

IN RE ASARCO INCORPORATED AND FEDERATED METALS CORPORATION

CERCLA § 106(b) Petition No. 94-22

FINAL DECISION

Decided April 17, 1996

Syllabus

Asarco Incorporated and Federated Metals Corporation, its subsidiary ("Petitioners"), have petitioned pursuant to CERCLA § 106(b) for reimbursement in full of response costs they incurred in complying with an administrative order (the "Order") issued by U.S. EPA Region V on March 22, 1994. The Order required Petitioners to test the levels of lead in the soil along the route of a water main renovation project in Beckemeyer, Illinois, and to remove and dispose of soil that contained elevated lead levels. Petitioners contend that the Region erred in three respects: That the Region failed to conduct an engineering evaluation/cost analysis (EE/CA) and provide a public comment period before selecting the response action, as required by Agency regulations; that the Region erred when it determined that the project posed an imminent and substantial endangerment to the public health or welfare or the environment; and that the 500 ppm cleanup level for lead in soil selected by the Region was overly stringent and unsupported by the administrative record. Petitioners also argue that the Region lacked authority to require them to pay the Agency's costs of overseeing the cleanup.

Held: The Petition is denied. Petitioners have not demonstrated that the Region erred by not conducting an EE/CA or providing a public comment period, by determining that the water main project posed a risk of imminent and substantial endangerment, or by imposing a 500 ppm cleanup level for lead in soil. The Board lacks jurisdiction to entertain Petitioners' request to strike the provision of the Order requiring it to pay oversight costs. The Board denies as untimely Petitioners' request to amend its petition to assert for the first time a claim for reimbursement for its payment of Agency oversight costs.

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

Opinion of the Board by Judge Reich:

ASARCO Incorporated ("Asarco") and Federated Metals Corporation, its subsidiary, both of New York City, have petitioned under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(2), for reimbursement in full of \$469,686.49 in cleanup costs, and

\$43,934.61 in Agency oversight costs,¹ they claim to have incurred in complying with a March 22, 1994 administrative order (the "Order") issued by U.S. EPA Region V pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The Order required them to test the levels of lead² in the soil along the route of a project to renovate the water distribution system in Beckemeyer, Illinois ("the water main project"); to excavate, remove, and dispose of any soil that contained elevated levels of lead; and to replace the lead-contaminated soil with clean soil.³

Petitioners do not dispute that they were responsible parties who may be held liable for response costs under CERCLA § 107(a), 42 U.S.C. § 9607(a). They argue instead that they are entitled to recover their response costs under CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D), which allows a petitioner who is liable for response costs under Section 107(a) to recover its response costs "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." Specifically: (1) Petitioners contend that the Region failed to provide for adequate public participation in the process of selecting a response action, in violation of Agency regulations. More particularly, Petitioners assert that the Region was required to conduct an engineering evaluation/cost analysis (EE/CA) and provide a public comment period prior to selection of a removal action (Petition at 6-8); (2) Petitioners argue that the Region's determination that the water main project posed "an imminent and substantial endangerment to public health or the environment" was erroneous in that it overestimated any risk posed by the water main project (*Id.* at 12-13);⁴ and (3) Petitioners

¹ See *infra* n.5.

² Lead is a hazardous substance under CERCLA § 101(14)(B), 42 U.S.C. § 9601(14)(B), as implemented by 40 C.F.R. § 302.4 (designating lead as a hazardous substance under CERCLA § 102(a), 42 U.S.C. § 9602(a)).

³ No specific cleanup level for lead in soil is established in the Order itself. Section V, subsection 3, of the Order, entitled "Work To Be Performed," provides that Petitioners shall "[r]emove contaminated material potentially encountered during excavation and trenching." Order at 6. However, the Order does not establish the level of lead in soil that causes the soil to be deemed "contaminated material" for purposes of the removal action. The Final Work Plan for the Time-Critical Removal Action Along the Proposed Water Line (May 12, 1994) ("Final Work Plan"), which the Region approved on May 12, 1994, established a 500 ppm cleanup level for the response action.

⁴ Pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a), a determination that "there may be an imminent and substantial endangerment to the public health or welfare or the environment * * *" is a prerequisite to the issuance of a cleanup order. However, as discussed in Section II.B. of this decision *infra*, we do not construe the Petition for Review as arguing that the Region lacked authority to issue a cleanup order in this instance but merely as challenging the extent of the remedy.

argue further that the 500 ppm lead in soil cleanup standard imposed by the Order was “overconservative and unrealistic,” inconsistent with Agency guidance, and unsupported by the administrative record (*Id.* at 7-11, 13-14). With particular regard to the third argument, Petitioners assert that the Region misapplied the computer model it uses for its risk assessments and thereby determined an inappropriately stringent cleanup level of 500 ppm. They contend that, if the model had been used with the inputs they propose, a cleanup level between 3,260 ppm and 4,685 ppm would have been determined to be appropriate “for residential children.” *Id.* at 8-9. They further argue that a substantially higher cleanup level would have adequately protected adult construction workers involved in the water main project, presumably at substantially lower costs than the costs Petitioners were required to bear in meeting the 500 ppm cleanup level. *Id.*

Finally, Petitioners argue that the Region lacked authority to require them to pay EPA’s costs in overseeing implementation of the Order. *Id.* at 15. They now ask the Board to order reimbursement of those oversight costs.⁵

For the reasons stated below, the Petition is denied in all respects.

I. BACKGROUND

A. Statutory and Regulatory Background

CERCLA § 106(a), 42 U.S.C. § 9606(a), authorizes the President to issue orders “necessary to protect public health and welfare and the environment” whenever 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 * * *.” The President’s authority to issue such orders has been delegated to U.S. EPA. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987).

In accordance with CERCLA § 105(a)(3), 42 U.S.C. § 9605(a)(3), the President has issued regulations establishing “methods and criteria for determining the appropriate extent of removal, remedy and other measures authorized by [CERCLA].”⁶ Such measures could include the issuance of an administrative order under CERCLA § 106(a). *Id.* The regulations distinguish between “removal actions”

⁵ This request is discussed at length *infra* in Section II.D.

⁶ These regulations appear in the National Oil and Hazardous Substances Pollution Contingency Plan at 40 C.F.R. Part 300.

and “remedial actions” and establish requirements for both types of response actions. The statute defines “remove” or “removal” broadly to include “the cleanup or removal of released hazardous substances from the environment” and further as:

[S]uch actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

CERCLA § 101(23), 42 U.S.C. § 9601(23). “Removal authority is mainly used to respond to emergency and time-critical situations where long deliberation prior to response is not feasible * * *.” Final Rule, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (March 8, 1994). By contrast, “remedy” or “remedial action” refers to “those actions consistent with permanent remedy taken instead of or in addition to removal actions * * *.” CERCLA § 101(24), 42 U.S.C. § 9601(24).

Pursuant to CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A), any person who has received and complied with an order issued under § 106(a), whether for a removal or remedial action, may petition for reimbursement of any reasonable response costs the petitioner has incurred. Of relevance to this proceeding, a petition can establish a right to reimbursement pursuant to CERCLA § 106(b)(2)(D) “to the extent that it can demonstrate, based on the administrative record, that the [Administrator’s] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law.”⁷ The petitioners bear the burden of proof in a CERCLA § 106(b) proceeding, including both the initial burden of going forward with evidence and the ultimate burden of persuasion. *See In re Sherwin Williams Company*, 6 E.A.D. 199, 207 (EAB 1995); *In re William H. Oliver*, 6 E.A.D. 85, 94 (EAB 1995). *See also Employers*

⁷ Agency regulations at 40 C.F.R. Part 300 Subpart I require the Agency to establish and maintain an administrative record to support the selection of a CERCLA response action. Generally, the regulations require that the administrative record shall contain factual information and data, analysis of the factual information and data, “[g]uidance documents, technical literature, and site-specific policy memoranda.” 40 C.F.R. § 300.810(a).

Insurance of Wausau v. Browner, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 699 (1996); *Dico, Inc. v. Diamond*, 35 F.3d 348, 351 (8th Cir. 1994).

B. *Factual Background*

The Village of Beckemeyer (hereinafter “Beckemeyer” or “the Village”) is a community of approximately 1,000 residents in southwestern Illinois. A zinc smelter has been in operation on a 41-acre site northeast of the Village since the early 1900’s. Federated Metals (a subsidiary of Asarco) began operating the smelter in 1930. The Circle Smelting Company (“CSC”) has operated it as a secondary zinc smelter since 1965.

Smelter activities have generated large quantities of waste materials known as “slag,” which contain lead and other metals that are considered hazardous substances under CERCLA. These waste materials from the smelter have accumulated in a 17-acre waste pile on the site. In addition, prior to CSC’s acquisition of the smelter, the slag was used throughout the Village as a fill for low-lying areas and as a surface cover material for roads and sidewalks. Petitioners do not dispute that slag containing elevated lead levels is present in various locations throughout the Village. *See, e.g.*, Petition at 2.

Region V first became aware in the late 1980’s of the potential health risk posed by the presence of hazardous metals both at the smelter site and in the Village. On July 26, 1988, at EPA’s request, the Illinois Environmental Protection Agency conducted a screening site inspection.⁸ The Region itself conducted a site assessment of the Village on March 29, 1993.⁹ Regional personnel, accompanied by a Technical Assistance Team, conducted a visual inspection and collected fourteen soil samples for analysis from areas that were either known to contain smelter slag or were likely to be contaminated with slag.¹⁰ According to the Region, both the site screening inspection and

⁸ *See* CERCLA Screening Site Inspection Report (Draft) (Oct. 17, 1988). The administrative record does not contain the final report.

