IN RE THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, AND ECDC ENVIRONMENTAL L.C./LAIDLAW ENVIRONMENTAL SERVICES, PETITIONERS

CERCLA § 106(b) Petition No. 96-5

FINAL ORDER DENYING REIMBURSEMENT IN PART AND ORDER GRANTING REIMBURSEMENT IN PART

Decided May 30, 2001

Syllabus

On October 12, 1995, the barge PATRICIA SHERIDAN, loaded with approximately 12,000 tons of material dredged from the Howland Hook Marine Terminal on Staten Island, New York, grounded near the Charleston Harbor in South Carolina, spilling approximately 2,500 tons of the dredged material.

Petitioners, the Port Authority of New York and New Jersey ("Port Authority") and ECDC Environmental, L.C. and Laidlaw Environmental Services, Inc. ("ECDC"), seek reimbursement of costs in excess of $4,600,000 that they contend they spent in complying with a unilateral administrative order ("UAO") issued by the United States Coast Guard acting under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a). The UAO required the removal of the materials that spilled from the PATRICIA SHERIDAN, which contained dioxin. ECDC, which had contracted with the Port Authority to perform the dredging at Howland Hook Marine Terminal and dispose of the dredged material, fulfilled the terms of the UAO issued to Port Authority.

Petitioners contend that they are entitled to reimbursement under section 106(b) of CERCLA because they are not liable for the cleanup and because the Coast Guard arbitrarily and capriciously selected the response action ordered by the UAO. On the issue of liability, Petitioners assert that they are not within the scope of any of the classes of liable persons under CERCLA § 107(a), 42 U.S.C. § 9607(a). The UAO provides that the Port Authority, by contract, agreement, or otherwise, arranged for the disposal of hazardous substances it owned, namely dioxin contained in the dredged material, and is therefore liable under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). Petitioners contend that an "arranger" can be liable under CERCLA § 107(a)(3) only for releases from a "facility," and that the statute expressly excludes vessels from the definition of "facility." Therefore, the Petitioners maintain, the statute precludes a finding of "arranger liability" under CERCLA § 107(a)(3) for releases that originate from vessels.

With regard to the remedy selection, Petitioners assert that the Coast Guard acted in an arbitrary and capricious manner because the Coast Guard failed to demonstrate the existence of an "imminent and substantial endangerment" prior to issuing the UAO, and because the UAO contains various arbitrary and capricious requirements, including the following: (1) in a February 28, 1996 amendment to the UAO, the Coast Guard required that Petitioners conduct additional dredging in an area around the spill site (designated as area "B-2") containing allegedly "elevated" dioxin levels, and to demonstrate that the area had been cleaned to pre-spill background levels even though no data on pre-spill background levels were available; and (2) in a March 1, 1996 amendment to the UAO, the Coast Guard, arbitrarily required future sampling and monitoring of the entrance channel, also based on allegedly "elevated" dioxin levels.

Held: With regard to liability, the Environmental Appeals Board concludes that Petitioners, who undeniably arranged for a hazardous substance to be shipped by barge for the purpose of disposal, are liable for the cleanup of the materials that spilled from the barge and came to be located at a discrete place on the ocean floor while in transit to the designated disposal site. The Board concludes that the Coast Guard has not misapplied the statute by concluding that the spill site in question is a "facility" for the purposes of CERCLA. Petitioners, as arrangers for disposal, fall clearly within the scope of those persons subject to liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). That is, the factors necessary for liability are all present in this case, i.e., an arrangement for disposal of hazardous substances owned or possessed by Petitioners and the disposal of those hazardous substances — although not in the form anticipated by Petitioners — at a facility (the ocean bottom) from which there was a release or threatened release. The exclusion of vessels from the definition of "facility" does not insulate arrangers from all potential liability for releases of hazardous substances that originally emanated from a vessel. Although the statutory language may allow for more than one possible interpretation, the better interpretation with regard to the issue before us, and the one that best reflects the broad remedial purposes of the statute, is that where, as here, a hazardous substance is released from a vessel and comes to be located at a discrete place on the ocean bottom, a facility within the meaning of CERCLA is created on the ocean bottom. Petitioners have not met their burden of proving that they are not liable within the meaning of CERCLA § 106(b)(2)(C).

With regard to Petitioners' assertion that certain of the Coast Guard's actions were arbitrary and capricious, the Board agrees that Petitioners are entitled to reimbursement of reasonable costs incurred in responding to both the February 28, 1996 and March 1, 1996 amendments to the UAO because the Coast Guard failed to provide a contemporaneous reasoned explanation for its determination that dioxin levels in area B-2 were "elevated." Although the Coast Guard generally referenced the existence of samples that purportedly support its determination that the levels were elevated, it has not identified nor has the Board found any place in the administrative record where there is a reasoned explanation of the basis for the conclusion that the samples were elevated. Absent such a reasoned explanation, the Board concludes that the February 28, 1996, and March 1, 1996, amendments to the UAO, which were issued in the absence of background data, were arbitrary and capricious. The Petition is therefore granted with regard to the reasonable costs incurred in complying with these amendments.

In all other respects, the UAO is not arbitrary and capricious, and the Petition for Reimbursement is therefore denied.

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

Opinion of the Board by Judge Stein:

On October 12, 1995, the barge PATRICIA SHERIDAN, loaded with approximately 12,000 tons of material dredged from the Howland Hook Marine Terminal on Staten Island, New York, grounded near the Charleston Harbor in South Carolina, spilling approximately 2,500 tons of the dredged material.

On January 10, 1996, the United States Coast Guard ("Coast Guard"), acting under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a), issued a unilateral administrative order ("UAO") to the Port Authority of New York and New Jersey ("Port Authority") requiring the removal of the materials that spilled from the PATRICIA SHERIDAN. Administrative Record at 125 ("AR").[1] ECDC Environmental, L.C. and Laidlaw Environmental Services, Inc. (collectively "ECDC"), which had contracted with the Port Authority to perform the dredging at Howland Hook Marine Terminal and dispose of the dredged material, fulfilled the terms of the UAO issued to Port Authority.

On October 15, 1996, Port Authority and ECDC (collectively "Petitioners") filed a petition for reimbursement of costs in excess of $4,600,000 that they contend they spent in complying with the UAO. Petition for Reimbursement at 17 ("Petition"). Petitioners contend that they are entitled to reimbursement because they are not liable for the cleanup and because the Coast Guard arbitrarily and capriciously selected the response action ordered by the UAO. The Coast Guard responded to the Petition,[2] and Petitioners have submitted a reply to the Coast Guard's response.[3] On August 18, 1998, the Board ordered the parties to submit supplemental briefs on the issue of liability. These briefs were submitted on November 12, 1998.[4] The Board held oral argument on the issue of liability on April 28, 1999. In the course of its deliberations, the Board determined that the Coast Guard's November 12, 1998 supplemental brief was not responsive to the Board's August 18th order to the extent that the brief did not include a discussion

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[1] The documents in the administrative record submitted by the United States Coast Guard are consecutively numbered and will be referred to in this decision as "AR" along with the number of the document.

[2] Reply on the Merits to Petition for Reimbursement of Costs (Feb. 6, 1998) ("Coast Guard Reply").

[3] Response of Petitioners ECDC Environmental, L.C./Laidlaw Environmental Services, Inc. to Coast Guard Reply on the Merits to Petition for Reimbursement of Costs (Mar. 18, 1998).

[4] *See* [Petitioners'] Supplemental Brief; [Coast Guard's] Supplemental Brief to the Reply on the Merits to Petition for Reimbursement of Costs.

of CERCLA legislative history. Thus, on December 2, 1999, the Board ordered the Coast Guard to submit an additional brief responsive to the Board's request in this regard. The Board also encouraged the parties to renew settlement negotiations and to advise the Board on the status of any such negotiations.[5] Thereafter, the parties entered into settlement discussions. By order dated April 21, 2000, the Board stayed proceedings in this matter until August 15, 2000, to allow settlement discussions to continue. Order Staying Petition for Reimbursement. On June 2, 2000, the parties informed the Board that they were no longer proceeding with settlement discussions.

On January 10, 2001, the Board issued a Preliminary Decision in which it proposed to deny in part and grant in part the Petition for Reimbursement. On March 5, 2001, the Coast Guard filed comments on that part of the Preliminary Decision granting the Petition for Reimbursement. ECDC filed comments on March 26, 2001, in which ECDC responded to the Coast Guard's comments. Neither party filed comments on that portion of the Preliminary Decision in which the Board proposed to deny the Petition for Reimbursement. Having considered the comments, and other submissions by the parties in support of, and in opposition to, the Petition for Reimbursement, and making such changes as are appropriate, the Board issues this Final Order Denying Reimbursement In Part and Order Granting Reimbursement In Part. *See* Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions at 9-11 (EAB, Oct. 9, 1996).

I. *BACKGROUND*

A. *Factual*

On July 31, 1995, the U.S. Army Corps of Engineers (the "Corps") issued a permit allowing the Port Authority to dredge approximately 150,000 cubic yards of material from the berth areas at the Howland Hook Marine Terminal on Staten Island. AR 7. In order to obtain this permit, the Port Authority was required to sample and analyze representative soils from the project area to characterize the dredged material. The sampling and analysis indicated that the material to be dredged was not a hazardous waste for the purposes of the Resource Conservation and Recovery Act ("RCRA"),[6] but it contained trace amounts of dioxin, polychlorinated biphenyls ("PCBs"), and metals. *Id*. The permit issued by the Corps allowed the Port Authority to de-water the dredged material and transport it by covered, ocean-going barges to Corpus Christi, Texas, where the dredged ma-

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[5] The Coast Guard submitted its second supplemental brief on February 18, 2000. *See* Second Supplemental Brief to the Reply on the Merits to Petition for Reimbursement of Costs.

[6] 42 U.S.C. §§ 6901-6992k.

terial would be transferred to railroad cars and shipped to a non-hazardous waste disposal site in East Carbon, Utah. *Id*. The Port Authority contracted with ECDC to perform the dredging and disposal authorized by the Corps permit.

ECDC arranged with Sheridan Transportation Company ("Sheridan"), owner of the barge the PATRICIA SHERIDAN, to transport the dredged material to Corpus Christi. On October 11, 1995, the PATRICIA SHERIDAN, loaded with approximately 12,000 tons of dredged material, was en route to Corpus Christi when it encountered adverse weather conditions and began to founder near the Charleston, South Carolina harbor. Arrangements were then made for a harbor pilot to take the barge into the harbor for protection.

The PATRICIA SHERIDAN's attempt to enter the Charleston Harbor was unsuccessful. At approximately 1:30 a.m. on October 12, 1995, the PATRICIA SHERIDAN grounded 150 feet south of the Charleston Harbor entrance channel. AR 6. When Coast Guard investigators arrived after sunrise, they found the hatches missing from one of the barge's three hoppers. Approximately 2,500 tons of dredged material had spilled near the entrance channel. AR 83. It is undisputed that the spilled dredged material contained dioxin.

