provisions require EPA to provide interested persons, including potentially responsible parties, with "reasonable opportunity" to comment on a proposed remedial action plan. *See infra* note 31 (discussing public participation provisions of CERCLA §§ 117(a) & (b), 113(k)(2)(B)). ARCO has not contended that its opportunity to comment on the Region's Proposed Plan was inadequate in any respect.

[4] *See* Proposed Plan at 5 (Administrative Record ["AR"] 1548) (Alternative 3 characterized as requiring, with respect to all portions of the Site contaminated by F019 sludge, excavation to "levels meeting clean closure requirements").

[5] Figures prepared by ARCO suggest that of the $9.04 million ARCO claims to have spent on this cleanup, roughly 1.97 per cent relates to alleged costs of analyzing or transporting

Continued

More specifically, ARCO contends that because of the increased volume of source material encountered at the Site, EPA must reimburse ARCO for all response costs that ARCO incurred in connection with the cleanup of source material after June 10, 1992, the date by which ARCO claims the Region should have been aware of the significantly increased volume of source material at the Site. ARCO's reasoning is as follows.

First, CERCLA section 106(b) authorizes a liable party to challenge, as arbitrary and capricious, EPA's "decision in selecting the response action ordered" under section 106(a) and to recover, if the challenge is found to be meritorious, "all reasonable response costs incurred * * * pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law." Second, section 106(b) does not expressly require a prospective petitioner to raise an objection to a section 106(a) order during the pendency of the cleanup and, according to ARCO, neither is any such requirement implied by anything in the section 106(b) reimbursement provisions. Third, CERCLA section 117(c) directs EPA to publish an "explanation of differences" if it takes "enforcement action under section 106" that "differs in any significant respects from the final plan" set forth in the ROD for a particular site. ARCO maintains that a section 106 order "significantly different" from the underlying ROD is necessarily "arbitrary and capricious or otherwise not in accordance with law" unless the order is *preceded* by publication of a section 117 "explanation of differences."[6] And fourth, EPA's regulations require an amendment to the ROD before implementing a CERCLA settlement or enforcement action that would "fundamentally alter the basic features of the selected remedy"—that is, the remedy selected in the ROD—"with respect to scope, performance, or cost." *See* 40 C.F.R. § 300.435(c)

"Unidentified Material" between August 21, 1992 (the date on which ARCO claims to have first encountered the black material) and October 23, 1992 (the date of ARCO's letter informing Region V that ARCO had stopped cleaning up the black material). *See* Petition Exhibit DD. The Environmental Appeals Board ("Board"), however, has not independently evaluated and hence expresses no opinion concerning the validity or reasonableness of those or any other cost figures presented in connection with ARCO's Petition.

[6] The parties in this case refer to the explanatory document described in CERCLA § 117(c) as an "explanation of significant differences" or "ESD." The Board will employ the same terminology in the remainder of this opinion. An ESD was in fact issued by Region V in this case, but only *after* ARCO filed its original petition for reimbursement under section 106(b). ARCO contends that the Region was required to issue the ESD much earlier: specifically, as soon as sufficient data became available to the Region to support a conclusion that the volume of material to be excavated from the Site would exceed ARCO's original estimate by fifty per cent. ARCO further contends that from that date forward, the Region's conduct in implementing this cleanup was unlawful, and hence all of ARCO's response costs incurred from that date forward should be borne by the Superfund.

("Community Relations"), subparagraph 2(ii). ARCO contends that an enforcement action that "fundamentally alter[s] the basic features of the selected remedy with respect to scope, performance, or cost" is necessarily "arbitrary and capricious or otherwise not in accordance with law" unless it is preceded by formal amendment of the ROD.

For the reasons that follow, the Board concludes that ARCO's claim for reimbursement must be denied in its entirety.

I. *BACKGROUND*

A. *The Site*

The Site occupies 4.8 acres along the Tuscarawas River in Tuscarawas County, Ohio. *See* ROD at 1. An aluminum products manufacturing plant has been in operation at the Site since 1948, including a ten-year period (January 1977 through December 1986) during which the plant was owned and operated by the ARCO Chemical Company division of petitioner ARCO. *Id.* The 4.8 acres that make up the Site are areas that have been contaminated by wastewater treatment sludge from the aluminum plant. *Id.* at 1–2. That sludge is a "hazardous substance" for purposes of CERCLA. *See supra* note 1. The sludge in one portion of the Site was also found to contain polychlorinated biphenyls ("PCBs"), including some PCBs in extremely high concentrations.[7] ARCO has not disputed its liability under CERCLA for the contamination of the Site.

Until 1965, process wastewater from the aluminum plant was discharged directly to the river. An unlined settling basin was installed in 1965 and, between 1965 and 1978, the settling basin was used for wastewater disposal and a sludge pit was used for disposal of wastewater treatment sludge. Sludge also came to be located in the wooded area adjacent to the settling basin, as a result of wastewater discharges and overflow from the basin; even after on-site sludge disposal was discontinued in 1978, treated wastewater continued to be routed to the basin until October 1980, and was routed directly to the adjacent wooded area (known as the "swamp" because of the wastewater and basin overflow

[7] *See* ROD at 5 (noting that portions of the so-called "swamp sludge"—sludge found in a wooded area near the aluminum plant, where process wastewater had been allowed to collect over a period of roughly twenty years—were "contaminated with PCBs in excess of 500 milligrams per kilogram (mg/kg), with a sampled high concentration of 3000 mg/kg"). PCBs are designated as "hazardous substances" under section 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A), and are therefore "hazardous substances" for purposes of CERCLA. *See* CERCLA § 101(14)(A); 40 C.F.R. § 116.4 tbl. 116.4A.

allowed to collect there) between October 1980 and October 1986. *See* ROD at 2.

B. *Investigation and Remedy Selection*

The EPA conducted a preliminary assessment of the Site in 1983, and proposed the Site for inclusion on the CERCLA National Priorities List ("NPL") in October 1984. ARCO retained a contractor the following month to perform a remedial investigation/feasibility study ("RI/FS"), which was begun in March 1985. The Site was formally placed on the NPL in June 1986. In January 1987 ARCO, EPA, and the Ohio Environmental Protection Agency ("Ohio EPA") executed a consent order pertaining to the conduct of the RI/FS.

An RI Report was submitted by ARCO in January 1989, and shortly thereafter the Region approved the portions of the RI Report addressing the "source material" (sludge and contaminated soil) at the Site but disapproved, as inadequately supported, those portions relating to ground water contamination. Therefore, the Region divided the remedial action at the Site into two operable units, one addressing the source material (hereinafter referred to as the "source material operable unit" or "SMOU"[8]) and the second addressing ground water and surface water contamination (the "GWOU"). Following the Region's disapproval of the ground water and surface water analysis in ARCO's original RI Report, ARCO submitted the ensuing Feasibility Study to the Region as a Focused Feasibility Study ("FFS") addressing alternative cleanup strategies for the SMOU only. The FFS was completed in June 1989, at which time EPA released for public comment the source material RI Report, the FFS, and a Proposed Plan for cleaning up the SMOU. In July 1989, a public meeting on the Proposed Plan was held at Gnadenhutten. A ROD for the source material cleanup was issued in September 1989.

The instant proceeding relates only to response costs associated with the SMOU. But because portions of the Site lie within the 50-year flood plain of the Tuscarawas River (ROD at 4)—and because a majority of the Site lies within the 100-year flood plain (*id.*)—decisions with respect to the cleanup of the source material were guided in large part by considerations associated with ground water and surface water protection (matters

[8] The SMOU includes the settling basin, the sludge pit, the "swamp" adjacent to the settling basin, and the land between those areas and the Tuscarawas River. *See* ROD at 1.

formally addressed in connection with the GWOU).[9] Seven remedial action alternatives (including a "no action" alternative) were considered in the process of selecting a remedy for the SMOU. Elements of the remedy selected ("Alternative 3") are summarized in the ROD as follows:

> [H]ot swamp material [i.e., swamp sludge with PCB levels exceeding 500 mg/kg] is excavated and transported off site to a facility permitted to incinerate PCB waste; the F019 sludge and underlying soil remaining in the swamp (approximately 3,250 cubic yards contaminated with PCBs) and in the sludge pit, [and in the] northern and southern impoundments [i.e., the settling basin] (approximately 5,570 cubic yards) are excavated to levels meeting clean closure requirements of 40 CFR 264.228 and [Ohio Admin. Code] 3745–66–11 for treatment and disposal or reclamation/reuse at an off-site facility; and the excavated sludge pit and impoundments are backfilled with clean borrow (approximately 5,600 cubic yards). Clean closure levels require excavation to a depth such that the remaining soils have pollutants at concentrations below a cumulative HI [hazard index] value of one for critical effect for noncarcinogenic pollutants and 1 x 10^{-6} cumulative excess cancer risk for carcinogenic pollutants. The indicator chemicals and their concentrations necessary to meet these clean closure levels for carcinogens and noncarcinogens will be established during Remedial Design/Remedial Action (RD/RA).

ROD at 10–11.

---

[9] As stated in the SMOU ROD:

> This ROD addresses the source material consisting of contaminated sludge and soil. The second planned activity will address contaminated ground and surface water. The response action proposed for the source material will contribute to the overall strategy for the site as it will remove the principal threat to human health and the environment due to possible ingestion or dermal contact with the sludge or soil, eliminate the threat of release of contaminated material to the river, and eliminate contaminant migration to the ground water.

ROD at 4.

ARCO endorsed the Region's remedy selection decision when that decision was made. In its comments on the Proposed Plan for the SMOU, ARCO stated:

> Alternative 3 is the preferred remedial action that Atlantic Richfield recommends. * * * Excavation of all waste materials for off-site treatment or landfilling will eliminate the contamination source from the site. Additionally, it will eliminate the potential risks to humans and the environment at the site.
>
> * * * * * * *
>
> Atlantic Richfield Company believes that Alternative 3 is the preferred alternative for the following reasons:
>
> • Alternative 3 satisfies the remedial goals by eliminating the contamination source at the site and reduces potential exposure to PCB-contaminated sludges.
>
> • Alternative 3 affords one of the highest degrees of long-term effectiveness and permanence because this alternative uses treatment technologies to reduce hazards posed by the waste materials at the site.
>
> • This alternative reduces the risks posed by the waste materials to a 10^{-6} cancer risk levels [*sic*].
>
> • Alternative 3 uses treatment technologies to reduce the inherent hazards posed by the waste materials at the site.
>
> • Alternative 3 will be the simplest to implement since there will be no on-site containment. * * *
>
> • The state generally prefers that all of the waste materials be removed from the 100-year floodplain.

ARCO Comments on Proposed Remedial Action Plan for Source Material Operable Unit at 2 (July 30, 1989).