⁹ *See* Memorandum, XRF Site Visit, March 29, 1993.

¹⁰ *See* Request for a Time Critical Removal Action and Determination of a Threat to Public Health or Welfare or the Environment at the Circle Smelting Corporation Site (“Action Memorandum”), March 17, 1994, at 3. Some of the samples contained lead levels as high as 31,000 ppm. *See* Order at 2. As will be discussed *infra*, the Region also performed calculations using a computer model and data from residential soil samples taken from backyards and pathways in Beckemeyer to estimate blood lead levels in the children of Beckemeyer. *See* Memorandum from Pat Van Leeuwen, Region V Toxicologist, to Tony Holoska, Remedial Project Manager, Review of site data for Circle Smelting Corp., Beckemeyer, IL, April 1, 1993 (“Van Leeuwen Memorandum”).

the site assessment occurred before the Region was aware that the Village intended to renovate its water line.

The Technical Assistance Team submitted its Site Assessment Report ("Report") on May 22, 1993.¹¹ According to the Report:

Analytical testing of residential soils indicates that very high concentrations of lead, arsenic, and zinc exist in the surface soil at residential properties within the town of Beckemeyer, Illinois. These high concentrations of metals present a health hazard to children, animals, and residents of Beckemeyer. Because the heavy metals are at or very near the surface, children or animals could easily ingest dirt with these associated contaminants.

Report at 10. The Report concluded that:

The analytical testing of heavy metals in soil from residential properties in the town of Beckemeyer indicate the existence of a definitive threat to human health and the environment from the presumed deposition of slag from the CSC facility throughout residential neighborhoods. The primary contaminant of concern is lead * * *.

The estimate of 67,200 cubic feet of contaminated topsoil and slag represent a minimum of potentially contaminated soil, based solely on the readily visible evidence of stressed vegetation or obvious slag present in soil.

Id. at 11.

The Region asserts that it first became aware in June 1993 that the Village of Beckemeyer had started to renovate its entire water distribution system, and that this project would involve the replacement of approximately eleven linear miles of new water main, including hookups to individual residences in the Village. Region's Response to Petition ("Response") at 4.¹² Regional personnel became concerned

¹¹ See Site Assessment Report for Circle Smelting Corporation (May 22, 1993).

¹² See also Action Memorandum at 5. The Village had previously been advised by the Illinois Department of Public Health ("IDPH") that the water supply system for the Village of Beckemeyer has "serious public health threats" and must be upgraded. Letter from John G. Pitzer, IDPH, to Mayor Allen Warnecke, Aug. 11, 1992 ("Pitzer letter"). However, Petitioners do not dispute the Region's assertion that the Region was unaware of the project until June 1993.

that the disturbance of contaminated soils along the water main route might pose a health risk to the residents of Beckemeyer. Therefore, on June 6, 1993, the Agency arranged for the collection and analysis of soil samples along that route.¹³

On June 18, 1993, the Region sent a letter to the Mayor of Beckemeyer advising him that the Village should not replace sections of the water main that were located on the smelter site itself or that would cross "any contaminated area" without prior consultation with EPA. The Region stated in the letter that it was in the process of assessing conditions at the site "to determine the need for action under CERCLA," and asked the Village to submit a work proposal for the water main project. Region's Letter to Village at 2. In response to the Region's letter, the Village altered the route of the new water main to avoid crossing the smelter property. The contractor for the Village suspended work on the project on June 22, 1993.¹⁴ The Region sent a letter to the attorneys for the Village on July 16, 1993, stating that, notwithstanding the rerouting of the water main, the Region remained concerned about the risks posed by the project. The Region informed the Village that the Region had developed "work plan specifications" to mitigate the threat posed by lead and other hazardous materials that would be disturbed by the water main project, and advised the Village that the Region "may order compliance" with these specifications if the Village did not agree to comply with them.

On July 30, 1993, the Technical Assistance Team collected a relatively small number of soil samples from locations along the route of the water main, and determined that some of the samples had elevated lead levels. Order at 2. It collected an additional 176 samples of soil and slag material along the route of the proposed new water main between October 4 and 7, 1993. On October 28, 1993, the Region notified the Village that, of the twenty-five soil samples (out of 176), which it had analyzed on a priority basis, four had lead levels that exceeded 500 ppm. The Region sent another letter to the Mayor on November 23, 1993, in which it characterized the preliminary test results as "very encouraging" in that relatively few soil samples had elevated level levels. However, it advised the Mayor that any soils with total lead concentrations over 500 ppm and any "untested slag material" must be removed from Beckemeyer's residential areas.

¹³ See Letter from Ecology and Environment, Inc. to Region V, January 5, 1994, at 4.

¹⁴ See Letter from David Ullrus to Village, September 20, 1993.

Sometime thereafter, the Region obtained additional test results indicating that “approximately 20%” of the samples taken between October 4 and 7, 1993, had lead concentrations greater than 500 ppm.¹⁵ On February 28, 1994, Region V sent a General Notice of Potential Liability to Petitioners alerting them that EPA had “documented the release or threat of release of hazardous substances, pollutants and contaminants into the environment,” and that it planned to conduct a “time-critical emergency removal action”¹⁶ to remove material encountered during the water main project unless it determined that a removal action would be “done properly by a responsible party or parties.” It stated that it also planned to conduct an Emergency Evaluation/Cost Analysis (EE/CA) to determine whether a separate non-time-critical response action was necessary to address contaminated soils at the smelter and in adjoining drainage ways and wetlands. *See* General Notice Letter at 1-2.

On March 17, 1994, the Region issued a Request for a Time Critical Removal Action and Determination of a Threat to Public Health or Welfare or the Environment at the Circle Smelting Corporation Site (“Action Memorandum”) “to address the potential release of contaminants within the Village of Beckemeyer during the replacement of its municipal water distribution system including the installation of approximately 60,000 linear feet of new water main * * *.” Action Memorandum at 1. The Action Memorandum stated that:

Given the widespread presence of lead-contaminated materials in excess of 500 ppm in residential areas (40 CFR 261.24; OSWER Directive #9355.4-02), the poisonous, toxic and suspected carcinogenic nature of lead, and the potential exposure pathways to nearby populations * * *, the proposed removal action is time-critical. The actual or threatened releases of hazardous substances from this site, if not addressed by implementing the response actions selected in this Action Memorandum, may present an imminent and substantial endangerment to public health, or welfare, or the environment * * *. [D]isturbing contaminated soils will

¹⁵ Action Memorandum at 3. Final test results had apparently not been obtained prior to the issuance of the Action Memorandum or Order.

¹⁶ Agency regulations and guidance distinguish between “time-critical” removal actions, which pose a risk that must be addressed within six months following approval of the action memorandum, and “non-time-critical removal actions,” which do not. *See* discussion *infra* at II.A, titled Public Participation in the Remedy Selection Process.

likely add to possible exposure levels and increase health risks unless preventive measures are taken.

Id. at 5.¹⁷

On March 22, 1994, Region V issued its Order requiring Petitioners to “identify potentially contaminated material along the water distribution route” and to “[r]emove contaminated material potentially encountered during excavation and trenching and properly handle, store, consolidate, and/or dispose of the contaminated material * * *.” Order at 6. The Region held an Administrative Order Conference on April 12, 1994, which Petitioners’ representatives attended. The Region states that it proposed the 500 ppm cleanup level that was subsequently established in the Final Work Plan at that conference.¹⁸ Response at 24-25. The Region published a notice of the availability of the administrative record file on April 1, 1994; it did not, however, hold a public comment period on the selection of a response action.¹⁹

On May 13, 1994, the Region approved a Final Work Plan for the Time-Critical Removal Action Along the Proposed Water Line, in which it “mandated 500 ppm total lead as the cleanup level for this time-critical removal action.”²⁰ Final Work Plan Para. 4.1. As discussed

¹⁷ The memorandum further stated that “[r]emaining contaminated material which does not pose an immediate risk (i.e., material that will not be disturbed during pipeline installation) will be addressed through a non-time critical action which is currently being reviewed * * *.” Action Memorandum at 6.

¹⁸ See *supra* n. 3. While Petitioners do not dispute that the cleanup level was discussed at this meeting, they do dispute that they “acquiesced” in this cleanup level at the meeting. Comments at 9 n.9. In any event, we do not rely on any alleged acquiescence in upholding the Region’s decision.

¹⁹ As discussed *infra* at II.A., where the Agency orders a time-critical response action, Agency regulations require the publication of a notice of availability of the administrative record file “within 60 days of initiation of on-site removal activity.” 40 C.F.R. § 300.415(n). The regulations further provide that the Agency shall “[p]rovide a public comment period, as appropriate, of not less than 30 days from the time the administrative record file is made available for public inspection, pursuant to § 300.820(b)(2) * * *.” Section 300.415(n), titled “Community relations in removal actions,” appeared as Section 300.415(m) in the 1994 edition of C.F.R. and is referred to in the Region’s Response as Section 300.415(m). For convenience, we will cite the current regulations, 40 C.F.R. Part 300 (1995), which are identical in all material respects to those cited by the Region.