The Coast Guard Captain of the Port for Charleston, Commander Marvin Pontiff, assumed the role of On-Scene Coordinator ("OSC") pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). *See* 40 C.F.R. § 300.120 (On-scene coordinators and remedial project mangers: general responsibilities). As required by the NCP, the OSC assembled a Regional Response Team ("RRT") to provide assistance in preparing and implementing an appropriate response action. *See* 40 C.F.R. § 300.115 (Regional Response Teams). The following organizations had representatives on the RRT: the Coast Guard, the Environmental Protection Agency — Region IV, the Department of Commerce — National Oceanic and Atmospheric Administration, the Department of the Interior — U.S. Fish and Wildlife Service, the Corps, the South Carolina Department of Health and Environmental Control, and the South Carolina Department of Natural Resources. Coast Guard Reply at 4; *see* 40 C.F.R. § 300.175 (Federal agencies: additional responsibilities and assistance).

On October 23, 1995, the Corps, concerned about the impact of the spill on the entrance channel to the harbor, issued an order requiring sampling of the dredged material from within the barge and on the sea bottom at the grounding site, as well as from three locations within the entrance channel. AR 36. The Corps' order also required a bathymetric survey of the sea bottom within 500 feet of the barge grounding to determine the location of the spilled dredged material. *Id*. At the Corps' request, the OSC issued a Captain of the Port Order on October 27, 1995, to ECDC and Sheridan incorporating the requirements of the Corps' order. Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to

ECDC & Sheridan Transportation Co. (Oct. 27, 1995) (AR 43).[7]

On November 14, 1995, the OSC, with the concurrence of the RRT, informed ECDC of the locations that were to be sampled pursuant to the Corps' October 23, 1995 order and the OSC's October 27, 1995 order. *See* Petition at 7. This sampling occurred between November 15 and 17, 1995. *Id*. at 7-8. According to the record, the test results were consistent with earlier testing performed by the Port Authority to obtain the original Corps dredging permit. That is, the spilled dredged material contained dioxin, a hazardous substance under CERCLA.[8] *See* CERCLA § 101(14), 42 U.S.C. § 9601(14) (definition of "hazardous substance"). *See* Petition at 8 ("The new sampling results were highly consistent with prior analytical results and chemical characterizations which had been obtained as part of the [Corps] permit process to dredge Howland Harbor.").

Upon receipt of the sampling results on December 14, 1995, the RRT met and determined that the spilled dredged material needed to be removed. The RRT was concerned that the dioxin in the spilled dredged material could contaminate fish in the local food chain, and could create difficulties in future dredging of the entrance channel. AR 103, 107. Consequently, on December 18, 1995, the OSC sent a letter to the Port Authority advising it that "some of the metals and dioxins found in the spilled dredge materials demonstrated concentrations at levels which may present an imminent and substantial danger to the public health or welfare. Therefore, the material that was spilled must be expeditiously removed, and the area remediated, to protect the public health, welfare and the environment * * *." Letter from the Cmdr. M.J. Pontiff, U.S. Coast Guard, to Francis Lombardi, Port Authority of New York & New Jersey at 1 (Dec. 18, 1995) (AR 107). The December 18th letter required that a removal and sampling plan be submitted by January 2, 1996. *Id*. ECDC's removal and sampling plan called for diver-directed

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[7] In his capacity as Captain of the Port for Charleston, Commander Pontiff was authorized to:

> [O]rder a vessel to operate or anchor in the manner directed when:
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> > (a) The District Commander or Captain of the Port has reasonable cause to believe that the vessel is not in compliance with any regulation, law or treaty;
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> > (b) The District Commander or Captain of the Port determines that the vessel does not satisfy the conditions for vessel operation and cargo transfers specified in § 160.113; or
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> > (c) The District Commander or Captain of the Port has determined that such order is justified in the interest of safety by reason of weather, visibility, sea conditions, temporary port congestion, other temporary hazardous circumstances, or the condition of the vessel.

33 C.F.R. § 160.111 (Special orders applying to vessel operations).

[8] *See infra* note 29.

vacuuming of the spill area. *See* AR 116-117. Upon review, the OSC found the plan unacceptable because it did not require mechanical dredging. Thereafter, the RRT rejected the use of diver-directed vacuuming to remove the spilled dredged material.

On the afternoon of January 10, 1996, the OSC issued a UAO pursuant to section 106(a) of CERCLA directing the Port Authority to submit a revised removal plan, mobilize dredging equipment at the location of the spilled dredged material no later than January 20, 1996, and begin dredging within twenty-four hours of arrival. AR 125 at ¶ 8.4. The UAO required the Port Authority to dredge a four-acre area around the location of the spill, to a depth of eight inches. *Id*. at ¶ 8.7. Once dredging was completed, the UAO required that the Port Authority "[p]rovide a comprehensive analysis of the area cleaned through sediment sampling as directed and controlled by the On Scene Coordinator to clearly demonstrate the area has been cleaned to [pre-spill] background dioxin levels."[9] *Id*. at ¶ 8.5 Thus, the UAO contained requirements for dredging to remove the spilled (dioxin-containing) material as well as for confirmatory sampling.[10]

Dredging began on January 22, 1996. Two days later, Petitioners, believing that they had completed the dredging required, requested permission to stop dredging. AR 156. The Coast Guard denied the request, determining that, among other things, the amount of material removed did not equate to eight inches of material from a four-acre area, as called for in the UAO. AR 157. Dredging then continued, and on January 29, 1996, the Petitioners again requested permission to stop dredging. The Coast Guard again denied the request for the same reason. AR 166. Dredging then resumed once again. On February 5, 1996, the OSC granted Petitioners' third request to stop dredging. AR 170.

Between February 6 and 8, 1996, Petitioners sampled the spill area to confirm that the dredging requirements of the UAO had been completed. Petition at 12. On February 28, 1996, after reviewing the results from that sampling and noting the presence of dioxin in the sediment, the OSC amended the UAO to require additional dredging around site B-2, a location within the four-acre area. *See* AR 195; Petition at 12-13. When this dredging was completed the next day, the OSC granted the Petitioners permission to cease dredging "pending the results

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[9] As noted later in this decision (part II.C.2.e.), throughout this process, the Coast Guard consistently required that the area surrounding the spill be cleaned to pre-spill background levels.

[10] The distinction between the requirement that Port Authority remove the spilled dredged material, and the requirement that Port Authority conduct confirmatory sampling is significant to the discussion in section II.C.2.e below. In particular, although we conclude that the Coast Guard had ample justification for requiring dredging to remove the spilled material, we conclude that the Coast Guard acted arbitrarily in requiring additional dredging and monitoring based on the results of confirmatory sampling.

of the B-2 sampling analysis." Letter from OSC to Petitioners at 1 (Mar. 1, 1996) (AR 204). The OSC stated that "concerns remained among the [RRT] agencies regarding the elevated dioxin levels in the vicinity of the spill site, and in the navigable channel." *Id*. In addition, the March 1st letter once again amended the UAO by requiring that Petitioners revise their "Remediation Work Plan" by submitting a plan to sample and monitor the spill site and the entrance channel, for the purpose of determining the level and extent of contamination migration over the next six months. *Id*. at 2. The letter also stated that the OSC was continuing to work with the Corps and the EPA to obtain data on pre-spill background contaminant levels. *Id*.

On March 19, 1996, Petitioners provided the Coast Guard with dioxin analytical results for samples taken at the B-2 site (*see* AR 211), and by letter dated March 25, 1996, the OSC responded that the additional dredging "appears to have been successful considering the significant drop in the level of dioxin at that site." Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Mar. 25, 1996) (AR 213). The March 25th letter further stated that "after a thorough search conducted by the [Corps]" no background data on dioxin levels were on record for the site, but that the requirement that Petitioners submit a plan for additional monitoring at the site remained in effect.[11] *Id*.

By letter dated April 1, 1996, the Petitioners requested that any additional monitoring requirements be rescinded, and the UAO deemed completed, as background contaminant levels had never been provided. Letter from Gordon Schreck, Buist, Moore, Smythe & McGee, to Cmdr. M.J. Pontiff, U.S. Coast Guard (Apr. 1, 1996) (AR 219). Petitioners stated that "without any pre-spill background data for use as a baseline comparison, there would be no practical way to ensure that any future elevated dioxin readings which might be detected in the subject area were attributable due to [sic] some other source entirely unrelated to the PATRICIA SHERIDAN release." *Id*. at 2. By letter dated April 25, 1996, the OSC denied this request. AR 231 at 2. In particular, the OSC stated, in part:

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[11] The UAO did not require that Petitioners establish applicable pre-spill background levels. Rather, from the record before us, it appears as if the Coast Guard was relying on the Corps to provide this information. Indeed, the record reflects that Petitioners had requested information on pre-spill background levels and that the Coast Guard had agreed to provide the information as soon as it was made available by the Corps. *See* Letter From Douglas Muller, Buist, Moore, Smythe & McGee, to Cmdr. M.J. Pontiff, U.S. Coast Guard (Feb. 28, 1996) (AR 196) (requesting that the Coast Guard provide information "as to the pre-spill background contaminant levels"); Letter from M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Mar. 1, 1996) (AR 204) (stating that the Coast Guard would provide information on pre-spill background contaminant levels "as soon as it is available").

> Until I am satisfied through proper sampling and analysis that your removal actions have been adequate in reducing dioxin levels, my Administrative Order remains in effect. Your sampling effort should be scientifically planned, and include total organic carbon (TOC), grain size analysis, and a second set of biota sampling and analysis.
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> With regard to pre-spill background data, it is acceptable scientific practice to use reference sites that most clearly represent the [a]ffected site when historical background data [are] not available. In this instance, the reference site dioxin levels previously collected may be used as background, in the absence of more specific sediment analyticals applicable to this area.

Id. Thus, based upon his understanding from several federal and state agencies that the use of reference sites (i.e., "sites that most closely represent the [a]ffected site when historical background data [are] not available") is a valid and common scientific practice,[12] the OSC required that Petitioners use previously taken samples in and around the area surrounding the spill as reference points.

In response to the OSC's March 1, 1996 letter amending the UAO, Petitioners submitted a sampling and monitoring plan on May 17, 1996. AR 241. The Coast Guard approved the plan on May 24, 1996. AR 246. Petitioners submitted sampling and monitoring results to the Coast Guard on July 30, 1996. AR 255. After reviewing the results with the RRT, the OSC determined that the work required by the UAO, as amended, had been completed, and so advised the Petitioners by letter on August 16, 1996, rescinding the January 10, 1996 UAO. AR 262.