Actually, ARCO's comments understated the vehemence with which Ohio EPA had objected to all of the SMOU remedial alternatives involving on-site containment of any portion of the source material. Whereas ARCO referred mildly to the State's "general preference" for removal of

contaminants from the flood plain, Ohio EPA itself stated unequivocally that, given the Site's location adjacent to the Tuscarawas River, use of a "containment" strategy to create an on-site landfill would violate Ohio landfill siting regulations and would, for that reason among others, violate CERCLA § 121(d) by failing to comply with all "legally applicable or relevant and appropriate requirements" ("ARARs").[10] In any event, the Region, the State, and ARCO itself all supported excavation and removal of the source material, rather than the remedial alternatives involving on-site containment. The ROD issued in September 1989 reflected that consensus.

According to the ROD, as of September 1989 it was believed that "[t]he total sludge volume at the site is approximately 8,850 cubic yards." ROD at 2. That figure was taken from the January 1989 RI Report for the Site prepared by ARCO's contractor. Section 3.2.1 of the RI Report, titled "Waste Distribution and Quantities," is reproduced here at length[11] to

---

[10] In correspondence to EPA's Remedial Project Manager during April 1989, addressing the "Detailed Analysis of Alternatives" in ARCO's draft RI Report, Ohio EPA wrote:

> The four alternatives involving containment (#2, #5, #6, and #9) are *not* protective or permanent; *do not* meet [Applicable or Relevant and Appropriate Requirements] as was stated in the report and *must no longer be considered as viable alternatives for site remediation.* * * * The consolidation and capping of impoundment material does not address siting criteria for landfills, *OAC 3745-27-06(I)(4)-(6)*. These regulations will not permit placement of the proposed landfill * * * . Further, Ohio EPA does not believe siting a landfill adjacent to the river and in sand and gravel, is a remedial action that will be protective of human health and the environment. Due to the above conditions, OEPA's Southeast District Office will *not* approve plans for an on-site landfill at the ALSCO site.

Ohio EPA Comments on Detailed Analysis of Alternatives at 1 (April 27, 1989) (AR 1506) (emphasis in original).

[11] Section 3.2.1 of the RI Report states:

> *Waste Distribution and Quantities.* Until 1978, when the wastewater treatment plant was fitted with a sludge-dewatering filter press, the metallic sludge was deposited on site, mainly in the settlement basin and sludge pit, where the sludge accumulated to present quantities. The impoundment and sludge pit combined occupy approximately four-tenths of an acre. The depth of the sludge in these unlined excavations is approximately eight feet in the lagoon and seven feet in the sludge pit (Table 3-1). The estimated total volume of sludge in both excavations is 5,570 cubic yards. In addition, nearly 1.5 acres of the swamp area adjacent to the lagoon are covered by sludge, with an average thickness of about 1.7 feet. The estimated volume of sludge in the swamp is 3,280 cubic yards. Figure 3-1 shows the approximate thickness of sludge over the Alsco-Anaconda NPL site. Assuming an average density of 1,100 pounds per cubic yard, the total sludge volume of 8,850 cubic yards at the Alsco-Anaconda NPL site would weigh nearly 4,868 tons.

Continued

illustrate the manner in which the sludge volume estimates appearing in the ROD were originally derived; the RI Report also ventured a weight estimate for the sludge, stating that "[a]ssuming an average density of 1,100 pounds per cubic yard, the total sludge volume of 8,850 cubic yards at the Alsco-Anaconda NPL site would weigh nearly 4,868 tons." RI Report section 3, at 2. The ROD, however, in no way suggested that the waste volume estimate represented a limitation on the extent of the cleanup that would be required.[12]

On December 28, 1989, the Region issued to ARCO an Administrative Order Pursuant to CERCLA Section 106 (Docket No. V–W–89–C–042) (hereinafter the "Order"), directing ARCO to remove the contaminated source material from the Site.[13] The response action described in the Order is the same action described in the ROD and endorsed by ARCO. Thus paragraph 49 of the Order, titled "Clean-up Performance Standards," states in part:

> The Respondent shall meet the following cleanup performance standards in accordance with the ROD and the [Scope of Work[14]]:

Remedial Investigation Report section 3, at 1-2. According to Table 3-1, the contractor's 8850-cubic-yard estimate for total sludge volume relied on thickness sampling performed during November 1986, from which "areal weighted averages" had then been estimated.

[12] To the contrary, the ROD emphasized that under the selected remedial alternative "[a]ll sludge and underlying soil are removed" to whatever depth might be necessary to achieve the specified risk-based standards of cleanliness. *See* ROD at 17 ("All sludge and underlying soil are removed to a depth that prevents the ingestion or direct contact of waste having a cumulative HI value of one for critical effect for noncarcinogens or having 1×10^{-6} cumulative excess cancer risk from carcinogens, and prevents contribution to further ground water contamination to in excess of Maximum Contaminant Levels (MCLs)."); *see also* ROD at 19 ("All contaminated sludge and soil is removed from the site, reducing the risk due to direct contact to less than established standards [for both carcinogens and noncarcinogens].").

[13] CERCLA section 106(a), 42 U.S.C. § 9606(a), states in relevant part:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he * * * may also * * * take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

The President's authority to issue the orders referred to in section 106(a) has been delegated to certain agencies, including EPA. *See* Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (1996); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

[14] The Scope of Work was a document issued as Appendix B to the Order; Appendix A was the ROD itself.

> A. Respondent shall excavate and remove to an off-site facility the sludges and underlying contaminated soils from the northern and southern impoundments [i.e., the settling basin], the sludge pit and the swamp to the levels set forth in the clean-up standards specified in the [Scope of Work[15]]. The vertical extent of the excavation is to a depth such that the remaining soils: (1) shall have less than a cumulative Hazard Index (HI) value of one for critical effect for noncarcinogenic pollutants; (2) shall present a cumulative risk for carcinogenic pollutants less than 1 x 10^{-6} cumulative excess cancer risk; and (3) shall prevent the contaminants in the remaining soils from contributing to further ground water contamination in excess of the ground water remedial action goals contained in the U.S. EPA approved [Source Material Operable Unit Feasibility Study]. * * * *The approximate horizontal and vertical extent of the excavations is represented in Appendix C, which in no way is intended to limit the Respondent's responsibility to meet the aforementioned clean-up standard.*
>
> B. All excavated sludges and soils will be packaged and transported off-site * * *. Excavated sludges or soils containing PCB concentrations greater than 500 mg/kg will be incinerated at a facility which is approved to incinerate such materials.

Order at 25–26 (emphasis added).

---

[15] According to the Scope of Work document, the "standards and specifications of the major components" of the remedial action were to include excavating F019 sludge and contaminated underlying soil from the sludge pit, the northern and southern impoundments (settling basin), and the swamp "to levels meeting clean closure requirements." The Scope of Work document further provided that, exactly as specified in paragraph 49 of the Order itself:

> Clean closure levels require excavation to a depth such that remaining soils have pollutants at concentrations below a cumulative Hazard Index (HI) value of one for critical effect for noncarcinogenic pollutants and 1 x 10^{-6} cumulative excess cancer risk for carcinogenic pollutants.

Order Appendix B, at 1.

The RD/RA Work Plan prepared by ARCO's contractor on the basis of the Order and accompanying Scope of Work notes that the "actual constituent concentrations" necessary to achieve "clean closure" would be determined in the course of the remedial design process: "Constituent concentrations will be derived through use of a risk analysis which will consider pathways for exposure to remaining constituents after remediation is complete." RD/RA Work Plan section 2, at 5 n.2; *see also id.* section 4, at 1.

C. *Remedial Action*

SMOU remedial activities began early in 1992, and by the end of February ARCO had discovered that the sludge pit was "larger than previously thought" and that "[t]he areal extent of the sludge is greater than shown on the design drawings." March 1992 Monthly Progress Report at 1–2. Shortly thereafter, in correspondence to Region V dated April 30, 1992, ARCO noted that it had discovered "a significant amount of subsurface sludge between the sludge pit * * * and the eastern boundary of the site," and that sludge would also likely be found "under the haul road" in an area not previously thought to require excavation. ARCO did not, however, intimate that the greater areal extent of the sludge should provoke reconsideration of the remedy set forth in the Order. Instead, according to ARCO's April 30, 1992 letter to the Region, "it was decided to delay excavation of the overburden and sludge in the sludge pit expansion area until a plan has been developed to better address contingencies."

It is unclear to us what ARCO meant by "a plan * * * to better address contingencies," and we are unsure whether ARCO or its contractors ever developed such a plan. One of ARCO's contractors did, however, eventually conduct a "Perimeter Sludge Investigation" evaluating previously unsampled areas of the Site, and also compiled a "Sludge and Subsurface Soil Investigation" report including updated sludge volume data for areas that had previously been studied but as to which "data gaps were identified during the planning of remedial activities." Elaborating on the nature of the identified "data gaps," the latter report explained that, "[i]n particular, historical estimates of sludge thickness [had originally been] prepared using only a few measurement points in each source area, and the horizontal extent of sludge in the impoundments, sludge pit and wooded area was not well defined." Sludge and Subsurface Soil Investigation Report section 1, at 1 (Sept. 8, 1992).[16] The results of those additional investigations were presented to the Region on September 2, 1992 (Perimeter Sludge Investigation) and September 8, 1992 (Sludge and Subsurface Soil Investigation).

In the meantime ARCO proceeded, without objection, to implement clean closure of the SMOU as described in the SMOU ROD and in the Order, and ARCO also participated in the selection of a ground water

[16] We note that ARCO's contractor criticizes, in retrospect, the sufficiency of the data relied on by a previous ARCO contractor to estimate both the horizontal and vertical extent (thickness) of the sludge. Those "historical estimates" had, nonetheless, made their way into ARCO's RI Report and had, consequently, been cited by Region V in the ROD.

remedy by, among other things, presenting a GWOU Focused Feasibility Study to the Region on or about July 21, 1992. In that document, ARCO recommended the adoption of an inexpensive "flushing and natural attenuation" remedy for the GWOU. ARCO asserted that clean closure of the SMOU would allow the existing level of ground water contamination to decrease naturally over time, without any need for costlier ground water extraction and treatment measures.[17]

The GWOU ROD adopting ARCO's proposed "flushing and natural attenuation" remedy (rather than a more expensive ground water treatment remedy) was executed by the Regional Administrator on September 30, 1992 (AR 8798).[18] Within one month after that date—in a letter to EPA

---

[17] The estimated "net present-worth cost" of ARCO's proposed GWOU remedy was approximately $500,000, *see* Focused Feasibility Study for the GWOU section 4, at 20 (July 21, 1992) (AR 8097), whereas the corresponding estimate for a ground water extraction and treatment remedy was nearly $8 million. *See id.* at 26 (AR 8103). ARCO thus had a powerful financial incentive for supporting clean closure of the SMOU before a final decision was reached concerning the GWOU: Clean closure of the SMOU was expected to save ARCO nearly $7.5 million in ground water remediation costs.

