



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

**EXPRESS MAIL
OVERNIGHT DELIVERY**

September 15, 2010

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

RE: Southern Iowa Mechanical Site
Titan Tire Corporation and Dico, Inc., Petitioners
Petition Number: CERCLA 106(b) 10-01
Docket Number: CERCLA-07-2009-0006

Dear Ms. Durr:

In accordance with your letter dated June 24, 2010, to Cecilia Tapia, Director, Superfund Division, U.S. Environmental Protection Agency, Region 7 (the Region) and the Environmental Appeals Board's (EAB or Board) subsequent Order Granting Extension of Time dated August 20, 2010, I have enclosed for filing in this matter, the Region's Response on the merits to Petitioners' Second Petition for Reimbursement of Funds. All exhibits relied on in the response brief are also included. The Region submitted a certified index of the Administrative Record for the Southern Iowa Mechanical Site in its initial response to the EAB on November 24, 2009.

I am filing this response and accompanying exhibits through the Board's Electronic Filing System and will submit identical paper copies to the Board via express overnight delivery as the response and the combined attachments are each over 50 pages.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel J. Shiel".

Daniel J. Shiel
Assistant Regional Counsel

Enclosures



**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN RE:

Southern Iowa Mechanical
Superfund Site
Ottumwa, Iowa

Titan Tire Corporation

and

Dico, Inc.,

Petitioners

Petition for Reimbursement Under
Section 106(b)(2) of the Comprehensive
Environmental Response, Compensation,
and Liability Act of 1980, as amended
42 U.S.C § 9606(b)(2)

Petition No.
CERCLA 106(b) 10-01
Docket No.
CERCLA -07-2009-0006

**RESPONSE TO PETITIONERS' SECOND PETITION FOR
REIMBURSEMENT OF FUNDS**

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I. Introduction

The United States Environmental Protection Agency, Region 7 (“EPA” or the “Region”), files the following response to the Petition for Reimbursement which Dico, Inc. (“Dico”) and Titan Tire Corporation (“Titan Tire”) (collectively, “Petitioners”) filed for costs pursuant to Section 106(b)(2)(A) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. 9606(b)(2)(A). Petitioners seek reimbursement for the costs allegedly incurred in cleaning steel beams contaminated with polychlorinated biphenyls (“PCBs”) at the Southern Iowa Mechanical (“SIM”) property located at 3043 Pawnee Drive, Ottumwa, Wapello County, Iowa (“Southern Iowa Mechanical Site” or “SIM Site”). Petitioners also seek reimbursement of other costs not related to the Southern Iowa Mechanical Site cleanup. See Second Petition for Reimbursement of Funds Expended by Petitioners Titan Tire Corporation and Dico, Inc. in Complying with United States Environmental Protection Agency CERCLA § 106(a) Administrative Order No. CERCLA-07-2009-0006 and Other Required Actions, and for Relief for Constitutional Violations (filed May 24, 2010) (“Petition”). Pet. at 2-3.

Under CERCLA Section 106(b)(2)(A), any person who receives and complies with the terms of an order issued pursuant to CERCLA Section 106(a) may, within 60 days after completion of the required action, petition the EPA for reimbursement from the Fund for the reasonable costs of such action.¹ CERCLA Section 106(b)(2) presents two alternative conditions under which reimbursement may be granted. First, CERCLA Section 106(b)(2)(C) provides for reimbursement of costs that are reasonable in light of

¹ The President's authority to implement CERCLA section 106(b) was delegated to the EPA Administrator by Executive Order 12580 (January 23, 1987). The authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b) has been delegated to the Environmental Appeals Board. See Delegation of Authority 14-27 ("Petitions for Reimbursement").

the action required by the relevant order if the Petitioners establish, by a preponderance of the evidence, that they are not liable for response costs under Section 107(a) of CERCLA. 42 U.S.C. 9606(b)(2)(C).² Second, CERCLA Section 106(b)(2)(D) provides for reimbursement even if Petitioners are liable for costs under Section 107(a) if Petitioners can demonstrate that based on the administrative record the Region's selection of the removal action was arbitrary and capricious or otherwise not in accordance with law. 42 U.S.C. 9606(b)(2)(D).

Petitioners present for resolution the following issues: (1) whether Petitioners are liable for response costs under Section 107(a) of CERCLA, (2) whether the EPA acted arbitrarily and capriciously in ordering Petitioners to clean up the Site, and (3) whether the CERCLA unilateral administrative order ("UAO") in this case or, in the alternative, the CERCLA UAO regime is unconstitutional under the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Pet. at 2-3.

Petitioners have failed to meet their burden of proof under CERCLA Section 106(b)(2)(C) of showing that they are not liable for response costs associated with the UAO. As will be discussed in greater detail in Section III, below, Petitioners have not demonstrated by a preponderance of the evidence that they are not liable as "arrangers" under Section 107(a) of CERCLA. Rather, the evidence clearly shows that Petitioners' primary purpose in entering into the agreement with SIM was to arrange for disposal of the buildings on Dico's property located at 200 Southwest 16th Street, Des Moines, Iowa (the "Dico Property") because these buildings had not been used for several years and

² To the extent the "other costs" referred to in the Petition include costs allegedly incurred by Petitioners removing PCB contaminated insulation from individual's residences, rather than cleanup of the SIM Site, these costs would not be costs of complying with this order and therefore would not be recoverable under Section 106(b).

were expensive to maintain. Also, the presence of hazardous substances in these buildings, including the PCBs encapsulated in the insulation, made the buildings very costly to demolish and dispose of if done properly and in accordance with law.

Petitioners therefore are liable for response costs under Section 107(a) of CERCLA as persons who arranged for the disposal of hazardous substances and are not eligible for reimbursement under Section 106(b).

Petitioners also fail to meet their burden of showing that the Region acted arbitrarily and capriciously in selection of the response action at the SIM site. Petitioners make a number of assertions as to EPA's allegedly arbitrary and capricious actions with respect to the SIM Site, which they argue should entitle them to reimbursement even if they were found liable for costs under Section 107(a) of CERCLA. Pet. at 40.

Petitioners largely support these assertions with unsubstantiated allegations and misrepresentations of the facts. A thorough examination of the relevant facts clearly shows that the Region acted properly at every step in the process. The Administrative Record demonstrates that the sampling data relied upon by the Region in selecting the SIM Site removal action was valid and the response action decision was appropriate under the conditions found at the SIM Site. The statutory prerequisites for issuance of an order were clearly met.

Having failed both conditions for recovery, Petitioners' request for reimbursement based on CERCLA Section 106(b)(2)(A) should be denied.

Petitioners' request for reimbursement, based on constitutional issues, should also be denied. Constitutional claims generally extend beyond the scope of EPA's authority to decide. The Board has previously declined to address similar claims in response to a

different petition. Furthermore, federal courts have repeatedly and uniformly rejected these types of challenges to CERCLA Section 106. Thus, Petitioners' claims based on constitutional issues must fail.

Finally, Petitioners request for oral argument is unnecessary based on the facts before the Board and should be denied. Petitions fail to explain how oral argument would assist the Board in reaching a decision on the merits. Pet. at 70. Petitioners have failed to demonstrate that they are not liable and the administrative record clearly demonstrates that EPA did not act arbitrarily or capriciously or otherwise not in accordance with law.

II. Statement of Facts

Although the response action for which Petitioners seek reimbursement was at the Southern Iowa Mechanical Site in Ottumwa, Iowa, the steel beams the Region ordered Petitioners to decontaminate came from buildings on the Dico Property in Des Moines, Iowa. The Dico Property is part of the Des Moines TCE Superfund Site, which EPA listed on the National Priorities List ("NPL") pursuant to CERCLA Section 105, 42 U.S.C. 9605, in 1983. Investigations conducted by Dico and EPA in the early 1990s found these buildings to be contaminated with various pesticides and PCBs, and led the Region to issue Dico a CERCLA Section 106 UAO requiring Dico to encapsulate these hazardous substances in the buildings.

A. The Dico Property and Buildings

Over the past 60 years, or more, a variety of business operations have been conducted on the Dico Property, including manufacturing steel wheels, formulating pesticides and herbicides, and distributing industrial and commercial chemicals. EPA Ex.

1, Des Moines Area Source Control Operable Unit Remedial Investigation Report, Volume I of V, Eckenfelder, Inc., January 1993, at 2-3. These activities left behind a legacy of environmental problems that have been the subject of EPA investigations and CERCLA enforcement actions for over 30 years, including contaminated groundwater, contaminated soils over much of the property, and contaminated buildings, some of which were demolished by SIM and are the subject of this Petition. EPA Ex. 2, Fourth Five-Year Review Report, Des Moines TCE Site, Des Moines, Iowa, February 2008 at 7.

1. OU2 Remedial Investigation and Feasibility Study/1992 Building Investigation Report

In 1989 the Region issued Dico a CERCLA Section 106 administrative order on consent (“AOC”) directing Dico to conduct a remedial investigation (“RI”) and feasibility study (“FS”) on the Dico Property. EPA designated this as the Operable Unit 2 (“OU2”) RI/FS. Dico retained Eckenfelder, Inc. as its contractor to conduct the OU2 RI/FS.³ As part of the OU2-RI Eckenfelder investigated several buildings on the Dico property that had been used by DiChem, Inc., a related company, for pesticide/herbicide formulation and chemical distribution operations. These buildings were designated as Buildings 1 through 5 and the Maintenance Building and are sometimes referred to as the “DiChem Buildings.” EPA Ex. 1, Fig. 2-1. Eckenfelder found a variety of hazardous substances in the concrete floors and dust in the DiChem Buildings, including aldrin, dieldrin, chlordane, heptachlor, 2,4-D, and 2,4,5-T. EPA Ex. 1 at 6-18.

In 1991 and 1992 Eckenfelder conducted an investigation focusing on contamination in the DiChem Buildings. EPA Ex. 3, Building Interior PCB Sampling

³ Aware, Inc., which became Eckenfelder, Inc., had been Dico’s consultant for design and construction of the groundwater remedy on the Dico Property starting in 1986. Eckenfelder was acquired by Brown and Caldwell in 1998. For convenience in this Response, EPA will refer to the corporate author of various reports by the name shown on the title page of the report.

Work Plan at 1-1. The primary investigation relating to the presence of PCBs in the buildings was conducted in January 1992. EPA Ex. 4, Building Sampling, Analysis, and Engineering Evaluation Report, Eckenfelder, August 1992 ("1992 Building Investigation Report").⁴ Eckenfelder researched the history of the construction of the buildings and selected insulation sampling locations to represent all the various dates of construction associated with the DiChem Buildings. *Id.* at 2-9. To help establish the source of the PCBs in the insulation Eckenfelder collected samples at three depths in the insulation, i.e., at the foil backing, an intermediate layer within the insulation, and adjacent to the roof. *Id.* at 2-9.

Eckenfelder found PCB contaminated insulation in Buildings 2, 3, 4, 5 and the Maintenance Building. *Id.* at 2-9. The highest concentration of any of the samples collected was 29,000 mg/kg of Aroclor 1254,⁵ found in the ceiling insulation in Building 5. Aroclor 1260 was reported as being below the method detection limit ("BMDL") in this sample. Eckenfelder found 2,700 mg/kg of Aroclor 1254 (Aroclor 1260 reported as BMDL) in the ceiling insulation in Building 4 and 15,000 mg/kg of Aroclor 1254 (Aroclor 1260 reported as BMDL) in the ceiling insulation in Building 3.⁶ *Id.* at Table 2-3. Eckenfelder noted that "[I]n most cases, PCB concentrations were greater closer to the fabric [liner] rather than in the center of the insulation or in insulation abutting the metal deck portion of the roof. This indicates that the potential source of PCBs may be related to the adhesive used to secure the insulation to the foil/fabric." *Id.* at 2-14.

⁴ Petitioners Exhibit 7, Attachment 2, is portions of this report

⁵ Aroclor is one of the most commonly known trade names for PCBs.

⁶ Four samples in Building 3 found Aroclor 1260 with Aroclor 1254 reported as BMDL. Three of these samples were taken at the same location, at the foil backing, in the intermediate layer, and at the roof. The results ranged from 12 mg/kg to 170 mg/kg, with the highest concentration being found at the foil backing. The fourth sample was collected from the intermediate layer at a different location in Building 3, with Aroclor 1260 being found at 22 mg/kg and Aroclor 1254 reported as BMDL. Samples were apparently not collected from the foil backing or adjacent to the roof at this location. EPA Ex. 4 at Table 2-3.

Eckenfelder evaluated various options for addressing the pesticide contamination in the buildings, including (1) vacuuming to remove dust from the ceilings, walls, floors, heavy equipment, piping, light fixtures, and other material that is either fixed in the building or determined to be too impracticable to move, (2) vacuuming and then washing interior building surfaces, and (3) vacuuming and then selectively washing any interior building surfaces, such as floors, ceilings, structural steel framing, walls, piping, light fixtures, ceiling fans, and other equipment determined not feasible to move which contain residual material not removed by vacuuming (and possibly chipping). *Id.* at 3-1.

However, Eckenfelder evaluated only one option for the contaminated insulation, which it described as “*repairing damaged exposed ceiling insulation, installing engineering controls to prevent damage to existing exposed wall insulation, and developing a notice arrangement that would notify any building leasee [sic] or potential buyer that the PCB containing insulation existed in the buildings.*” (emphasis added). *Id.* at 3-6. Eckenfelder went on to describe the proposed insulation cleanup as follows:

Exposed insulation ceiling repairs for the most part would involve placing heavy adhesive tape over small tears and holes. A few panels of ceiling insulation (primarily in Building 4) have been damaged more extensively so removal and replacement may be appropriate. Proper off site disposal of any waste PCB containing insulation would be required, however, the quantity of waste material is expected to be quite small and would be minimized. Workers who conduct the repairs would have to be properly trained in health and safety.