B. *Petition for Reimbursement*

On October 15, 1996, the Petitioners filed a petition for reimbursement of the costs ($4,628,841.67) they claim they spent to comply with the UAO. The Petitioners contend that they are entitled to reimbursement because they are not

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[12] *See, e.g.,* Letter from Jane D. Settle, Project Manager, South Carolina Department of Natural Resources, to OSC (Apr. 10, 1996) (AR 220) ("[T]he use of reference station data in the absence of pre-release data from a contaminated site is common scientific practice."); Letter from Ron Kinney, Director, Division of Waste Assessment & Emergency Response, South Carolina Department of Health and Environmental Control, to OSC (Apr. 10, 1996) (AR 221) ("The use of reference background data in the place of unobtainable site background data is a common scientific practice."); Letter from Denise M. Klimas, Coastal Resources Coordinator, U.S. Department of Commerce, National Oceanic & Atmospheric Administration, to OSC (Apr. 16, 1996) (AR 223) ("It is accepted scientific practice that when historical baseline data are not available for a site, reference sites are then selected that most closely represent the [a]ffected site.").

liable under CERCLA § 107(a), and because the Coast Guard acted arbitrarily and capriciously in selecting the ordered response action. Consistent with the Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions, 61 Fed. Reg. 55,298 (Oct. 25, 1996), the Board asked the Coast Guard to respond to the petition.[13]

The Petitioners contend that they are not liable under CERCLA § 107(a). The UAO provides that the Port Authority, by contract, agreement, or otherwise, arranged for the disposal of hazardous substances it owned, namely the dioxin in the dredged material, and is therefore liable under CERCLA § 107(a)(3). *See infra* part II.B. Petitioners contend that an "arranger" can be liable under CERCLA § 107(a)(3) only for releases from a "facility," and that the statute expressly excludes vessels from the definition of "facility." Therefore, the Petitioners maintain, the statute precludes a finding of "arranger liability" under CERCLA § 107(a)(3) for releases from vessels. The Coast Guard opposes reimbursement on these grounds, asserting that the "facility" from which there was a release was not the vessel the PATRICIA SHERIDAN, but the pile of dredged material on the ocean bottom outside the entrance channel to the Charleston Harbor. The Petitioners contend that such a pile cannot be a "facility."

Petitioners contend that, even if they are liable, they are nevertheless entitled to reimbursement on the ground that the Coast Guard's determination in the selection and conduct of the response action was arbitrary and capricious.

II. *DISCUSSION*

A. *Statutory Framework*

Where there may be an imminent and substantial endangerment to the public health or welfare, or to the environment, from a release or threatened release of a hazardous substance from a facility, the EPA or certain other federal agencies may, under CERCLA § 106(a), 42 U.S.C. § 9606(a),[14] unilaterally order the

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[13] The Coast Guard initially responded to the petition by filing a motion to dismiss on November 18, 1996. By letter dated December 31, 1997, however, the Coast Guard withdrew its motion to dismiss, and on February 6, 1998, the Coast Guard responded to the merits of the petition for reimbursement.

[14] CERCLA § 106(a) provides, in pertinent part:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he * * * may also * * * take other action under this section

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abatement of the release or threatened release.[15] Those who comply with such administrative orders may timely petition the Environmental Appeals Board for reimbursement of their costs in that effort, according to CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). To obtain reimbursement, a petitioner:

> [S]hall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). Thus, the statute places upon the petitioner the burden of proving, by a preponderance of the evidence, that it is not liable under CERCLA § 107(a) in order for the petitioner to prevail.

A petitioner who is liable under CERCLA § 107(a), and therefore is not entitled to reimbursement under the provision quoted above, may nevertheless recover costs it expended in complying with the order to the extent that:

> [I]t can demonstrate, on the administrative record, that the [government's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law.

CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D). Again, the statute places the burden upon the petitioner to establish its claim.

B. *Liability*

This case presents the issue of whether a party that contracts for a hazardous substance to be shipped by barge to a disposal site can be held liable under CERCLA § 107(a)(3) when that barge runs aground in foul weather and spills some of its cargo, thus necessitating a cleanup of the spilled material from the

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> including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA § 106(a), 42 U.S.C. § 9606(a). Although the statute gives the President the authority to issue orders, the President has delegated this authority to certain agencies, including the Coast Guard. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987), *as amended by* Exec. Order No. 13,016, 61 Fed. Reg. 45,871-72 (Aug. 30, 1996).

[15] CERCLA also provides other tools for the government to respond to the release or threatened release. For example, the government may itself undertake a cleanup action under CERCLA § 104(a), 42 U.S.C. § 9604(a), and then initiate a cost recovery action against the responsible parties under CERCLA § 107(a), 42 U.S.C. § 9607(a).

ocean floor. The issue appears to be one of first impression, and it requires that we consider both the scope of "arranger" liability under CERCLA as well as the statutory exclusion of "vessel" from CERCLA's definition of "facility." For the reasons that follow, we conclude that in the circumstances of this case, the Petitioners, who undeniably arranged for a hazardous substance to be shipped by barge for the purpose of disposal, are liable for the cleanup of the materials that spilled from the barge and came to be located on the ocean floor.

The categories of parties liable for CERCLA clean-ups are set forth in CERCLA § 107(a). One such category, known as "arrangers,"[16] is provided for in section 107(a)(3), which defines as a liable party:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, *or arranged with a transporter for transport for disposal* or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances[.]

CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (emphasis added). A person falling within this category is liable for the clean-up costs incurred pursuant to an order issued under CERCLA § 106(a) if there has been a release or a threatened release from a "facility." *See In re Chem-Nuclear Sys.*, 6 E.A.D. 445, 455 (EAB 1996). CERCLA § 101(9) defines a facility as:

> (A) any building, structure, installation, equipment, pipe or pipeline * * *, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or
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> (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

CERCLA § 101(9), 42 U.S.C. § 9601(9).

In this case, the UAO was issued to the Port Authority on the basis that it arranged for the disposal of the Howland Hook Marine Terminal dredged material. UAO at ¶ 1.1. Importantly, the Petitioners do not contend that they did not

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[16] Arranger liability under CERCLA § 107(a)(3) is sometimes referred to as generator liability. *See, e.g. In re: Chem-Nuclear Sys.*, 6 E.A.D. 445, 455 (EAB 1996).

make such arrangements. Instead, the Petitioners dispute whether there has been a release or threatened release from a "facility" as that term is defined in CERCLA § 101(9)(B).

According to the Petitioners, the release that triggered the UAO was the spill of the dredged material from the PATRICIA SHERIDAN into the ocean near the entrance to the Charleston Harbor. The Petitioners assert that the PATRICIA SHERIDAN is not a "facility" because vessels are specifically excluded from the statutory definition of "facility." Petitioners contend that because CERCLA holds arrangers liable for releases only from facilities, and because the PATRICIA SHERIDAN is not a facility, the Petitioners are not liable for the costs of the cleanup.

The Coast Guard does not contend that the PATRICIA SHERIDAN is a facility. Instead, it contends that the area on the ocean floor where the spilled materials came to rest is a facility. Indeed, the UAO states that "[t]he area in which the dredge spoils containing hazardous materials has come to be located is a 'facility' as defined by Section 101(9) of CERCLA * * *." UAO ¶ 4.1. The Coast Guard argues that there is no difference between hazardous substances spilled on land and hazardous substances spilled onto the ocean bottom. That is, the Coast Guard asserts that in both situations, the area where the hazardous substances come to be located is a "facility."[17] It argues that "Petitioners would have the Board rule that an arranger can circumvent the comprehensive arranger liability built into CERCLA by choosing to transport the cargo by vessel, instead of by truck or rail." Coast Guard Reply at 21.

The Petitioners respond that accepting the Coast Guard's application of the statute would frustrate Congress' intent, allegedly evident in the language of the statute, to exclude arrangers of a vessel's cargo from CERCLA liability for spills occurring in marine transportation. According to the Petitioners, "[t]he [UAO] takes the irrational position that although CERCLA exempts a cargo arranger from liability for a release or a spill from a vessel, every such arranger immediately becomes liable once the spilled material comes to rest somewhere." Petition at 22. Petitioners contend that interpreting the statute in this manner would render the "vessel exclusion" meaningless and thus "impute absurd consequences to a Congressional enactment." *Id.*

As noted above, the legal issue presented here appears to be one of first impression. We have found no controlling case law, and there is limited legisla-

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[17] Where a hazardous substance comes to be located on land due to an accidental spill, the area surrounding the spill is a "facility" within the meaning of CERCLA § 101(9)(B), 42 U.S.C. § 9601(9)(B). *See Envtl. Trans. Sys. v. ENSCO, Inc.*, 763 F. Supp. 384, 387 (C.D. Ill. 1991), *aff'd*, 969 F.2d 503 (7th Cir. 1992).

tive history addressing the "vessel exclusion." In interpreting the relevant statutory provision, we recognize that the statutory language may be ambiguous and thus allow for more than one possible interpretation. However, we conclude that the better interpretation with regard to the issue before us, and the one that best reflects the broad remedial purposes of the statute,[18] is that where, as here, a hazardous substance is released from a vessel and comes to be located at a discrete place on the ocean bottom, a facility within the meaning of CERCLA is created on the ocean bottom.[19]

Petitioners are correct that the statutory definition of "facility" excludes vessels. However, that exclusion is a limited exception to an otherwise expansive definition of the term "facility." The term "facility," to which the exception applies, covers "*any* site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located[.]" CERCLA § 101(9), 42 U.S.C. § 9601(9) (emphasis added). Courts have interpreted this language very broadly. *See Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 245 (5th Cir. 1998), *as modified on reh'g* (1999) ("In examining the contours of § 9601(9), it is apparent that facility is defined in the broadest possible terms, encompassing far more than traditional waste sites"); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 743 (8th Cir. 1986) ("The term 'facility' should be construed very broadly to include 'virtually any place at which hazardous wastes have been dumped, or otherwise disposed of.'") (quoting *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985)).

Further, an arranger for disposal of a hazardous substance is liable for clean-up costs under CERCLA where, as here, a hazardous substance spills during transport and comes to be located in a discrete place, i.e., in a facility wholly apart from the means of transport itself.[20] *See, e.g., Amcast Indus. Corp. v. Detrex*

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[18] *See Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 242 (5th Cir. 1998) (noting CERCLA's broad remedial purpose and stating obligation to construe its provisions liberally to avoid frustrating Congress' intent); *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) (same); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992) ("CERCLA is a remedial statute which should be construed liberally to effectuate its goals.").

[19] This situation is distinguishable from one in which there is a release of a hazardous substance from a vessel and the substance is immediately dispersed into the ocean environment and never comes to be located somewhere else (e.g., where a hazardous substance was released from a moving vessel in small amounts over a long period of time).