[18] The substantial temporal overlap between implementation of the SMOU remedy and the selection of a GWOU remedy, and the presupposition of SMOU clean closure that underlay all of the Region's remedial decisions with respect to the GWOU, could well have discouraged ARCO from raising with EPA any concerns ARCO may have had regarding the volume of F019 sludge that its contractors encountered during the spring and summer of 1992. ARCO's support for clean closure of the SMOU in the first instance (i.e., during 1989) was consistent with ARCO's own interest in avoiding the expense of ground water extraction and treatment. By the time ARCO filed its comments supporting a clean closure remedy for the SMOU, ARCO had already been advised by EPA that there were "significant questions" surrounding the nature and extent of ground water contamination at the Site; that EPA had determined, for that reason, to disapprove all portions of ARCO's RI Report and draft FS Report addressing ground water contamination, specifically including the RI Report's proposed conclusion (AR 1472) that "even under low flow conditions in the Tuscarawas River, the contribution of contaminants from the ground water will not have a significant impact on the public health or the environment"; that all references to ground water remedial action would have to be deleted from the draft FS; and that the principal decision to be made with respect to the GWOU—whether or not ground water extraction and treatment should be required—was still unresolved. *See* June 14, 1989 Letter from U.S. EPA Remedial Project Manager to ARCO at 1 (AR 1525); *see also* SMOU FFS section 3, at 20 (AR 2075).

During the summer of 1992, while ARCO was implementing the SMOU remedy, ARCO was simultaneously urging the Region to conclude that "Natural Flushing and Attenuation" (with monitoring but without treatment) would be an appropriate remedy for the GWOU. E.g., Focused Feasibility Study for the GWOU section 4, at 9 (July 21, 1992) (AR 8086) (with SMOU cleanup nearing completion, ARCO reports that "[s]ince sludge and affected soils will be remediated as part of the SMOU, only the contaminants currently in the saturated zone and sediments will remain. Consequently, contaminant concentrations in the ground

Continued

and Ohio EPA dated October 23, 1992—ARCO formally objected to undertaking any further removal of the "black material" that it had encountered in late August, specifically citing a concern over the volume of that material and of the associated overburden.[19] ARCO concluded its October 23, 1992 correspondence by giving notice that "we have directed our contractor to discontinue efforts to locate, and excavate [the] black material."[20]

ARCO did not raise a similar objection concerning F019 sludge volume. ARCO submitted monthly progress reports to Region V as required by the Order, but neither in those reports nor in any other manner did ARCO identify F019 volume as grounds, pursuant to 40 C.F.R. § 300.825(c), "support[ing] the need to significantly alter the response action."[21] Nor did ARCO expressly request that the ROD be amended.

During the cleanup, ARCO had any number of opportunities to raise an objection based on the volume of material it was excavating. ARCO

---

water will decrease with time as they are transported by the ground water and discharged into the Tuscarawas River."). The Region ultimately agreed with ARCO's position and proposed a GWOU remedial plan that did *not* require extraction and treatment, justifying its proposal to the local community by observing that "[s]ince sludge and affected soils will be remediated to health-based and ground-water protection standards as part of the SMOU cleanup (already underway) only the contaminants [already present] in the affected ground water zone and sediments" were matters of concern. August 1992 Fact Sheet at 4 (AR 8171); *see also* August 1992 Proposed Plan for the GWOU at 3 (AR 8178) ("removal of the source materials * * * will stop the future release of contaminants to the ground water and sediments"); August 1992 Proposed Plan for the GWOU at 16 (AR 8191) (ground water treatment deemed unnecessary "since the source of the contamination (the sludge and contaminated soil, which has been contributing contaminants to the ground water and sediments for many years) is being removed during the SMOU remedial action").

[19] October 23, 1992 Letter From ARCO to U.S. EPA Region V, at 2 (AR 8826) ("While there is a great deal of uncertainty, we believe * * * the minimum volume of remaining [black] material to be around 3,000 cubic yards. Removal of this 3,000 cubic yards of black material would require the excavation of over 16,000 cubic yards of material, including overburden. * * * [C]ontinued excavation of this material * * * is neither reasonable nor cost effective.").

[20] The Region, initially, took the position that additional black material might have to be excavated in order to achieve clean closure. During the early part of 1993, ARCO agreed to undertake additional studies concerning the black material. Ultimately, ARCO demonstrated to the Region's satisfaction that the remaining black material could be left on site without violating the clean closure standard embodied in the section 106 order and the underlying ROD.

[21] 40 C.F.R. § 300.825(c) provides that although the administrative record for selection of a response action generally closes, upon adoption of the ROD, to documents other than

Continued

was required to submit monthly reports detailing the "actions taken toward achieving compliance" with EPA's cleanup order (including "percentage completion" as of the end of the reporting period) as well as any "anticipated problems and recommended solutions, [and] problems encountered/resolved." Order ¶ 66. In the monthly progress reports submitted by ARCO for the time periods relevant to its claim for reimbursement, an increase in F019 sludge volume is noted but there is no intimation that the SMOU remedy either had been impermissibly expanded by EPA beyond the obligations described in the ROD or should be altered on the basis of source material volume. In the following discussion, we examine in detail the information presented in ARCO's progress reports to the Region during the time periods in question.

First, in its report for the March 1992 reporting period, ARCO stated:

> In late February, borings between the sludge pit and the debris pile determined that the sludge pit is larger than previously thought. [AR 9376.] The areal extent of the sludge is greater than shown on the design drawings. Along the western border it typically extends well into the 50 foot buffer zone and is also on the western side of an existing gas line. This will generate a greater volume of sludge (sludge/soil) and require hand excavation. [AR 9377.]

In its report for the April 1992 reporting period, ARCO mentioned increases in sludge volume at some length, once again without any proposal for post-ROD decision making that would limit the sludge volume required to be excavated from the SMOU:

> Early in the month it was determined that in order to achieve a clean site that the 50' buffer zone along the

---

those generated by the lead agency itself, a limited category of outside "comments" must be considered and placed in the administrative record:

> The lead agency is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action. All such comments and any responses thereto shall be placed in the administrative record file.

ARCO does not identify any such comments in the administrative record for the response action for this site. ARCO instead maintains that it was not required to ask for a new "decision in selecting the response action ordered" once the original cleanup order was in force and that, moreover, any such request would have been futile. *See infra* Section II.C.

> river could not be maintained. Discussions with the agencies determined that the clean site criteria was [sic] more important than saving trees in this area. [AR 9386.] The sludge pit expansion area was drilled by ERM on 4/21 and 4/22/92. Preliminary field information indicated that the additional sludge may virtually be continuous with the previously defined sludge pit and may also extend under the haulroad [sic]. Because of this and other unknowns about the rubble overburden, it was decided not to excavate this overburden until a plan has been developed to better address contingencies. [AR 9388.] Because the sludge extends well into the 50 foot buffer zone along the river, it is virtually impossible to remove all the sludge and save all the trees. *ARCO and [the] Agency agreed that the clean site criteria overrode the hoped for 50 foot buffer zone which was based on early investigatory information.* Sludge will be removed from the area and all visibly affected trees will also be cleared. [AR 9390 (emphasis added).]

ARCO's next progress report, covering the May 1992 reporting period, was submitted under cover of a letter dated June 10, 1992. In its Petition for Reimbursement, ARCO claims that EPA's receipt of the information contained in the May 1992 progress report required that EPA immediately issue an ESD with respect to this Site. ARCO further claims that, because EPA did not immediately issue an ESD, ARCO is entitled to all response costs that ARCO incurred after ARCO's June 10, 1992 submission of the May 1992 progress report. In the May progress report, however, ARCO raised no dispute and asked for no new Agency "decision in selecting the response action ordered," based either on grounds associated with the volume of source material at the Site or on any other grounds:

> *Field Activity, Week Ending 5/10/92:* * * * [On] May 8th, excavation began on the >50 ppm PCB affected soil within the limits marked by ERM. In the northern portion of this excavation a blackish stained soil was encountered. This material was field tested and indicated >50 ppm PCB's and was therefore excavated. The excavated soil is being staged in a designated area of the unconditioned material staging area. After additional excavation, field testing indicated that the northern portion of the excavation required removal of additional material. [AR 9417.]

> *Schedule Review:* The project schedule was update[d] as of the end of May. A run of the network shows the project to be 21 days behind the baseline schedule, giving a project completion of October 23, 1992. This additional slippage from last month is caused by scope increase in some existing activities and the addition of new activities such as unknown drum removal and excavation, treatment, disposal and testing of the sludge pit expansion. The network is being analyzed for possible logic faults, and revisions to construction efforts will be evaluated to see if this schedule slippage can be recovered. [AR 9421.]
>
> *Activities Planned Next Period:* Continuation of remedial action per project schedule and as indicated by weekly reports. [*Id.*]

In its claim for reimbursement, ARCO also places special emphasis on its monthly progress report for the June 1992 reporting period. ARCO now contends that when the monthly progress report for June 1992 was presented to EPA's on-site representative—at a monthly progress meeting held July 22, 1992—EPA was required immediately to suspend the SMOU cleanup and initiate the process of issuing an amendment to the SMOU ROD. The June 1992 progress report included the following references to waste volume:

> *Week Ending 6/21/92:* * * * Wednesday, 6/17/92, ERM–SW personnel completed the * * * efforts to better define the extent of sludge on-site. The sludge does not extend beyond the fence line except on the northern border and there it is only on the surface. * * * Wednesday afternoon ARCO's Project Manager met with Westinghouse's geotechnical engineer and ERM–SW's geotechnical engineer to review the slope protection plan. It was agreed that the initial step, a better topographic survey of the areas of interest, will begin as soon as possible. Discussion on cost impact of this agreed that any work undertaken by Westinghouse is open for discussion relative to scope of work determination, but that *ARCO's current position is that until it can be shown that there is a meaningful change in scope of work there will be no contract change.* [AR 9460–61 (emphasis added).[22]]

[22] Westinghouse Remediation Services, Inc. and ERM-Southwest, Inc. were performing cleanup activities at the Site under contract to ARCO.

> *Problem Resolution*: Preliminary results from the confirmation sampling in the wooded area has indicated that there are areas that require additional excavation to meet the clean-up criteria. Additional investigation will be done to better determine if additional excavation will be effective and how much will be required. [AR 9463.]
>
> *Activities Planned Next Period:* Continuation of remedial action per project schedule and as indicated by weekly reports. [*Id.*]

Finally, at the July 22 monthly progress meeting ARCO reported that "[t]he field execution of the project was 67% complete for [Westinghouse] and 62% complete for ERM–SW as of July 1, 1992." AR 9503.