²⁰ The Scope of Work required petitioners to “excavate at least the upper two feet of the remaining length of the proposed water line route (48,000 feet),” to identify materials containing total lead concentrations in excess of 500 ppm, and to transport identified contaminated materials to the Circle Smelter for storage and/or disposal. Final Work Plan at 2.

in detail *infra*, the Region states that it determined the 500 ppm cleanup level based on Agency guidance, computer-generated predictions of the risk posed to the residents of Beckemeyer from lead-contaminated soil, and the advice of a Region V toxicologist.

Petitioners began the work required by the Order on May 14, 1994, and completed the work on September 30, 1994. On November 7, 1994, the Region sent Petitioners a letter stating that the work required by the Order had been completed.²¹ Letter from Region V to Asarco, Inc., November 7, 1994.

Petitioners submitted a petition for reimbursement on November 22, 1994. As described *supra*, they argue that they are entitled to reimbursement of their entire response costs for the following three reasons:

1. The Region did not provide adequate public participation in the process by which it selected the response action (Petition at 6-8);
2. The Region's conclusion that the water main project posed an imminent and substantial endangerment to the residents of Beckemeyer is not supported by the administrative record (*Id.* at 12-13); and
3. The 500 ppm cleanup level imposed by the Administrative Order was too stringent, in light of site-specific data and recent Agency guidance (*Id.* at 7-11, 13-14).

Petitioners also argued in their Petition that they should not be required to reimburse the Agency for the costs the Region incurred in overseeing the work performed under the Order. They contended that the Region lacked authority to require Petitioners to pay oversight costs, and asked that Section VIII of the Order, which requires the payment of oversight costs, be stricken. Petition at 15 *et seq.* See *infra* Section II.D.

The Region filed a response to the petition on March 1, 1995. The Region argued that Petitioners had not met two threshold require-

²¹ As discussed *infra*, the Region initially argued in its Response that, although the work specified in the "Work to be Performed" section of the Order had been completed, Petitioners had not "compl[ie]d with the [Order] in its entirety" in that they had not paid Agency oversight costs, and therefore Petitioners had not met a threshold criterion for filing a reimbursement petition. Response at 11. Petitioners subsequently remitted the oversight costs and the Region withdrew that argument.

ments for filing a petition for reimbursement. Specifically, the Region contended that Petitioners had not “complied with the terms of” the Order and had not “completed the required action” because they had not reimbursed the Agency for its oversight costs, as required by Section VIII of the Order. *See* CERCLA § 106(b)(2) (providing that only persons who comply with the terms of an Order and who complete the required action may petition for reimbursement). The Region acknowledged that the Region had not sent Petitioners a bill for these oversight costs. Response at 10. It stated that it planned to submit the bill “expeditiously” and that it would withdraw its procedural objections to the petition as soon as the bill was paid. *Id.* With regard to the three substantive arguments enumerated above, the Region responded that it had acted within its authority, and in accordance with all applicable statutory and regulatory requirements in determining a 500 ppm cleanup level for lead.

On August 18, 1995, the Region sent Petitioners a bill for \$43,934.61 for oversight costs which Petitioners paid under protest on September 20, 1995. The Region advised the Board by letter of September 20, 1995, that it had received the payment, and that it was withdrawing its arguments with regard to Petitioners’ compliance with the threshold requirements for filing a petition for review. The Region maintains its substantive objections to the merits of the Petition.²²

The Board issued a preliminary decision on February 22, 1996. Petitioners filed comments on the preliminary decision (“Comments”) on March 25, 1996. After due consideration of the comments received, and making such changes as are appropriate, the Board issues this Final Decision. *See Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions* at 10 (EAB, June 9, 1994).

II. DISCUSSION

A. Public Participation In The Remedy Selection Process

Petitioners contend that the process by which the Region selected the removal action violated Agency regulations and guidance because it did not provide for adequate public participation. Specifically, they claim that the Region should have determined that the proposed action was a non-time critical removal action, and there-

²² Since the Region has withdrawn its arguments that Petitioners failed to meet two statutory threshold requirements for filing a petition for reimbursement, we express no opinion as to whether those arguments would have constituted valid objections to the timeliness of a petition.

fore should have complied with Agency regulations that require the Region to conduct an engineering evaluation/cost analysis (EE/CA) of removal options for any proposed non-time critical removal action, and solicit public comments on the EE/CA. They claim that if the Region had conducted a more extensive analysis of removal options, including holding a public comment period, Petitioners would have been able to demonstrate that less extensive measures would have addressed any risk posed by lead-contaminated soil along the route of the water main project. Alternatively, Petitioners argue that even if the Region properly determined that the removal action was a time critical removal action, and therefore that the Region was not required to conduct an EE/CA, the Region was still required to hold a public comment period. For the reasons set forth below, Petitioners' arguments are rejected.

The Agency has issued regulations at 40 C.F.R. Part 300 Subpart E that establish procedures for the Region to follow in evaluating the risks posed by a release or potential release, determining whether a removal action is appropriate, and selecting and implementing removal measures. Included in the procedures established by the regulations are requirements for the Region to provide opportunities for public participation in the selection of removal measures under specified circumstances. The regulatory procedures for selecting and implementing removal measures (including provisions for public participation in the selection process) differ depending on whether the Region has classified the removal action as time-critical or non-time critical.²³ As explained below, we conclude that, under the circum-

²³ Although the parties use the terms "non-time critical" and "time critical" removal actions in their briefs, these terms do not appear in Agency regulations. The Agency introduced these terms in OSWER Directive #9318.0-05 (April 13, 1987), as a short-hand way of distinguishing between removal actions for which it had determined that a planning period of at least six months exists before on-site activities must be initiated and removal actions for which such a lengthy planning period did not exist. The OSWER directive, titled, "Environmental Review Requirements for Removal Actions," is a policy statement articulating the Agency's strategy for complying with the National Environment Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* for CERCLA removal actions. NEPA requires federal agencies, including EPA, to study the potential environmental impact of proposed actions and to provide an opportunity for public comment on these actions "to the fullest extent possible." 42 U.S.C. § 4332. The federal courts have held that "functional compliance" rather than formal compliance with Section 4332 is sufficient where an agency (such as EPA) is engaged primarily in examining environmental questions and where substantive and procedural standards ensure full consideration of environmental issues. *Municipality of Anchorage v. U.S.*, 900 F.2d 1320 (9th Cir. 1992); *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (U.S. App. D.C. 1973). Moreover, particular federal actions may be exempt from NEPA where an Agency demonstrates an irreconcilable conflict between the requirements of NEPA and the requirements of another statute. *Westlands Water District et al. v. U.S. Department of Interior et al.*, 43 F.3d 457, 460 (9th Cir. 1994).

Continued

stances of the Beckemeyer water main renovation project, the Region did not err in determining that the removal action was time-critical nor did it err in deciding that the regulations applicable to time-critical removal actions did not require it to hold a public comment period.

Before turning to Petitioners' arguments, it is necessary to outline briefly the sequence of actions which the regulations prescribe for deciding upon a removal action. Section 300.410 describes the process by which the Region evaluates the risks posed by a release or potential release (the "removal site evaluation"). Section 300.415 establishes requirements for the Region's determination that a removal action is appropriate and for the selection and implementation of removal measures. Pursuant to Section 300.415(a)(1):

In determining the appropriate extent of action to be taken in response to a given release, the [Region] shall first review the removal site evaluation, any information provided through a remedial site evaluation, if any has been done previously, and the current site conditions, to determine if removal action is appropriate.²⁴

Section 300.415(b)(3) of the regulation then provides that:

If the [Region] determines that a removal action is appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare of the United States or the environment. The [Region] shall, at the earliest possible time, also make any necessary determinations pursuant to paragraph (b)(4) of this section.

OSWER Directive #9318.0-05 provides that:

Time-Critical Removal Actions are exempt from NEPA environmental review and public participation requirements based on statutory conflict * * *. For Non-Time-Critical Removal actions, adequate time is generally available for a formal environmental review and public comment period.

The two primary considerations in determining whether site response can be delayed are the stability of the wastes and the potential for public contact with the wastes. The Directive notes, however, that "an analysis of alternatives is performed for *all* removal actions [although it need not be extensive if time constraints preclude detailed analysis."

²⁴ The regulation enumerates factors the Region should consider "in determining the appropriateness of a removal action * * *." 40 C.F.R. § 300.415(b)(2).

Subparagraph (b)(4) requires the Region to conduct an EE/CA (or its equivalent) of removal alternatives:

Whenever a planning period of at least six months exists before on-site activities must be initiated, and the [Region] determines, based on a site evaluation, that a removal action is appropriate[.]

40 C.F.R. § 300.415(b)(4). The Region must provide a public comment period of not less than 30 days on the selection of the removal action following completion of the EE/CA. 40 C.F.R. § 300.415(n)(4)(iii); 40 C.F.R. § 300.820(a)(2). Thus, the regulations contemplate that once the Region has determined that a removal action is “appropriate,” one of the additional “necessary determinations” it must then make is the determination whether a six-month planning period is available before initiation of on-site activities within which to conduct an EE/CA and hold a public comment period. The “planning period” referred to in Section 300.415(b)(4) therefore begins with the determination that a removal action is appropriate, and ends with the initiation of on-site activities. Consistent with this reading of the regulation, OSWER Directive #9318.0-05 (Apr. 13, 1987) states that a “*Non-Time-Critical Removal Action*” is one that “may be delayed for six months or more following approval of the action memo,”²⁵ and that:

Time-Critical Removal Actions are actions initiated in response to a release or threat of release that poses a risk to public health or welfare or the environment, such that cleanup or stabilization actions must be initiated *within six months following approval of the action memo*.