Id. at 3-6.

2. Dico Building Removal Action

On December 10, 1993, Dico sent EPA a proposed work plan for cleaning Buildings 1 through 5 and the Maintenance Building and sealing all interior exposed surfaces by encapsulating them with epoxy paint. EPA Ex. 5, Work Plan Removal

Action Operable Unit No. 4, December 10, 1993 ("Proposed Building Work Plan"). The Proposed Building Work Plan's stated objectives were "to remove residue pesticides and prepare interior building surfaces for the application of an encapsulant." *Id.* at Sec. 2.0. Specific activities for Buildings 4 and 5 were described in the Proposed Building Work Plan as follows:

1. Initially the floors will be dry vacuum cleaned of all residual loose material and drummed in DOT approved containers to minimize further potential of airborne exposure during response activities.
2. *Roof/building beams, trusses ceiling and wall insulation material will be dry vacuumed.*
3. *Damaged ceiling insulation material will be repaired or replaced as necessary.* All joints will be covered with duct tape or appropriate tape.
4. Building walls will be dry vacuum cleaned. *Damaged insulation will be repaired or replaced.* All joints will be taped with duct tape or approved material.
5. Floor surface areas will be dry vacuumed and surface washed with appropriate industrial unit (tenant floor washer/sweeper).
6. *All exposed surfaces of interior of building will then be prepared and encapsulated with epoxy paint, sealing all interior exposed surfaces*
7. Metal panels will be installed along wall surfaces which have exposed insulation to a height 4' off of floor surface in order to protect the insulation from future potential damage.
8. All collected waste material will be disposed of at regulated facilities based on analytical results received from representative samples.
(emphasis added)

Id. at Sec. 3.0. Essentially the same description was provided for cleanup activities in the Maintenance Building and for Buildings 1, 2, and 3. This proposal very much parallels the options evaluated by Eckenfelder in the 1992 Building Investigation Report, discussed above, especially with respect to repairing damaged ceiling and wall insulation and encapsulating the remaining hazardous substances in place. EPA Ex. 4 at 3-6.

Although the Region had some comments on the details of the Proposed Work Plan, it initiated efforts to negotiate an AOC with Dico for the building cleanup consistent with the basic approach proposed by Dico. EPA Ex. 6, Glenn Curtis letter to

Gary Schuster, December 30, 1993, at 1. The negotiations were not successful and on March 8, 1994, the Region issued Dico a UAO directing it to “[R]epair, seal and protect all building insulation and clean and seal all exposed interior surfaces, including the walls, ceilings and concrete floors of Buildings 1 to 5 and the Maintenance Building.” EPA Ex. 7, In the Matter of Dico, Inc., EPA Region 7 Docket No. VII-94-F-0017, CERCLA 106 UAO issued to Dico Inc. on March 8, 1994, (“1994 Building UAO”) at 10.

Dico submitted a revised Removal Action Work Plan on or about March 26, 1994, in which it described the objectives of the Work Plan as follows:

The objective of this work plan is to outline the criteria for remediation of OU4 *resulting in the encapsulation of hazardous substances, pollutants, or contaminants* that either may have been or are threatened to be released into the environment at the facility. The information collected from previous reports and investigation have been used as a basis for the development of this work plan. This work plan describes the methods to be used to remove residue pesticides and *prepare interior building surfaces for the application of an encapsulant.*

...

The implementation of this work plan will restore the OU4 Buildings safely, economically and environmentally to protect human health and safety for ongoing industrial use generating a continued economic base for the local and regional area. Ongoing and future industrial use of the facilities will involve light duty manufacturing only and prohibit any heavy production process or foundation work. Light duty manufacturing may include such processes as painting, minor assembly, packaging, shipping, or storage of materials. *For future protection of human health and the environment, an Operation and Maintenance Program (Appendix C) will be instituted to insure surface coverages remain effective.* (emphasis added)

EPA Ex. 8, Work Plan, Removal Action Operable Unit No. 4 Dico, Inc., Des Moines, Iowa, Prepared By: Titan Wheel International, Inc./Dyneer Corporation Environmental Engineering Department, undated but received by EPA on March 26, 1994, (“Building Removal Action Work Plan”) at 3.

The relevant work required by the 1994 Building UAO is described in the Building Removal Action Work Plan as follows:

3. Roof/building beams, trusses, ceiling and wall insulation material will be dry vacuumed by equipment containing HEPA filters. The sweepings will be containerized.

...

5. Damaged ceiling insulation material will be repaired or replaced as necessary. *Any insulation that is beyond repair will be removed and new insulation will be installed while salvageable insulation will be covered with new foil backing.* All joints will be covered with duct tape or appropriate tape.⁷ (emphasis added)

Id. at 4-8. Thus, the only material the Work Plan provided for removing was insulation that was too badly damaged to be repaired. It did not provide for locating or removing the specific sections of insulation sampled by Eckenfelder.⁸

The reports and other documents prepared contemporaneously with the Building cleanup work consistently indicate that, with specific exceptions,⁹ Dico only removed insulation that was too badly damaged to be repaired. Pet. Ex. 7, Att. 9, Second Monthly Progress Report- April 11, 1994 through May 8, 1994, dated May 13, 1994, at 1. In the Second Monthly Progress Report, Dico also described the four main waste streams being produced by the building cleanup.¹⁰ The only waste stream relating to insulation was described as “the damaged insulation which is containerized in fiber drums and marked as to its contents.” *Id.* at 1.

Dico’s Third Monthly Progress Report included a Waste Generation, Staging and Disposal Plan. Pet. Ex, 7, Att. 18A, Third Monthly Progress Report – May 9, 1994

⁷ This description is for Buildings 4 and 5. The same requirements are specified for Buildings 1, 2 and 3 and the Maintenance Building.

⁸ The Work Plan also provided for dry vacuuming the building and roof beams and trusses, and the ceiling and wall insulation material. Building Removal Action Work Plan at 4, 7.

⁹ For example, for some interior wall insulation in Building 3 Dico made the decision that it would be easier to remove the insulation than to replace it.

¹⁰ The Second Monthly Progress Report and several other documents relating to the Building Removal Action were submitted by Titan Wheel International.

through June 12, 1994, dated June 14, 1994. Dico described its plans for handling “removed insulation” as follows: “As set forth in the Work Plan . . . waste generated by *removing insulation beyond repair* or no longer required will be containerized for proper handling and disposal.” *Id.* at 3.

According to Dico’s fourth and fifth monthly reports, all insulation repair, floor cleaning and encapsulation had been completed in Buildings 3, 4, and 5 by the time the fifth monthly report was submitted. Pet. Ex. 7, Att. 18B, Fourth Monthly Progress Report – June 12, 1994 through July 9, 1994, dated July 14, 1994 at 3 and EPA Ex. 9, Fifth Monthly Progress Report – July 10, 1994 through August 6, 1994, dated August 11, 1994 at 2. Although other work remained to be completed pursuant to the 1994 Building UAO and Dico continued to submit progress reports for several more months, there is no indication in any of the progress reports that any additional insulation was removed from Buildings 3, 4, or 5 after the epoxy paint encapsulation layer was in place. Thus, the progress reports submitted during the building encapsulation operations, which were intended to make a record of the work that was completed under the 1994 Building UAO, give no indication that all PCB-contaminated insulation was removed from the buildings.

3. Building Removal Action Operation and Maintenance

By letter dated June 10, 1994, Dico submitted its Building Operation and Maintenance Plan (“Building O&M Plan”) for the buildings required by the 1994 Building UAO. EPA Ex. 10, Operation and Maintenance Plan for Dico, Inc., Des Moines, Iowa, Buildings No. 1-5, Maintenance Building and Maintenance of Interior Surface Coatings, June 1994. In the Building O&M Plan Dico described the building cleanup actions as follows:

The following actions were taken during the remediation actions:

Residual and loose material was cleaned from the floors.
Building walls, roof/building beams, trusses, and ceilings were dry vacuumed to remove loose material.

Dirt, dust, and oil and grease was cleaned from interior surfaces.

Damaged insulation was repaired or replaced.

Floors were wet scrubbed with a mild acid solution.

Surfaces were prepared and then encapsulated with a coating.

Metal panels were installed along walls which had exposed insulation.

The Aldrin tank annex was removed along with the Aldrin tank itself. Surrounding soil was excavated for disposal.

Air sampling was performed upon completion to ensure the encapsulation was effective. (emphasis added)

Id. Sec. 2.0 at 2.

Observations by EPA's oversight contractor also support the conclusion that all insulation was not removed from the buildings. EPA's oversight contractor visited the Dico Property to observe the cleanup on two occasions, on April 12 to 14, 1994, and again on May 23 and 24, 1994. The report submitted to EPA regarding the April 12 to 14, 1994 visit indicates the oversight contractor observed Dico's cleanup contractor vacuuming the walls and ceilings in Buildings 4 and 5 and that after vacuuming, the insulation seams and tears in the insulation were being repaired. EPA Ex. 11, Memo dated April 20, 1994, from Robin Wankum, Black & Veatch Waste Science, Inc., to Glenn Curtis, EPA, re Field Observations of Removal Activities, "Wankum April 20, 1994, memo," at 1. During the May 23 and 24, 1994, visit, Ms. Wankum noted that the ceilings, walls, and beams in Buildings 4 and 5 had been painted white. Insulation seams were still being repaired and the paint touched up. Adhesive foil was used to repair insulation in some areas where it "was really ripped up." Adhesive foil was also used to repair the insulation on the ceiling in Building 3. EPA Ex. 12,

Memo dated June 6, 1994, from Robin Wankum, Black & Veatch Waste Science, Inc., to Glenn Curtis, EPA, re Field Observations of Removal Activities, "Wankum June 6, 1994, memo," at 1.

4. Building Removal Action Final Report

Dico submitted the Removal Action Final Report required by the 1994 Building UAO on April 11, 1997, approximately three years after it completed encapsulating the interior surfaces in Buildings 3, 4, and 5. EPA Ex. 13, Removal Action Final Report, Operable Unit 4 Removal Action, dated April 11, 1997 ("Building Removal Action Final Report").¹¹ Dico asserts for the first time in the Building Removal Action Final Report that it removed materials that were identified as containing PCBs:

2.3.3 Insulation Repair/Removal

At various locations within the buildings, some panels of worn and aged insulation were falling from the ceilings. Since such damage would not be acceptable for painting later these sections were replaced and/or repaired where necessary. *In some buildings the ceiling insulation backing had been identified as containing PCB's in past investigation and in these cases the panels were removed for disposal.* Repairs of existing insulation and installation of new material was secured with tape to prevent gaps in coverage. (emphasis added)

Id. at 6.

In the buildings, where previous investigations indicated PCB's were present in the insulation, this material was removed for disposal as work progressed through the buildings. As the waste insulation was removed, it was placed into 55 gallon fiber drums which were sealed and labeled. The drums were placed in the hazardous waste storage area to await offsite removal. The insulation was disposed of by incineration at the Aptus facility in Lakeville, Minnesota. A waste profile and analysis is provided in Attachment 5.5 and a summary of quantities and shipment dates is in Attachment 5.0. (emphasis added)

Id. at 17.

¹¹ Pet. Ex. 7, Att. 6 includes portions of this report.

The highlighted statements serve as the one of the primary grounds for Petitioners' argument that PCB-contaminated materials were removed from the buildings long before the buildings were demolished. However, there is no factual support for these conclusions. Dico's initial evaluation of insulation cleanup options included in the 1992 Building Investigation Report, its December 1993 Proposed Building Work Plan, its March 1994 Building Removal Action Work Plan, its Building O&M Plan, its Waste Generation, Staging and Disposal Plan and its monthly progress reports all describe the work as repairing damaged insulation and only removing insulation which is too badly damaged to be repaired. Some exceptions to this plan were highlighted in the monthly reports, such as the interior insulation in Building 3. The observations made by EPA's oversight contractor were consistent with this being the general plan. Nowhere is there any record of Dico's having removed and replaced any more insulation than absolutely necessary. The Region's certification that the work required by the 1994 Building UAO had been completed and the long-term O&M requirements were now in effect does not indicate EPA's agreement with every statement in the Building Removal Action Final Report. EPA Ex. 14, May 8, 1997, letter from Mary Peterson to Jim Fechter, Titan Wheel, ("Notice of Completion") at 1.

In addition to Dico's descriptions of the work and the observations of EPA's oversight contractor, the quantities of insulation removed from the buildings do not support Petitioners' contention that materials identified as PCB-contaminated had been removed from the buildings. Attachment 5.0 to the Final Report indicates that a total of 36 55-gallon fiber drums, or 1980 gallons of waste insulation, weighing 1008 pounds were removed from the buildings and sent off-site for disposal. EPA Ex. 13, Att. 5.0 at

1-2.¹² In the Final Feasibility Study for Operable Units 2 and 4 of the Des Moines TCE Site, EPA evaluated a remedial option in which all the insulation in the buildings would be removed and properly disposed of. EPA Ex. 15, Final Feasibility Study for the Des Moines TCE Site, Operable Unit Nos. 2 and 4, May 30, 1996, ("OU2/4 FS"), Table E-3. Based on the size of the buildings, EPA's contractor calculated the total volume of contaminated insulation in the Dico buildings to be approximately 2,811 cubic yards, or 10,146 gallons.¹³ *Id.* at E-3. Thus, the 1980 gallons of waste insulation Dico reported sending for disposal in 1994 is approximately 20 percent of EPA's estimate of the total volume of insulation that was in the buildings, leaving approximately 80 percent of the insulation still in the buildings enclosed within the encapsulation barrier. Clearly, the Petitioners did not remove all of the contaminated insulation during the 1994 removal action.