Following ARCO's October 1992 objections to any further removal of the black material, in December 1992 ARCO sought a determination by Region V that clean closure of the SMOU had been achieved. *See* AR 9751 (request for "SMOU project final inspection"). The Region concluded in March 1993, however, that clean closure had not yet been achieved. *See* AR 8858. Further investigation and negotiations concerning the required supplemental SMOU closure activities took place between 1993 and 1995, culminating in an April 5, 1995 meeting at which ARCO "agreed to remove * * * remaining pockets of sludge and drums" by September 30, 1995. Response to Petition for Reimbursement at 19.[23]

D. *The Reimbursement Petitions and the ESD*

On November 20, 1995, ARCO filed a petition with the Board seeking reimbursement of response costs incurred in connection with the SMOU cleanup. That petition, docketed as CERCLA Petition No. 95–6, was dismissed by the Board after ARCO "acknowledged that certain tasks required by the [SMOU cleanup] Order were not complete as of November 20, 1995." Order Dismissing Petition and Granting Leave to

[23] The record indicates that "[p]rior to the cleanup, studies had been performed by ARCO which indicated that no buried drums were located on the property. However, during cleanup, 94 drums and numerous drum fragments were discovered buried in various locations on-site." Explanation of Significant Differences, Alsco Anaconda Site, Gnadenhutten, Ohio at 6 (June 21, 1996) (hereinafter "Alsco Anaconda Site ESD").

Refile at 1 (Feb. 1, 1996). In the same order the Board accepted ARCO's petition for refiling as of February 1, 1996, as CERCLA Petition No. 96–1.[24]

On June 21, 1996, the Region's Superfund Division Director issued an ESD noting that two "significant changes" had occurred during the SMOU cleanup: "1) expansion of the horizontal and vertical extent of contamination in the sludge pit area; and 2) an increase in the volume of the contaminated sludges which were excavated and transported off-site as a result of the expansion of the area which contained sludge." Alsco Anaconda Site ESD at 5.

On July 1, 1996, the Region filed a response ("Region V Response") addressing the merits of Petition No. 96–1. ARCO submitted a reply brief ("ARCO Reply Brief") on or about August 2, 1996, and ARCO and the Region subsequently filed supplemental briefs on July 1, 1997 and August 4, 1997, respectively. The Board issued its Preliminary Decision on November 19, 1998. ARCO filed comments on the Preliminary Decision ("ARCO Comments") on December 22, 1998. The Region filed its comments, including a response to ARCO's comments (collectively "Region V Comments") on January 13, 1999. After due consideration of the comments received and making such changes as are appropriate, the Board issues this Final Decision. *See* Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions, 61 Fed. Reg. 55,298, 55,301 (1996).

II. *ANALYSIS*

When EPA determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, CERCLA section 106(a) authorizes the Agency, without seeking judicial intervention, to issue its own administrative orders for the protection of public health and welfare and the environment. A party who complies with such an order and who does not contest its liability with respect to the contamination of the affected site[25] may petition the Agency for reimbursement of certain reasonable costs associated with its cleanup

[24] By motion dated March 28, 1996, Region V again sought dismissal of ARCO's petition, noting that the Region had not yet approved certain reports and other documents submitted by ARCO pursuant to the SMOU cleanup order and that certain alleged deficiencies in those reports had yet to be corrected. The Region's renewed motion to dismiss was denied by the Board on May 2, 1996.

[25] Parties who claim that they are not liable may also seek reimbursement pursuant to CERCLA § 106(b)(2)(C). No such claim is presented in this case, however.

effort, but only "to the extent that it can demonstrate, on the administrative record, *that the [Agency's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law.*" CERCLA § 106(b)(2)(D) (emphasis added).[26] The statute expressly assigns to the petitioner the burden of proving its alleged entitlement to reimbursement. *See In re A&W Smelters & Refiners, Inc.,* 6 E.A.D. 302, 314 (EAB 1996), *aff'd*, 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part & rev'd in part on other grounds,* 146 F.3d 1107 (9th Cir. 1998). Accordingly, the question presented to the Board[27] is whether ARCO, an admittedly liable party with respect to releases of hazardous substances at the Site, has demonstrated that the Agency's "decision in selecting the response action ordered [for the Site] was arbitrary and capricious or was otherwise not in accordance with law." The Board concludes that ARCO has failed to make any such demonstration.

ARCO bases its claim on a contention that while ARCO's contractors were excavating and removing F019 sludge and contaminated soil, Region V was legally required to monitor the numerical relationship between the waste volumes being reported in ARCO's monthly status reports and the "historical estimates" of waste volume that had been cited in the ROD. Specifically, ARCO contends that, upon receipt on or about July 22, 1992 of ARCO's June 1992 status report, the Region was obliged to suspend the SMOU cleanup pending formal amendment of the ROD. ARCO states:

> By July 22, 199[2], ARCO had provided EPA information indicating that the actual remedy would require removal of more than double the amount of materials set forth in the ROD. * * * [A]fter ARCO had informed EPA in July 1992 that the enforcement action required a remedy that with respect to scope and cost fundamentally altered basic features of the remedy selected in the ROD, EPA was required [by] its own regulations, and implicitly under § 117 of CERCLA, to amend the ROD. EPA was required to do so before the remedial work the amendment would have addressed was begun, and thereby provide ARCO an opportunity to propose alternative remedies, such as

[26] The "administrative record" referenced in section 106(b)(2)(D) is the one developed under CERCLA § 113(k)(1), which directs the Agency to "establish an administrative record upon which the [Agency] shall base the selection of a response action."

[27] The President's statutory authority to decide claims for reimbursement under section 106(b) has been delegated to the EPA Administrator. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987). The Administrator's authority has, in turn, been delegated to the Board. *See* Delegation of Authority 14–27 ("Petitions for Reimbursement") (June 1994).

> containment, that may have been available to address further remediation at a considerably reduced cost.

Petition at 3.[28] It is ARCO's contention that Region V became obligated to amend the ROD irrespective of ARCO's failure to request any such action at the time, and that because the Region failed to amend the ROD *sua sponte* EPA must now reimburse ARCO for all costs that ARCO incurred at the Site after July 22, 1992. ARCO also makes the argument that it should be reimbursed for all costs incurred after the submission on or about June 10, 1992, of the May 1992 progress report. ARCO contends that the May 1992 progress report contained information from which the Region should have determined that the actual source material volume would be fifty per cent greater than ARCO had initially estimated. ARCO asserts that at that time, the Region was required immediately to issue an ESD pursuant to CERCLA § 117, and that the Region's failure to do so entitles ARCO to recover all costs that it incurred from that time forward.

---

[28] In its response to the Petition for Reimbursement, Region V addressed not only ARCO's contentions concerning increased volume but also any suggestion that increased costs might have obliged the Region to suspend the SMOU cleanup pending formal amendment of the ROD. *See generally* Region V Response at 27–35. When ARCO filed a responsive brief approximately one month later, ARCO did not address the Region's arguments regarding costs. Instead, ARCO characterized the Region's cost discussion as "a strawman that requires no attention from the Board." ARCO Reply Brief at 2. ARCO explained that "the argument presented in ARCO's Petition is based on the fundamental difference in the *volume* of materials ARCO was required to remove from the site from the *volume* of materials anticipated in the ROD." *Id.* (emphasis ARCO's). Accordingly, the Preliminary Decision likewise focused on volume rather than cost. ARCO now argues in its comments (ARCO Comments at 2 n.1) that it did not abandon its cost claim (while acknowledging that increased costs were never its primary basis for seeking reimbursement). We reject ARCO's characterization. Because ARCO stated that "Respondent's argument regarding the fundamental change in costs * * * requires no attention from the Board"—and because ARCO failed to respond to the Region's arguments concerning cost—the Board appropriately found ARCO to have abandoned any such claim, and ARCO cannot now resurrect it.

In any event, the record indicates that ARCO had not presented any documentation of actual cleanup costs to the Region as of July 22, 1992—the critical date by which ARCO claims the Region should have perceived a "fundamental" remedial change and halted the entire cleanup. It appears that, as of that date, ARCO had submitted only one cost-related document (AR 9491), which referred not to actual cleanup costs but only to past and projected "EPA oversight" costs associated with the SMOU cleanup. The Board cannot fault the Region's July 1992 conduct based on information that the Region did not then have. Much less can the Board rely on such information in evaluating the Region's choice of a response action in December 1989, when the Region issued the order that is before the Board for review. The "arbitrary and capricious" standard of review looks to the information that was before the decision maker at the time of the challenged decision. *See infra* note 50. Thus, cost information assembled at some later time does not bolster an argument that Region V acted arbitrarily in December 1989.

In advancing this latter contention, ARCO seeks to rely on CERCLA section 117(c), 42 U.S.C. § 9617(c) ("Explanation of Differences"), which provides:

> After adoption of a final remedial action plan—
>
> (1) if any remedial action is taken,
>
> (2) if any enforcement action under section 9606 of this title is taken, or
>
> (3) if any settlement or consent decree under section 9606 of this title or section 9622 of this title is entered into,
>
> and if such action, settlement, or decree differs in any significant respects from the final plan, the [U.S. EPA] or the State shall publish an explanation of the significant differences and the reasons such changes were made.

To implement the provisions of section 117 of CERCLA, EPA promulgated the "Community Relations" requirements of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. § 300.435(c).[29] In the NCP, however, the requirement to "publish" an explanation of "significant" differences appears alongside a set of public participation requirements, not expressly referred to in section 117 of CERCLA, that come into play when an enforcement action or a proposed settlement would not only differ significantly from a previously issued final remedial action plan but would "fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost."[30] Thus, section 300.435(c)(2) of the NCP, on which ARCO's reimbursement claim is based, provides as follows:

> After the adoption of the ROD, if the remedial action or enforcement action taken * * * differs significantly from

[29] Congress enacted section 117 ("Public Participation") to enhance the opportunity for local community involvement in Superfund cleanup decisions. E.g., H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 5, at 65 (1985) ("The Committee believes that increased public participation will in the short term add procedural steps to the decision-making process, but in the long term will expedite cleanup progress and increase public understanding of and support for remedial actions taken at Superfund sites.").

[30] Both the ESD and the ROD-amendment provisions of NCP section 300.435(c) were enacted on the basis of CERCLA section 117(c)'s reference to "significant" post-ROD changes, but the ROD-amendment provisions (unlike the ESD-publication provisions) were developed to reflect Agency policy rather than any express statutory requirement. *See*

Continued

the remedy selected in the ROD with respect to scope, performance or cost, the lead agency shall * * * either:

(i) Publish an explanation of significant differences when the differences in the remedial or enforcement action * * * significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:

(A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under § 300.815 and the information repository; and

(B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or

(ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action * * * fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost. To amend the ROD, the lead agency * * * shall:

* * * * * * *

(B) Make the proposed amendment to the ROD and information supporting the decision available for public comment;

(C) Provide a reasonable opportunity * * * for submission of written or oral comments on the amendment to the ROD. * * *;

Interim Final Guidance on Preparing Superfund Decision Documents, OSWER Directive 9355.3–02, ch. 8 at 2 (June 1989) ("The proposed revisions to the NCP incorporate [the] statutory requirement for the lead agency to address significant changes that arise after the ROD is signed. In addition, the proposed revisions to the NCP incorporate for the first time EPA's policy of amending a ROD (or other decision document) if a significant change is made to a remedy that fundamentally alters the hazardous waste management approach presented in the ROD.").