Oswer Directive #9318.0-05 (Apr. 13, 1987), at 2 (emphasis added).

In this case, the Region made the determination that a removal action was appropriate when, on March 17, 1994, the Region’s Waste Management Division Director approved the “action memo,” titled Request for a Time Critical Removal Action and Determination of a Threat to Public Health or Welfare or the Environment at the Circle Smelting Corporation Site (“Action Memorandum”). *See supra* n.25. Therefore, pursuant to Section 300.415(b), the Region had the duty to determine whether, at that time, a six-month planning period existed

²⁵ The “action memo” is a memorandum prepared by Regional personnel to support their recommendation for a proposed removal action. When approved by the authorized Regional official, the action memorandum constitutes a determination that a removal action is appropriate.

during which it could conduct an EE/CA. The Region (in the Action Memorandum) characterized the proposed removal action as “time critical” (*i.e.*, a removal action for which a six-month planning period was not available). Accordingly, on March 22, 1994, it issued the Order to the Petitioners requiring them to begin removal activities promptly.

The Region has amply supported its determination that, as of March 17, 1994, when it issued the Action Memorandum, “site conditions dictated that a greater than six month window for response planning simply did not exist,” and a time-critical removal response action was therefore appropriate. Response at 17-18.²⁶ In any event, Petitioners do not dispute that determination. Instead, they argue that the Region should have conducted an EE/CA (and held a public comment period on the EE/CA) because the Region had a “planning period [of] at least six months” between June 18, 1993, when the Region sent the Village a letter stating that the Village should not replace sections of the water main that crossed contaminated areas without prior consultation with EPA, and March 22, 1994, when the Region issued the Order. Comments at 3. Petitioners argue that the Region’s June 19, 1993 letter to the Village (actually dated June 18, 1993) “effectively halted the waterline project,” and that “the response of EPA, from the point of halting the project to the issuance of the Order, took over 9 months.” Petition at 6. They contend that, since the Region spent nine months “actively planning and selecting a response action,” it therefore had ample time to conduct, and was required to conduct, an

²⁶ The Region states that:

Specifically, of primary concern to U.S. EPA were the facts that the waterline project was likely to be remobilized shortly and that frequent emergency work was required to repair breaks in the old water main. The remobilization of the waterline project and emergency repairs on the old water main would lead to a heightened short term exposure to all residents in the area and to all workers to the lead contained in the soils in the Village of Beckemeyer. It was necessary to prevent this threat of exposure in order for [the water main project] and the response actions at CSC site to take place in an efficient manner.

Response at 20. There is no question as to the urgency of replacing the old water main. *See, e.g.*, Statement of Need, Requirement for Replacement of Water System, Village of Beckemeyer, Illinois (stating that “[w]ithout the completion of the Water System Replacement as presently under construction serious health and safety problems could develop”); Letter from Village of Beckemeyer to Mark C. Gauss, Illinois Department of Commerce and Community Affairs (Aug. 13, 1992), at 1 (stating that the “old lines and reduced pressures are indeed a significant health threat”); Pitzer letter, cited *supra* at n.12.

EE/CA and to provide a public comment period pursuant to 40 C.F.R. § 300.415(b)(4). Comments at 3.

Petitioners do not state clearly the legal basis for their contention that we should regard the period between June 18, 1993, and March 17, 1994, as the “planning period” to which the regulations refer. It appears to be their contention that we should consider the June 18 letter as an “effective” determination by the Region that a removal action was appropriate because, according to Petitioners, the letter stopped the project from proceeding. Petitioners suggest that the Region spent the nine-month period that began on June 18 exploring removal options. They argue, therefore, that the fact that more than six months elapsed before the Region ordered the commencement of on-site removal activities demonstrates that a six-month planning period was available in which to conduct an EE/CA.

Petitioners’ arguments lack merit. The Region’s June 18, 1993 letter did not constitute a determination that a removal action was “appropriate” within the meaning of § 300.415(b)(4). The Region did not make that determination until March 17, 1994, when the Waste Management Division Director approved the Action Memorandum. The Region’s letter specifically stated that the Region was engaged in evaluating the site “to determine the need for action under CERCLA.” The letter asked for information that the Region needed “to assess the proposed water main project.” *Id.* A follow-up letter of July 16, 1993, stated that EPA had developed “work plan specifications” for the water main project and that the Region “may order compliance” with the specifications if the Village did not comply with them voluntarily. The Region conducted several site inspections and collected soil and slag samples for analysis between June and October 1993. These activities are typical of the removal site evaluation process described in section 300.410, which precedes the process of “determining the extent of action to be taken,” described in section 300.415. After completing its analysis, the Region issued an Action Memorandum on March 17, 1994, which documents its determination that the water main renovation project posed an “imminent and substantial endangerment” and which also documented its determination that the required removal action was “time-critical.” The Region issued the Order five days later on March 22, 1994. Petitioners have not suggested any valid legal basis for us to consider the period beginning June 18, 1993, as the “planning period” to which the regulations refer. Since the regulations require the Region to determine whether a “six-month planning period” for an EE/CA exists at the time it determines that a removal action is appropriate, and the time period of June 1993 to February 1994 preceded the Region’s determination that a removal

action was appropriate, the fact that the time period exceeded six months has no bearing on whether the Region should have conducted an EE/CA.

Petitioners further argue that even if the Region properly determined that the removal action was “time-critical,” the Region was still required to provide a 30-day public comment period pursuant to 40 C.F.R. § 300.415(n)(2)(ii). Petition at 6. That regulation provides that the Region shall “[p]rovide a public comment period, *as appropriate*, of not less than 30 days from the time the administrative record file is made available for public inspection * * *.” (Emphasis added.)²⁷ Petitioners contend that OSWER Directive #9833.3A-1, Final Guidance on Administrative Records for Selecting CERCLA Response Actions (1990), states that a comment period “is appropriate if the response action has not been completed at the time the Administrative Record is made available, and if public comments may have an impact on the selection of the response action.” Petition at 6. They argue that their comments and those of the public “could have” had an impact on the selection of the response action. *Id.* at 7.

The Region maintains the regulations do not mandate that it hold a public comment period for a time-critical removal action but merely provide that a public comment period should be held “as appropriate.” Response at 23. It states that it exercised its discretion not to hold a public comment period because it concluded that the water main replacement project could not be delayed, and because it was “unlikely that public comment would affect the selected response action.” *Id.* The Region further contends that Petitioners are mistaken in their assertion that the Region’s decision not to hold a public comment period violates OSWER Directive #9833.3A-1. *Id.* at 23; *see* Petition at 6. The Region maintains that the OSWER Directive does not require a public comment period but “merely reiterates the [regulatory] requirements * * * and explains when a public comment period, in general, would be considered appropriate.” Response at 23.

Petitioners have not demonstrated that the Region erred when it decided not to hold a 30-day public comment period for the time-critical response action. Agency regulations do not mandate a 30-day public comment period for every time-critical response action but

²⁷ Under the regulations, a public comment period for a time-critical removal action need not precede the commencement of removal activities. Any such public comment period begins when the administrative record file is made available for public inspection. For a time-critical removal action, the administrative record file must be made available within 60 days after initiation of on-site removal activity. 40 C.F.R. § 300.820(b).

merely provide that a public comment period shall be held “as appropriate.”²⁸ We construe the regulation to mean that a public comment period is not required if deemed inappropriate by the Region. We interpret the OSWER Directive as restating and amplifying the same regulatory standard. The Region states that it exercised its discretion not to hold a public comment period because it concluded that the water line replacement project should not be delayed and because it believed that public comment would not have affected its choice of remedy. Response at 16-21. This decision was well within the discretion afforded to the Region and did not render its decision arbitrary or capricious.

B. The Determination Of An “Imminent and Substantial Endangerment”

CERCLA § 106(a) authorizes the Agency to order a removal action based on a determination that there “may be an imminent and substantial endangerment to the public health or welfare or the environment.” Petitioners argue that the administrative record does not support the Region’s determination that the water main project posed such an imminent and substantial endangerment. They contend that any risk posed by the excavation of lead-contaminated soils was “minimal” and could have been alleviated through “good construction practices.” Petition at 13. As examples of such practices, they suggest that “the contractor could have easily eliminated the presence of excavated soils by excavating, placing the pipeline, and filling in any excavation each day.” Comments at 6. They assert that the risk posed to adults from a dirt pile that is exposed for a day is minimal or non-existent and that the dirt piles would not pose a risk to young children because they are “highly supervised and would not be allowed

²⁸ 40 C.F.R. § 300.415(n)(2)(ii). The Preamble to the regulations explains that the requirement that a public comment period be held “as appropriate” was intended to:

[P]reserve both the flexibility and discretion required by the lead agency in time-critical removal action situations as well as EPA’s commitment to encouraging public participation and to keeping an affected community well-informed * * *. The regulatory language * * * provides the [Agency] needed flexibility when the emergency nature of circumstances makes holding a comment period infeasible.

Final Rule, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (March 8, 1990).

The regulations at 40 C.F.R. Part 300 Subpart I, which set forth requirements for establishing the administrative record for removal actions, also provide that a public comment period for a time-critical removal action shall be held “as appropriate.” 40 C.F.R. § 300.820(b)(2). According to the preamble to the regulations, “a comment period is held only where the lead agency deems it appropriate.” 55 Fed. Reg. at 8666.

to play in excavation areas.” *Id.* Petitioners maintain, therefore, that the Region overestimated the risk posed by the water main project and that, as a result, it imposed overly stringent cleanup requirements. As explained below, Petitioners’ argument is without merit.