Attachment 5.5 to the Final Report is the APTUS waste profile information for the insulation removed from the buildings. EPA Ex. 13, Attachment 5.5. APTUS was Dico's waste disposal contractor for the Building Removal Action. The data reported in Attachment 5.5 shows the composite sample of insulation removed from the buildings for disposal had a PCB concentration of 28 $\mu\text{g/g}$ (28 mg/kg).¹⁴ *Id.* at Attachment 5.5, 2-3. This composite sample, along with the insulation samples analyzed at the SIM Site, are the only insulation samples analyzed after the building interiors were encapsulated. This

¹² Pet. Exhibit 4, p. 17, Attachments 5.0

¹³ The estimated cost for removal and disposal of the insulation and decontamination of the buildings in 1996 FS was \$2,275,260. EPA Ex. 15 at Table E-3.

¹⁴ According to Dico's Waste Generation, Staging and Disposal Plan, the sample analyzed would have been from a composite sample collected from the different drums of insulation staged for disposal. Pet. Ex. 7, Att. 18A, at D0440.

data confirms, rather than contradicts, the earlier Eckenfelder sampling data in that it shows the presence of PCBs in the insulation.

In June 2000, Environmental Science, another Dico contractor, collected and analyzed interior building surface wipe samples pursuant to the Building O&M Plan. The purpose of the sampling was to verify that the encapsulation layer remained effective in containing the PCBs. Pet. Ex. 7, Att. 11. No insulation samples were collected since it would have been necessary to invade the encapsulation barrier to collect such a sample. Not finding PCBs in the surface wipe samples may indicate that the encapsulation barrier remained effective, but would not indicate that there were no PCBs in the insulation itself.

5. Proposed Modification to O&M Plan

Over time, the activity level in the buildings declined and Dico sought relief from the Region for some of the requirements of the 1994 Building UAO. By letter dated July 2, 2003, Dico proposed the following modifications to the O&M activities with respect to the Buildings:

Operable Unit 4 Building Removal Action

This system is operating under the guidelines of the following documents:
USEPA Administrative Order Docket No. VJI-94-F-0017
Operation and Maintenance Plan, 10 June 1994

11. The interior surface coating maintenance for Buildings 1, 2, 3, 4, 5, and the Maintenance Building at the Des Moines TCE site is very costly and time consuming. At the end of 2001, all manufacturing operations were shut down and the buildings were vacated. On the date of this work plan, some inventory remnants remain in the Maintenance Building and Buildings 3, 4, and 5. One man is currently working on a weekly basis to remove these remnants of inventory. DICO has intentions of possible future demolition or dismantling of these buildings. No date of certainty can be given for this, however.

It is proposed to discontinue the requirements of the Operation and Maintenance Plan of 10 June 1994. This is based on the fact the buildings are not being used for manufacturing activities, the cost associated with the upkeep, and there is no occupancy of people to perform the work. The only people visiting the site are for the sampling, monitoring, and maintenance requirements of OUI and OU4 Capping Removal Action, and the one person mentioned in 13 above.

The effective date would be the date of approval of this work plan. (emphasis added).

EPA Ex. 16, July 2, 2003 letter from Dan Buttars, Dico Environmental Coordinator, letter to Mary Peterson, EPA. Dico's letter makes no reference to the PCB-contaminated insulation being removed from the buildings to support its request to discontinue the requirement of the Building O&M Plan, which included maintaining the encapsulated buildings.

The Region responded to Dico's proposed changes by letter dated September 3, 2003, stating:

The work plan mentions that Dico may demolish the buildings which are associated with previous response actions and subject to certain requirements for operation and maintenance. The EPA does not necessarily object to demolition of the buildings, but urges Dico to coordinate any plans for demolition of the buildings with EPA. *Certain disposal requirements may apply for building debris, and the EPA or state would want to oversee the demolition.* (emphasis added)

EPA Ex. 17, September 3, 2003, letter from Mary Peterson, EPA, letter to Dr. Gazi George, Titan International, Inc., at 1.

Dico's Building Removal Action Annual Report from July 2005 states as follows:

The buildings remain unoccupied for any manufacturing or warehousing activities. The entire inventory has been moved out. The only items that remain are some pieces of miscellaneous production machinery. *In addition to existing perimeter fencing and locked gates, twenty-four hour onsite security services are scheduled to return to the premises to discourage vagrants and/or trespassers.* (emphasis added).

EPA Ex. 18, Operable Unit 4 Building Removal Action Report for 2005, dated July 25, 2005 at 1.

Thus, by July 2005 the buildings had not been used productively for several years, Dico acknowledged that upkeep pursuant to the 1994 Building UAO was expensive and time consuming and Dico indicated it was considering demolishing the buildings. However, Dico had not proposed a specific plan or even an approximate time frame to the Region and the Region had not given Dico approval to demolish the buildings. The requirements of the 1994 Building UAO to maintain the encapsulation barrier remained in effect.

6. Plans to Redevelop Dico Property

The City of Des Moines was interested in re-developing the Dico property.¹⁵ At the City's request, the Region prepared a Reuse Assessment Report for the Dico Property. EPA Ex. 19, Reuse Assessment Report for the DICO Property, EPA Region 7, March 2007. This report addressed questions raised by the City regarding redevelopment of the Dico Property in light of the existing contamination. This report repeatedly mentions the existence of the PCB-contaminated insulation in the buildings, including the following:

Property owned by Dico, Inc. southwest of downtown Des Moines, Iowa, is part of the Des Moines TCE Superfund site . . . *Several buildings on the property contain pesticide residues and polychlorinated biphenyls (PCBs).* (emphasis added)

Id. at 2.

In March 1994, under EPA oversight, the DICO Company conducted a removal action addressing contamination inside on-site buildings. *Interior surfaces were cleaned, building walls and floors were encapsulated, and*

¹⁵ On September 22, 2006, the Region met with representatives of Dico and the City of Des Moines to discuss the City's interest in redeveloping the Dico Property.

interior building insulation containing PCBs was secured. (emphasis added)

Id. at 20.

Thus, the report clearly indicates that the PCB-contaminated insulation had been encapsulated in the buildings. The Region forwarded copies of the Reuse Assessment Report to multiple Dico representatives by letter dated March 17, 2007, including Cheri Holley who participated in the September 22, 2006 meeting with EPA and the City. EPA Ex. 20, Letter dated March 19, 2007, from Mary Peterson, EPA, to Brian Mills, Dico, w/cc to Cheri Holley, Titan International, transmitting a copy of the Reuse Assessment Report for the Dico Property. Dico did not dispute the information in this report and less than five months after receipt of the report Petitioners entered into the demolition contract with SIM.

B. Building Demolition

The Region first learned the buildings were being demolished when Mary Peterson, the Region's Remedial Project Manager ("RPM") for the Des Moines TCE Site, visited the Dico Property on September 19, 2007. EPA Ex. 21, Site Inspection Report, Des Moines TCE Site, September 2007, at 2. This site visit was part of a Five Year Review ("FYR") the Region was conducting pursuant to Section 121 of CERCLA, 42 U.S.C. 9621, to determine whether the Superfund remedies in place on the Dico Property, including the Building cleanup, remained protective. At the time of this visit large portions of some of the former DiChem buildings had already been dismantled and essentially all the insulation had been removed from these buildings.

The Region sent Dico a letter dated November 8, 2007, requesting information about the building demolition. EPA Ex. 22, Letter dated November 8, 2007, from Mary

Peterson to Brian Mills, Dico, re: Follow-up from September 2007 Site Inspection and Response to Recommendations in PER No. 21, at 1. Cheri Holley responded on behalf of Dico by letter dated January 22, 2008, stating in relevant part the following:

5) Buildings 4 & 5: During the initial phases of Building post closure monitoring required by the original Administrative Order No. VII-94-F-0017, DICO conducted testing on the inside surfaces of the buildings to include the parameters stated in your November 8th, 2007 [letter]. All testing showed that these concentrations did not meet any RCRA or TSCA hazardous waste standards. Mr. Thomas Duncan sampled these buildings on a regular basis. *It was then, and only then that EPA approved the dismantling and disposal/ sale of these buildings in USEPA letter dated September 3rd 2003 Paragraph 2, pending notification of USEPA Region VII. DICO apologizes for the miscommunications that resulted in not notifying the USEPA within the period specified by your above referenced letter. The miscommunications resulted from the departure of two consecutive Environmental Engineers and the eventual hire of a third professional within the past 3 years.* (emphasis added)

EPA Ex. 23, Letter dated January 22, 2008, from Cheri Holley, General Counsel, Dico, Inc. to Mary Peterson, re: Response to USEPA letter dated November 8th, 2007, at 2.

Dico's response did not address the information contained in the Reuse Assessment Report about PCB contamination remaining in the buildings. Dico also substantially misstated the condition of the buildings when they were demolished and incorrectly indicated that the Region had approved building demolition, subject only to prior notice by Dico. The September 3, 2003, letter referenced by Dico did not give EPA's approval to demolish the buildings subject only to EPA's receiving prior notice of the demolition. EPA Ex. 17, at 1. The terms of the 1994 Building UAO required prior written approval by EPA before the buildings were demolished. EPA. Ex. 7, Sec. XVI, at 23. Dico had not notified the Region that it had specific plans to demolish the buildings and the Region had not granted approval for the demolition. Buildings 4 and 5 and the Maintenance Building were completely demolished. EPA Ex. 24, Mary Peterson's May

8, 2008, memorandum re: Trip Report for Dico Building Demolition Follow-up. April 21-22, 2008, at 2.

In their responses to information request letters Dico and SIM provided copies of a written agreement signed on or about July 26, 2007, between Titan Tire and SIM. Pet. Ex. 4. This agreement purported to be a “purchase agreement” between those parties “for two buildings at our Dico location in Des Moines, IA.” The agreement included no description of the condition of the buildings or any other reference to the buildings having contamination or being subject to the requirements of the 1994 Building UAO.

According to Petitioners, SIM purchased the buildings because SIM wanted the steel structural support members for use in constructing buildings on its property in Ottumwa, Iowa. Pet. at 2. Both Dico and SIM agree that Dico did not tell SIM the buildings were contaminated. Pet. Ex. 6 at D0065-0066. SIM admits that it took no special precautions because of the contaminants either during the building demolition or in handling, transporting, and disposing of the demolition debris.¹⁶ SIM reported in its information request responses that it transported the beams to its property in Ottumwa, Iowa. Pet. Ex. 2, at D0030-0031. Dico offers no evidence that the beams on SIM’s property were not the beams SIM removed from the Dico Property.

C. SIM Site Investigation

On May 16, 2008, the Region collected samples from the steel beams stored on SIM’s property in Ottumwa, Iowa. The sampling included wipe samples collected from beam surfaces, soil samples, and a bulk insulation sample. The sampling was conducted

¹⁶ In its initial evaluation of cleanup options for the buildings, Dico’s contractor Eckenfelder described the encapsulation option, which is essentially the option selected for the contaminated insulation, as the “Ceiling Insulation Repair, Wall Insulation Protection, and Notice Arrangement,” in recognition of the need to notify any building leasee [sic] or potential buyer that the PCB containing insulation existed in the buildings. See 1992 Building Investigation Report at 3-6.

pursuant to a Quality Assurance Project Plan ("QAPP") dated May 8, 2008, approved in accordance with the Region's standard practice.¹⁷ EPA Ex. 25, May 8, 2008, memorandum from Diane Harris, EPA, to Mary Peterson, EPA, approving beam and soil sampling QAPP, at 1. The Region had not anticipated finding bulk insulation on the beams and the QAPP reflected that only surface wipe and soil samples would be collected. However, when bulk insulation was found with the beams, the Region made the decision to substitute an insulation sample for one of the planned soil samples. The sample container and preservation methods were consistent for the soil and bulk insulation samples. EPA Ex. 26, RLAB Method No. 3240.2G, Organochlorine Pesticides and PCBs, April 26, 2006.

Potential cleanup criteria are referenced in the QAPP to provide some basis for evaluating the data. For wipe samples, the QAPP referenced the cleanup standard of 10µg/100 cm² for non-porous surfaces and for soils it referenced the cleanup standard of 25 mg/kg for bulk remediation waste and porous surfaces for low occupancy areas. EPA Ex. 25, at 9. The QAPP is not a response action decision document and the reference to the low occupancy standards was not intended to establish the final cleanup level for soils, which was set in the December 30, 2008, SIM Site Action Memo. EPA Ex. 27, Enforcement Action Memorandum, Request for Time-Critical Removal Action at the Southern Iowa Mechanical Site dated December 30, 2008, "SIM Site Action Memo."

The Region arranged for access for the sampling with SIM, the owner of the property and purportedly the owner of the steel beams. EPA Ex. 28, May 16, 2008, Access Agreement for SIM Site sampling. Under Section 104(e)(4) of CERCLA, the

¹⁷ A QAPP documents how specific data collection activities shall be planned, implemented, and assessed for a particular project.

Region's obligations with respect to collecting samples run to the "owner, operator, tenant, or other person in charge of the place from which the samples were obtained" 42 U.S.C. 9604(e)(4). Petitioners make no claim that they fall into one of these categories of persons.