> (D) Provide the opportunity for a public meeting to be held during the public comment period at or near the facility at issue;
>
> * * * * * * *
>
> (F) Include in the amended ROD a brief explanation of the amendment and the response to each of the significant comments, criticisms, and new relevant information submitted during the public comment period; [and]
>
> * * * * * * *
>
> (H) Make the amended ROD and supporting information available to the public in the administrative record and information repository prior to the commencement of the remedial action affected by the amendment.

In short, these provisions indicate that if a proposed enforcement action is "significant[ly] differ[ent]" from the remedy selected in the ROD, notice to the public is required. If an enforcement action would "fundamentally alter the basic features" of the remedy selected in the ROD, the lead agency must not only give notice to the public, but must solicit and respond to public comment through the process of amending the ROD.[31] We now consider whether, based on the provisions of NCP section

---

[31] The public participation requirements associated with amendment of a ROD under section 300.435(c) of the NCP are equivalent to those described in CERCLA section 113(k)(2)(B), which states in relevant part:

> The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions * * *. The procedures developed under this subparagraph shall include, at a minimum, each of the following:
>
> (i) Notice to potentially affected persons and the public * * *.(ii) A reasonable opportunity to comment and provide information regarding the plan. (iii) An opportunity for a public meeting in the affected area * * *. (iv) A response to each of the significant comments, criticisms, and new data submitted in oral or written presentations. (v) A statement of the basis and purpose of the selected action.

A ROD amendment is, in other words, procedurally equivalent to the earlier process of soliciting and responding to public (and potentially responsible party) comments on a "proposed plan" for remedial action before the lead agency's adoption of a "final remedial action plan." *See* CERCLA § 117(a) & (b). As we have previously pointed out, that earlier process was one in which ARCO was an active participant and in which ARCO's own clean closure recommendation prevailed.

300.435(c)(2), the continuation of SMOU remedial work at the Site beyond June 10, 1992 (in the absence of a previously issued ESD) or its continuation beyond July 22, 1992 (in the absence of a ROD amendment) entitles ARCO to reimbursement pursuant to CERCLA section 106(b)(2)(D).

A. *The Timing of the ESD Does Not Entitle ARCO to Reimbursement*

We reject ARCO's argument that the Region's failure to issue an ESD on or about June 10, 1992 (the date of submission of ARCO's May 1992 progress report) entitles ARCO to reimbursement for all response costs that ARCO incurred thereafter. That argument fails irrespective of whether the data submitted by ARCO in June 1992 indicated, or should have indicated, to the Region that the remedial action at the Site had in some relevant respect expanded "significantly" beyond the Region's or ARCO's original expectations.[32] ARCO's argument rests on the premise that it was arbitrary and capricious for the Region to continue implementing the SMOU remedy, without immediately issuing an ESD, once evidence of an arguably "significant" increase in volume was presented to the Region. We reject that premise, because nothing in CERCLA section 117 or in NCP section 300.435(c)(2)(i) suggests that remedial action must stop once the Region becomes aware of a potentially "significant difference." To the contrary, Agency guidance specifically provides that if a significant difference is determined to have arisen during the implementation of a remedial action, and if the issuance of an ESD is determined to be warranted, remedial activities should nonetheless proceed in the interim:

> During the period when the ESD is being prepared and then made available to the public, the lead agency should proceed with the pre-design, design, construction, or operation activities associated with the remedy. The remedy can continue to be implemented * * * because the ESD represents only a notice of a change, and is not a formal opportunity for public comment since the Agency is not reconsidering the overall remedy.

Interim Final Guidance on Preparing Superfund Decision Documents, OSWER Directive 9355.3–02, ch. 8 at 10 (June 1989).

[32] The Region does not agree that sufficient information was available at this time to justify or require the issuance of an ESD. We need not and do not consider whether an ESD was *ever* legally necessary in connection with this cleanup. Rather, we address the contention actually raised by ARCO, i.e., that the timing of the ESD's issuance entitles ARCO to recovery.

Thus, EPA has affirmatively construed 40 C.F.R. § 300.435(c)(2)(i) *not* to require the interruption of a CERCLA remedial action pending preparation and dissemination of an ESD. This interpretation of NCP section 300.435(c)(2) is wholly consistent with CERCLA section 117(c) and with the goal of providing for expeditious cleanup of Superfund sites. *See* Preamble to the 1990 National Contingency Plan, 55 Fed. Reg. 8666, 8757 (1990) (noting "Congress' mandate to expeditiously cleanup sites" through the Superfund program). ARCO suggests no reason to conclude that EPA has misinterpreted its regulation.[33]

EPA's interpretation, moreover, gives effect to the markedly different regulatory language used in outlining the ESD process and the ROD amendment process: Whereas 40 C.F.R. § 300.435(c)(2)(i) states only that an ESD and its supporting information will be made "available to the public," 40 C.F.R. § 300.435(c)(2)(ii) specifies that an amended ROD and its supporting information will be made "available to the public * * * prior to the commencement of the remedial action affected by the amendment." Evidently, when the Agency intended for an ongoing remedial action to be interrupted pending consideration of remedial changes, the Agency expressed that intention. With regard to remedial changes addressed in an ESD, the Agency simply concluded that no such interruption would be appropriate. *See* Preamble to the 1990 NCP, 55 Fed. Reg. at 8772–73 (lead agency need not invite comments in connection with the issuance of an ESD, given "the lead agency's need to move forward expeditiously with design and implementation of the remedy after fundamental decisions have been made in the ROD"; awaiting the expiration of comment and response periods "is not necessary or consistent with the need to take prompt action, especially where the change is not a fundamental one").[34]

---

[33] In addition, the legislative history associated with CERCLA section 117 makes clear that the ESD requirement "is not intended to be unreasonably burdensome for the Administrator." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 91 (1985). *See also* Interim Final Guidance on Preparing Superfund Decision Documents, OSWER Directive 9355.3–02, ch. 8 at 2 (June 1989) ("[T]he significant differences provision in CERCLA section 117(c) was not intended to be unreasonably burdensome on the lead agency.") (citing legislative history).

[34] The Region did eventually conclude, when it issued an ESD for the Site, that the volume of waste removed during the SMOU cleanup had turned out to be "significantly" greater than ARCO's original estimate. *See* Alsco Anaconda Site ESD at 5. As the quoted Agency guidance points out, however, an ESD is merely a notice-giving document. ARCO did not need to receive notice from EPA concerning waste volume increases in the form of an ESD. ARCO at all times had actual notice of the volumes of waste that its contractors were encountering at the Site, and the ability to form its own judgments concerning the "significance" of that information.

For these reasons, ARCO's contention that Region V acted arbitrarily and capriciously or otherwise unlawfully by continuing to implement the SMOU remedy at the Site on and after June 10, 1992 is without any basis in law. ARCO's claim for reimbursement based on the timing of Region V's issuance of an ESD for the Site is, accordingly, rejected.

B. *No ROD Amendment Was Required*

For the reasons explained below, we reject ARCO's argument that the volumetric increases in the materials excavated and removed from this Site required EPA to amend the ROD. We reach this conclusion after first reviewing the regulatory history of the ROD amendment provision, 40 C.F.R. § 300.435(c)(2)(ii), and applicable Agency guidance. We further conclude that despite the increase in the volume of materials excavated, the clean closure performance standard for the SMOU cleanup at this Site remained the same throughout the cleanup, as did the fundamental approach for managing wastes at the Site (excavation and removal for off-site disposal). Neither the ROD nor the Order, nor the Scope of Work attached to the Order, provided that ARCO's waste volume estimates would limit the amount of waste that ARCO would have to remove from the Site. In these circumstances and for this particular Site, no basic feature of the SMOU cleanup was ever "fundamentally" altered, and thus no ROD amendment was required.

Moreover, as we also explain below, the Region in this case was simply overseeing the implementation, according to its terms, of a cleanup order whose validity has never been disputed. The Region did nothing to alter ARCO's cleanup obligation in any respect, and in these circumstances it was ARCO's responsibility to bring any alleged dissatisfaction or grievance to the Region's attention during the cleanup. It is not sufficient for ARCO to claim in retrospect, after the conclusion of the cleanup, that something went seriously wrong. Rather, if ARCO actually came to believe that grounds had arisen for changing over to a fundamentally different remedial strategy, then it was incumbent upon ARCO to communicate that belief to the Region. Section 825(c) of the National Contingency Plan provides a formal means of doing so. *See infra* notes 44–46 and accompanying text. But ARCO said nothing, formally or informally, and the SMOU cleanup therefore proceeded toward the clean closure objective envisioned in the remedial plan. Under these circumstances, nothing in CERCLA section 106(b)(2)(D) entitles ARCO to reimbursement. *See also* Section II.C, *infra*. Our analysis of these issues follows.

When it proposed to establish procedures for post-ROD remedial decision making that would differ according to whether the particular

remedial change under consideration was "significant" or "fundamental," the Agency recognized a distinct category of "fundamental" changes that CERCLA itself does not define. But even in the absence of a statutory or regulatory[35] definition, it is apparent from the plain meaning of the term "fundamental" and from the context of the regulations that the 1990 NCP's ROD-amendment provisions (40 C.F.R. § 300.435(c)(2)(ii)) apply to a far narrower category of remedial changes than the ESD provisions of CERCLA section 117 and NCP section 300.435(c)(2)(i). According to a dictionary definition, "fundamental" is said to mean "basic" or "central," whereas "significant" simply means "important." *Webster's II New Riverside University Dictionary* 512, 1083 (1988). Thus, the regulations impose a far more rigorous process on the Agency for making "fundamental" changes.

During the rulemaking process "[m]any commenters contended that the distinction between significant difference and ROD amendment was not clear and requested clarification." Preamble to the 1990 National Contingency Plan, 55 Fed. Reg. 8666, 8772 (1990). By way of explanation, the 1990 NCP's drafters stated flatly that "the appropriate threshold for amending a ROD is when a fundamentally different approach to managing hazardous wastes at a site is proposed." *Id.* at 8771. In the Preamble, the drafters characterized "fundamental" changes as ones that would: (a) substitute "a fundamentally different approach to managing hazardous wastes at a site" for the approach reflected in the ROD (*id.*); or (b) "change the selected [waste management] technology" by, for example, replacing an "innovative technology" chosen "as the waste management approach in the ROD" with a more conventional waste management technology, based on a post-ROD determination "that the innovative technology will not achieve the remediation goals specified as protective of human health and the environment in the ROD" (*id.* at 8772).[36] As a counter-example, the Preamble stated that a post-ROD shift

[35] The regulations also do not define the term "fundamental." Rather, as discussed *infra,* the Agency's intentions are explained by way of example.

[36] Similarly, applicable Agency guidance explains that a "fundamental change" occurs only in those "few cases" in which post-ROD information causes "reconsideration of the hazardous waste management approach selected in the ROD":

> In a few cases, new information submitted by the public post-ROD or developed by the lead agency during the remedial design/remedial action leads to the reconsideration of the hazardous waste management approach selected in the ROD. Such reconsideration of the remedy constitutes a fundamental change.