Both a recent decision of the Board,²⁹ and a long line of federal court decisions, have made it clear that the Region does not need to determine that an endangerment to the public health or welfare or the environment exists but only that it “may exist.” *See, e.g., U.S. v. Northeastern Pharmaceutical and Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff’d in part and rev’d in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Thus, “if ‘the public health or welfare or the environment’ may be exposed to a risk of harm, an endangerment may exist * * *. [A]n endangerment is not actual harm, but a threatened or potential harm.” *United States v. Conservation Chemical Company*, 619 F. Supp. 162, 192 (W.D. Mo. 1985). Moreover, “while the risk of harm must be imminent, * * * the harm itself need not be.” *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D. Conn. 1988). Finally, an endangerment is “substantial” whenever there is a reasonable likelihood that the public may be exposed to a threat of harm. *Id.* at 96 n.8; *U.S. v. Conservation Chemical Company* at 175, 195-96. The Agency is not required to quantify the endangerment. *Id.* Region V asserts that the water main project posed an imminent and substantial endangerment because the water line project “needed to go forward without further delay,” the project would expose the residents of Beckemeyer to soil that was contaminated with elevated lead levels unless Petitioners undertook a removal action to minimize that exposure, and exposure to lead adversely affects human health. Response at 34. The Region argues that piles of excavated soils would “pose an attractive nuisance to children,” and could be “washed away by rain or driven away by wind,” increasing residential exposure. *Id.*

The Region’s findings are amply supported by the administrative record. *See id.* and documents cited therein. The problems that the Village was encountering with the existing water supply system — problems relating to “water pressure, maintaining disinfection of the water as required by drinking water regulations, * * * repeated water main breaks, taste and odor problems, and discoloration” — are all well documented in the record. Moreover, the record also contains ample evidence that lead-contaminated soil was present in many locations throughout the Village at levels that could pose a risk to human health and the environment. *See, e.g.,* Letter from IDPH to Mayor

²⁹ *See In re Sherwin Williams Co.*, 6 E.A.D. 199, 210 (EAB 1995).

Allen Warnecke, Aug. 11, 1992. The Site Assessment Report describes the presence of soil with elevated lead levels along the route of the water main and evidence that these soils may be accessible to the residents of Beckemeyer, including young children. *See* Site Assessment Report at 4-9. *See also* Letter Report for Circle Smelting, Ecology and Environment, Inc., Jan. 5, 1994. A February 28, 1994 memorandum from Bruce C. Barrow, a toxicologist with the Illinois Department of Public Health, to Region V (“Barrow Memorandum”) describes lead-contaminated soil in the Village and states that:

Since much of the highest soil contamination off-site appears to be the results from the past use of the smelter waste materials (cinders and slag) in forming walkways, alleys, and possibly roads, disturbing the contaminated soils in these areas will likely add to possible exposure levels and increase health risks unless preventive measures are taken.

Barrow Memorandum at 3-4. The memorandum urged that “[e]very effort must be made to reduce any increased exposure and reduce any additional health risks created by the disturbance of the contaminated soil during the water system renovation project activities extending throughout the entire Beckemeyer community.” *Id.* at 4.

Petitioners do not dispute that the water main required prompt attention. They acknowledge that, without renovation, the water main posed the risk of an “unsanitary water system,” and that the renovation project would involve disturbing some lead-contaminated soil in residential areas of Beckemeyer. Comments at 5. Petitioners simply argue that the Region should have concluded that the project did not pose an “imminent and substantial endangerment” because any risk to the residents of Beckemeyer was small and could have been easily addressed with “simple preventative measures in place.” *Id.* at 7. They argue that there were only a few, widely scattered areas where the soil was contaminated with high levels of lead and that “[t]he minimal risk to the residences and children would have been alleviated merely through good construction practices that would probably have taken place even without EPA’s interference.” Petition at 12-13. They suggest, for example, that the contractor “could have easily been instructed to excavate only small segments of the pipeline at one time and that residents of Beckemeyer “could have been notified to avoid the construction areas while excavation was taking place.” *Id.* They argue that the risk that lead-contaminated soil would migrate could have been minimized by wetting down piles of excavated soil when they were dry and covering them when it rained. *Id.* at 12.

Petitioners appear to misunderstand the nature of the “imminent and substantial endangerment” finding. It relates to whether the conditions at the site posed a *threat* that necessitated a removal action. As discussed previously, the Region’s finding of an “imminent and substantial endangerment” was based on its determination that it was necessary for the Village to renovate the existing water main without delay and its further determination that excavation in connection with the renovation would expose soils along the pipeline route that were highly contaminated with lead. Neither of these points is disputed by Petitioners. These findings cannot be defeated by arguments (whether or not factually-supported) that the work could have been performed using work practices that would have minimized any risks the excavation might pose. The argument that any risk could have been addressed with less onerous response measures than those required by the Order does not prove that a risk did not exist in the first place. Thus, even if we were to find that the work practices Petitioners suggest would have been effective in alleviating the risk, that finding would not support Petitioners’ contention that no imminent and substantial endangerment existed. Moreover, we are not persuaded by Petitioners’ argument that the “good construction practices” it proposes would have been effective in alleviating any risk to the residents of Beckemeyer, and therefore, that the Region’s choice of response measures was arbitrary and capricious. Petitioners have not provided any evidence to support their assertion that their recommendations would work and therefore that removal of contaminated soil was unnecessary. Their suggestion that the residents of Beckemeyer could have been warned to stay away from contaminated soil is impractical and would have been of doubtful efficacy where young children are involved. Also at least questionable is Petitioners’ assertion that the Region need not have been concerned about any threat to young children because “children in this age group are highly supervised and would not be allowed to play in excavation areas.” Comments at 6. Therefore, this basis for seeking reimbursement is rejected.

C. The 500 ppm Cleanup Level For Lead

The Region states that, in establishing a 500 ppm cleanup level for lead, it relied in part on a risk assessment that it performed using the Uptake Biokinetic (UBK) Model, which is a computer software program that predicts blood lead levels for children from the ages of six months through six years who are exposed to the same or a similar environment, based on information about the various lead-containing media (such as air, dust, soil, and water) to which they are likely to be exposed. Response at 25, 28-29. The Region maintains that it also relied on “the then-current guidance concerning soil cleanup

levels for lead,³⁰ * * * information concerning the toxicology of lead, and the advice of U.S. EPA's toxicologist."³¹ *Id.* at 26.

Petitioners argue that the Region's determination of a 500 ppm cleanup level was arbitrary and capricious. They contend that the Region misapplied the UBK model by entering overly conservative default values for the various lead-containing media (other than soil) in Beckemeyer into the computer program. They contend that the Region should have instead used site-specific values for some intake parameters and "updated" default values for other parameters. They argue that, as a consequence of the Region's use of the inappropriate default values, the computer predicted unrealistically higher blood lead levels for the children of Beckemeyer, based on their potential exposure to lead-contaminated soil in addition to these other media. Additionally, Petitioners argue that the Region relied too heavily on the computer-generated risk prediction, and did not consider other information that would have led it to determine a much lower cleanup level. *Id.* at 8-11.

In response to Petitioners' contentions, the Region argues that it had a "reasoned basis for its decision to use a soil cleanup level of 500 ppm lead." Response at 28. It maintains that it used the version of the UBK model that was appropriate at the time and that it properly applied the model. *Id.* at 25-26. The Region states that it had limited site-specific data and therefore "saw no reason to go above the 1000 ppm interim standard and believed that the 500 ppm standard was appropriate for a residential setting."³² *Id.* at 27-28. Finally, the Region claims that it "was willing to discuss [the] cleanup level with Petitioners" during an April 12, 1994 meeting but that Petitioners "acquiesced to a soil lead cleanup level of 500 ppm." *Id.* at 24-25. *See supra* n.3.

In order for Petitioners to obtain reimbursement for any of their response costs, they must demonstrate that the Region's selection of

³⁰ The guidance to which the Region refers is OSWER Directive #9355.02 (September 1989), which recommends a soil cleanup level of 500 ppm to 1000 ppm for residential settings in the absence of site-specific factors that warrant a higher or lower level.

³¹ The toxicologist to whom the Region refers is Ms. Patricia Van Leeuwen. Samuel F. Borries, the On-Scene Coordinator for the Removal Action, has signed an affidavit stating that he consulted with Ms. Van Leeuwen before determining a cleanup level. *See* Borries Affidavit, Feb. 24, 1995. It was Ms. Van Leeuwen who performed the risk assessment using the UBK model to which the Region refers in its response to the petition.

³² *See supra* n.30. *See also infra* Part II.C.1. for a brief chronology of Agency guidance on soil lead cleanup levels..

the 500 ppm cleanup level was “arbitrary and capricious.” See CERCLA § 106(b)(2)(D). As discussed below in subsections 1-3, Petitioners have not met that burden.

Subsection 1 sets forth our reasons why the Petitioners have not met their burden of demonstrating either that the Region’s application of the model was improper or that the Region acted arbitrarily and capriciously when it failed to take into account recent Agency guidance and various data that the Petitioners claim would have affected the Region’s determination of a cleanup level for lead. Subsection 2 addresses several other matters raised by the Petitioners with regard to the cleanup level. Finally, Subsection 3 addresses Petitioners’ contention that the administrative record supporting the selection of a removal action is incomplete.