[20] In their response, Petitioners assert, without support, that the dredged material never came to rest on the ocean bottom but was immediately dispersed into the surrounding sea water. *See* Response of Petitioners ECDC Environmental, L.C./Laidlaw Environmental Services, Inc. to Coast Guard Reply on the Merits to Petition for Reimbursement of Costs, at 4 (Mar. 18, 1998). According to the record, however, not only was the area of the spill relatively shallow, but sonar data collected after the spill revealed "several significant anomalies in the study area." *See A Side Scan Sonar and Bathymetric Survey of the F/B Patricia Sheridan Grounding Site of Charleston, South Carolina*, Prepared for
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Corp., 2 F.3d 746, 751 (7th Cir. 1993) ("The words 'arranged with a transporter for transport for disposal or treatment' appear to contemplate a case in which a person or institution that wants to get rid of its hazardous waste hires a transportation company to carry them to a disposal site. If the wastes spill en route, then since spillage is disposal and the shipper has arranged for disposal—though not in that form—the shipper is a responsible person and is therefore liable for clean-up costs."); *Envtl. Trans. Sys., Inc. v. ENSCO, Inc.*, 763 F. Supp. 384, 387 (C.D. Ill. 1991) (Where truck carrying transformers containing PCBs overturned, the transformers, the truck, and the area of land where the material spilled are all "facilities," and the arranger is a "responsible person" as defined by CERCLA), *aff'd*, 969 F.2d 503 (7th Cir. 1992); *see also ACME Printing Ink Co. v. Menard, Inc.*, 881 F. Supp 1237, 1248 (E.D. Wis. 1995) (an arranger for disposal under CERCLA § 107(a)(3) need not intend to dispose of hazardous waste at any particular site, but only to dispose of hazardous wastes).

Despite the breadth of arranger liability, which the courts have repeatedly upheld when hazardous substances are spilled en route to their ultimate disposal site, Petitioners assert that the exclusion of vessel from the definition of "facility" insulates them from arranger liability in this case. We disagree. Contrary to Petitioners' suggestion, there is no such exception to the scope of arranger liability.

Paramount is the fact that the vessel exception is a specific exception to the definition of facility and not to the scope of arranger liability generally. As an exception to the definition of facility, the term "vessel" is plainly not broad enough to encompass the ocean bottom. *See* CERCLA § 101(28), 42 U.S.C. § 9601(28), (defining "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"). On the other hand, the ocean bottom where the materials came to rest in this case is a "facility" in its own right, because it constitutes a site where a hazardous substance came to be located. The statutory definition's use of the term "any" (i.e., "any site * * * where a hazardous substance has * * * otherwise come to be located") strongly suggests that spill sites on the ocean floor are not *per se* excluded from its coverage, and Petitioners have conceded as much at oral argument. *See* Oral Argument Transcript at 17-18 ("In certain circumstances I,

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ECDC by Tidewater Atlantic Research, Inc., at 3 (AR 52) ("Survey"). The Survey found that "bottom surface sediments in the immediate vicinity of the [PATRICIA SHERIDAN's] grounding are different from those in adjacent and undisturbed areas * * *." *Id.* The Survey concluded that this difference could be related to spilled dredged material. *Id.* at 7. Finally, samples taken from the area surrounding the spill revealed the presence of dioxin. *See* Memorandum for Captain of the Port, U.S. Coast Guard, from Elmer W. Schwingen, Chief, Construction & Operations Division (Dec. 12, 1995) (AR 99); Letter from Cmdr. M. J. Pontiff, U.S. Coast Guard, to Francis Lombardi, Port Authority of New York & New Jersey (Dec. 18, 1995) (AR 107). Under these circumstances, the record supports the conclusion that at least some of the dredged material came to be located on the ocean bottom; and Petitioners' unsupported assertions to the contrary fail to convince us otherwise.

[counsel for Petitioners], believe that the ocean floor could be a facility. I do not believe in any situation involving a vessel that it could be.").

Significantly, in another portion of the statute not applicable here, CERCLA specifically exempts "navigable waters or the beds underlying those waters" from the definition of "facility" for the purposes of that clause, thus confirming that without such an exemption, they would be included in the definition of facility. *See* CERCLA § 104(c)(3)(C)(ii), 42 U.S.C. § 9604(c)(3)(C)(ii) ("For the purpose of clause (ii) of this subparagraph [pertaining to cooperative agreements with states for remedial actions] the term 'facility' does not include navigable waters or the beds underlying those waters."); *see also* CERCLA § 101 (17), 42 U.S.C. § 9601(17) (defining an offshore facility to include any facility located in, on, or under any of the navigable waters of the United States, other than a vessel). Thus, Congress was obviously aware that locations such as the ocean floor generally constitute a facility under the broad language of section 101(9). If Congress wanted to exclude from the "facility" definition ocean beds in cases where the release emanated from a vessel, it could have done so by making clear that all releases that originally emanated from vessels are within the scope of the vessel exclusion.[21]

The question thus becomes does the vessel exclusion come into play at all where hazardous substances, initially released from a vessel, are subsequently released or there is a threat of release from another facility where they have "otherwise come to be located?" In other words, is it even legally relevant that the materials were first released from a vessel so long as there is a subsequent release or threat of release from another facility? In the circumstances of this case, where there was an arrangement for disposal of hazardous substances and the materials came to rest at another discrete location while in transit to the designated disposal site, we think not. Petitioners, as arrangers for disposal, fall clearly within the scope of those persons subject to liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). That is, the factors necessary for liability are all present in this case, i.e., an arrangement for disposal of hazardous substances owned or possessed by Petitioners and the disposal of those hazardous substances — although not in the form anticipated by Petitioners — at a facility (the ocean bottom) from which there was a release or threatened release. *See Amcast,* 2 F.3d at 751.[22]

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[21] *See City of Chicago v. Envtl. Def. Fund,* 511 U.S. 328, 337 (1994) ("there is nothing extraordinary about an activity's being exempt for some purposes and nonexempt for others.").

[22] As this Board has previously stated, the term "'arrangement for disposal or treatment' must be given a liberal interpretation in order to effectuate CERCLA's remedial purposes." *In re A & W Smelters & Refiners, Inc.*, 6 E.A.D. 302, 320 (EAB 1996), *aff'd* 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part, rev'd in part, and remanded by* 146 F.3d 1107 (9th Cir. 1998); *accord Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990). Here, as in *Northeastern Pharmaceutical, supra,* an arranger — in order to dispose of hazardous substances — set in

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Petitioners devote a substantial portion of their supplemental brief to a discussion of the CERCLA legislative history allegedly supporting their assertion that by excluding vessels from the definition of facility, Congress intended to shield arrangers for disposal from liability for all spills occurring when hazardous substances are transported by vessel. We find no evidence that Congress intended such a result. On the contrary, our review of the legislative history, reveals very little in the way of explanation regarding the vessel exclusion in section 101(9).

There are no committee or other reports discussing the exclusion, nor is there a record of any floor debates or testimony on the issue. The only direct reference to the rationale for amending the definition of facility so as to exclude vessels is the following:[23]

> The definition of the term "facility" in S. 1480 is sufficiently broad to include vessels or parts of vessels. However, the term "vessel" is separately defined and used in the bill. This amendment is intended to clarify that "vessels" are not also intended to be "facilities" for the purposes of this Act.

Staff of Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess. (Comm. Print 1983), *reprinted in* 3 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), at 188. We find it difficult to infer from this brief explanation evidence of an intention to exempt arrangers for disposal from liability whenever an arranger chooses to ship hazardous materials by vessel. Indeed, this statement makes no mention at all of arranger liability in section 107(a)(3). Surely, if Congress had intended such an exemption for arrangers, it could have done so explicitly. On its face, the above-quoted statement seems merely intended to scale back the otherwise expansive facility definition to clarify that vessels are separately defined and treated differently under the Act. For examples of the separate definition of vessel under CERCLA, *see* CERCLA § 101(28), 42 U.S.C. § 9601(28), (defining the term "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."); 107(a)(1), 42 U.S.C. § 9607(a)(1), (imposing liability on "the owner and operator of a vessel or a facility"); 107(c)(1)(A), 42 U.S.C. § 9607(c)(1)(A), (limiting the liability of the owner or operator of a vessel for a release of a hazardous substance to "$300 per gross ton, or $5,000,000 whichever is greater").

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motion a series of events that led to disposal of those hazardous substances while in transit. The fact that the actual disposal site is not the same as the ultimate disposal site is not a basis on which to defeat liability. Under long-established case law, liability under CERCLA § 107(a)(3) exists.

[23] The amendment was one of 12 proposed by Senator Schmitt to the Senate bill, S. 1480.

Contrary to Petitioners' assertion, construing the statute to exclude only vessels from the definition of facility, not all releases of hazardous substances that originally emanate from vessels, would not render meaningless the exclusion of vessels from the definition of facility in CERCLA § 101(9). If, for example, a vessel were to release a hazardous substance over a long distance (e.g. spilling a liquid hazardous waste into fast-moving currents), and this material were immediately dispersed into the ocean and never came to be located on the ocean bottom or somewhere else, liability would not appear to attach under CERCLA § 107(a)(3) because no "facility" would appear to exist. *See* Oral Argument Transcript at 39-41. (stating that the Coast Guard has never made the argument that there is always going to be a facility; "[W]hen you've got an owner/operator of a vessel and they are losing material over the side that never settles anywhere * * * solid. I think that's a much more difficult argument.").[24] The mere fact that this construction of the statute excludes less than Petitioners urge does not render the exclusion a nullity. *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 (1994) (rejecting petitioner's arguments that the court's construction of RCRA renders an exclusion meaningless even if it is narrower than urged by petitioners).

We note further that the term "transport" is defined as "the movement of a hazardous substance by *any mode*." CERCLA § 101(26), 42 U.S.C. § 9601(26) (emphasis added). There is no exclusion for arrangers who choose to transport by vessel. This tends to undermine Petitioners' assertion that by excluding vessels from the definition of facility Congress intended to shield arrangers from liability for releases whenever transport occurs by vessel. We therefore remain unpersuaded by the Petitioners' argument that defining the "facility" in this case to be the pile of dredged material on the ocean floor would frustrate the alleged intent of Congress to insulate arrangers for disposal from CERCLA liability any time hazardous substances are transported by vessel. As previously stated, we find no evidence that Congress intended such a result.[25]

For the foregoing reasons, we conclude that the Coast Guard has not misapplied the statute by concluding that the spill site in question is a "facility" for the

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[24] The Coast Guard maintains that "[t]he dredge material and its elements of dioxin were not lost directly from the barge into the ocean waters, to be immediately diluted and washed out to sea." Coast Guard Reply at 21. Rather, "[t]he materials collected on the bottom adjacent to the grounded barge." *Id.*

[25] In its supplemental brief, the Coast Guard suggests that Petitioners are liable because they contributed to the release. Supplemental Brief to the Reply on the Merits to Petition for Reimbursement of Costs at 13 (Nov. 12, 1998). Because we find liability exists on other grounds, however, we do not reach this issue.

purposes of CERCLA.[26] And, for those reasons, we conclude that the Petitioners have not met their burden of proving that they are not liable within the meaning of CERCLA § 106(b)(2)(C).[27]

C. *Remedy Selection*

1. *Imminent and Substantial Endangerment*

A federal agency's authority to issue clean-up orders under CERCLA § 106(a) is limited to those situations where there has been a determination that "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). Petitioners argue that the

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[26] Petitioners note that in 1986, Congress expanded arranger liability to include any person who arranges for disposal at any "incineration vessel." CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). According to Petitioners, this expansion shows that Congress intended to exclude from liability those persons who arrange for disposal "upon generic vessels." Petition at 23. Petitioners, however, have not cited to any case law or legislative history that would support this assertion, nor are we aware of any. In fact, the legislative history reveals that the purpose of including incineration vessels was to ensure that ocean incineration would be treated similarly to land-based incineration. *See* Senate Debate on S.51 (statement of Sen. Bentsen) (Sept. 23, 1985), *reprinted in* 2 A Legislative History of the Superfund Amendments and Reauthorization Act of 1986, at 1180 (stating that the amendment "erases a distinction between liability for ocean incineration and liability for land-based incineration").