Guide to Addressing Pre-ROD and Post-ROD Changes, OSWER Publication 9355.3–02FS–4 at 4 (April 1991). We assume, although we need not decide, that the second quoted sentence

Continued

from one particular ground water treatment technology to another would not represent a “fundamental” remedial change, *provided* that “the basic pump and treat remedy remains unaltered and the performance level specified in the ROD will be met by the new technology.” *Id.*

Neither of the Preamble’s illustrations of a post-ROD “fundamental” change corresponds to anything alleged to have occurred in this case: Region V did not adopt “a fundamentally different approach to managing hazardous waste” after issuing the ROD, nor did Region V direct ARCO to employ a more-protective waste management technology than was contemplated in the ROD. By what yardstick, then, should the remedy implemented at the Site be regarded as “fundamentally” different from the remedy contemplated in the ROD?

ARCO proposes what is essentially a numerical standard. According to ARCO’s proposed interpretation of the NCP, a 100 per cent increase in the quantity of material required to be handled in implementing the remedy selected in a ROD must invariably be deemed to “fundamentally alter the basic features” of that remedy, requiring the immediate suspension of cleanup activity while EPA issues a proposed ROD amendment for public comment. *See* Petition for Reimbursement at 3. Without expressly saying so ARCO is, in effect, urging that we construe the ROD-amendment provisions of NCP section 300.435(c)(2)(ii) to require EPA continually, or at least periodically, to recalculate waste volumes for every Superfund site undergoing remediation—even if the site is being cleaned up by a responsible party with superior access to the relevant information, and even if no one associated with the cleanup requests that such updated calculations be performed.

We reject ARCO’s proposed numerical standard for distinguishing “fundamental” remedial changes from remedial changes that are merely “significant.” A more reasonable approach, in our view, is reflected in applicable Agency guidance, which points out that “[t]he lead agency’s characterization of a change is a site-specific determination.” Interim Final Guidance on Preparing Superfund Decision Documents, OSWER

is somewhat imprecise, and that it is the actual post-ROD *adoption* of a different hazardous waste management approach—rather than the mere consideration of a different approach—that “constitutes a fundamental change.” The distinction is of no importance for present purposes, because there is no evidence in this case to suggest that Region V considered changing the ordered hazardous waste management approach post-ROD, much less that it actually adopted or implemented such a change.

Directive 9355.3–02, ch. 8 at 8 (June 1989).[37] Moreover the Agency's guidance, like the 1990 NCP Preamble, takes a plain-meaning approach[38] to the regulatory term "fundamental," suggesting that only changes that are genuinely basic or central to the nature of a cleanup—that reflect actual "reconsider[ation] [of] the hazardous waste management approach selected in the ROD"—are to be regarded as "fundamental" for purposes of NCP section 300.435(c). *Id.* at 16.

We recognize that neither the Preamble nor the applicable guidance exhaustively illustrates what is meant by a "fundamental" remedial change. It is possible that, in appropriate circumstances, other kinds of remedial changes might also reasonably be deemed "fundamental." But we are generally disinclined to substitute our own judgment for that of the Regional office in determining whether a particular change rises to such a level of centrality.[39] The Board is particularly disinclined to engage in its own *de novo* characterization with the benefit of hindsight where no request was ever made at the time for the Region to characterize a particular alleged or proposed change as "fundamental," and where there is consequently no administrative record of the decision making process that such a request would trigger. To do so would effectively require the Region to have understood intuitively, in the absence of any claim or comment from a potentially responsible party ("PRP"), that as of a particular date the PRP's cleanup had expanded to a degree that the PRP regarded as "fundamental." We cannot reasonably demand such clairvoyance from the Region, and we therefore cannot accept ARCO's suggestion that the Region's failure here to make a new remedy selection decision on its own initiative, in the absence of any clear statutory or regulatory obligation to do so *and* in the absence of any objection by a PRP

[37] *Cf. In re CoZinCo, Inc.,* 7 E.A.D. 708, 736 (EAB 1998) (when addressing the claim that an amendment to a CERCLA section 106(a) order is in fact not an amendment but the legal equivalent of a "new order," the Board will do so "on a case-by-case basis, with close scrutiny of the particular facts presented").

[38] *See supra* text accompanying note 35 (contrasting the dictionary definitions of "fundamental" and "significant").

[39] As the courts have consistently recognized, "determining the appropriate removal and remedial action involves specialized knowledge and expertise, [and therefore] the choice of a particular cleanup method is a matter within the discretion of the EPA." *United States v. Hardage,* 982 F.2d 1436, 1442 (10th Cir. 1992) (quoting *United States v. Northeastern Pharmaceutical & Chem. Co.,* 810 F.2d 726, 748 (8th Cir. 1986)) (bracketed language added by *Hardage* court). Here, it is Region V that possessed "specialized knowledge and expertise" with respect to the particular Site and the particular Order that are at issue, and the requisite expertise to judge whether any post-ROD remedial changes were indeed fundamental.

to the existing remedial plan,[40] must be deemed arbitrary and capricious. Indeed, to all outward appearances the two dates now deemed so significant by ARCO were quite unremarkable in the context of a substantial Superfund cleanup that was, according to ARCO, already nearing completion.[41]

We proceed, then, to examine the site-specific judgment that the Region ultimately made when ARCO finally raised a contention that the scope of this cleanup had changed "fundamentally." ARCO's contention was raised in its November 30, 1995 petition for reimbursement (CERCLA Petition No. 95–6), and the Region addressed the contention when the Region issued an ESD for the Site in June 1996. In the ESD, the Region indicated that the volume of source material had turned out to be "significantly" greater than ARCO's original estimate, owing to the "expansion of the horizontal and vertical extent of contamination in the sludge pit area." Alsco Anaconda Site ESD at 5. At the same time, however, the Region emphasized that the SMOU remedy ARCO had been ordered to implement had never changed: "The type of remedy, excavation and off-site disposal to levels which met the cleanup criteria set in the SMOU ROD, remained the same throughout the cleanup." *Id.* at 7.

The Region's observation that the remedy for this Site had not changed is correct. As we have already pointed out, *see supra* Section I.B,

---

[40] The requirement to call alleged errors to an administrative agency's attention at a time when they can still be cured, and to do so clearly and explicitly, is a well established principle of administrative law. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 553–54 (1978) ("[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"); *Saco Cellular, Inc. v. FCC,* 133 F.3d 25, 33 (D.C. Cir. 1998) (as a matter of "[s]imple fairness to those who are engaged in the tasks of administration," reviewing court "should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice") (quoting *United States v. Tucker Truck Lines,* 344 U.S. 33, 37 (1952)). In this case, ARCO did not timely suggest that Region V reconsider its remedy or issue an amended ROD in any manner whatsoever—not even by "cryptic and obscure reference."

[41] As we have previously pointed out, at a meeting on July 22, 1992, ARCO reported that the field execution of the SMOU remedial action was between 60 and 70 per cent complete for each of its contractors as of July 1. *See supra* text accompanying note 22 (quoting AR 9503). Similarly, in a report submitted on or about August 10, 1992, ARCO stated that the excavation and hauling of F019-contaminated material was already 80 per cent complete as of the end of July (AR 9500); and in a report submitted on or about September 7, 1992, ARCO reported that the excavation and hauling of F019-contaminated material was already 90 per cent complete as of the end of August (AR 9537).

in its SMOU cleanup order the Region took pains to define the remedy for this Site in terms of a performance standard (clean closure), and to exclude any possible argument that the SMOU remedy was defined or limited in terms of ARCO's own sludge volume estimates. *See* Order ¶ 49 (diagram based on ARCO's sludge volume estimates "in no way is intended to limit [ARCO's] responsibility to meet the * * * clean-up standard"); *see also supra* note 12.[42] ARCO itself acknowledges that the SMOU remedy was defined in terms of a performance standard. *See* Petition for Reimbursement at 9 (SMOU cleanup order "clearly stated that the cleanup performance standards to be followed under the order were the qualitative clean-up levels, and not the quantitative levels [i.e., sludge volume estimates] referenced in the ROD").[43] In short, the nature of the contamination remained the same; the locations required to be excavated and backfilled remained essentially the same, albeit slightly "expanded" at the margins; the clean closure performance standard remained the same; and

[42] As pointed out in the ROD, the estimates were understood to be statistical constructs ["areal weighted averages"] based on sampling performed for ARCO three years earlier. *See supra* note 11 (quoting RI Report).

[43] It is clear that ARCO and its contractors understood the SMOU cleanup order to require clean closure without regard to the volume of F019 sludge that might be present. For example, in its Remedial Design/Remedial Action Work Plan dated August 20, 1990 (approximately eight months after issuance of the Order), ARCO's contractor ERM-Southwest, Inc. noted that "waste volumes and off-site landfill disposal costs" under the Order would be "driven by the cleanup criteria and the treatment standards for the waste." RD/RA Work Plan section 4, at 1 (AR 3157). Accordingly, ARCO's contractor wrote:

> A complete and recent topographic and boundary line survey is needed to allow development of the Closure Plan drawings. The volumes of sludges and contaminated soils must be better defined to permit more detailed and accurate estimates of material volumes for disposal and incineration.

Id. The same contractor recognized sixteen months later, in a document titled "Derivation of Cleanup Levels, Source Material Operable Unit" (Feb. 27, 1992 revision, AR 7490–7635) that:

> The ROD calls for clean closure of the site. * * * Clean closure means that all constituents must be removed to levels at which they are not expected to be associated with adverse effects to human health or the environment.

Id. section 1, at 1 (AR 7493). Similarly, in a Remedial Action Plan dated February 28, 1992, ARCO's contractor Westinghouse Remediation Services, Inc. noted its understanding that the extent of sludge excavation would be governed in the first instance by "visual criteria, as determined by ARCO." Remedial Action Plan at 36–37 (AR 7674–75) ("The sludge is a white/grayish material of a gelatinous nature and the sludge/soil interface is visually discernable. The visual criteria, as determined by ARCO, will govern the depths of excavation."). *See also id.* at 35 (acknowledging the likely existence of both "large areas" and "smaller areas" of "contaminants outside the impoundments and wooded areas"). ARCO, in any event, does not contend that its cleanup obligations under the Order were limited by any preexisting estimates of the horizontal or vertical extent of the sludge.

the fundamental approach to managing the hazardous waste (i.e., excavation and removal for off-site disposal) remained the same. The SMOU cleanup proceeded almost exactly as contemplated in the ROD—there was simply more contamination than expected. The defining features of the SMOU remedy, as outlined in the ROD, were neither challenged nor reconsidered in any meaningful respect during the course of the cleanup. The Board concludes that, in these circumstances and for this particular Site, no basic feature of the SMOU cleanup was ever fundamentally altered, and thus no ROD amendment was required.