The Region conducted what it referred to as biased sampling when collecting samples at the SIM Site. Biased sampling is sometimes referred to as "judgmental" sampling because the sample locations are based on professional judgment of the sampling team. EPA Ex. 25 at 8. In EPA terminology, biased sampling means sampling in the locations most likely to be contaminated. This was the initial sampling event at the SIM Site and the Region was primarily interested in learning whether PCBs were present on the beams or in the soil at the Site. The Region planned this investigation to look for PCBs where they were most likely to be found if they were present. Although there are occasions where statistically based sampling is appropriate, biased sampling was appropriate in this instance to make an initial determination as to whether PCBs were present at the SIM Site.

The samples were collected by two Region 7 On-Scene-Coordinators ("OSC"), Todd Campbell and Adam Ruiz. EPA Ex. 29, Todd A. Campbell, OSO/UPR/ERNB, Memo dated December 12, 2008, re Trip Report for Southern Iowa Mechanical Site, "Trip Report." The OSCs noted the date and time the samples were collected and the latitude and longitude where they were collected. EPA Ex. 30, Transmittal of Sample Analysis Results for ASR #: 3867, dated May 30, 2008, at 12 - 36. The OSCs photographed all sampling locations and noted the locations in the SIM Site logbook. EPA Ex. 29 at 3 to 21. The OSCs used a 10 cm by 10 cm template to collect samples

from a 100 cm² area and recorded in their field notes and trip report that all wipe samples were collected over a 100 cm² area. This approach is consistent with the Region's wipe sampling protocol. In cases where the beam surface was less than 10 cm wide, they collected a 100 cm² sample by dividing the sample template in half and wiping two adjacent areas to achieve a total sample area of 100 cm². *Id.* at 2. They noted the specific samples that were collected using this approach in the field log. *Id.* at 19. In accordance with the approved QAPP, a field blank and two matrix spike samples were collected for quality assurance purposes. *Id.* at 2.

The approved QAPP called for the collection of beam surface wipe samples and soil samples. However, when the OSCs arrived at the SIM Site, insulation fragments were visible on some of the beams. After consulting with the RPM by telephone, the decision was made to substitute one insulation sample for one soil sample. The insulation sample was placed in one of the glass jars that had been provided for a soil sample. The jar was labeled sample No. 9. *Id.* at 2, 21.

After collection the samples were placed on ice in a cooler, driven to Kansas City by the OSCs, and delivered to the EPA Region 7 Laboratory. The Region 7 Laboratory is a locked building with restricted access, located within a secure gated property. The sealed coolers, with chain of custody records, were placed in a temperature controlled refrigerator provided for this purpose at the Region 7 Laboratory, where they were stored until processing for analysis the following Monday. The samples were received with seals intact by Nicole Roblez on May 19, 2010 for the purpose of analysis. EPA Ex. 30, at 12-16. Each step in this process is noted on the sample chain of custody forms. EPA Ex. 30, at 12-36, EPA Ex. 31, Sample Storage Access History Log at 1-3.

Samples were handled by the Region 7 Laboratory in accordance with appropriate Standard Operating Procedures. RLAB Method No. 3210.1D, Extraction of Wipes Samples for PCB Analysis specified the appropriate procedures for the SIM Site wipe samples. EPA Ex. 32, RLAB Method No. 3210.1D, Extraction of Wipes Samples for PCB Analysis, recertified April 18, 2008. SOP 3210.1D specifies that wipe samples need to be extracted within 14 days of collection, and the extracts analyzed within 40 days. Id at 5. All samples were analyzed within acceptable holding times. EPA Ex. 31.

In order to analyze wipe samples, an extract is prepared and the extract is injected into the instrument for analysis. The instrument provides raw area counts which represent the concentration in the sample extract in units of micrograms (μg) per liter (l) of extract. As provided in SOP 3210.1D the results are converted to μg per square centimeter (cm^2). EPA Ex. 32 at 7-8.

Initially, no special precautions or instrument preparations were made in advance of analyzing the SIM Site insulation sample. However, the very high concentrations of PCBs in the sample exceeded the concentration the analytical instrument had been calibrated to analyze, requiring maintenance to be performed before the sample could be analyzed. This is a common occurrence in sample analysis and is a normal instrument response to high concentrations. Ultimately another instrument, which had been properly calibrated and prepared to analyze a high-concentration PCB sample, was used to analyze this sample. EPA Ex. 33, Affidavit of Lorraine Iverson

D. The SIM Site UAO

The results of the May 16, 2008, investigation data confirmed the presence of PCBs on the beams, in soil beneath the beams, and in the residual insulation on the

beams. EPA Ex. 30 at 1-12. Because PCBs are specifically regulated under TSCA, the Region looked to decontamination regulations promulgated at 40 C.F.R. 761.79 as the primary applicable or relevant and appropriate requirements (“ARARs”) for the beam cleanup action. The Region also requested that the State of Iowa identify any state requirements that may be applicable or relevant and appropriate to the anticipated cleanup action. EPA Ex. 34, July 25, 2008, letter from Glenn Curtis, EPA, to Cal Lundberg, IDNR, requesting that IDNR identify state ARARs for SIM Site removal action. Although the State identified some potential ARARs, the TSCA cleanup criteria largely dictated the nature of the cleanup action. EPA Ex. 35, July 31, 2008, letter from Bob Drustrup, IDNR, to Glenn Curtis, EPA, responding to EPA’s request for state ARARs.

Because the beams were located in an open area, with few or no access restrictions, the Region considered the appropriate decontamination standards to be those for unrestricted access. Cleaning the beams to the unrestricted access criteria would also eliminate the need for access restrictions on the SIM Site after completion of the cleanup. The beams at the SIM Site had been in contact with non-liquid PCBs and many of the beams had been painted. Ex. 29 at 3-16. The appropriate cleanup criteria would then be “cleaning to Visual Standard No. 2, Near-White Blast Cleaned Surface Finish, of the National Association of Corrosion Engineers.” 40 C.F.R. 761.79(b)(3)(i)(B). The appropriate decontamination method to achieve this standard is scarification, *i.e.* mechanical cleaning of the beam surface.

EPA initially considered use of a solvent wash, as proposed by Petitioners, as a possible cleanup option. The Region ultimately rejected this approach because under the

TSCA decontamination regulations, the solvent wash option applies to unpainted non-porous surfaces previously in contact with liquid PCBs, conditions which were not consistent with the conditions present at the SIM Site. *See* 40 C.F.R. 761.79(b)(3)(i)(A). Solvent wash would not be expected to achieve the same level of cleanup as would scarification.

The beams were stored in an open area where rain, wind, and other natural elements can cause the migration of contaminants from the beams into the surrounding soils. The beams presented a threat of direct contact exposures to SIM workers, site visitors, and trespassers. The primary routes of exposure would include direct contact for dermal exposures and ingestion which could occur if food is handled and consumed following contact with the beams or if exposed areas of skin are brought into contact with the mouth. EPA Ex. 27 at 6.

The Region attempted to negotiate a CERCLA administrative settlement agreement with Petitioners to clean up the SIM Site, but Petitioners did not consent to do the cleanup. On December 30, 2008, the Region signed the SIM Site Action Memo selecting the appropriate cleanup measures for a time critical removal action at the SIM Site. EPA Ex. 27. The SIM Site Action Memo was supported by an administrative record containing the information considered by the Region in selecting the cleanup action for the SIM Site. EPA Ex. 36, Southern Iowa Mechanical Site Administrative Record Index. EPA made a copy of the administrative record available in the area of the SIM Site and published a notice of the availability of the administrative record in a local paper. EPA Ex. 37, Administrative Record Document Transmittal Acknowledgement

Form signed July 6, 2009. For time critical removal actions the NCP allows the removal action to begin before the public notice is published. 40 C.F.R. 300-415(n)(2)(i).

Also on December 30, 2008, the Region transmitted to Petitioners a final proposed settlement agreement for their signature. EPA Ex. 38, December 30, 2008 letter from Cecilia Tapia, EPA, to Mark Johnson, Stinson, transmitting proposed AOC and delayed effective date UAO for SIM Site removal action. Along with the final proposed settlement agreement the Region transmitted a UAO that would become effective on January 23, 2009, if Petitioners did not sign the settlement agreement. Petitioners elected not to sign the proposed settlement agreement and the UAO became effective on the date specified. The terms of this UAO applied to the cleanup action conducted at the SIM Site. Id at 1, para. 2

E. The SIM Site Removal Action

The SIM Site UAO required the following actions:

1. All residual insulation was to be removed from the beams
2. Beams or portions of beams with surface contamination above 10 $\mu\text{g}/100 \text{ cm}^2$ PCBs would be cleaned using the scarification process specified in the TSCA decontamination regulations, as described above.
3. Beams or portions of beams that did not exhibit visual signs of contamination would be tested using a standard wipe test to verify that they contained less than 10 $\mu\text{g}/100 \text{ cm}^2$ PCBs and cleaned using the scarification process if found to contain more than 10 $\mu\text{g}/100 \text{ cm}^2$ PCBs.
4. All removed materials would be properly disposed of.

5. All soils above 1 ppm PCBs would be excavated and disposed of off-site. *Id.* at 7, para. 29.

Petitioners submitted a Work Plan describing how they planned on performing the work required in the SIM Site UAO. Pet. Ex. 16. Petitioners' work plan provided for visual inspection of the beams to look for insulation and adhesive residues on the beams. *Id.* at D0571. Areas exhibiting such signs would be cleaned using scarification. A "grab" surface wipe sample would be collected for analysis from 10 percent of the beams with no such indications. Pet. Ex. 17 at D0597. Composite samples of soil would also be analyzed to identify soils above 1 ppm PCBs. *Id.* at D0597. Ultimately no soils were found above 1 ppm, so no soil cleanup was performed.

During the course of the work, a change was suggested in the approach for verifying that beams initially screened out by visual inspection would be sampled to verify that they were clean. Under the revised approach, verification sampling of beams that passed the initial visual inspection would be based on a more thorough visual examination of the beams for indications of contact with the insulation, rather than grab sampling described in the QAPP. This change was consistent with the cleanup standards specified in the SIM Site UAO, which required testing of beams that were not scarified using a standard wipe sample. EPA Ex. 38 at para. 29. As a result of making this field change, additional contaminated beams were identified and cleaned that may otherwise have been overlooked.

The UAO included a requirement that within 60 days after completion of all Work required by this Order, Petitioners submit a final report summarizing the actions taken to comply with this Order. *Id.* at para. 46. The purpose of the Final Report was to

make a permanent record of the actions taken at the Site, including reports of analysis for all media sampled and records of the disposition of materials removed from the Site. By the terms of the SIM Site UAO the work under it was not complete until a final report meeting these criteria had been submitted and approved by the Region. *Id.* at para. 76. The Region found Petitioners' initial submittal lacking information necessary to describe some of the work. Petitioners' initial submittal also contained information not directly related to the work that the Region believed was not accurate, was more argumentative in nature than a factual description of the work performed, and therefore not appropriate for the Final Report.

One of the Region's main concerns was documenting how the determinations were made as to which beams exceeded the cleanup standard of 10 $\mu\text{g}/100\text{ cm}^2$ PCBs specified in the UAO. Petitioners' initial final action report submittals failed to provide adequate documentation. Pet. Ex. 28 and 31. Eventually Petitioners submitted a Final Report with sufficient information for the Region to agree that the work required by the SIM Site UAO had been completed and on June 10, 2010, the Region sent Petitioners a Notice of Completion. EPA Ex. 39, Letter dated June 10, 2010, from Mary Peterson, EPA, to Mark Johnson, Stinson, re Notice of Completion of Work.

With respect to the SIM Site UAO, the actions taken at Malcolm, Iowa and Grinnell, Iowa were not requirements of the SIM Site UAO or any other order issued by the Region. Pet. at 12-14. These actions took place several months before the SIM Site UAO was issued. Dico performed the sampling and analysis without EPA approved plans and without EPA knowledge or oversight. Dico ultimately made the decision as to

how and where to dispose of the materials involved. Petitioners should not be reimbursed for any costs associated with those properties pursuant to this Petition.

III. Petitioners are Liable Under Section 107(a) of CERCLA

Petitioners argue that they are not CERCLA arrangers under the standard for arranger liability set forth in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). To support this argument, Petitioners claim that they did not take “intentional steps to dispose of a hazardous substance” by contracting with SIM for the demolition of contaminated buildings that were subject to the 1994 Building UAO. However, Petitioners entered into this transaction without informing SIM of the contamination in the buildings or the permanent requirements in the 1994 Building UAO for maintaining the encapsulation barriers covering the PCB-contaminated insulation in the buildings’ walls and ceilings. Petitioners knew that these barriers would inevitably be compromised during SIM’s demolition activities, yet they remained silent. Petitioners also failed to disclose the demolition transaction to EPA, despite the clear terms of the 1994 Building UAO requiring EPA approval prior to any removal action being conducted at the Site or deviation from the UAO’s encapsulation requirements. Although Petitioners argue that they did not “arrange” for disposal of hazardous substances, the circumstances surrounding their transaction with SIM provide compelling circumstantial evidence sufficient to establish their intent to dispose of a hazardous substance and their liability as arrangers under CERCLA Section 107(a)(3). Petitioners claim for reimbursement under CERCLA Section 106(b) must therefore fail based on their erroneous interpretation of CERCLA’s arranger liability scheme, and their failure to show by a preponderance of the evidence that they are not liable as CERCLA arrangers.