1. *The Region’s Selection Of A 500 ppm Cleanup Level*

Petitioners’ main objection to the cleanup order is that “Region V must have relied on an erroneous application of the EPA [Uptake Biokinetic Model or UBK model] using out of date default values to have arrived at the extremely overconservative and unrealistic lead cleanup standard of 500 ppm.” Petition at 8. They contend that “when the UBK model is properly applied to the site using available site-specific information, significantly higher cleanup levels are derived.” *Id.* The Region responds that the model was “used appropriately,” using the default input values that were recommended at the time.³³ To help explain and address Petitioners’ specific contentions with regard to the application of the UBK model to the site at issue, we will provide some background on the then-applicable Agency guidance on establishing soil lead cleanup levels and on the use of the UBK model in soil lead risk assessments.

In 1989, the Agency published OSWER Directive #9355.4-02, Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites (Sept. 1989) (“the Directive”), to provide guidance for Regional personnel on how to establish cleanup levels for soil contaminated by lead. The Directive “set forth an interim soil cleanup level for total lead, at 500 to 1000 ppm, which [EPA] consider[s] protective for direct contact at residential settings.” Directive at 1. The Agency issued an Update to the Directive on August 29, 1991, in which it reiterated its recommendation for “an interim soil cleanup level of 500-1000 ppm total lead for CERCLA sites characterized as residential.”

³³ See generally EPA Response to Comments of Dr. Tsuji on the UBK Model and the California Spreadsheet (unsigned and undated), referenced in the Response at 26 n.5.

Update on OSWER Soil Lead Cleanup Guidance ("Update") at 1. The Update stated that the Agency had developed a computer model known as the "uptake biokinetic (UBK) model" as a tool for site-specific risk assessments for lead in soil. While the Agency did not explicitly recommend the use of the UBK model for risk assessment, it characterized the model as "the best available approach" for "account[ing] for the contribution of various media to total lead exposure * * *." Update at 1.

The UBK model performs complex calculations which enable the Agency to predict the probable distribution of lead concentrations in the bloodstreams of a group of children. The UBK model predicts blood lead levels for children from the ages of six months through six years who are exposed to the same or a similar environment, based on site-specific information (if available) about the various lead-containing media (such as air, dust, soil and water) to which they are likely to be exposed. The Agency can also use the model to calculate "a plausible distribution" of blood lead levels within a group of children, and thereby determine what percentage of that group is likely to have blood lead levels that pose a health risk. *Id.* The Agency has determined that a level of 10 ug/dL [micrograms per deciliter] in the blood stream of a child poses such a health risk. It has further determined that a response action is appropriate when more than 5% of the affected population are predicted to have lead levels that exceed 10 ug/dL. *See* Update at 3.

The UBK model prescribes "default" input values for the various lead-containing media (such as outdoor air, indoor dust) for the Regions to use when no site-specific data are available for any particular medium. The default values are intended to be "broad-based estimates of the expected environment of a child."³⁴ The Agency may run the UBK model using actual soil lead levels, in combination with either site-specific data or default values for all those parameters for which site-specific data are unavailable. Based on the Agency's experience in running the UBK model, when the computer runs are performed using default values for all media other than soil, the model will predict bioaccumulation of lead at levels that exceed the threshold level of concern whenever the actual soil samples have lead concentrations exceeding 500 ppm. Update at 3.³⁵

³⁴ IEUBK Guidance Manual at 1-4. *See* n. 35, *infra*.

³⁵ On March 23, 1994, the Director of EPA's Office of Emergency and Remedial Response transmitted to Regional Offices a Guidance Manual for the Integrated Exposure Uptake
Continued

We turn now to the application of the foregoing Agency guidance and procedures to the cleanup order at issue. The Region relies on an analysis by Ms. Patricia Van Leeuwen, a Region V toxicologist, of the results of computer runs performed with the UBK model in connection with a risk assessment for lead contamination in the Village of Beckemeyer.³⁶ According to Ms. Van Leeuwen, the Region's computer runs were performed using default values for all intake parameters other than soil. She describes the specific default values the Region used as follows:

The indoor dust level was assumed to be 85% of the outdoor soil level; model defaults were used for air level (0.200 ug PB/m³), indoor air concentration (30.0% of outdoor air), diet (standard FDA market basket levels), water (4.00 ug PB/L) and the geometric standard deviation (GSD). The paint intake was considered to be zero, so that the effect of the soil exposure could be evaluated.

Van Leeuwen Memorandum at 1. Ms. Van Leeuwen concluded that, when the model was run using default values for all parameters other than soil, it predicted "a probability" that more than 5% of the children exposed to environmental sources of lead in Beckemeyer will have blood lead levels greater than 10 ug/dL when lead in soil levels equalled or exceeded 530 ppm.³⁷ As noted *supra*, the Agency has determined that a response action is appropriate when the risk to children meets these criteria. Ms. Van Leeuwen concluded, therefore, that "any soil with this level, given the assumed exposure scenario, will present a chronic risk of elevated blood lead levels and the accompanying health risk."³⁸ *Id.*

Biokinetic (IEUBK) Model for Lead in Children (Feb. 1994) ("IEUBK Guidance Manual"), with a recommendation that the IEUBK model be used for risk assessments at CERCLA sites. Since the Guidance Manual was issued after the Order, it does not apply to the Region's risk assessment in this case. However, as will be discussed *infra*, Petitioners cite to this document for "updated" default values.

³⁶ See the Van Leeuwen Memorandum, cited *supra* at n.10. The Van Leeuwen Memorandum does not indicate when the soil samples were collected that were used for the model runs. However, the identifying numbers on the soil samples do not correspond to the identifying numbers of the 14 soil samples collected in March 1993. The samples may have been those collected in July 1988.

³⁷ A lead concentration of 530 ppm is not surprising because, as noted previously, when default values are used in the UBK model for all media other than soil, the model will predict bioaccumulation of lead at levels of concern when lead concentrations in the soil exceed 500 ppm.

³⁸ Although Ms. Van Leeuwen does not describe the "assumed exposure scenario" in her memorandum, we assume that her intended reference is to the presence of lead-contaminated soils at the smelter site and in residential areas within the Village of Beckemeyer.

Based upon the model runs, and Ms. Van Leeuwen's analysis of them, the Region selected a cleanup level of 500 ppm.

Ms. Van Leeuwen's analysis of the computer runs preceded and did not specifically address the risks posed by the water main project. However, Ms. Van Leeuwen relied on these computer runs when she was subsequently consulted as to an appropriate cleanup level for the water main project.³⁹

Petitioners argue that the "proper application of the UBK model at this site results in lead cleanup levels for residential children between 3,260 and 4,685 ppm." Petition at 8-9. They explain that they derived the higher cleanup levels by running the UBK model using "updated" default values for outdoor air concentrations, dietary intake levels, and soil and dust ingestion rates, instead of the default values used by the Region, and by using values for indoor dust concentration and bioavailability that are based on site-specific information instead of using default values.⁴⁰ *Id.* at 9. The cleanup level of 3,260 ppm was obtained using a geometric standard deviation of 1.35 and the cleanup level of 4,685 ppm was derived using a geometric stan-

³⁹ Affidavit of Patricia A. Van Leeuwen (Feb. 23, 1995), at 2.

⁴⁰ Petitioners contend that the cleanup standards they propose for the water main renovation project are conservative because they "were developed for remediation of the Village overall and are not specific to the waterline project." Petition at 9, n.6. They refer the Board to a 20-page report written by Dr. Joyce Tsuji of Kleinfelder, Inc. entitled *Review of Engineering Evaluation and Cost Analysis, Circle Smelting Site*, dated August 4, 1994 ("the Tsuji report"), for a "detailed discussion of determining cleanup levels." *Id.* at 9.

The Tsuji report consists of Dr. Tsuji's comments on the April 29, 1994 EE/CA that was prepared for the proposed *non-time critical* response action for the Village of Beckemeyer, which, as the Region explains, is "separate and distinct from the [water main renovation project] that is at issue in this proceeding." Response at 30. The Tsuji Report does not comment on the water main renovation project. *Id.* Therefore, many of Dr. Tsuji's comments are not relevant to the selection of a removal action at issue in this proceeding. For example, Dr. Tsuji's assertion that version 0.5 of the UBK model was outdated when the Region conducted the EE/CA for the non-time critical removal action has no bearing on whether version 0.5 of the UBK model was appropriate for the time-critical removal action. In addition, it appears that the model runs used for the EE/CA were *different model runs* than those that were used to support the time-critical response action. (For example, the Region states in the EPA Response to Comments of Dr. Tsuji that the computer runs for the EE/CA used an indoor dust lead to outdoor soil lead ratio of 40% while the Van Leeuwen Memorandum states that the model runs used for the time critical removal action used an indoor dust lead to outdoor soil lead ratio of 85%.) Finally, we note that the EE/CA, Dr. Tsuji's comments, and the Agency's response to her comments, are not part of the administrative record. We look to the Tsuji Report and the Agency's comments on it only to the extent that they have been incorporated as technical argument into the petition and response.

dard deviation of 1.6.⁴¹ The values proposed by Petitioners (for inputs where they disagree with the Region), as compared to the values used by the Region, are set forth in a table below:

	<i>Petitioners' Values</i>	<i>Region's Values</i>
Indoor Dust	10% ⁴²	85%
GI absorption	20%	30%
Outdoor air concentration	0.100	0.200
Daily ingestion of soil(ug/day) (varies by age of children)	0.021-0.135	0.10
Dietary intake (ug/day)(varies by age of children)	5.53-7.00	5.88-7.48

a. *Values For Indoor Dust and GI Absorption.*

Petitioners argue that the Region should have used site-specific values instead of default values for indoor dust concentration and for gastrointestinal (GI) absorption. They contend that a value of 10% for indoor dust concentration would have been more appropriate than the default value of 85% used by the Region. They further contend that a 20% value for GI absorption of lead from soil and dust (the per-

⁴¹ The geometric standard deviation (GSD) is a numerical factor used in statistical analysis that, as applied to this case, "reflect[s] variability among individuals who have contact with a fixed lead concentration." IEUBK Guidance Manual at 1.3.1. The Agency's choice of a GSD for a particular risk analysis reflects its assumption, based on experience, of the extent to which the responses of the group being studied will tend to cluster near the mean response or will be widely distributed. The Van Leeuwen Memorandum does not specify the geometric standard deviation that was used. However, the default GSD for version 0.5 of the UBK model is 1.42. See EPA Response to Comments of Dr. Tsuji on the UBK model and the California Spreadsheet at 3 (unsigned and undated) ("EPA Response to Comments of Dr. Tsuji"). We do not construe the petition as challenging the Region's use of the default GSD of 1.42 for the model runs that are at issue. To the extent that Petitioners intended to make that argument, we reject it. The selection of an appropriate GSD is within the Region's discretion. Petitioners have not demonstrated that their exercise of discretion was inappropriate.