ARCO's claim is even less persuasive when the Region's conduct is examined in its proper temporal context, i.e., in the context of the post-ROD, post-Order period, when the Region was quite properly focused not on remedial decision making but on smoothly and expeditiously implementing remedial decisions that had already been formally adopted in accordance with proper statutory and regulatory procedures. That is not the time period in which "fundamental" remedial issues are ordinarily meant to be debated and resolved. Rather, the Region's preeminent concern after adoption of a ROD—unless the Region itself decides to embark upon a "fundamental" reevaluation of its remedial decision, or unless post-ROD comments are submitted that "substantially support the need to significantly alter the response action" (40 C.F.R. § 300.825(c)) — is to ensure that implementation of the selected remedy proceeds with reasonable promptness.

The NCP explicitly provides a mechanism for bringing exceptional kinds of post-ROD information to the Region's attention:

> The lead agency is required to consider comments submitted by interested persons after the close of the public comment period *only* to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action.

40 C.F.R. § 300.825(c) (emphasis added).[44] ARCO made no effort to employ the procedure in 40 C.F.R. § 300.825(c) for obtaining post-ROD

[44] "Once the lead agency has selected the response action, the obligation to respond to comments on the remedy is limited." Interim Final Guidance on Preparing Superfund Decision Documents, OSWER Directive 9355.3–02, ch. 8 at 4 n.1 (June 1989). The lead agency is obligated to consider only those post-ROD comments that satisfy four criteria:

Continued

reconsideration of the response action. In the absence of any comment from ARCO or from any other interested person, the Region was under no obligation in this case to consider amending the ROD on its own initiative. As EPA emphasized in promulgating section 300.825(c), the language of the regulation:

> is intentionally designed to define carefully the circumstances in which EPA must consider comments submitted after the response action has been selected. This standard [i.e., the four-part standard in section 300.825(c)] recognizes CERCLA's mandate to proceed expeditiously to implement selected response actions, but also recognizes that there will be certain instances in which significant new information warrants reconsideration of the selected response action. Section 300.825(c) is intended to provide a reasonable limit on what comments EPA must review and consider after a [remedy selection] decision has been made.

Preamble to the 1990 NCP, 55 Fed. Reg. 8666, 8808 (1990).[45] ARCO would have the Board override the NCP's "reasonable limits" on EPA's obligation to reconsider response actions that have been lawfully selected and are in the process of being implemented. The Board, however, declines to do so.[46]

"The comments contain significant information; [t]he information is not contained elsewhere in the administrative record file; [t]he information could not have been submitted during the public comment period; and [t]he information substantially supports the need to significantly alter the response action." *Id.* at 4; *see also* Guide to Addressing Pre-ROD and Post-ROD Changes, OSWER Publication 9355.3–02FS–4 at 3 (April 1991) (same).

[45] This is consistent with other provisions of the NCP which are similarly circumscribed after the ROD is issued. For example, the NCP limits the incorporation of newly promulgated ARARs into a remedial action for which a ROD has already been issued (*see* 40 C.F.R. § 300.430(f)(1)), even though attainment of ARARs is generally required by statute (CERCLA § 121). As explained in the Preamble to the 1990 NCP:

> [C]ontinuously changing remedies to accommodate new or modified requirements would * * * disrupt CERCLA cleanups, whether the remedy is in design, construction, or in remedial action. Each of these stages represents significant time and financial investments * * *. This lack of certainty could adversely affect the operation of the CERCLA program, [and] would be inconsistent with Congress' mandate to expeditiously cleanup sites.

55 Fed. Reg. at 8757.

[46] Like section 300.825(c), EPA guidance makes clear that post-ROD information submitted to the lead agency *as grounds for a proposed remedial change* must somehow be

Continued

In support of its ROD-amendment argument, ARCO cites *United States v. Broderick Inv. Co.,* 963 F. Supp. 951 (D. Colo. 1997), in which the court criticized EPA (and disallowed EPA's cost-recovery claim against a responsible party in substantial part) for failure to amend a ROD. *Broderick* is, however, inapposite. In *Broderick,* the court examined a claim for response costs brought by the United States and the State of Colorado under CERCLA section 107(a), which provides for recovery of costs that are "not inconsistent with the national contingency plan." The costs at issue had been incurred in implementing an interim remedy that, according to EPA's ROD, was to have involved the removal of sludge from two on-site impoundments to an off-site facility, followed by "reclamation of the useful components of the sludge, and incineration and disposal of the residues." 963 F. Supp. at 953. In undertaking that portion of the cleanup, *EPA's contractors* discovered that the sludge had a considerably higher solid content than they had expected. As a result, the contractors "took three remedial actions that were not anticipated in" the Record of Decision. *Id.* The defendant in EPA's cost-recovery action argued that costs associated with those three remedial activities were "inconsistent with the national contingency plan"—hence, not recoverable by EPA—because EPA was required to, but did not, amend the Record of Decision pursuant to 40 C.F.R. § 300.435(c) before allowing its contractors to proceed with the unforeseen activities.

The court concluded that a ROD amendment was required under those circumstances, and that EPA could not recover costs associated with the three remedial activities that were not mentioned in the existing ROD. The court explained that by failing to follow the NCP procedures:

> EPA effectively abdicated its statutorily-mandated planning role and delegated to its contractors authority to

---

identified as such. Indeed, the reference in section 300.825(c) to "comments" supporting a remedial change is made even more explicit in the applicable guidance, which demands a "request that a component of the remedy be changed." *See infra* note 57 (quoting Interim Final Guidance on Preparing Superfund Decision Documents, OSWER Directive 9355.3–02, ch. 8 at 3–4 (June 1989)). Whether the necessary explanation is referred to as a "comment" or as an outright "request" for remedial change, it is clear that a party like ARCO, having submitted unexplained post-ROD information without any indication of its purported significance, cannot later insist that the information should immediately have triggered reconsideration of the remedy in the ROD. The lead agency is not required to react to any and all post-ROD submissions in that manner. *See* Guide to Addressing Pre-ROD and Post-ROD Changes, OSWER Publication 9355.3–02FS–4 at 3 (April 1991) (stating that the lead agency "should" consider post-ROD submissions that satisfy each of the criteria in 40 C.F.R. § 300.825(c), and that the lead agency "may"—but need not—"also evaluate whether a change to the remedy is warranted on its own initiative * * * where the requirements of NCP section 300.825(c) are not met").

> instigate indiscriminate remedial measures. This course of conduct not only excluded the public and potentially responsible parties such as [the defendant] from the decision-making process, but also precluded EPA from selecting the remedy, as the NCP requires. *See* 40 C.F.R. § 300.430(f)(ii) ("The lead agency . . . makes the final remedy selection decision, which shall be documented in the ROD."). For these reasons, additional costs associated with increased solids will be disallowed as the result of arbitrary and capricious action not in conformance with the NCP.

963 F. Supp. at 965.

In the case before us, Region V cannot similarly be faulted for "exclud[ing] the public and potentially responsible parties * * * from the [remedial] decision-making process." ARCO at all times had knowledge of the results of sampling conducted by its own contractors.[47] Thus the absence of a proposed ROD amendment did not affect or impair, in any manner whatsoever, ARCO's own knowledge concerning on-site conditions or its own ability to request—formally or informally, by any method that ARCO might have seen fit to employ—that the Region or its on-site personnel consider limiting or otherwise revising the scope of ARCO's SMOU cleanup obligations. ARCO was itself the source of all of the information that it now claims would have supported such a request as of June or July 1992, but ARCO simply failed to make the request.

The absence of a proposed ROD amendment in this case simply did not exclude ARCO from the decision making process whose results ARCO now seeks to challenge. ARCO could at any time have proposed reconsideration of the remedy that its own contractors were implementing, but it did so only after the remedy had already been implemented.

[47] The PRP in *Broderick* had not learned of its potential CERCLA liability until long after the issuance of the relevant Records of Decision, and had therefore had no opportunity to participate in the formulation of the remedial actions for which EPA later sought to recover costs. *See United States v. Broderick Inv. Co.,* 955 F. Supp. 1268, 1270 (D. Colo. 1997). ARCO, in contrast, was actively involved throughout the remedy selection process associated with the Alsco Anaconda Site. Indeed it was ARCO that undertook, in a January 1987 Consent Order, to perform the Remedial Investigation and Feasibility Study that, as ARCO well understood, were meant to serve as foundations for subsequent remedial decision making with respect to the Site. In this case, therefore, responsibility for assembling reliable information concerning site conditions lay, in the first instance, with ARCO itself. The PRP in *Broderick,* having been uninvolved in the remedial investigation and planning process, bore no comparable responsibility.

ARCO suggests in its Petition for Reimbursement that some unspecified alternative remedy should have been explored during the spring or summer of 1992, but that suggestion comes too late.[48] ARCO was in no way prejudiced by the alleged legal error that it has belatedly identified in connection with the SMOU cleanup, and that alleged error cannot support ARCO's claim for reimbursement of its response costs from the Superfund. The Board concludes, in short, that Region V did not act arbitrarily and capriciously or otherwise unlawfully by failing to make an unsolicited determination that ARCO's implementation of the SMOU cleanup had somehow "fundamentally alter[ed] the basic features" of the Region's own cleanup order.

C. *ARCO Has Not, in Any Event, Challenged a Reviewable "Decision in Selecting the Response Action Ordered"*

ARCO's failure to utilize the procedure outlined in 40 C.F.R. § 300.825(c) as a means of eliciting post-ROD remedial decision making does more than merely undermine ARCO's contention that the Region's failure to engage in such post-ROD decision making was "arbitrary and capricious." It also highlights a more basic defect associated with ARCO's entire claim for reimbursement under CERCLA section 106(b)(2)(D). Specifically, the statutory provision underlying ARCO's claim only authorizes the Board to review a challenged "decision in selecting the response action ordered." The Board concludes that no such decision has been challenged in this case and, for that reason, that the Board must deny the reimbursement that ARCO seeks.

Clearly, when EPA is weighing its "decision in selecting the response action ordered" for a particular site, interested parties should have ample opportunity to dissuade the Agency from any remedial action that is "arbitrary and capricious or otherwise not in accordance with law." Section 106(b) provides a mechanism for assuring that, if the Agency cannot be dissuaded from making such a decision in the first instance, a responsible party will later have an opportunity, if it completes the ordered action and satisfies the other various statutory prerequisites, to obtain administrative and judicial review of its challenge to the Agency's remedy selection decision.

---

[48] We note, moreover, that it is far from clear that any alternative or more cost-effective remedy would have been selected even if the remedy had been reconsidered, given the previous rejection of containment alternatives and the decision making with respect to the GWOU—which was predicated on clean closure of the SMOU. *See* Region V Comments at 16; *see also supra* notes 10, 17–18 and accompanying text.