A. The Law of Arranger Liability

Under Section 107(a) of CERCLA, one of the four categories of “covered persons” includes: “any person who by contract, agreement or otherwise arranged for disposal or treatment...of hazardous substances owned or possessed by such person, by any other person or entity, at any facility...owned or operated by another party or entity and containing such hazardous substances.” 42 U.S.C. § 9607(a)(3). Section 107(a)(3) was enacted to prevent parties from contracting away their potential CERCLA liability by using a third party to dispose of their hazardous substances.¹⁸ The Supreme Court recently clarified the scope of this provision in the context of spills of a new and useful product that resulted during the delivery of that product to the defendant. *Burlington Northern*, 129 S. Ct. at 1880.

1. The Supreme Court’s *Burlington Northern* Decision

Burlington Northern involved a manufacturer’s sale and delivery of an unused, useful product (the pesticide D-D) to a customer, Brown & Bryant (“B&B”). Shell, the manufacturer, knew that spills would occur during the delivery and transfer of the product into B&B’s bulk storage tanks. These spills occurred despite the steps Shell had undertaken to minimize the likelihood of spills during delivery and transfer. When EPA later cleaned up B&B’s facility under CERCLA, EPA sued Shell for cost recovery.

In ruling on Shell’s liability as a CERCLA arranger, the Court observed that CERCLA does not specifically define what it means to “arrange for” disposal, and therefore gave the phrase its ordinary meaning. Noting that the word “arrange” implies action directed toward a specific purpose, the Court held that “an entity may qualify as an arranger...when it takes intentional steps to dispose of a hazardous substance.”

¹⁸ S. Rep. No. 96-848, at 31 (1980).

Burlington Northern, 129 S. Ct. at 1879 (internal citations omitted). This holding confirmed that intentionality plays a role in CERCLA arranger liability. Consequently, *Burlington Northern* was not a sea change in arranger liability but merely confirmed a proposition that had been recognized by some courts prior to the Court's decision.¹⁹ On the unusual facts before it – involving an unused, useful product, where Shell had taken steps to prevent accidental spills – the Court found insufficient evidence to conclude that Shell had arranged for disposal.

In *Burlington Northern*, the Court left no doubt that some transactions do not require extensive inquiry to determine whether intentionality exists sufficient to establish arranger liability. First, the Court recognized that a party's intent is clear and liability will attach in transactions for the sole purpose of getting rid of used and no longer useful materials. The “intent to dispose” can be inferred under such circumstances simply by a party's involvement in a transaction specifically designed to discard its waste. Second, the Court recognized that a lack of intent exists in transactions involving the sale of a new and useful product when the purchaser of that product later, and unbeknownst to the seller, disposes of the product improperly. *See Burlington Northern*, 129 S. Ct. at 1878 (internal citations omitted).

Between these two extremes, the Court acknowledged a grey zone where the party's intent in the transaction is less than clear. In this grey zone, the determination of whether a party is liable as an arranger requires a fact-intensive and case-specific inquiry. *See Burlington Northern*, 129 S. Ct. at 1879-80 (internal citations omitted). Thus, the

¹⁹ See e.g., *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir.1990); *Louisiana Pacific v. ASARCO, Inc.*, 24 F.3d 1565, 1575 (9th Cir. 1994); *AM Intern., Inc. v. International Forging Equipment Corp.*, 982 F.2d 989, 999 (6th Cir.1993); *U.S. v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996).

Supreme Court stopped short of establishing any single test or formula for discerning intent, but required each case to be developed and decided on its own unique facts. The Court did, however, emphasize that this fact-intensive inquiry looks beyond the parties' subjective characterizations of the transaction as a "sale" or "disposal." Instead, the Court endorsed the reasoning of *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227 (6th Cir. 1996), which held that intent to dispose need not be proven by direct evidence, but can be inferred from the totality of the circumstances. Lower court decisions applying *Burlington Northern* have reaffirmed the relevance of circumstantial evidence to this analysis.²⁰

Finally, in articulating that a party must act with some intention to dispose, the Court made clear that a party may be liable if it enters into a transaction with the "intention that *at least a portion of the product be disposed of.*" 129 S. Ct. at 1880 (emphasis added). An entity cannot simply claim that it was selling a useful product and avoid liability; courts will look beyond the professed "primary purpose" of a transaction. Thus, it is clear that the Court anticipated that arranger liability could arise with respect to a transaction with dual motivations (i.e., a particular transaction may be both the sale of a material that has some residual use and the arrangement for disposal of a substance that is no longer useful). *Burlington Northern* makes clear that courts are not limited to deciding whether the transaction as a whole represents an arrangement for disposal, but rather can look at the party's intentions with respect to each component of a transaction.

²⁰ See *United States v. General Electric Co.*, Case No. 06-cv-354-PB (D.N.H. Oct. 28, 2009) (unpublished opinion); *United States v. Atlas Lederer Co.*, No. 3:91cv309 (S.D. Ohio Sept. 1, 2009) (unpublished opinion); and *Carolina Power & Light Company dba Progress Energy Carolinas, Inc. v. 3M Company, et al.*, (consolidated cases) No. 5:08cv460-FL (E.D. North Carolina March 24, 2010).

B. The Supreme Court Expressly Recognized that Transactions such as Petitioners' Demolition Agreement with SIM Plainly Give Rise to Arranger Liability

The facts in this case are markedly different from *Burlington Northern*. Unlike *Burlington Northern*, the transaction here does not involve the sale of an unused, useful product that, if it had been handled properly, would have been used in its entirety without any release of hazardous substances into the environment. In contrast, Petitioners' transaction with SIM belongs at the other end of the arranger liability continuum: it sought to get rid of old, dilapidated, and no longer useful buildings subject to a pre-existing 1994 Building UAO that, among other things, required containment of PCBs inside the buildings. The Supreme Court expressly recognized that such circumstances "plainly" give rise to arranger liability:

It is plain from the language of the statute that CERCLA liability would attach...if an entity were to enter into a transaction for the sole purpose of *discarding* a used and no longer useful hazardous substance.

Burlington Northern, 129 S. Ct. at 1878 (emphasis added).²¹

1. The Circumstances Surrounding Petitioners' Transaction with SIM Show that Petitioners' Sole Purpose for the Transaction was to Get Rid of its Waste, the Contaminated Buildings

In an effort to prove that Petitioners' transaction with SIM was not an arrangement for the disposal of a hazardous substance, Petitioners' proffer the affidavits of company officials from Titan Tire and SIM. Pet. at 39. These affidavits offer conclusory assertions regarding the buildings' utility and the parties' intent behind the demolition transaction. Such assertions are of limited value, particularly when

²¹ Unlike the term "disposal," the term "discard" is not defined in CERCLA. The dictionary defines "discard" to mean "to get rid of especially as useless or unwanted." *Merriam-Webster Online*, available at <http://www.merriam-webster.com/dictionary/discard> (last visited August 10, 2010).

contradicted by the objective evidence surrounding Petitioners' transaction with SIM. *See Cello Foil*, 100 F.3d at 1233 ("frequently, the most probative evidence of intent will be objective evidence of what happened rather than evidence describing the subjective state of mind of the actor.")

a. **The Buildings Constituted Wastes, not Useful Products**

At the time of Petitioners' transaction with SIM, the buildings were approximately 40 years old and had not been constructively used for several years. EPA Ex. 16 at 5-6. The buildings were also contaminated with PCBs and other hazardous substances and in very poor physical condition, with broken doors and windows. EPA Ex. 21 at 2.

Even the steel beams, which were of primary interest to SIM, were contaminated with PCBs. EPA Ex. 30 at 4. Consequently, once the barrier encapsulating the PCBs on those beams was compromised during demolition, the beams became unusable until treated to remove the PCB contamination. Accordingly, EPA issued the SIM Site UAO to Petitioners' requiring the concentrations of exposed PCB residue on the dismantled beams to be cleaned, thereby preventing any potential endangerment to public health, welfare, or the environment from the release of PCBs. EPA Ex. 27 at 6-7.

Petitioners point to SIM's payment of \$148,754 for the buildings as evidence of the buildings' utility.²² Pet. Ex. 4. SIM's payment, which equals approximately one dollar per square foot of building space, cannot be viewed in isolation from the total circumstances surrounding the transaction. As discussed more fully below, Petitioners failed to disclose to SIM that the buildings were contaminated and subject to the 1994

²² The demolition agreement signed on or about July 26, 2007 between Petitioners and SIM was for the payment of approximately \$143,000. The parties entered into an addendum to that agreement in February 2008 that increased the price SIM paid for the buildings to approximately \$148,754.

Building UAO at the time of the transaction. Pet. Ex. 2 at D0028-29. This failure to disclose to the buyer that the buildings were subject to an EPA order created a false appearance of value. SIM's \$148,754 payment to Petitioners for the buildings was based on a false impression (*i.e.*, that they were buying clean buildings), as acknowledged by SIM in its responses to EPA's information request.

In short, ... Southern was not aware of any polychlorinated biphenyls ("PCB") in the structure. Southern was not aware of any requirement for encapsulation. Southern was not aware that any of the materials that were removed from the structures that it purchased required any special handling of any sort. All of that would have been information uniquely known by Titan, Dico and the EPA, not Southern.

Pet. Ex. 2 at D0028. Consequently, the money SIM paid for the buildings does little to establish their true and accurate value or the intention of the Petitioners in entering into the transaction.²³

Petitioners also claim that Dico sought and received bids from other parties for the buildings to support their argument that the buildings were a useful product. Pet. at 39. Petitioners, however, have provided no documentation or other information, such as the names of the individuals or companies Petitioners corresponded with or the amount of the offers, to support this claim. Petitioners also have not confirmed whether they informed the other bidders that the buildings contained PCBs and were subject to the 1994 Building UAO. Regardless, the sale of a *waste* to the highest bidder does not protect a party from CERCLA arranger liability. See *United States v. A&F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) ("The fact that [the seller's] decision to give the waste to [the purchaser] was governed by the marketplace (*i.e.*, the highest bidder) is of no consequence."); *United States v. Summit Equip. & Supplies*, 805 F. Supp. 1422, 1432

²³ As noted above, in the OU2/4 FS EPA estimated the cost of removing and properly disposing of the insulation and decontaminating the builds at approximately \$2.2 million. OU2/4 FS, Table E-3.

(N.D. Ohio 1992) (not relevant for purposes of arranger liability that the owners of used electrical equipment could sell it; relevant only that they wanted the used equipment taken away).

Considering their actual condition, the buildings could not be used for the purpose they were purchased without further treatment. As such, they are inherently different from the types of virgin materials and new products exchanged in cases applying *Burlington Northern* to date that have ruled against imposing arranger liability.²⁴

b. Petitioners' Failed to Disclose the True Condition of the Buildings' and the Existence of the 1994 Building UAO to SIM

Petitioners were fully aware of the PCB-contaminated insulation in the buildings when they contracted with SIM for the demolition activities. Dico's contractor, Eckenfelder, conducted the investigations and sampling in 1991 and 1992 that established the presence of PCBs in the buildings. The Region subsequently issued the 1994 Building UAO to Dico in March 1994, requiring Dico to clean the buildings, repair and reattach the damaged insulation, and apply an encapsulation layer to the buildings' interiors. Upon completion of this work, Dico conducted operation and maintenance activities to verify that the encapsulation layer was preventing the release of PCBs in the buildings. At no point during this process did Dico ever establish that all of the PCB-contaminated insulation had been removed from the buildings. To the contrary, much of that insulation remained in place, beneath the encapsulation barrier Dico applied to the

²⁴ See *Government of the U.S. Virgin Islands v. Vulcan Materials Co.*, 2010 WL 2654631 (D. Virgin Islands July 1, 2010) (dismissal of claim for arranger liability against the seller of virgin hazardous chemicals); *Hinds Investments, L.P. v. Team Enterprises Inc.*, 2010 WL 289116 (E.D. Cal. Jan 15, 2010) (dismissal of claim for arranger liability against the manufacturer of new dry cleaning equipment); *Hinds Investments L.P. v. Team Enterprises Inc.*, 2010 WL 922416 (E.D. Cal. Mar. 12, 2010) (same); *Hinds Investments L.P. v. Team Enterprises, Inc.*, 2010 WL 1663986 (E. D. Cal. Apr. 22, 2010) (same).

buildings' interiors. Thus, the 1994 Building UAO and its PCB encapsulation requirements also remained in effect at the time the buildings were demolished.

Petitioners, however, failed to disclose to SIM the existence of the 1994 Building UAO or the presence of PCB-contaminated insulation in the buildings. Even after EPA's letter dated November 8, 2007, Petitioners chose not to inform SIM of EPA's concerns with the demolition activities. Instead, Petitioners allowed those activities to continue, thereby contributing to the improper handling and disposal of the PCB-contaminated insulation. Consequently, Petitioners, unlike Shell in *Burlington Northern*, did not try to minimize or prevent environmental contamination. *See* 129 S. Ct. at 1880. The exact opposite is true: Petitioners' activities were focused on getting rid of the contaminated buildings without regard to environmental consequences of the demolition activity.

c. Petitioners' Failed to Disclose the Demolition Transaction and the Start of Demolition Activities to EPA

Petitioners were aware of the 1994 Building UAO's requirements when they executed the demolition contract with SIM. The 1994 Building UAO contained notice and approval prerequisites for deviations from its requirements, which included maintenance of the barriers encapsulating the PCB-contaminated insulation. For example, the "Order" section mandated, "Respondent *shall not* commence or undertake any removal action without prior EPA approval." EPA Ex. 7 at p. 12, para. 33. (emphasis added). The "Modification" section also stated, "[i]f Respondent seeks permission to deviate from any requirement of the Removal Action Work Plan or this Order, Respondent's Project Coordinator *shall* submit a written request to EPA for approval outlining the proposed modification and its basis." *Id* at p. 27, para. 68. (emphasis

added). Although EPA agreed to modifications in the O&M Plan as use of the buildings changed, EPA never agreed to eliminate the requirement that the PCB-contaminated insulation be encapsulated in place. In fact, upon learning that Dico was considering demolishing the Buildings, EPA cautioned Dico that “[c]ertain disposal requirements may apply for building debris, and the EPA or state would want to oversee the demolition.” EPA Ex. 17 at 1.