⁴² The 10% figure is an approximation. The actual proposed value is the specified percent plus an additional 100 micrograms of lead per gram of dust for every microgram of lead in a cubic meter of air.

centage of ingested lead that enters the bloodstream) would have been more appropriate than the 30% default value used by the Region. To support both contentions, Petitioners argue that the major source of lead in Beckemeyer is cinders used as fill material, and that cinder particles that would be exposed by the water main renovation project are large and therefore would be unlikely to attach to household dust and would also be unlikely to be ingested. *See* Dr. Tsuji Report at 17-18.

The Region maintains that it was appropriate to use default values for all media, including indoor dust and gastrointestinal absorption, because the record contained no adequate site-specific data (such as site-specific measurements of dust levels) to support the use of alternative values. It asserts that it would have considered site-specific data had Petitioners provided it but that the Region did not have any obligation to generate such data. Moreover, the Region disagrees with the Petitioners' description of the size of the cinder particles. It describes them as "friable cinder waste which crumbles easily," and asserts that "most particles are easily crushed or pulverized into dust-like particles, which would be "easily ingestible and can cling to clothing and be tracked indoors." EPA Response to Comments of Dr. Tsuji at 2; Response at 30. Therefore, the Region maintains that the use of the default values was reasonable.

Petitioners' argument that the Region should have used site-specific values for indoor dust and GI absorption is rejected. Since the administrative record does not contain site-specific data supporting alternative values for these parameters, the Region did not err in relying on default values. Petitioners' site-specific recommendations and supporting information (which we note the Region disputes) were first presented to the Region in the Tsuji report, which was not written until August 4, 1994, several months after the Region issued the Order and after the Region had established the 500 ppm soil lead cleanup level for this removal action. Failure to consider these data, which had not been presented to the Region at the time it made its decision, was clearly not arbitrary and capricious.

b. Updated Default Values For Other Parameters.

Petitioners argue that the Region should have used "updated" default values for outdoor air concentration, dietary intake levels, and soil and dust ingestion rates. Their argument is without merit. The Region asserts that the UBK model runs on which it relied in selecting a soil lead cleanup level were the model runs that were discussed in the April 1, 1993 Van Leeuwen Memorandum. These model runs

were performed using the default values that were appropriate at that time. The “updated default values” that Petitioners propose are the default values recommended in the IEUBK Guidance that OSWER issued to the Regions on March 23, 1994. Since the IEUBK Guidance was issued subsequent to the Region’s risk assessment and the issuance of the Order to Petitioners, the Guidance is irrelevant in judging the Region’s selection of the cleanup level for this removal action.

2. *Other Considerations*

In addition to Petitioners’ specific objections to the input values used in the UBK model runs, Petitioners also argue that the Region failed to take certain factors into account in selecting a response action. For the reasons stated below, their arguments are rejected.

First, Petitioners argue that the Region “did not consider adult standards when assessing risk to the pipeline construction workers even though these workers are the only individuals really in contact with the excavated soils.” Petition at 10. They argue that the UBK model, on which the Region relied, measures long-term risk to children, and that it “cannot be used to assess risk to workers” with a short-term exposure. Comments at 7 and n.6. They contend that the California Department of Toxic Substances Control has developed a model for assessing the risk to adults, and that, “using an adult target blood lead level of 25 ug/dl and conservative default values, application of the model results in a lead cleanup level of 17,000 ppm.” Petition at 10; Comments at 7. The Region asserts that it based its cleanup level on the risk of lead exposure for young children because there is a risk of exposure for such children and they are more sensitive to exposure than adults.⁴³ Response at 28. Moreover, the Region asserts that it regards the UBK model as more accurate than the “California spreadsheet” because the UBK model “simulates lead uptake, distribution within the body, and elimination of lead from the body,” while the “California spreadsheet” merely adds the exposures from five pathways. *Id.* at 28-29.

Petitioners’ argument is rejected. Petitioners’ toxicologist acknowledges that “[y]oung children tend to have greater exposure to soil because of their hand-to-mouth behavior and greater inherent

⁴³ See, e.g., the statement in the Van Leeuwen Memorandum that “the fact that children are a very fragile population of concern should be considered in all decisions involving a removal action.” As discussed in Section II.B. of this decision, *supra*, we find Petitioners’ assertions that young children were not at risk because they could have been warned to stay away from the site to be highly unrealistic.

susceptibility to toxic effects of chemicals.” Tsuji Report at 7. Petitioners have not demonstrated how the Region’s use of the California spreadsheet to assess blood levels in adults would have affected the Region’s determination of a cleanup level for lead protective of residential children. Moreover, the Region has articulated a plausible justification for deciding not to rely on the California spreadsheet rather than the UBK model. Petitioners have not demonstrated that this rationale is flawed.

Second, Petitioners argue that the Region did not take into account blood lead data generated by the Illinois Department of Health that “indicates that a lead problem in the Village of Beckemeyer does not exist.” Petition at 10-11. Petitioners have appended to their petition a news release from the Illinois Department of Public Health (IDPH) dated March 11, 1994, which states that “blood tests of Beckemeyer residents found no evidence that exposure to emissions from the Circle Smelting Site in Clinton County resulted in elevated blood lead levels.” They further assert in their Comments on the Preliminary Decision that the Region acted arbitrarily and capriciously when it failed to request the data and to review them before determining a cleanup level. Comments at 9. The Region responds that IDPH did not provide it with the data described in that news release until June 15, 1994, and therefore the data “[were] not appropriate for inclusion in the Administrative Record * * *” for the Order. Response at 36. Moreover, the Region has provided a detailed explanation why it believes that reliance on these data is not justified. Response at 32. The Region asserts that the IDPH data were based on a “screening” rather than a “full-blown exposure study.” Response at 30. It enumerates a number of factors that may adversely affect the probative value of the IDPH data, including the fact that data were obtained only from volunteers and therefore may not be representative of the residents of Beckemeyer. Response at 32.

Petitioners have not shown that the Region had the data at the time it issued the Order,⁴⁴ nor have Petitioners responded to any of the concerns raised by the Region relating to the utility of the IDPH data, nor have they demonstrated how the IDPH data should have affected the selection of a response action, particularly since the Circle Smelting Site emissions are not the sole source of exposure to lead in Beckemeyer. Therefore, we find no basis for concluding that the

⁴⁴ See *Elf Atochem North America, Inc. v. U.S.*, 882 F. Supp. 1399 (E.D. Pa. 1995)(rejecting proffered after-acquired data not in the administrative record submitted for purposes of showing that the Agency made the “wrong” decision, as opposed to information submitted to clarify the basis for the Agency’s decision). See *infra* n.49.

Region erred in not considering these data in its selection of a response action.

Third, Petitioners argue that the Region “disregarded recent studies and proposed guidance when selecting the response action.” Petition at 11. In particular, Petitioners cite a 1993 Urban Soil Lead Abatement Demonstration Project (Draft), the Agency’s Revised Interim Soil Lead Guidance for CERCLA Sites, and the Agency’s TSCA Section 403 Guidance. They contend that the Urban Soil Lead Abatement Demonstration Project indicates that reducing soil lead levels did not lower blood lead levels in children. They contend that the guidance documents both recommend higher soil lead cleanup levels than 500 ppm.

The Region responds that the Revised Interim Soil Lead Guidance and the TSCA Section 403 guidance were both issued on July 14, 1994, and therefore neither could have been considered in issuing the Order involved in this matter. We agree. We reject Petitioners’ contentions with regard to the Urban Soil Lead Abatement Project because they have not demonstrated how the results of the project would have affected the selection of a soil cleanup level.

3. *Administrative Record*

Finally, as previously noted, CERCLA § 106(b)(2)(D) provides that the Region’s selection of a response action be based “*on the administrative record*” (emphasis added).⁴⁵ Petitioners contend that “[t]he Administrative Record on which the EPA based its selection of the response action was incomplete,” alleging four specific omissions from the administrative record.⁴⁶ Petition at 13- 14. The petition contains no discussion or supporting arguments as to how these alleged omissions make the selection of the 500 ppm cleanup level arbitrary and capricious or otherwise not in accordance with law. For that reason alone, Petitioners’ arguments are without merit. In addition, for the reasons set forth below, we conclude that Petitioners’ arguments respecting the incompleteness of the record because of the alleged omissions are without merit.