We are aware that in 1984, in response to questions posed by Congressman Solomon P. Ortiz concerning liability for spills resulting from the incineration of hazardous wastes at sea, A. James Barnes, then EPA General Counsel, stated: "CERCLA § 107 does not expressly impose liability upon persons who 'arranged for disposal or treatment' of hazardous substances by a 'vessel.' Therefore there is no clear basis for imposing liability under CERCLA § 107 upon generators of hazardous wastes which are spilled from vessels." Correspondence from A. James Barnes, EPA General Counsel, to The Honorable Solomon P. Ortiz, U.S. House of Representatives, re: Legal Issues Concerning Incineration of Hazardous Wastes at Sea (Mar. 1, 1984). As the title of this document makes clear, however, Mr. Barnes was addressing liability under section 107 in the context of incineration at sea rather than the transport of hazardous waste for disposal. Moreover, Mr. Barnes did not address the issued presented in the this case — whether liability under section 107(a)(3) exists where hazardous waste spilled from a vessel comes to be located on the ocean bottom, thereby creating a separate facility.

[27] We note that in *U.S. v. M/V SANTA CLARA I*, 887 F. Supp. 825 (D. S.C. 1995), the Federal District Court for South Carolina denied a motion for summary judgment brought by the owners of a vessel transporting hazardous substances. The owners of the vessel had sought to recover from the owners of the hazardous substances the costs incurred in retrieving and disposing of hazardous substances that spilled en route. In denying the motion for summary judgment, the court held that ownership of hazardous substances lost from a vessel during transport did not result in liability to the owner of the hazardous substances absent a showing of culpability. That case, however, involved the definition of "owner and operator" under CERCLA § 101(20)(B), 42 U.S.C. § 9601(20)(B), and owner and operator liability under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), not arranger liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). Moreover, the hazardous substances in that case were not being transported for disposal. Thus, *SANTA CLARA* is clearly distinguishable from the present case.

Coast Guard's decision was arbitrary and capricious because the Coast Guard failed to demonstrate the existence of an "imminent and substantial endangerment." Thus, in essence, Petitioners are asserting that the Coast Guard acted arbitrarily and capriciously because, in the absence a showing of imminent and substantial endangerment, no remedy was required.[28]

Petitioners assert that the Coast Guard's finding of imminent and substantial endangerment lacked any support in the administrative record. As far as we can tell from the Petition, the basis for Petitioners' assertion in this regard is that "[t]here was no indication whatsoever that any health or environmental risk assessment had been conducted or factored into [the Coast Guard's decision]." Petition at 32. In addition, Petitioners state that "[t]here was no finding or statement that any of the factors which legally must be considered in determining the appropriateness of a removal action had been considered or found to exist." *Id.*

Although the "imminent and substantial endangerment" requirement is not specifically defined in CERCLA, the Board has previously discussed the requirement. In particular, the Board has stated:

> [T]he phrase has been scrutinized by the courts. "Endangerment means a threatened or potential harm and does not require proof of actual harm." *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985). The "endangerment" need not be an emergency, nor does it have to be immediate to be "imminent." *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 193 (W.D. Mo. 1985). Given the importance of any threat to public health and the reality that implementing a corrective plan might take years, "imminence" must be considered in light of the time that might be needed to sufficiently protect the public health. *See B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D. Conn. 1988). Thus, an "endangerment" is "imminent" "if factors giving rise to it are present even though the harm may not be realized for years." *Conservation Chem.*, 619 F. Supp. at 194.

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[28] As the Board has previously stated:

> CERCLA § 106(b)(2)(D) is broad enough to allow an argument that the [entity issuing a clean-up order] acted arbitrarily or capriciously in selecting a remedy where no remedy selection was authorized because the statutory prerequisites to the issuance of an order did not exist.

In re A & W Smelters & Refiners, Inc., 6 E.A.D. 302, 325 (EAB 1996) (citing *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991)), *aff'd*, 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part, rev'd in part*, and remanded by 146 F.3d 1107 (9th Cir. 1998).

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

In re Cyprus Amax Minerals Co., 7 E.A.D. 434, 452-53 (EAB 1997) (quoting *In re Sherman Williams Co*., 6 E.A.D. 199, 210-11 (EAB 1995)).

It is undisputed that dioxin was present in the material dredged from Howland Hook Marine Terminal and was present in samples taken from the ocean bottom in the area surrounding the PATRICIA SHERIDAN following the spill. *See* Petition at 33-34. Further, Petitioners do not dispute that dioxin is a hazardous substance under CERCLA.[29] The UAO states that "[t]he dredge spoils contain Tetrachloro Dibenzo Dioxin * * *, a carcinogen which bioaccumulates in aquatic animals." UAO at ¶ 3.5. The UAO further states:

> 4.4 The release of dredge spoils containing dioxin from the F/B PATRICIA SHERIDAN, and the presence of hazardous substances at and around the Site, and the past, present, and/or potential migration of hazardous substances from the Site, constitutes and [*sic*] actual/ or threatened "release" as defined in Section 101(22) of CERCLA, 42 U.S.C. 9601(22).[30]
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> * * * * * * *
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> 5.1 The actual or threatened release and/or discharge of a hazardous substance onto the navigable waters of the United States, and/or from the Site, presents an imminent

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[29] Petitioners state that the small amount of dioxin present in the dredged materials was not sufficient to be considered hazardous under RCRA, but do not dispute that the material is a hazardous substance under CERCLA. As the Board has previously observed, however, even if a material is not a "hazardous waste" for RCRA purposes, it may nevertheless be a "hazardous substance" for CERCLA purposes. A & W Smelters & Refiners, 6 E.A.D. at 318. The volume or concentration of a substance is not relevant to the determination of whether or not the substance is hazardous under CERCLA. *See In re Chem-Nuclear Sys.*, 6 E.A.D. 445, 461 n.21 (EAB 1996).

[30] CERCLA § 101(22) states, in part:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment * * *.

CERCLA § 102(22), 42 U.S.C. § 9601(22).

> and substantial endangerment to the public health or welfare, including, but not limited to, that of fisherman, fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and non-living natural resources under the jurisdiction or control of the United States.
>
> 5.2 This Order is necessary to protect the public health and welfare and the environment.
>
> 5.3 Because there is a threat or potential threat to public health or welfare or the environment, a removal action is appropriate to abate, minimize, stabilize, mitigate or eliminate the release of hazardous substances at or from the Site.

Id. at ¶¶ 4.4, 5.1 — .3. The UAO also states that dioxin is a hazardous substance under CERCLA. *Id*. at ¶ 4.3.

Prior to issuance of the UAO, the Corps, the United States Fish and Wildlife Service ("USF & WS"), and the EPA all expressed concern regarding the presence of dioxin in the spilled dredged materials. *See* Meeting Minutes from December 14, 1995 RRT meeting ("Dec. 14th Minutes") (AR 103). The USF & WS noted that dioxin was of primary concern because of its adverse effect on fish. *Id*.; *see also* Facsimile from U.S. Army Corps of Engineers District, Charleston District, to U.S. Coast Guard, re: "Suggested Cleanup Plan - Patricia Sheridan Spill Site," (Dec. 15, 1995) (expressing concern over the impact of dioxin on the marine environment) (AR 104). Petitioners do not dispute the toxicity of dioxin or its potential adverse effects on the marine environment. Nor have Petitioners presented any evidence that the presence of dioxin at the levels detected in the spilled dredged material is not hazardous. Clearly, the potential hazard posed by the 2,500 tons of uncontained dredged material spilled onto the ocean floor was both imminent and substantial under the case law discussed above.

Under these circumstances, the Board finds that Petitioners have not met their burden of proof of demonstrating by a preponderance of the evidence that the Coast Guard's actions in issuing the UAO were "arbitrary and capricious" because there was allegedly no "imminent and substantial endangerment" at the site.

2. *Arbitrary and Capricious Requirements*

Petitioners contend that the UAO contains arbitrary and capricious requirements, and that the Coast Guard's actions "demonstrate a pattern of behavior unsupported by the administrative record." Petition at 25. In particular, Petitioners assert that the Coast Guard's actions in issuing the UAO were arbitrary and capri-

cious in that: (1) the UAO was issued only to the Port Authority, when it also should have been issued to ECDC and Sheridan; (2) the UAO required mechanical dredging rather than the use of diver-directed vacuuming to remove the spilled material; (3) the Coast Guard had no reasonable basis for requiring the dredging of a four-acre area to a depth of eight inches; (4) the Coast Guard twice erroneously concluded that the Petitioners failed to remove the requisite volume of material, resulting in unnecessary dredging; (5) in an amendment to the UAO, the Coast Guard required that Petitioners conduct additional dredging in an area around the spill site, designated as "B-2," and to demonstrate that the area had been cleaned to pre-spill background levels even though no data on pre-spill background levels were available; and (6) the UAO, as amended by the Coast Guard, arbitrarily required future sampling and monitoring of the entrance channel. We will address each of these arguments.

a. *Determining Which Parties to Include in a UAO*

First, the determination regarding which party or parties to include in a UAO is within the discretion of the issuing agency. The Board will not review this determination. *See In re Chem-Nuclear Sys.*, 6 E.A.D. 445, 465 (EAB 1996) ("[T]he Board will not review [EPA's] determination not to name certain parties as respondents in an administrative order.").

b. *Mechanical Dredging Versus Diver-directed Vacuuming*

Second, we reject Petitioners' assertion that the Coast Guard's decision to require mechanical dredging rather than adopt ECDC's plan for diver-directed vacuuming was arbitrary and capricious. According to the administrative record before us, among the reasons cited for rejecting diver-directed vacuuming of the spill site were: (1) the potential dispersion of the dredge material since the time of the bathymetric survey, making a visually-oriented removal method inadequate; and (2) the belief, based on discussions with RRT members, that diver-directed vacuuming was too dependent on adequate wind and sea conditions. Letter accompanying UAO, from Cmdr. M.J. Pontiff, U.S. Coast Guard, to F. Lombardi, Port Authority (Jan. 10, 1996) (AR 125); Minutes of January 10, 1996 RRT meeting ("Jan. 10th Meeting Minutes") (AR 124)). According to the Jan. 10th Meeting Minutes, these as well as other concerns were expressed by RRT members in their consideration of ECDC's plan. *See, e.g.*, Jan. 10th Meeting Minutes at ¶ 9 ("The question of being able to identify all contaminants visually using the proposed method was raised since the material was easily dispersed * * * and the material had had time to disperse. The question 'how will the dispersed "invisible" contaminated material be retrieved' was raised."), and ¶ 14 ("[I]t was believed by some agencies that dispersed contaminants which were essentially invisible were not being addressed by the proposed removal plan."); *see also* Letter from Roger L. Banks, Field Supervisor, U.S. Fish and Wildlife Service, to Cmdr. M.J. Pontiff, U.S. Coast Guard (Jan. 8, 1996) (AR 121) (describ-

ing ECDC's plan for diver-directed vacuuming as a "band-aid approach" and expressing support for dredging the material from an identified area).[31]

While ECDC may be correct that diver-directed vacuuming was a reasonable alternative to mechanical dredging, this is not the issue before us.[32] Rather, we need only determine whether the Coast Guard's decision to require mechanical dredging was arbitrary and capricious. CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D); *In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434, 457 (EAB 1997) ("Under the arbitrary and capricious standard, 'the critical determination is *not* whether the Region selected the best possible response, or whether another response would also have been an acceptable selection; it is merely whether the Region acted arbitrarily in making its selection.'") (quoting *In re TH Agric. & Nutrition Co.*, 6 E.A.D. 555, 578 (EAB 1996), *aff'd*, No. 1:96-CV-193-1(WLS) (M.D. Ga. 2000)). Given the concerns raised by various member of the RRT regarding ECDC's plan, we cannot say that the Coast Guard's decision to adopt the recommendation of those team members supporting mechanical dredging was arbitrary and capricious. We cannot fault the Coast Guard for relying on what appears to be the informed recommendations of RRT members. Petitioners' assertions in this regard are therefore rejected.

c. *Dredging Four Acres to a Depth of Eight Inches*

Third, Petitioners have asserted that the Coast Guard's determination regarding the amount of material to be dredged (a four-acre area to a depth of eight inches) lacked a reasonable basis in the record. We disagree.