Petitioners, nevertheless, entered into an agreement with SIM on or around July 26, 2007, contracting for the demolition and removal of the Maintenance Building and Buildings 4 and 5 from the Dico Property. Pet. Ex. 4.²⁵ By the nature of this transaction, Petitioners should have known that SIM’s demolition activities would compromise the barrier encapsulating the PCB-contaminated insulation. For example, the agreement specifically mentions the “removal” of the buildings, which, given their size, necessarily called for the buildings to be dismantled and the encapsulation barrier to be penetrated. However, Petitioners failed to inform EPA of this agreement or the commencement of the demolition activities at the Dico Property. Petitioners also withheld this information from the State. In addition, Petitioners never sought EPA’s agreement to revise the 1994 Building UAO to allow for destruction of the encapsulation layer.

Upon seeing the partly demolished buildings during a Site inspection, EPA’s Remedial Project Manager sent a letter dated November 8, 2007, to Dico stating, “[t]he most significant issue to address from the site inspection relates to the dismantling of buildings 4 and 5. As you know, EPA had no knowledge prior to the site inspection that

²⁵ As discussed *supra*, tests conducted by Petitioners’ own consultant as part of the 1992 Building Investigation found that the buildings contained insulation in walls and ceilings contaminated with PCBs at levels up to 29,000 mg/kg.

these buildings were being dismantled.” EPA Ex. 20 at 1. EPA continued, “[d]uring the removal action...the PCB contaminated insulation was sealed to prevent exposures and was left in place. It is the handling and disposal of the insulation materials that is now a concern to EPA.” *Id.* Because Petitioners did not notify EPA of the demolition activities, EPA was unable to oversee those activities and implement measures protective of human health and the environment. EPA’s involvement and oversight prior to and during the demolition activities, although an additional governmental expense to Petitioners, would have prevented the PCB-contaminated beams from reaching the SIM property and the subsequent release of PCBs into the environment.

d. The Buildings were a Significant Financial Strain on Petitioners

Until they were demolished, the buildings were a liability and significant cost for Dico. Under the 1994 Building UAO, Dico was required to install and maintain an encapsulation barrier over walls, floors and ceilings contaminated with various hazardous substances, including PCBs. EPA Ex. 7 at 9, Sec. V. Dico admitted that this work was “very costly and time consuming.” EPA Ex. At 5-6. In addition to these maintenance expenses, Dico also had to hire guards to provide 24-hour onsite security to discourage trespassers and vagrants from entering the vacant buildings. EPA Ex. 18 at 1.

As early as July 2, 2003, Dico complained to EPA about the cost and effort required to maintain the buildings and indicated a desire to demolish or dismantle them. EPA Ex. 16 at 5. Dico sought to demolish the buildings based on “the fact the buildings are not being used for manufacturing activities, the cost associated with the upkeep, and there is no occupancy of people to perform the [maintenance] work.” *Id.* at 5. Moreover, in September 2006, Dico and the City of Des Moines met jointly with EPA Region 7 to

discuss Dico's proposal to give the property to the City to facilitate its redevelopment. EPA Ex. 44, Dico Performance Evaluation Report No. 20, (January 2005 through December 2005), Groundwater Extraction and Treatment System, Des Moines TCE Site, Des Moines, Iowa, January 2007, at 11. The City had been actively working on redevelopment plans for the property immediately adjoining Dico's property since at least 2000. EPA Ex. 45, Letter dated October 16, 2006, from Cecilia Tapia, EPA, to Honorable Frank Cowie, Mayor of the City of Des Moines re: September 22, 2006, meeting on redeveloping the Dico Property.

Collectively considering the aforementioned facts and circumstances surrounding Petitioners' transaction with SIM, Petitioners' intent behind the transaction is clear: Petitioners' sought to get rid of their waste. On these clear facts, Petitioners are liable as CERCLA arrangers and no further inquiry is necessary.

2. Alternatively, Petitioners Remain Strictly Liable as Arrangers even if they Intended to Dispose of Only a Portion of the Buildings

Even if the EAB were to conclude that the contaminated beams were of some value to SIM, and that the buildings in their entirety did not constitute wastes, finding Petitioners' liable would still be consistent with *Burlington Northern*. In *Burlington Northern*, the Court made clear that a person can be liable as an arranger if it intends to dispose of "at least a portion of the product" containing a hazardous substance. 129 S. Ct. at 1880. Thus, it is clear that the Court anticipated that arranger liability could arise with respect to a transaction with dual motivations, such as a transaction that may be both the sale of useful material and an arrangement for disposal of a hazardous substance. The Court also spoke of the "motives" a party may have for a "sale," which clearly anticipates more than one motive in certain circumstances. See *Burlington Northern*, 129 S. Ct. at

1879. Thus, the whole premise of Petitioners' argument – that they sold a useful product for a useful purpose and did not intend to dispose of a hazardous substance – is incorrect. Arranger liability will attach if Petitioners took intentional steps to dispose of “a portion of” the buildings, which would include the PCB-contaminated insulation, residual PCB on the steel beams or other contaminated components.

Petitioners are, therefore, liable as arrangers even under their version of the facts. To establish that they were selling a useful product, Petitioners rely, in part, on the response of SIM's President, Jim Hughes, to an EPA information request. In that response, Mr. Hughes' states, “[a]s indicated, the intended purpose of the removal of the structures was to use the *steel structures* at Southern's property in Ottumwa, consequently the *steel structures* were taken to that property.” Pet. Ex. 2 at D0031 (emphasis added). Dico's counsel confirms that the purpose of the agreement with SIM was for the transfer of the “steel structures” in the buildings. EPA Ex. 23 at 2-3. The transaction with SIM, however, was not limited to the steel beams. Rather, the transaction was for the “buildings” at the Dico Property. Pet. Ex. 4. The buildings contained components other than the steel structures, including the PCB-contaminated insulation that was of no use to Petitioners or SIM. However, Petitioners never requested SIM to leave behind or return the insulation or other unwanted components. Instead, some of the insulation was sent to the Metro Park East landfill while residual amounts on the steel beams ended up at SIM's property. EPA Ex. 23 at 2-3.²⁶

²⁶ It is irrelevant as a matter of law whether Petitioners intended to have the PCBs disposed of at the SIM site; the issue is simply whether they intended to get rid of the PCBs. See *U.S. v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996) (“[O]nce it has been demonstrated that a party possessed the requisite intent to be an arranger, the party cannot escape liability by claiming that it had no intent to have the waste disposed in a particular manner or at a particular site.”). See also *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752-753 (9th Cir. 1994) (arranger need not control the details of disposal); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989) (plaintiff need not prove that the generator selected the facility).

The facts in the Petitioners' transaction with SIM are analogous to the facts in cases involving the sale of used batteries to a recycler. In *United States v. Atlas*

Lederer Co., 282 F. Supp. 2d. 687 (S.D. Ohio 2001), the court found arranger liability for a defendant that sold lead/acid batteries to a battery "cracking" facility which cracked open the batteries, extracted the scrap lead for recycling from the worthless acid and contaminated casings which were then discarded. The operator would cut off the battery tops, drain the acid into a pit, and then grind up the lead contaminated battery casings for disposal. *Id.* at 708. Citing to the Sixth Circuit's decision in *Cello-Foil*, the court stated that the proper inquiry with respect to arranger liability "is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances" and that such intent can be inferred from the totality of the circumstances. *Id.* at 710-11 (*quoting Cello-Foil*, 100 F.2d at 1331). The court found that the recovery of the lead necessarily required the disposal of the spent acid and contaminated casings. Therefore, reviewing the totality of the circumstances, the court found that the defendant intended to dispose of the acid and battery casings as part of the transaction and was liable as an arranger (*i.e.*, the contaminated casings were the portion of the product intended to be disposed of). *Id.* at 714-15.²⁷ See also *Catellus Dev. Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994) (defendant who sold spent auto batteries to lead reclamation plant for recycling held liable for arranging to dispose of contaminated leftover battery casings); *EPA v. TMG Enterprises, Inc.*, 979 F. Supp. 1110 (W.D. Ky.

²⁷ On September 1, 2009, the *Atlas Lederer* court rejected a motion by the defendants in that case seeking reconsideration of its arranger liability determinations in light of the *Burlington Northern* decision. The court explained that its intent to dispose analysis – which followed *Cello-Foil's* – intent analysis – was consistent with the Supreme Court's analysis in *Burlington Northern*. See *United States v. Atlas Lederer Co., et al.*, slip op. at 10, Civ. No. 3:91-cv-00309-WHR (S.D. Ohio September 1, 2009).

1997) (defendant had intent to arrange for disposal when it sold scrap wire to a copper reclamation business without first removing the contaminated and worthless insulation that covered the wire, as “[r]eclamation of the copper necessitated removal and disposal of the insulation material covering the copper wire.”).

Like the discarded battery casings in *Atlas Lederer* and *Catellus* and the wire insulation in *TMG*, the buildings the Petitioners sold to SIM were never intended to be used in their entirety. Rather, the buildings were full of wastes, including the PCB-contaminated insulation and the PCB residues remaining on the steel beams brought to SIM’s property, for which SIM had no use. EPA Ex. 38, UAO at 2. Similarly, SIM also had to break through and subsequently discard these wastes to reach the component it actually sought. As stated above, SIM sent many of these unwanted components to a landfill. Accordingly, the evidence clearly establishes that Petitioners indeed sought to dispose of at least a portion of the PCB-contaminated building components, and therefore the transaction with SIM was an arrangement by Petitioners for disposal of a hazardous substance.

C. The “Useful Product” Decisions Cited by Petitioners are all pre-*Burlington Northern* and Distinguishable from the Facts of this Case

The pre-*Burlington Northern* case law Petitioners’ rely upon to assert a useful product defense to arranger liability are misleading for several reasons. First, none of the cases Petitioners cite in their Petition apply the specific standard for arranger liability prescribed in *Burlington Northern*: whether a party entered into a transaction “with the intention that at least a portion of the product be disposed of.” 129 S. Ct. at 1880. Based on this standard, the Court in *Burlington Northern* did not endorse the “useful product” defense or hold that a transaction involving a useful product can never be considered an

arrangement for disposal. Rather, the Court anticipated that arranger liability could arise with respect to a transaction with dual motivations (i.e., a particular transaction may be both the sale of a useful material and the arrangement for disposal of a hazardous substance). Accordingly, there is no need for the court to engage in a separate analysis of Petitioners' useful product defense. Second, none of the cases cited by Petitioners involve facts where EPA issued a UAO to a party requiring it to keep buildings containing PCBs intact and then the party subsequently transacted for the demolition of those same buildings.²⁸

Petitioners cite *In Re Solutia* 10 E.A.D. 193 (EAB 2001), the EAB's most recent decision on the useful product defense, as support for their argument. In *Solutia*, Monsanto Company ("Monsanto"),²⁹ a chemical manufacturer, sold an off-specification adhesive called Gelva to Morgan Materials, Inc. ("Morgan"), a chemicals broker. *Id.* at 199 and 209. These sales took place in 1986. Morgan subsequently sold approximately 245 drums of Gelva to twelve different customers and stored the remaining drums at its facility. *Id.* at 194 and 200. More than ten years after Monsanto's sale of Gelva to Morgan, EPA discovered leaking drums containing Gelva at Morgan's facility and issued a UAO to Solutia to remove and destroy the drums. Solutia complied with the order and filed a petition for reimbursement with the EAB. *Id.* at 194.

In determining whether Solutia had a useful product defense, the EAB looked at: (1) the "reason of the transaction"; and 2) the "nature of the material exchanged" at the time of sale. *Id.* at 209 (internal citations omitted). In reviewing the "reason of the

²⁸ The United States has potential cost recovery and non-compliance claims in this case that may be brought in district court and is currently considering its enforcement options for non-compliance of the Building UAO.

²⁹ In 1997, Monsanto spun off its chemical manufacturing division, including the adhesives business, to Solutia, Inc. ("Solutia").

transaction,” the EAB stressed that Morgan did not need to treat or process the Gelva before it could be used by purchasers in the condition it was sold in 1986. *Id.* at 210. Therefore, the reason for Morgan’s transactions involving Gelva in 1986 was to sell a useful product. In examining the “nature of material exchanged,” the Board asked whether the product was useable “for its normal purpose in its existing state.” *Id.* at 213. At the time of sale, the Gelva was pourable, re-workable, and useful, and the adhesive was a “product with value, rather than a waste to be discarded.” *Id.* at 215. Based on the two-prong analysis, the EAB held that Solutia sold a useful product.

While the EAB’s two-pronged analysis for arranger liability is characterized differently from the standard for arranger liability applied in *Burlington Northern*, both standards are likely to reach the same result when applied to the facts of a case. For example, the “reason for a transaction” and whether a party had the “intent to dispose of a hazardous substance” both examine the seller’s state of mind.³⁰ In addition, the “nature of the material exchanged” is a factor considered as part of the totality of the circumstances analyzed to discern a party’s intent under *Burlington Northern*. Consequently, both tests focus on the nature and purpose of the transaction to determine if arranger liability should attach.