⁴⁵ The Board has issued guidance stating that “EPA will review a claim under subsection 106(b)(2)(D) based solely on the information contained within the administrative record for the selection of the response action.” Guidance on Procedures for Submitting CERCLA Section 106(b) Petitions and on EPA Review of Those Petitions (June 9, 1994), at 6.

⁴⁶ Petitioners’ assertion that the Region misapplied the Uptake Biokinetic Model (“UBK Model”) has nothing to do with Petitioners’ argument regarding the completeness of the administrative record and is addressed *supra* in Section II.C.1.

Petitioners' first three alleged omissions require little discussion. First, Petitioners contend that the administrative record does not contain a "thorough risk assessment." *Id.* at 14. That assertion is no more than a restatement of their argument that the Region should have conducted an "EE/CA." As explained in Section II.A., *supra*, none was required. Therefore, their argument is rejected. Second, Petitioners contend that the administrative record does not include public comments. That assertion is merely a restatement of Petitioners' argument that the regulations required the Region to hold a public comment period. As explained in Section II.A., *supra*, the Region had the discretion not to hold a public comment period. Therefore, we reject Petitioners' argument. Third, Petitioners argue that the administrative record should have included blood lead data collected by the Illinois Department of Health ("IDPH"). Petitioners' argument lacks merit because, as explained *supra* in Section II.C.2., Petitioners have not demonstrated that the data were available to the Region before it selected a removal action nor have they demonstrated how those data would have affected that selection.

Fourth, Petitioners assert generally that "EPA did not include documentation in the administrative record to support its choice of a 500 ppm soil cleanup level for lead." Petition at 14. The Region has identified eleven documents containing site-specific information on which it relied in selecting a cleanup level, all of which are listed either in the April 1, 1994 Administrative Record Index or the June 3, 1994 Administrative Record Index Update, and therefore are part of the administrative record that supports the selection of the removal action.⁴⁷ Region's Response to September 19, 1995 Order (Sept. 25, 1995). These documents confirm the presence of soil with elevated lead levels along the route of the proposed water main. However, they do not support a particular soil lead cleanup level. We have supplemented the administrative record with three additional documents, OSWER Directive #9355.04-2, Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites (Sept. 1989), an August 29, 1991 Update to the Directive, and the Van Leeuwen Memorandum

⁴⁷ The Region asserts that it also relied on an additional 131 documents listed in a February 25, 1995 Administrative Record Index Update. These documents consist almost entirely of published studies describing the adverse health effects of exposure to lead.

Agency regulations at 40 C.F.R. § 300.425(n)(2)(i) direct the Region to create an administrative record file, and publish notice of its availability, within 60 days of the initiation of the removal action. The February 25, 1995 update index was published nine months after the initiation of the removal action on May 14, 1994, and several months after the petition for reimbursement was filed on November 22, 1994. Therefore, the documents listed in the index are not part of the administrative record for this proceeding.

(discussed *supra* at II.C.1.)⁴⁸ These three documents were all in existence at the time the Region established the 500 ppm cleanup level and the Region represents that it relied on them in selecting a 500 ppm cleanup level. These documents fall within “generally accepted exceptions to the administrative record rule,” which “allow [a reviewing tribunal] to consider supplemental materials if * * * 1. [r]eview is frustrated because the record fails to explain the agency’s actions [or] * * * 2. the record is incomplete * * *.” *Elf Atochem North America v. U.S.*, 882 F. Supp. 1499, 1501 (E.D. Pa. 1995).⁴⁹ See also *U.S. v. Princeton Gamma-Tech, Inc.*, 817 F. Supp. 488, 495 (D.N.J. 1993), *rev’d and remanded on other grounds*, 31 F.3d 138 (3d Cir. 1994). As supplemented, the administrative record contains adequate documentation of the data on which the Region relied to support the Region’s selection of a response action.

D. Oversight Costs

In the original Petition, Petitioners asked the Board to strike from the Order Section VIII, which requires them to pay Agency costs incurred in overseeing the removal action. Petitioners argued that the Agency lacks authority to require reimbursement for oversight costs, citing *U.S. v. Rohm and Haas Co.*, 3 F.2d 1265 (3d Cir. 1993). The Region responded that the Board does not have the authority to strike contested portions of an order issued under CERCLA § 106(a). Response at 41. The Board’s Preliminary Decision indicated that the Board intended to deny Petitioners’ request to strike Section VIII of the Order.

In their Comments, Petitioners ask the Board to “reconsider its refusal to review Respondent’s authority to seek reimbursement” of

⁴⁸ OSWER Directive #9355.4-02 (Sept. 1989) and the April 1, 1993 Van Leeuwen Memorandum were identified by the Region as part of the February 25, 1995 Update. While that Update was untimely, we have ourselves supplemented the record to include these documents for the reasons discussed in the text.

⁴⁹ *Elf Atochem* is a memorandum ruling on the scope of judicial review of Agency action under CERCLA § 113(j)(1), 42 U.S.C. § 9613(j)(1), which provides that:

In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. *Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.*

42 U.S.C. § 9613(j)(1) (emphasis added). The court noted four recognized exceptions to the rule limiting review to the administrative record in ruling that after-developed evidence proffered by the defendant did not meet any of these exceptions.

oversight costs. Comments at 10. They also ask the Board to allow amendment of their original Petition “to include oversight costs paid under protest by Petitioners on September 29, 1995,” after they filed the Petition. Comments at 2. They assert that the oversight costs amounted to \$43,934.61. *Id.*⁵⁰

We find Petitioners’ comments confusing. To the extent that they intend by their Comments to raise again the argument that the Board has authority to strike Section VIII from the Order, we reject the argument. As we stated in the Preliminary Decision, the Board’s jurisdiction in this matter is circumscribed by Section 106(b) of CERCLA. CERCLA §§ 106(b)(2)(C) and (D), respectively, authorize us to grant petitions for reimbursement of response costs, based on a demonstration that the petitioner is not liable for response costs or that the Region’s decision in selecting a response action was “arbitrary and capricious or otherwise not in accordance with law.” Petitioners’ challenge to the validity of Section VIII of the Order in the form of a request to strike is neither a claim for reimbursement under subsection (2)(C), based on Petitioners’ alleged nonliability, nor a claim for reimbursement under subsection (2)(D), based on a challenge to the Region’s selection of the response action, and therefore it is not cognizable under either statutory provision. Since the Board lacks jurisdiction to grant Petitioners the relief they seek, their request to strike Section VIII of the Order is denied.

To the extent that Petitioners also appear to be requesting, for the first time in their Comments, reimbursement for oversight costs, their request is untimely. CERCLA § 106(b)(2)(A) provides that a petition for reimbursement of the costs of a response action must be filed within “60 days after completion of the required action.” As we recently stated in *In re A & W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996), the failure to satisfy statutory conditions “justifies denial of the petition without any consideration of the merits of petitioner’s claim.” *Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1996), *cert. denied*, 116 S.Ct. 699 (1996) (failure to comply with a cleanup order precluded consideration of the merits of petitioner’s claim). Consistent with the statute, the Board’s CERCLA guidance provides that: “[T]he Board will, except in extraordinary circumstances, decline to consider any new claims or new issues sought to be raised during the comment period [on the Preliminary Decision].” Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions at 11 (June 8, 1994).

⁵⁰ The original Petition seeks \$469,686.49 in cleanup costs.

In this case, Petitioners paid the bill for oversight costs on September 20, 1995. However, their request for reimbursement for oversight costs was first made on March 20, 1996, when they filed their Comments on the Preliminary Decision. If payment of oversight costs is part of the selection of the response action, as Petitioners now suggest, the response action was "completed" within the meaning of the statute on September 20, 1995, when Petitioners remitted their payment for oversight costs.⁵¹ Therefore, the time to petition for reimbursement of those response costs expired sixty days later. Petitioners have given no explanation for their failure to seek amendment of their Petition during that time period. If we were to allow Petitioners to raise this wholly new claim now, we would be undermining the clear statutory requirement that claims be filed within sixty days. Therefore, the assertion of this new request is untimely and must be denied.⁵²

III. CONCLUSION

Based on the foregoing, the Board concludes that Petitioners have not demonstrated that Region V acted arbitrarily and capriciously or otherwise not in accordance with law when the Region issued the Order requiring Petitioners to remove soil contaminated with lead at levels that exceed 500 ppm along the route of the water main project in Beckemeyer, Illinois. Accordingly, Petitioners' request for reimbursement of their response costs is denied in all respects. The Board further concludes that it lacks jurisdiction to entertain Petitioners' request to strike Section VIII of the Order, which requires Petitioners to reimburse the Region for its costs in overseeing implementation of the Order. Petitioners' request to that effect must also be denied. Finally, Petitioners' request for reimbursement of oversight costs is rejected as untimely and Petitioners' request to amend the Petition to include such costs is denied.

So ordered.

⁵¹ Indeed, if oversight costs are part of the response action, as Petitioners now assert, it would follow that the Petition as a whole was premature, since it was filed before the response action was completed. In fact, the Region made that argument in its response to the Petition. However, since the Region withdrew its objections based upon the prematurity of the Petition, we will not consider whether to dismiss the entire Petition on that basis.

⁵² Since we are denying the request for reimbursement of oversight costs as untimely, we are denying the request to amend the Petition to include these costs as well.