According to the record before us, in requiring dredging of a four-acre site to a depth of eight inches, the Coast Guard adopted a suggestion provided by the Corps. According to the Corps, dredging of a four-acre area would "encompass[] the entire plume area identified during bathymetric surveys." Suggested Cleanup Plan, Patricia Sheridan Spill Site ("Corps Plan") (attached to Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Francis Lombardi, Acting Chief Engineer, Port Authority of New York & New Jersey (Dec. 18, 1995) ("Dec. 18th Letter")) (AR

[31] *But see* Jan. 10th Meeting Minutes at ¶ 6 ("Some agency representatives indicated that the selective, diver-directed technique of recovery seemed like a better strategy than blind mechanical dredging.").

[32] According to Petitioners, the use of divers and a submersible pumping operation was appropriate given the sandy conditions and the possibility that dredging could cause the suspension and dispersal of materials on the ocean bottom before any hazardous substance could be removed. Petition at 35.

107).[33] The Corps Plan stated further:

> This [four-acre] area should be positioned to maximize the cleanup of areas sloping toward the navigation channel in order to minimize the future potential of channel contamination. Suggested operations consist of dredging the designated area to a minimum depth of eight inches. Increased dredging depth would be required in order to assure removal of any mounds of spilled material and to assure that the material remaining in the clean area is of suitable quality to meet EPA criteria for ocean disposal.

Id.[34] According to the Dec. 18th Letter, the Corps Plan "ha[d] been discussed with involved State and Federal Agencies." Dec. 18th Letter at 1. Under these circumstances, Petitioners have not met their burden of establishing that the Coast Guard's decision to adopt the Corps' recommendation in this regard was arbitrary and capricious.

d. *Denial of Requests to Cease Dredging*

Fourth, Petitioners assert that the Coast Guard acted arbitrarily and capriciously when it twice denied ECDC's request to cease dredging and proceed with confirmatory sampling. Petition at 39-42. As stated above, by letter dated January 24, 1996, counsel for ECDC informed the Coast Guard that the four-acre site had been "thoroughly dredge[d]," and that ECDC was ready to begin sediment sampling as set forth in section 3.6 of ECDC's Revised Remediation Plan. Letter from Elizabeth H. Warner, Buist, Moore, Smythe & McGee, to Lt. Chuck Jennings, U.S. Coast Guard (Jan. 24, 1996) (AR 156). In its response, the Coast Guard did not agree that the area had been sufficiently dredged and required that ECDC "continue to dredge the prescribed site as expediently as possible to minimize further dispersion and ensure the spilled material is retrieved." Letter from

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[33] *See* Letter from Timothy Dunlap, ECDC, to Cmdr. M. J. Pontiff, U.S. Coast Guard (Nov. 9, 1995) (attaching results of bathymetric survey of the area surrounding the spill prepared by Tidewater Atlantic Research, showing "potential area of dredge spoil distribution.") (AR 52).

[34] The Dec. 18th letter was referenced in the UAO. *See* AR 125. Specifically, the UAO states, in part:

> Within 72 hours * * *of the delivery of this order to you or your representative, prepare, and submit to the On Scene Coordinator, a revised plan designed to (1) dredge to a depth of 8 inches in way of a generally described 4 acre area referenced in our letter dated December 18, 1995 * * * surrounding the spill plume * * *.

UAO at ¶ 8.7.

Cmdr. M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Jan. 25, 1996) (AR 157). The letter further stated:

> My Administrative Order of January 10, 1996, directed that the four acre area be dredged to a depth of 8 inches. The volume of material retrieved to date does not equate to the amount that will be retrieved once the entire area is dredged to specifications. This fact alone demonstrates that the intent of the requirement has not been met. Additionally, our review of the M/V PADRE ISLAND[35] trackline while dredging the site indicates an incomplete dredging of the four acre area to date. Therefore, further dredging must be completed before the post-dredging sediment sampling and testing required by the Administrative Order is initiated.

Id.

ECDC then conducted additional dredging at the site and, by letter dated January 29, 1996, again requested permission to proceed with confirmatory sampling. Letter from Elizabeth H. Warner, Buist, Moore, Smythe & McGee, to Lt. Cmdr. Roy Nash, U.S. Coast Guard (AR 162). By letter dated January 31, 1996, the Coast Guard again rejected the request to cease dredging. Letter from R.A. Nash, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (AR 166). The Coast Guard's January 31st letter stated, in part:

> Your [January 29th] letter states that 2428 cubic yards of material was recovered during the first dredging operation. The amount of material transferred to rail cars, and subsequently weighed after removal from the decanting barge * * *, is significantly less than your estimate and does not equate to the amount that will be retrieved once the entire area is dredged to specifications. Therefore, further dredging is required.

Id.

In support of its assertion that the Coast Guard's actions were arbitrary and capricious, Petitioners assert that the Coast Guard relied on "an artificial volumetric quota" in concluding that further dredging was required. For the following

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[35] "Padre Island" is the name of the dredging vessel used at the site. It is referred to in the Revised Remediation Work Plan as "a split hull trailing suction hopper dredge." Revised Remediation Work Plan at 4 (AR 136).

reasons we conclude that Petitioners have failed to meet their burden of establishing that the Coast Guard's January 25, 1996 and January 31, 1996 decisions requiring further dredging were arbitrary and capricious.

As previously stated, the UAO required dredging of a four-acre area to a depth of eight inches. The January 25th letter, in addition to stating that the amount of material dredged up to that point was insufficient, stated that the trackline of the dredging vessel indicated that the dredging was incomplete. As the Coast Guard's conclusion regarding the trackline of the dredging vessel demonstrating that the dredging was incomplete provided an independent basis for requiring further dredging, and because Petitioners have not objected to the Coast Guard's determination in this regard, we reject Petitioners' assertion that the January 25th decision to require further dredging was arbitrary and capricious.

We also reject Petitioners' assertion that the Coast Guard's January 31st letter requiring additional dredging was arbitrary and capricious. As stated above, the Coast Guard's decision regarding the area to be dredged (a four-acre site to a depth of eight inches) was based on the recommendation of U.S. Army Corps of Engineers, which, in turn, was based on a bathymetric survey of the spill site identifying the "potential area of dredge spoil distribution."

In determining whether ECDC complied with the UAO in this regard, the Coast Guard looked to the amount of material retrieved compared to the amount that would be expected if the area had been dredged as required by the UAO and determined that the site had not been dredged sufficiently. Although, after completing the additional dredging, ECDC suggested that any discrepancy between ECDC's estimates of the amount of material to be dredged and the amount of material subsequently transferred to rail cars *may* have been due to differences in volume and weight after the dredged material has dried,[36] nothing in the Petition or in the record before us convinces us that the Coast Guard's determination was arbitrary and capricious at the time it was made. Petitioners have therefore failed to meet their burden in this regard.

e. *Dredging Area B-2 and Six Months' Sampling of the Navigation Channel (February 28, 1996 and March 1, 1996 UAO Amendments)*

Fifth, Petitioners assert that the Coast Guard acted arbitrarily and capriciously in requiring additional dredging in an area around the spill site, designated as "B-2," and in requiring that this area be cleaned to pre-spill background levels.

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[36] *See* Letter from Douglas M. Muller, Buist, Moore, Smythe & McGee, to Cmdr. M.J. Pontiff, Coast Guard, at 2 (Feb. 2, 1996) (AR 167).

For the following reasons, we agree with Petitioners that the Coast Guard's determination in this regard was arbitrary and capricious.

By letter dated February 5, 1996, the Coast Guard approved ECDC's third request to cease dredging and to proceed with confirmatory sampling. *See* Letter from M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Feb. 5, 1996) (AR 170). By letter dated February 28, 1996, however, following submission of sampling data by ECDC, the Coast Guard amended the January 10, 1996 UAO, to require additional dredging. Letter from M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Feb. 28, 1996) (AR 195). The February 28th letter stated:

> *Due to elevated levels of dioxin persisting in the sediment offshore, as demonstrated by the data you provided on February 20, 1996, I require that further dredging be conducted.*
>
> Pursuant to paragraph 8.8 of my Administrative Order of January 10, 1996,[37] I require that you conduct further dredging operations in the area around the sample site designated as B-2 * * *, *and provide a sampling proposal to show how you will demonstrate that the area has been cleaned to background levels, as originally required.* This amends my Administrative Order of January 10, 1996, which remains in effect.
>
> I have also consulted with the federal and state agencies during this review. There remains concern about the migration of contaminants away from the B-2 sample site. This migration appears to be evidenced by elevated dioxin levels shown in samples S-1 and BS-4 through BS-7, which are all located north of the spill site and towards the channel. Please address in your revised plan, how you will mitigate these levels or monitor this situation to ensure the affected areas are returned to pre-spill background contaminant levels.

Id. (emphasis added). On February 29, 1996, in compliance with this amendment to the UAO, ECDC conducted further dredging in the vicinity of sampling site

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[37] Paragraph 8.8 of the UAO requires that the Port Authority "[m]ake revisions to the [Revised Work Plan] as directed by the On Scene Coordinator within the time periods prescribed by the On Scene Coordinator."

B-2. *See* Letter from Douglas M. Muller, Buist, Moore, Smythe & McGee, to Cmdr. M.J. Pontiff, U.S. Coast Guard (Feb. 29, 1996) (AR 202).