Like the intent analysis under *Burlington Northern*, applying the EAB’s analysis in *Solutia* to the Petitioners’ transaction with SIM also supports the conclusion that Petitioners are liable as arrangers under CERCLA Section 107(a)(3). Looking at the “reason for the transaction,” Petitioners were discarding buildings that were old, dilapidated and not being constructively used at the time of the transaction with SIM.

³⁰ In *Solutia*, the EAB examined both the buyer’s and seller’s reason for the transaction. *Id.* at 210. In *Burlington Northern*, the Court reaffirmed that the focus of the “intent” inquiry for purposes of arranger liability is on the seller. 129 S. Ct. 1879.

EPA Ex. 16 at 5-6. While SIM might have thought it was entering into a transaction for a useful product, the purpose of the transaction from Petitioners' perspective was to get rid of the buildings. Turning to the "nature of the material exchanged," the buildings were dilapidated, contaminated, and of no use on the Dico Property. The buildings and the steel beams also could not be used once they were dismantled and the PCB encapsulation layer was compromised. Once compromised, the exposed PCBs had to be treated first before the beams became useable. The buildings and the beams were unlike the off-specification Gelva, which did not need to be treated or processed to be immediately used in the condition it was sold. Therefore, even using the EAB's previous arranger liability test in *Solutia*, the Petitioners did not sell a useful product.

The other useful product cases Petitioners cite also show that Petitioners arranged for the disposal of a hazardous substance. For example, several of these cases involve products that could be immediately used in the condition they were sold without modification or treatment.³¹ Other cases involved parties who were not active participants in the transactions for the disposal of a hazardous substance.³² The remaining cases involve sellers that did not know of the buyers' plans to demolish buildings that were in useful condition at the time of the applicable transaction.³³ By

³¹ See *U.S. v. B & D Electric, Inc.*, 2007 WL 1395468 (E.D. Mo. 2007) (cost recovery action where seller of used transformers established a useful product defense because the transformers did not need to be repaired or serviced to be useful); *Kelley v. ARCO Indus. Corp.*, 739 F. Supp. 854 (W.D. Mich. 1990) (contribution action involving the sale of neoprene compounds which were used to manufacture rubber goods); *Prudential Ins. Co. v. U.S. Gypsum*, 711 F. Supp. 1244 (D. N.J. 1989) (contribution action involving the sale of asbestos-containing products that were used in the construction and maintenance of various buildings)

³² *Ashland Oil, Inc. v. Sonford Prod.*, 810 F.Supp. 1057 (D. Minn. 1993) (contribution action where a corporate lender who secured title to a contaminated property through a security interest was not liable because the lender did not make a crucial decision regarding the disposal of hazardous substances); *Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257 (D. N.J. 1987) (contribution action where seller did not actively dispose of mud containing hazardous substances which was used as fill material).

³³ *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 854 F.Supp. 539 (S.D. Ill 1994) (contribution action where a party who sold a power plant was not liable because the property and equipment had use and value in the

contrast, the steel beams were not useable without further treatment, Petitioners' were active contracting parties and Petitioners' were aware of SIM's demolition activities.

Finally, while Petitioners cite many pre-*Burlington Northern* decisions holding defendants not liable as arrangers, there are many other such decisions that rejected the useful product defense and imposed arranger liability. Similar to the Petition at issue, these cases have generally involved parties seeking to dispose of a hazardous substance through the guise of an alleged "sale" transaction. See e.g., *CP Holdings v. Goldberg-Zoino & Assoc.*, 769 F. Supp. 432 (D.N.H. 1991) (sale of building containing asbestos with knowledge that the building would be demolished, which caused the release of asbestos, sufficient to create a valid cause of action under CERCLA); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 24 F.3d 1565 (9th Cir. 1994) (upholding finding of liability under Section 107(a)(3) with respect to slag, a byproduct ASARCO "wanted to get rid of") *cert denied*, 513 U.S. 1103 (1995); *Gould v. A&M Battery & Tire Svc.*, 933 F. Supp. 431 (M.D. Pa. 1996) *rev'd on other grounds*, 232 F.3d 162 (3d Cir. 2000) (imposing arranger liability on seller of whole used batteries sent to a battery breaking facility); *U.S. v. Pesses*, 794 F. Supp. 151 (W.D. Pa. 1992) (rejected useful product defense to sellers of scrap metal because the metal could not be used for its intended purpose without processing); *In re Micronutrients Int'l, Inc.*, 6 E.A.D. 352 (EAB 1996) (sellers of zinc-containing furnace dusts liable as CERCLA arrangers). Therefore, based on the facts, the Board's previous decision in *Solutia* and the relevant pre-*Burlington Northern* case law, the Petitioners' useful product defense should be denied.

D. Petitioners' are Liable as CERCLA Arrangers

commercial resale market); *Yellow Freight Sys. V. ACF Indus.*, 909 F.Supp. 1290 (E.D. Mo. 1995) (seller of real property containing an industrial plant was not liable as an arranger because the threat of release of hazardous substance did not occur until three years after the sale);

Considering the totality of the circumstances and the objective evidence surrounding Petitioners' transaction with SIM, Petitioners' intent was clear. The buildings constituted a waste and liability that Petitioners wanted to get rid of, the inevitable and intended consequence of their demolition transaction with SIM. Alternatively, even if the EAB were to conclude that the contaminated beams were of some value to SIM, Petitioners' clearly intended to dispose of the buildings' other components, including the PCB-contaminated insulation and residual PCBs on the steel beams. Finally, Petitioners' useful product arguments based on pre-*Burlington Northern* case law are unavailing. On these clear facts, Petitioners are liable as CERCLA arrangers.

IV. The Region's Decision in Selecting the Response Action Was Not Arbitrary and Capricious or Otherwise Not in Accordance with Law

Pursuant to its authority under CERCLA Section 106(a), the Region made a determination of an imminent and substantial endangerment at the SIM Site due to the PCB contamination. Based on the investigation and administrative record, the Region selected a removal action and ordered the Petitioners to clean up the contaminated beams in order to protect human health and the environment. See 42 U.S.C. 9606(a).

Petitioners make numerous arguments to support their position that the Region's actions in selecting the removal action for the SIM Site and ordering them to perform are arbitrary and capricious or otherwise not in accordance with law. Further examination of these arguments will show that they are without merit.

A. Sampling Data

Petitioners argue that the sampling data relied upon by EPA is invalid, unreliable and has been improperly manipulated. Pet. at 42. In support thereof, Petitioners first argue that the Region's May 2008 sample collection at the SIM Site was done without notice to Petitioners and without Petitioners having any opportunity to participate in the sampling. Although not specifically stated, inherent in this argument is the inference that Petitioners' oversight of EPA's investigation is necessary to insure the validity of the data. EPA has established protocols to insure that its field investigations are conducted properly and the data resulting from the investigation are the type and quality needed for their intended use. The Region prepared a Quality Assurance Project Plan for the May 16, 2008, sampling which was reviewed and approved by the EPA Region 7 Quality Assurance Manager EPA Ex. 25.³⁴ Thus, oversight by Petitioners is not necessary to assure the quality of the Region's sampling data.³⁵

Petitioners go on to argue that the Region failed to comply with EPA protocols and procedures in that EPA did not record the specific locations where samples were collected on a map, sketch or by making permanent markings on the areas sampled; EPA did not record the precise area from which wipe samples were taken; and no field blanks, replicates or other quality assurance samples were collected or tested in accordance with 40 C.F.R. Section 123, to verify the reliability of the data. Petition at 42.

³⁴ The approved QAPP is included on the SIM Site Administrative Record index, pg. 3 of 9.

³⁵ In the event Petitioners are arguing that the Region failed to follow CERCLA's procedural notice requirements for sampling, the Region points out that under Section 104(e)(4) of CERCLA, the Region's obligations with respect to collecting samples run to the "owner, operator, tenant, or other person in charge of the place from which the samples were obtained" 42 U.S.C.9604(e). Petitioners make no claim that they fall into one of these categories of persons and thus they have no statutory right to notice or an opportunity to participate in this investigation.

The procedures the Region followed in collecting and handling samples in at the SIM Site are described in Todd Campbell's Trip Report dated December 12, 2008, EPA Ex. 29.³⁶ Mr. Campbell notes in his Trip Report that "All samples were collected in accordance with the approved site specific QAPP." *Id.* at 2. The Trip Report included a site sketch, based an aerial photograph of the site, showing the locations of the beams in relation to other features in the area. *Id.* at 17. The longitude and latitude at which the samples were taken was reported on the sample field sheets. Chain of Custody Records included as part of EPA Ex. 30 at 12-13. Photographs were taken showing the sampling locations and information regarding the samples collected and photographs taken were recorded in the Site field log book, included in the Trip Report. EPA Ex. 29 at 3-16 and 18-21, respectively.

With respect to quality assurance samples, Mr. Campbell notes that "Sample 3867-108-FB was a field blank to ensure no PCB contamination was introduced to the samples from the solvent, gauze, containers, or gloves. Sample 3867-121 was collected in triplicate and labeled as 3867-121, 3867-122, and 3867-123 so the lab would be able to run matrix spikes on a wipe sample. Soil sample 3867-6 was also collected in triplicate and labeled as 3867-6, 3867-7, and 3867-8 for matrix spike analysis by the laboratory." *Id.* at 2.

Within this section of their discussion, Petitioners cite to 40 C.F.R. Section 123 without explanation. Petition at 42. 40 C.F.R. Section 123 relates to the procedures EPA will follow in approving state programs under the Clean Water Act, and it is not

³⁶The May 12, 2008, Trip Report is included on the SIM Site Administrative Record index, pg. 3 of 9.

immediately apparent to the Region how these regulations are relevant to the validity of the SIM Site samples.

Petitioners next argue that EPA did not explain how two side-by-side areas of 5 by 10 centimeters (“cm”) were accurately collected or identify which beam wipe samples were collected in this manner. Petition at 42. In his Trip Report, Mr. Campbell indicates that “For sample locations on the channel steel that were less than 10 cm wide, samples were collected by dividing the 10 cm grid template in half and collecting two side by side 50 cm² (5 cm x 10 cm) areas with the same gauze pad and template, yielding a total sample area of 100 cm².” EPA Ex. 29 at 2. The 10 cm by 10 cm grid template was divided by being folded in half to achieve the 5 by 10 cm template. In his field notes included as part of the Trip Report Mr. Campbell identifies specific samples were collected from side-by-side 5 cm by 10 cm areas, identified as “50 cm²” samples, e.g., sample numbers 3867-109, 3867-110, 3867-111, and 3867-112. *Id.* at 19. All of this information is part of the Administrative Record.

Petitioners represent they believe that the Region did not provide all documents they requested in two prior Freedom of Information Act (“FOIA”) requests and that these documents may contain information about additional deviations from standard operating procedures. Petition at 43. Petitioners filed three FOIA requests relating to the SIM Site activities. Pet. Ex. 18, 19, and 20. EPA responded to each of these requests. However, during preparation of this Response, the Region identified additional documents and electronically stored information that may not have been provided to Petitioners as part of the Region’s initial responses. The Region advised counsel for Petitioners of the existence of these documents and promptly provided copies these documents to

Petitioners. EPA Ex. 46, Letter dated August 19, 2010, from Kathy Montalte, EPA Region 7 FOIA Officer, to Mark Johnson.

B. Chain of Custody

Petitioners allege that the integrity of the Region's May 16, 2008, SIM Site samples was compromised by a three-day gap in the chain of custody when these samples were apparently left unattended somewhere at or outside the EPA Regional Lab. Petition at 43. Petitioners cite a series of entries in Mr. Campbell's field log and the sample chain of custody records to support this allegation.

There was no three-day break in chain of custody as alleged by Petitioners. The samples collected at the SIM Site on May 16, 2008, were placed in a cooler with ice for preservation and transported on the day they were collected back to Kansas City in a government vehicle by the OSCs Todd Campbell and Adam Ruiz. EPA Ex. 29 at 2. The OSCs drove from the SIM site in Ottumwa, Iowa to the EPA R7 Training and Logistics Center in Kansas City, Missouri, also sometimes referred to as "the cave." EPA Ex. 47, SIM Site Field Log Book at 1. As noted in the Field Log Book, Mr. Campbell relinquished custody of the sample cooler to Adam Ruiz, also an OSC, who assisted Mr. Campbell in collecting the samples, for delivery of the samples to the EPA Region 7 Laboratory. *Id.* at 1, EPA Ex. 30 at 12-13. The May 30, 2008, memorandum, with the field sheets, including the chain of custody records, is listed on the Administrative Record index, pg. 4 of 9. The sample chain of custody records note that Mr. Ruiz drove the samples from the cave to the Region 7 Laboratory on May 16, 2008, where he relinquished custody of the samples at 2039 (8:39 PM). *Id.* at 12-13. Mr. Ruiz placed the samples in a locked refrigerator inside the Region 7 Laboratory, which is

provided for the purpose of holding samples prior to analysis. The EPA Region 7 Laboratory building in Kansas City, Kansas is a locked building located within a secured area. The chain of custody seals remained intact when Nicole Roblez, sample custodian for the EPA Region 7 Laboratory, checked the samples the following Monday morning, May 19, 2008, at 8:45 AM. Id at 12-13. A record of the samples' chain of custody after receipt by the Region 7 Laboratory is shown on the Sample Storage Access History Log, EPA Ex.31.

C. Laboratory Procedures

Petitioners point to various alleged laboratory irregularities that they claim compromise the validity of the laboratory results. Pet. at 46-47. These alleged irregularities include exceeding the maximum holding times for analysis, Pet. at 46, and using an instrument for analysis that was not functioning properly, Pet. at 47.