In this case, the Region adhered to its statutory decision making obligations when it selected the response action that it ordered ARCO to undertake. As contemplated by the statute, the fundamental remedial approach to this cleanup was deliberated during a notice-and-comment period following issuance of a proposed plan. ARCO contributed substantially to the formulation of the fundamental remedial approach—specifically by proclaiming its own preference for a remedy involving excavation and removal to a standard of RCRA clean closure. ARCO endorsed that approach in its comments and has never claimed that the Agency's adoption of that fundamental remedial approach was arbitrary, and hence legally indefensible.[49] Thus, ARCO raises no challenge to the ROD itself or to the section 106 order issued in 1989 that directs ARCO to implement the remedy described in the ROD. The Agency's "decision in selecting the response action ordered" for this Site remains unchallenged.[50]

If ARCO had requested a second "decision in selecting the response action ordered" during the pendency of the cleanup, and if that request were adequately supported by new information (of the kind contemplated in 40 C.F.R. § 300.825(c)) that had become available to ARCO only after the remedial design/remedial action phase of the cleanup was under way, the Region's response in accepting or rejecting that request might well have represented a "decision in selecting the response action ordered." Such a response could therefore arguably have been reviewable, pursuant to CERCLA § 106(b)(2)(D), under the arbitrary and capricious standard.

---

[49] As noted *supra,* the remedial decision set forth in the Order was explicitly defined in terms of ARCO's "responsibility to meet" a particular cleanup standard (clean closure). *See supra* text accompanying note 42.

[50] If ARCO is indeed seeking to challenge the remedy selection decision made by the Region in 1989, based on post-ROD, post-Order information acquired by ARCO during the spring and summer of 1992, any such challenge must clearly fail. "The arbitrary and capricious standard is not based on hindsight." *In re T H Agriculture & Nutrition Co.,* 6 E.A.D. 555, 586 (EAB 1996). We can only judge the validity of the Region's section 106(a) Order based on the information that was available to the Region when it issued that Order. What the Region knew or should have known in later years is not a permissible consideration. *See id.* at 587 ("The matter before us now is concerned with how the Region selected [a remedial standard] for an order issued in March 1992; what the Region did two years later is not relevant * * * ."); *see also In re Asarco Inc.,* 6 E.A.D. 410, 438 (EAB 1996) (guidance document issued after the Region's issuance of a section 106(a) order held "irrelevant in judging the Region's selection of the cleanup level" in a subsequent challenge to the order brought under section 106(b)(2)(D)). Thus, to the extent ARCO is relying on later-acquired information to retroactively invalidate the Region's original 1989 remedy selection decision, ARCO's challenge is groundless. To the extent that ARCO is challenging the Region's actions during 1992, the challenge fails because, as we demonstrate in this section of the opinion, the Region did not make—and was neither asked nor required to make—a "decision in selecting the response action ordered" during 1992 to which the provisions of section 106(b)(2)(D) might apply.

But because ARCO did not request such a decision during the pendency of the cleanup—despite ample opportunity to make such a request and superior access to the information that ARCO now claims would have supported the request—and because the Region did not *sua sponte* issue a new "decision in selecting the response action ordered,"[51] ARCO has not challenged an Agency "decision in selecting the response action ordered" and no such decision is properly before us for review.[52]

ARCO intimates that the unavailability of pre-enforcement *judicial* review, combined with the statutory sanctions provided for noncompliance with a valid EPA cleanup order, would have made any post-ROD request for a new remedy selection decision futile—even after ARCO became aware that waste volumes and cleanup costs were beginning to exceed original expectations. That suggestion misses the point. We cannot know, of course, how a request by ARCO for modification of the cleanup order would have been received, although the Region's handling of the subsequent "black material" controversy[53] suggests that requests of that nature were unlikely to be rejected out of hand. The point, however, is that the Region was not asked to change the remedy described in the ROD and in its section 106 order, and the Region, therefore, made no "decision in selecting the response action ordered" subsequent to the initial issuance of the order. There is, accordingly, no statutory basis for ARCO's reimbursement claim.

ARCO's failure to ask for a new "decision in selecting the response action ordered" was not a matter of perceived futility or of any lack of sophistication. The record indicates that when ARCO had a concern regarding the course of the source material cleanup, ARCO experienced no difficulty in bringing its concern to the Region's attention.[54] That is perhaps most vividly illustrated by ARCO's unilateral decision to stop excavating "black material" in October 1992 based on ARCO's concern over the cost that might ultimately be involved. In that instance, ARCO very

[51] *See* Section II.B, *supra,* for a discussion of why the Region was not required to issue a new decision *sua sponte* under the circumstances of this case.

[52] The only remedy selection decision in the record before us is the Region's original decision, which, by ARCO's own admission, was valid and nonarbitrary when made.

[53] *See supra* note 20.

[54] ARCO, moreover, was obligated to bring actual or anticipated problems to the Region's attention under the terms of the SMOU cleanup order. *See* Administrative Order ¶ 66 (describing ARCO's reporting obligations including, specifically, a requirement to inform the Region each month of any "anticipated problems and recommended solutions, [and any] problems encountered/resolved").

effectively elicited a post-ROD response from Region V. ARCO, in contrast, remained silent regarding the volume of F019 sludge and contaminated soil that its contractors encountered between March and September 1992. The most reasonable inferences arising from ARCO's failure to request a new "decision in selecting the response action ordered" are that ARCO remained at the time satisfied with the clean closure standard adopted in the ROD (and from there incorporated into the section 106 order) notwithstanding the increased waste volume that ARCO encountered during the cleanup[55] or, alternatively, that ARCO itself regarded the volume increase as falling below the threshold of "significance" that would have warranted the submission of formal post-ROD comments for the Region's mandatory consideration (and for inclusion in the administrative record) under the procedure provided in 40 C.F.R. § 300.825(c).[56]

ARCO in effect suggests that in the post-ROD period of remedial design and remedial action, EPA is obliged to reexamine even an unchallenged remedy selection decision and to ask itself whether, in light of subsequent events, the original remedy selection decision has somehow *become* "arbitrary and capricious." ARCO's suggestion would, as a practical matter, render the Agency's oversight function under section 106 exceedingly burdensome, and the Agency would, as a practical matter, need to repeatedly re-validate the soundness of a chosen remedy in order to safeguard against later section 106(b) challenges alleging that the chosen remedy had somehow become arbitrary and capricious at some point after its adoption. Neither CERCLA nor section 106(b) imposes any such requirement. Rather, section 106(b)(2)(D) contemplates that a liable party such as ARCO may challenge, under the arbitrary and capricious standard, only the Agency's "decision in selecting the response action ordered." If, as in this case, the liable party identifies no arbitrary and capricious "decision in selecting the response action ordered," the Board cannot grant relief under section 106(b)(2)(D). In certain extraordinary situations—where, for example, compliance with an originally reasonable and valid cleanup order becomes impossible or utterly impracticable owing to an unforeseen change of circumstances—the Agency's refusal, without adequate justification, to properly evaluate and respond to a responsible party's properly substantiated post-ROD request[57] for a modified or revised

[55] As noted above, because of its interest in avoiding an expensive ground water treatment remedy, ARCO had a strong incentive to support clean closure of the SMOU before a final decision was reached concerning the GWOU on September 30, 1992.

[56] *See supra* note 21.

[57] *See* Interim Final Guidance on Preparing Superfund Decision Documents, OSWER Directive 9355.3–02, ch. 8 at 3 (June 1989) ("The public, including PRPs, may submit
Continued

"decision in selecting the response action ordered" might itself be reviewable under section 106(b).[58] We need not decide whether such a claim is cognizable under section 106(b), because this is clearly not such a case. In this case, ARCO generated and controlled all of the data with which it now seeks, retrospectively, to invalidate the Region's cleanup order. But ARCO sought no modification of the SMOU remedy when modifications were still possible: ARCO kept silent and continued to incur costs pursuant to the original remedy selection decision that ARCO, itself, had at all relevant times strongly endorsed. Having done so, ARCO cannot now ambush the Agency with a claim for cost reimbursement based on the Agency's failure to make a "decision" that the Agency was never asked to make. Because ARCO raised no objection during the pendency of the source material cleanup at the Alsco Anaconda Site, proposed no change to the SMOU remedy selection decision set forth in the ROD, and thus made no demonstration that any proposed change was "fundamental," the Region was never called upon to make a post-ROD "decision in selecting the response action ordered." (Nor was the Region required to amend the ROD *sua sponte*.) ARCO's claim for reimbursement does not challenge any "decision in selecting the response action ordered," and must therefore be rejected.

III. *CONCLUSION*

The Board concludes that ARCO's claim for reimbursement of response costs under CERCLA section 106(b)(2)(D) must be denied in all respects.[59]

So ordered.

---

information to the lead agency after the ROD is signed *that serves as the basis for their request that a component of the remedy be changed."*) (emphasis added); *id.* at 4 (if the information supporting a requested change is newly obtained and "substantially supports the need to significantly alter the response action," then "the lead agency should prepare either an ESD or a ROD amendment"). *See also* 40 C.F.R. § 300.825(c) ("The lead agency is required to consider *comments* submitted by interested persons after the close of the public comment period *only to the extent that the comments* * * * substantially support the need to significantly alter the response action.") (emphasis added). ARCO submitted neither a request for a new remedy selection decision nor any "comments" suggesting that a change was warranted.

[58] *See Employers Ins. of Wausau v. Browner,* 52 F.3d 656, 664 (7th Cir. 1995) (suggesting in dictum that if compliance with an EPA cleanup order turns out to be "impossible" or nearly so, the Agency's "unreasonable insistence on full compliance" with the order might be subject to review under section 106(b)).

[59] Because we have concluded that ARCO is not entitled to reimbursement under the facts presented, we have not considered the reasonableness of any particular costs allegedly

Continued

incurred by ARCO, nor have we considered the methodology advocated by ARCO for calculating reimbursable costs in a proceeding arising under CERCLA section 106(b)(2)(D). We express no opinion with respect to either of those matters.

We note, finally, that in its December 22, 1998 comments on the Board's Preliminary Decision, ARCO states that it does not wish to "repeat the substance of the Petition" but requests, instead, "to incorporate the Petition by reference for purposes of the administrative record." ARCO Comments at 1. Toward that end, ARCO has attached a copy of the Petition to its December 22 comments. ARCO's request is granted to the extent that it seeks to ensure inclusion of the Petition in the record of the proceedings before the Board. The record of the proceedings before the Board, however, is not the same thing as the administrative record file for the selection of the remedial action at the Alsco Anaconda Site (the "administrative record" described at 40 C.F.R. § 300.815). Before seeking inclusion of a post-ROD document, like the Petition, in the section 300.815 administrative record, ARCO would be required to comply with the provisions of 40 C.F.R. § 300.825. *See* 40 C.F.R. § 300.815(d) (post-ROD documents "shall be added to the administrative record file [for selection of the remedial action] only as provided in § 300.825"). Therefore, to the extent ARCO may be requesting the inclusion of its Petition in the administrative record for the selection of the remedial action for the Alsco Anaconda Site, ARCO's request is denied based on ARCO's failure to satisfy the requirements of sections 300.810(b), 300.815(d), and 300.825.