As the Coast Guard's February 28th letter made clear, because of "elevated" dioxin levels, ECDC was required to conduct further dredging and demonstrate that the area had been cleaned to pre-spill background levels. Further, as the Coast Guard states in its reply to the Petition:

> When he originally issued the January 10, 1996 [UAO], the [OSC] required that the results of future sampling be checked against pre-spill background level [*sic*] for dioxin. The [OSC] based this requirement on information he received from the Corps [of Engineers] in Charleston that background data was available.

Coast Guard Reply at 33 (record citations omitted). It is undisputed that as of February 28th, the Coast Guard had not obtained background information from the Corps. Indeed, on that same date the Coast Guard formally requested background information from the Corps. *See* Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Lt. Cmdr. T. Julich, Charleston District Corps of Engineers ("February 28th Corps Letter") (AR 194). The February 28th Corps Letter stated:

> Since the beginning of this incident I have been advised by your staff that analytical data exists for the Charleston Harbor Entrance Channel which predates the October 12, 1995 grounding of the F/B PATRICIA SHERIDAN. I have verbally requested this data on several occasions but have not received any of the information to date. By this letter, I am formally requesting any analytical data you may have for the vicinity of the grounding site which may help me assess the actual impact this grounding and resulting spillage may have had on the Charleston coastal area.

Id.

Immediately upon receipt of the UAO as amended, ECDC made known to the Coast Guard its need for information about background data. On the same day the amended UAO was issued, ECDC sent a letter to the Coast Guard acknowledging receipt of the amended UAO, in which ECDC stated, in part:

> [W]e have not been provided with any information as to the "pre-spill background contaminant levels" in the areas you have identified, and without this information we cannot determine what, if anything, needs to be done with

> respect to these areas * * *. We respectfully request that you provide us with this information in accordance with Paragraph 10.1 of the Administrative Order, and we will respond to your request after we have had the opportunity to review this information.

Letter from Douglas Muller, Buist, Moore, Smythe & McGee, to Cmdr. M.J. Pontiff, U.S. Coast Guard (Feb. 28, 1996) (AR 196).

The next day, February 29, 1996, the Coast Guard learned from the Corps that pre-spill background levels for dioxins were not available. Coast Guard Reply at 33. However, the Coast Guard did not immediately apprise ECDC of this fact.[38] Instead, by letter dated March 1, 1996, the Coast Guard further amended the January 10, 1996 UAO to require additional monitoring and proceeded to suggest to ECDC that the background data would be forthcoming, thereby implying that it existed. Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Mar. 1, 1996) (AR 204). The letter stated, in part:

> Pursuant to paragraph 8.8 of my Administrative Order of January 10, 1996, I require that you revise your "Remediation Work Plan" by submitting a proposal for sampling and monitoring the spill site, including sufficient sampling of the navigation channel to determine the level and extent of contamination migration, over the next six months. Based on the results of your proposed monitoring plan and previously required biota sampling and analysis, a final determination will be made regarding completion of this removal project. I reserve the right to require additional action be taken if the sample analysis results from sample site B-2 and the aforementioned monitoring plan indicate that elevated dioxin levels remain. This amends my Administrative Order of January 10, 1996, which remains in effect.
>
> In response to your [February 28, 1996] request for "pre-spill" background contaminant levels," I will provide that information to you as soon as it is available. I continue to work closely with the Army Corps of Engineers

[38] The Coast Guard did not inform Petitioners that background data were not available until March 25, 1996. *See* Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Mar. 25, 1996) (AR 213).

> and the Environmental Protection Agency to obtain this data.

Id. at 2.

From this record, it is clear that from at least the time the UAO was issued in January 1996, the Coast Guard relied on the Corps' alleged representation regarding the existence of pre-spill background data. Indeed, the UAO, as originally issued and as amended, required that ECDC establish that the site had been cleaned to pre-spill background levels. Despite the importance that the Coast Guard attached to these data, however, the Coast Guard did not formally request that the Corps provide these data until February 28, 1996, and rather than waiting for a response, the Coast Guard amended the UAO on the same day so as to require that "the affected areas are returned to pre-spill background contaminant levels." Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Feb. 28, 1996) (AR 195).

Under the circumstances of this case, we conclude that the UAO amendment issued on February 28, 1996, was arbitrary and capricious. Because the Coast Guard based its decision to require further dredging in area B-2 on a finding that the dioxin levels in sampling area B-2 were "elevated," the administrative record must provide adequate support for this conclusion. The arbitrary and capricious standard, as we have stated, is not based on hindsight but on the information available at the time. *See In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434, 457 (EAB 1997). Although the Coast Guard, in its February 28, 1996 letter amending the UAO, generally referenced the existence of samples that purportedly support its determination that the levels were elevated, it has not identified nor have we found any place in the administrative record where there is a reasoned explanation of the basis for the conclusion that the samples were elevated. We thus find that the Coast Guard's February 28th amendment of the UAO prior to receiving a reply from the Corps as to the existence of background data and comparing that data with the samples, or providing a reasoned explanation of the basis for its determination that the levels were elevated, demonstrated a lack of considered judgment on the part of the Coast Guard. *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must examine the relevant data and articulate a satisfactory explanation for its action "including a 'rational connection between the facts found and the choice made.'") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *D & F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1196 (D.C. Cir. 2000) (finding agency action arbitrary and capricious where the agency failed to adequately explain the basis for its determination); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397, 417 (EAB 1997) (the administrative record must reflect the considered judgment necessary to support EPA's determination; acts of discretion must be ade-

quately explained and justified).[39]

We reject the Coast Guard's assertion that the Board should disregard the absence of data on pre-spill background levels of dioxin contamination in the area surrounding the spill. According to the Coast Guard, even in the absence of data on pre-spill background levels, it was nevertheless appropriate to continue to require sampling and testing, but to allow the samples to be tested against "reference points" instead of background data. *See* Coast Guard Reply at 34. According to the Coast Guard, "RRT member agencies advised the [OSC] that this method of analysis was scientifically valid." *Id*. While the Coast Guard may be correct that the use of reference points is "scientifically valid," the above-mentioned amendment to the UAO requiring additional dredging to site B-2 was based expressly on the assertion that the dioxin levels were elevated and, implicitly, on the assumption that the sample results exceeded pre-spill background levels that were in the possession of the Corps. As stated above, however, no such background data existed and the Coast Guard has proffered no other contemporaneous explanation in the record for the conclusions it reached on February 28, 1996, and March 1, 1996, that the levels were elevated.[40] In our view, the Coast Guard, therefore, lacked contemporaneous data to support its determination that the levels were elevated before amending the UAO on those dates. *See In re A & W Smelters & Refiners, Inc.*, 6 E.A.D. 302, 326 (EAB 1996) (the Board's review of a clean-up order will be confined to examining the administrative record as it existed at the time the Region issued the clean-up order), and cases cited *supra*. Thus, we agree with Petitioners that the Coast Guard's determination in this regard was arbitrary and capricious.

In its comments on the Preliminary Decision, the Coast Guard proffers a new explanation for requiring additional dredging in area B-2. In particular, the Coast Guard now asserts that, in concluding that dioxin levels in area B-2 were "elevated," the Coast compared sampling data submitted by Petitioners on February 20, 1996, with previous samples taken during the course of the response in November 1995 and January 1996. Government's Response to Preliminary Decision ("Gov't. Comments") at 3 (Mar. 5, 2001). The Coast Guard states:

> Initial testing conducted at [site B-2] on November 17, 1995 and January 10, 1996 showed dioxin levels at the "non-detectable level," as described by the lab conducting

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[39] *See also In re Beckman Prod. Servs.*, 8 E.A.D. 302, 313 (EAB 1999) (remanding permit determination where the Region provided differing rationales and stating that the Board was unable to determine with sufficient certainty the actual basis for the Region's determination) (citing *In re Austin Powder Co.*, 6 E.A.D. 713, 719 (EAB 1997)).

[40] As discussed below, in commenting on the Board's Preliminary Decision, the Coast Guard has offered a post hoc rationalization for its determination.

> the tests. However, after initial dredge operations were completed at the actual spill site in January 1996, post-dredge sampling submitted to the Coast Guard on February 20, 1996 revealed a significant increase in dioxin levels at this same site. The dioxin level jumped from the non-detectable level to 5.7 [parts per trillion].

Id. at 3-4 (record citations omitted). According to the Coast Guard, the February 28, 1996 amendment to the UAO "clearly expressed" that this rise in the dioxin level was the basis for requiring additional dredging. *Id*. at 4.

ECDC strenuously objects to the Coast Guard's new explanation. *See* Response of Petitioners ECDC Environmental, L.C./Laidlaw Environmental Services, Inc. to Preliminary Decision ("ECDC Comments") (Mar. 26, 2001). ECDC states:

> The Coast Guard does not and cannot cite a single item in the Administrative Record which provides even a premonition, much less a discussion, of this newfound explanation. In answer to repeated requests and pointed questions on this subject at the time events unfolded, the Coast Guard was silent. It never mentioned reliance on the post-spill sampling data it now says were compared and evaluated to justify the decision. Nor does the Coast Guard square its claimed reliance on only *post-spill* results with the amendments' consistent references to *pre-spill* levels. If the analysis the Coast Guard actually performed was a straightforward and easy to understand as it now maintains, why is the Administrative Record so barren of even the most cursory reference to it?

ECDC Comments at 5.

As stated above, the February 28th letter stated only that "[d]ue to elevated levels of dioxin persisting in the sediment offshore, as demonstrated by the data you provided on February 20, 1996, I require that further dredging be conducted." AR 195. The letter makes no mention of the existence of, let alone a change from, the earlier sampling results to which the February 20th samples were allegedly compared. If anything, the statement that these samples show that "elevated" dioxin levels were "persisting" in the sediment implies that the Coast Guard believed dioxin levels remained high in comparison to preexisting (background) levels, especially when read in conjunction with the requirement articulated later

in the same letter that the area be cleaned to pre-spill background levels.[41] Thus, contrary to the Coast Guard's assertion in its comments on the Board's Preliminary Decision, the Coast Guard, during the relevant time period, failed to provide ECDC with a reasoned explanation for its determination. Absent such a contemporaneous explanation, the Coast Guard's action in requiring additional dredging was arbitrary and capricious. *See Motor Vehicle Mfrs. Assoc.*, 463 U.S. at 42-43; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (courts will not accept *post hoc* rationalizations for agency action; "an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself."); *Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 355 (1st Cir. 1994) (arguments may not be raised for the first time on appeal even where an argument involves no new facts, but only a new theory); *see also In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434, 457 (EAB 1997) (arbitrary and capricious standard is not based on hindsight); Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions at 9 (EAB, Oct. 9, 1996) (except in extraordinary circumstances, the Board will "decline to consider any new claims or new issues sought to be raised during the comment period.").[42]

Having said this, we do not suggest that, in defending issuance of a UAO before the Board in the context of responding to a petition for reimbursement under CERCLA § 106(b), an agency is barred from providing any additional explanation or amplification of a previously articulated (and record supported) rationale. Nor do we demand unrealistic precision in remedy-selection determinations made in the field. However, where, as here, the Coast Guard attempts to support issuance of an amended UAO by relying on a rationale neither articulated at the time the amendment was issued nor even in the reply to the Petition for Reimbursement, the Board will decline to consider the new-found rationale.[43]

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[41] In its comments on the Preliminary Decision, the Coast Guard concedes that "[t]hroughout most of the response * * * the [Coast Guard] indicated its intent to confirm the final success of the response by comparing the levels of dioxin from samples taken by Petitioners with pre-spill background data provided by the [Army Corps of Engineers]." Gov't Response at 8.

[42] The Coast Guard had a substantial amount of time and numerous opportunities to alert the Board to the explanation it now proffers in its comments on the Board's Preliminary Decision. We find no extraordinary circumstances that would prompt us to consider the Coast Guard's new explanation at this late date.

[43] Moreover, it appears to us that the Coast Guard's new explanation contradicts statements in the Coast Guard's reply to the Petition for Review. In particular, in its reply, the Coast Guard justified the requirement for additional dredging in area B-2 by stating that sampling showed "continuing unacceptable levels of dioxin contamination." Coast Guard Reply at 31. In addition, the Coast Guard stated that it received input from other agencies "concerned about the level of dioxin remaining at sample site B-2." *Id.* at 32. Again, no mention is made of comparisons to or a material change from, prior samples. If anything, these statements imply that dioxin levels have remained elevated in comparison to

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Accordingly, Petitioners are entitled to reimbursement of all reasonable response costs incurred in complying with the February 28, 1996 amendment to the UAO. Similarly, because the Coast Guard's decision to require sampling of the navigation channel over a six-month period was also based on the allegedly "elevated" dioxin levels,[44] we find this monitoring requirement lacked adequate support in the administrative record as well.[45,46] Petitioners are therefore entitled to reimbursement of all reasonable response costs incurred in complying with this requirement.[47]

(continued)
pre-spill background levels. Under these circumstances, we reject the Coast Guard's assertion that the rationale for requiring additional dredging was "fully articulated to Petitioners." *Id*.

[44] As indicated in the February 28, 1996 amendment to the UAO, the requirement for additional monitoring reflected in the March 1, 1996 amendment was predicated on the alleged migration of contaminants "as evidenced by elevated dioxin levels" north of the spill cite. Letter from M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Feb. 28, 1996) (AR 195). The March 1, 1996 amendment also referenced "elevated dioxin levels." *See* Letter from Cmdr. M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Mar. 1, 1996) (AR 204) (reserving the right of the Coast Guard to require additional action if monitoring results "indicate that elevated dioxin levels remain.").

[45] In the February 28, 1996 amendment to the UAO, the Coast Guard makes the following statement in support of a monitoring requirement:

> There remains concern about the migration of contaminants away from the B-2 sample site. This migration appears to be evidenced by elevated dioxin levels shown in samples S-1 and BS-4 through BS-7, which are all located north of the spill site and towards the channel.

Letter from M.J. Pontiff, U.S. Coast Guard, to Gordon Schreck, Buist, Moore, Smythe & McGee (Feb. 28, 1996) (AR 195). However, the Coast Guard has provided no explanation regarding this assertion. Indeed, the Coast Guard appears to have abandoned this argument before the Board.

[46] Petitioners have also alleged that in imposing a post-dredging sampling requirement, "the Coast Guard improperly required the undertaking of a 'remedial' action under the guise of a 'removal' action. Given our holding above, we need not reach this issue.

[47] In its comments on the Board's Preliminary Decision, the Coast Guard states:

> [T]here is no indication that references to [Army Corps of Engineers] background data in the March 1, 1996 UAO caused Petitioners to suffer any prejudice. In a letter dated March 25, 1996, the [Coast Guard] notified Petitioners that pre-spill background contaminant level data did not exist. At that point, Petitioners had not submitted a testing plan. Petitioners did not submit a sampling plan until May 17, 1996. The [Coast Guard] approved the Petitioners final sampling plan on May 24, 1996. Therefore, the Petitioners cannot validly claim to have detrimentally relied on representations that [Army Corps of Engineers] pre-spill background data existed.

Gov't Comments at 7 (record citations omitted). While this may or may not be true, it misses the point. As stated above, the Coast Guard's imposition of the monitoring requirement lacked adequate support
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As stated above, the UAO contained requirements for dredging to remove the spilled (dioxin-containing) material as well as for sampling to confirm that the area had been cleaned to pre-spill background levels. In today's decision we have concluded that the provision of the UAO requiring removal of the dredged material spilled by Petitioners was adequately justified. This portion of the order is supported by the record before us and, as discussed above, Petitioners' assertions to the contrary have been rejected. However, with regard to the implementation of that portion of the order requiring confirmatory sampling during which the Coast Guard twice amended the UAO, we find fault with the Coast Guard's reasoning. In particular, as stated above, the Coast Guard consistently required that the spill area be cleaned to pre-spill background levels — levels which, as previously discussed, did not exist. Further, the Coast Guard has failed to provide adequate support in the record for its determination that dioxin levels were "elevated" in area B-2, or, for that matter, whether petitioners were responsible for the allegedly elevated levels.[48] Thus, it is only the February 28, 1996, and March 1, 1996 amendments to the UAO that we find arbitrary and capricious in today's decision.

f. *Motion to Supplement the Record*

By motion dated April 17, 1998, Petitioners seek to supplement the administrative record with two documents produced by the Coast Guard after ECDC's completion of the response in this matter. Motion of ECDC Environmental, L.C./Laidlaw Environmental Services, Inc. For Leave to Supplement the Administrative Record ("Motion"). Specifically, Petitioners seek to have the following documents admitted to the administrative record before us: (1) "Federal On-Scene Coordinator's (FOSC) Report on the Response to the Release of Contaminants from F/B Sheridan on 12 October 1995" ("FOSC Report"); and (2) a memorandum dated October 9, 1996, commenting on the FOSC Report, from Commander, Seventh Coast Guard District. Attached to the FOSC Report, are

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(continued)
in the administrative record. While the March 25, 1996 letter did acknowledge a lack of background data, and further stated that this fact did not alter the requirement for a monitoring plan since "[t]his monitoring is required to determine if additional mitigation would be required for the north side of the spill site and into the navigation channel[,]" it failed utterly to articulate a sufficient rationale to support this assertion. Thus, the fact that Petitioners were required to engage in additional monitoring at all resulted in prejudice, regardless of when Petitioners had submitted a monitoring plan. The Coast Guard's assertion in this regard is therefore rejected.

[48] According to the record, Petitioners raised questions as to whether contamination found in the channel was caused by other sources. *See* Letter from Robert F. McGhee, Director, Water Management Division, U.S. EPA, Region IV, to Elmer Schwingen, Army Corps of Engineers (Mar. 15, 1996) (AR 209); *see also* Letter from Gordon D. Schreck, Buist, Moore, Smythe & McGee, to Cmdr. M. J. Pontiff, U.S. Coast Guard, at 2 (Apr. 1, 1996) (AR 219) ("[W]ithout any pre-spill background data for use as a baseline comparison, there would be no practical way to insure that any future elevated dioxin readings which might be detected in the subject area were attributable due to some other source entirely unrelated to the PATRICIA SHERIDAN release.").

various documents that appear to be duplicative of documents already part of the administrative record. The Environmental Protection Agency's Office of General Counsel and the Office of Enforcement and Compliance Assurance have filed a response opposing the Motion. Opposition to ECDC's Motion for Leave to Supplement the Administrative Record (June 26, 1998). Petitioners have filed a reply to EPA's Response. ECDC Environmental, L.C./Laidlaw Environmental Services, Inc. Reply to EPA Opposition to Supplementation of Record (July 10, 1998).

As the Board has previously pointed out, the NCP requires the lead agency to "establish an administrative record that contains the documents that form the basis for the selection of a response action." 40 C.F.R. § 300.800(a); *see TH Agric. & Nutrition Co.*, 6 E.A.D. 555, 574 (EAB 1996). Pursuant to section 300.820(b)(3) of the NCP, "[d]ocuments generated or received after the decision document is signed shall be added to the administrative record file only as provided in 300.825." 40 C.F.R. § 300.820(b)(3). Section 300.825 specifies only two circumstances in which documents may be added to the administrative record "after the decision document selecting the response action has been signed":

> (1) The documents concern a portion of a response action decision that the decision document does not address or reserves to be decided at a later date; or
>
> (2) An explanation of significant differences required by § 300.435(c), or an amended decision document is issued, in which case, the explanation of significant differences or amended decision document and all documents that form the basis for the decision to modify the response action shall be added to the administrative record file.

40 C.F.R. § 300.825(a)(1)-(2). Neither of these circumstances exist in this case.

Because the documents Petitioners seek to add to the administrative record file were not in existence at the time the Coast Guard's response selection decision was made, or any of the amendments to the UAO were issued, and because the documents do not meet the above-quoted criteria for adding documents to the record, Petitioner's Motion is denied. *See Elf Atochem N. Am., Inc. v. United States*, 882 F. Supp. 1499, 1502 (E.D. Pa. 1995) (refusing to consider evidence developed after the agency's decision regarding a response action "because the question is not whether the EPA was right or wrong, but whether its decision was made without caprice."); *United States v. Amtreco, Inc.*, 806 F. Supp. 1004, 1007 (M.D. Ga. 1992) ("Post-decisional information is not relevant to a judicial review of an agency decision."); *In re A & W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 326 (EAB 1996) (Board review is confined to the administrative record as it existed at the time of the clean-up order); *In re CoZinCo, Inc*, 7 E.A.D. 708, 744 (EAB 1998) (arbitrary and capricious standard is not based on hindsight). Al-

though the court in *Elf Atochem* noted the existence of certain exceptions to the administrative record rule (*see Elf Atochem*, 882 F. Supp. at 1502), such as where "there is a strong showing that the agency engaged in improper behavior or acted in bad faith," or where the "agency failed to consider all relevant factors," Petitioners have not convinced us that any such exception applies in the this case. *See Amtreco*, 806 F. Supp. at 1006 ("These exceptions are to be narrowly construed, and defendants have a heavy burden to show that supplementation is necessary."). Finally, upon review, even were we to accept the documents into the administrative record, they would not affect the outcome of today's preliminary decision.

III. *CONCLUSION*

Except with regard to costs incurred in responding to both the February 28, 1996 amendment to the UAO (requiring additional dredging in the area surrounding the spill site designated as area "B-2"), and the March 1, 1996 amendment to the UAO (requiring additional monitoring), the Petition for Reimbursement is denied. With regard to costs incurred in responding to the February 28, 1996, and March 1, 1996, amendments to the UAO, the Petition for Reimbursement is granted and Petitioners are hereby ordered to file no later than June 29, 2001, a brief, along with supporting documentation, documenting the reasonable costs incurred in implementing those portions of the order we find arbitrary and capricious (unless the parties are able to settle this matter before that date). The Coast Guard will then have until July 27, 2001, to file any challenge to particular cost items (as unreasonable or otherwise not recoverable). Petitioners will then have until August 17, 2001 to file a response.[49]

So ordered.

[49] Documents are "filed" with the Board on the date they are received.