EPA handled and analyzed the SIM Site samples using a tightly controlled process consistent with approved laboratory procedures developed by Region 7 specifically for PCB analysis. EPA Ex. 32, RLAB Method No. 3210.1D, Extraction of Wipe Samples for PCB Analysis, originally dated December 3, 2003, but subsequently recertified on March 3, 2006 and April 18, 2008. As described in Method 3210.1D, analysis of wipe samples includes two basic steps. First, the wipe sample, in this case the gauze pad used to wipe a measured surface area of the steel beams, is prepared for analysis by extracting the compounds absorbed on the gauze pad. After further preparation of the extract, it is analyzed using gas chromatography with electron detectors ("GC/ECD"). EPA Ex. 32, Sec. 2.0 at 3 of 9. Section 8.0 of Method 3210.1D provides that wipe samples must be extracted in 14 days and the extracts analyzed in 40

days. Samples and extracts are to be stored at 4° C. Id Par. 8.1 at 5 of 9. The same holding times for extraction and analysis for the soil and insulation samples are specified in Paragraph 8.3 of RLAB Method No. 3240.2G, Organochlorine Pesticides and PCBs, April 26, 2006, EPA Ex. 48. The dates the samples were checked out of the freezer for analysis are shown on Sample Storage Access History Log, EPA Ex.31. Petitioners allege that the samples were extracted on 6th day after collection and analyzed on the 7th day, both of which are well within the holding times provided for in Method 3210.1D. Pet. at 47. Method 3210.1D provides for reporting wipe sample results in units of $\mu\text{g}/\text{cm}^2$. EPA Ex. 48, Par. 12.3 at 8 of 9.

Petitioners' allegations that the analyses were performed with a malfunctioning instrument are also without merit. Based on descriptions of the building demolition activities provided by SIM, EPA had not anticipated there being any insulation remaining on the beams. However, when Mr. Campbell observed some bulk insulation on the beams, he conferred by telephone with Mary Peterson, the Remedial Project Manager, and the decision was made to substitute an insulation sample for one of the soil samples. This sample was labeled Sample No. 9. EPA Ex. 47 at 1.

The Region 7 Laboratory anticipated that the concentrations of PCBs in Sample No. 9 would be low, so the analytical instrument was not prepared for analysis of high concentration sample. Sample No. 9 contained very high concentrations of PCBs, which created the need for instrument maintenance. EPA Ex. 50, Maintenance Log EAQ13, Varian 3800 GC at 2. Instrument maintenance includes things such as replacing various components on the instrument. Instrument maintenance is a common occurrence in sample analysis especially when analyzing samples with high concentrations. However,

the short term maintenance steps did not restore proper performance of this instrument and the analysis of Sample No. 9 was performed on another instrument properly calibrated to handle a high concentration sample. EPA Ex. 51, Maintenance Log EAQ028, Varian GC at 2.

D. Aroclor "Fingerprint"

As discussed in Section II, Statement of Facts, above, Aroclor 1254 was the contaminant of concern on the Dico Property and it was the contaminant of concern found at the SIM Site. Beams at both sites were contaminated with the same type of PCB, which is attributable to Petitioners. Petitioners, however, claim that Aroclor 1260 is a "crucial marker" and that finding Aroclor 1248, but not Aroclor 1260, at the SIM Site indicates that the PCBs at the SIM Site could not have come from the Dico buildings. Pet. at 49. Petitioners' main support for this position comes from two letters sent by Petitioners' counsel to the Region, one dated October 8, 2008, Pet. Ex. 6, and one dated January 16, 2009, Pet. Ex. 11. Petitioners' Ex. 6 is listed on the Index of the Administrative Record, pg. 8 of 9. Those letters set forth basically the same arguments that Petitioners make in the Petition and provide little factual or scientific basis to support their position.

SIM, with the assistance of a contractor, transported the beams from the Dico Property to its property in Ottumwa, Iowa. Pet. Ex. 2 at D0027, D0031. Petitioners have produced no evidence indicating that the beams on the SIM Site are not those SIM removed from the Dico Property. As discussed in Section II, Statement of Facts, above, there is no evidence that PCBs present on the beams had been removed in the past.

The 1992 Eckenfelder Building Investigation data and the EPA SIM Site sampling data show that Aroclor 1254 was the primary contaminant of concern at both locations. During the 1992 Building Investigation Eckenfelder collected 34 bulk insulation samples from the Dico buildings. EPA Ex. 4 at Table 2-3. Of the 34 samples collected, 3 samples did not contain PCBs and 24 of the 31 samples that contained PCBs, over 75 percent, contained only Aroclor 1254 and no other Aroclors. Aroclor 1248 was not reported. The sample containing the highest concentration of PCBs (29,000 mg/kg) found in Building 5 at the Dico Property contained only Aroclor 1254. Only 4 samples contained Aroclor 1260 and 3 of those samples also contained Aroclor 1254. The 1992 Eckenfelder report states that “aroclors 1254 was used as a component in adhesives during the same time frame that the buildings were constructed” and that it was “common practice to use a fire-retardant in adhesives used to apply paper or foil backing to insulation.” *Id.* at 2-3. Thus, the Eckenfelder data demonstrate that Aroclor 1254 is the compound of interest and that Aroclor 1260 was much less prevalent in the insulation in buildings on the Dico Property.

These results are consistent with results of the May 2008 EPA sampling data at the SIM Site. The only bulk insulation sample collected from the SIM Site contained high levels of only Aroclor 1254 and no other Aroclors. EPA Ex. 30 at 6-11. Of the 6 soil samples collected, 4 contained only Aroclor 1254 and no other Aroclors and the other 2 samples contained no PCBs at all. Wipe samples collected from the beams at SIM contained either Aroclor 1254 or Aroclor 1248, but none of the wipe samples contained Aroclor 1260. *Id.* at 6-11. Of the 12 beam wipe samples 7 exceeded the TSCA regulatory threshold § 761.61(a)(4) as the cleanup standard for nonporous surfaces for

high occupancy areas of $10\mu\text{g}/100\text{cm}^2$. EPA Ex. 27 at 4. Of the 6 soil samples collected 4 contained PCBs, with one sample exceeding the TSCA cleanup threshold of $1000\mu\text{g}/\text{kg}$ for an unrestricted use area.

Petitioners' speculation that the PCBs may have come from some other source is vague and unsubstantiated. Pet. at 53. Petitioners describe the alleged "other sources of PCBs" as being in the "vicinity of" the piles of beams, but offer no evidence as to the actual location of these materials in relation to the beams. Pet. at 53. No such other materials were reported as being near the beams in Mr. Campbell's Trip Report and no such materials are visible in the numerous pictures taken during the May 16, 2008 sampling event. Trip Report at 3-4. Petitioners present no data to support their claims that these other materials even contained any PCBs. The data obtained from samples collected by EPA on May 16, 2008, show that the beams transported from the Dico Property to the SIM Site had PCBs concentrations above TSCA cleanup levels.

E. Data Manipulation

Petitioners assert that the Region inappropriately multiplied the SIM Site sampling results by 100 so the results would be above regulatory concentrations. Pet. at 54. As discussed above in connection with Petitioners' allegations of laboratory irregularities, Method 3210.1D calls for reporting data in units of $\mu\text{g}/\text{cm}^2$. EPA Ex. 32, Par. 12.3 at 8 of 9. However, the TSCA decontamination standards were promulgated in units of $\mu\text{g}/100\text{cm}^2$, so it is necessary to convert the laboratory data from units of $\mu\text{g}/\text{cm}^2$ into units of $\mu\text{g}/100\text{cm}^2$ to compare the sampling results with the TSCA standards. The

following is an example how data in units of $\mu\text{g}/\text{cm}^2$ would be converted to units of $\mu\text{g}/100\text{ cm}^2$:

Results in units of $\mu\text{g}/\text{cm}^2 \times 100\text{ cm}^2/100\text{ cm}^2 = \text{results in units of } \mu\text{g}/100\text{ cm}^2$

EPA attempted to explain this conversion in Ms. Tapia's letter to Mr. Johnson dated December 30, 2008. EPA Ex. 38. It is clear from the Petition that EPA had already produced a copy of Method 3210.1D in response to Petitioners' earlier FOIA request, that the Region attempted to explain the basis for the conversion in at least one telephone conference, and provided another copy of Method 3210.1D with an email as a follow-up shortly after the telephone conference. Pet. at 57. The Region believes it made a good faith effort to explain to Petitioners both how this conversion was made and why it was necessary.

F. Cleanup Standards

Petitioners claim that EPA manipulated the cleanup standards to select the high occupancy TSCA requirements so that cleanup would be required when no cleanup would otherwise be necessary. Pet. at 58. The removal action consisted of decontaminating the steel beams by removing the PCB residues by scarification. The beams were decontaminated to meet the Visual Standard No. 2, Near-White Blast Cleaned Surface Finish, of the National Association of Corrosion Engineers (NACE), as called for by 40 CFR 761.79(b)(3)(B). This standard applies to "non-porous surfaces in contact with non-liquid PCBs (including non-porous surfaces covered with a porous surface, such as paint or coating on metal)." The beams were a nonporous surface in contact with nonliquid PCBs (insulation and adhesive residue) and the beams were coated

with paint. Following scarification, the cleaned beams would then be available for reuse. EPA Ex. 27 at 7.

Decontamination waste, including the scarifying agent, was containerized and transported off-site for disposal in accordance with applicable TSCA regulations. Soil beneath the area where the beams have been stored was sampled using a statistical sampling scheme to verify that appropriate cleanup levels were achieved. Any areas exceeding cleanup levels were to be excavated and transported off-site for disposal in accordance with 40 CFR 761.61. *Id.* at 7.

Petitioners misrepresent the intent of citing standards in the QAPP by referring to them as cleanup standards, when the QAPP is not a decision document that establishes cleanup standards. One of the purposes of a QAPP is to explain how the data collected will be used and to assist in doing that the author of the QAPP usually includes a reference to a numerical standard against which the data being collected can be compared. If the data will be used for risk assessment purposes, then health based standards are presented in the QAPP. If the data will be used to determine the need for response, then regulatory and/or health based standards might be presented in the QAPP. However, QAPPs do not establish cleanup levels for a site. Cleanup levels are established on a site-specific basis and are selected in an agency decision document such as the Action Memo signed for the SIM Site. Prior to cleaning the beams were stored in a large field with access limited only by a temporary snow fence installed by SIM. SIM employees, Site visitors or trespassers could easily come in contact with the contaminated beams and soil. EPA Ex. 27 at 6. Based on these conditions the Region determined in

that the conditions at the SIM Site warranted cleaning the beams to high occupancy standards.

G. Cleanup Alternatives

EPA selected a cleanup standard for the beams based on the TSCA decontamination regulations for unrestricted use of the beams based on the condition of the beams and the conditions present on the SIM Site. As is obvious from the photographs of the beams included in Mr. Campbell's Trip Report, many of the beams had been painted. EPA Ex. 29 at 3-17. Indeed, application of an epoxy paint coating to the building interiors was a significant part of the Dico Building Cleanup Action. Section II, Statement of Facts. Under the TSCA decontamination standards, the beams were considered to have a non-porous surface covered with paint, a porous surface. 40 C.F.R. 761.79(b)(3)(i)(B). For porous surfaces with a nonporous coating, the appropriate decontamination standard is cleaning to Visual Standard No. 2, Near-White Blast Cleaned Surface Finish, of the National Association of Corrosion Engineers. 40 C.F.R. 761.79(b)(3)(i)(B).

Petitioners argue that a solvent wash is a more appropriate decontamination method. Pet. at 62. EPA considered solvent wash as a possible option in the Action Memo and rejected it. EPA Ex.27 at 8. Under the TSCA decontamination standards, a solvent wash might be appropriate under 40 C.F.R. 761.79(b)(3)(i)(A) for unpainted nonporous surfaces but not surfaces that have been painted. Because the beams at the SIM Site had been painted, the conditions for decontamination under 40 C.F.R. 761.79(b)(3)(i)(A) were not met, and solvent washing was not an appropriate decontamination standard. Thus, the Region did not select a solvent wash approach

because it was not consistent with the conditions present at the SIM Site and would not achieve acceptable decontamination as per TSCA standards. 40 C.F.R. 761.79(b)(3)(i) (A).

Finally, Petitioners argue that grinding the beam surfaces could result in the release of PCB-contaminated dust and the tracking of PCB-contaminated dust into un-impacted areas of the site. Pet. at 62. As discussed above, the scarification process selected by the Region is provided for in the TSCA decontamination regulations. 40 C.F.R. 761.79(b)(3)(i)(A).

H. Biased Sampling During the Cleanup

The SIM Site UAO required Petitioners to (1) remove and properly dispose of residual insulation from the beams and (2) and to decontaminate using scarification to comply with 40 C.F.R. § 761.79(b)(3)(i)(B) all beams or portions of beams contaminated with PCBs at concentrations greater than 10 $\mu\text{g}/100 \text{ cm}^2$ PCBs, as determined using a standard wipe test in accordance with 40 C.F.R. § 761.123. Beams or portions of beams determined by visual inspection not to contain insulation or adhesive residues, and which do not undergo scarification, shall be tested by standard wipe testing to verify that those surfaces do not contain PCBs over a level of 10 $\mu\text{g}/100 \text{ cm}^2$. EPA Ex. 38 at 7. The SIM Site UAO required Petitioners to plan and implement this work. During the course of the work, both Petitioners and EPA realized that additional sampling would better ensure that all PCBs were properly addressed under the SIM Site UAO. Although this was more sampling than the Work Plan required, it better implemented the terms of the SIM Site UAO. The Wipe Sampling and Double Wash/Rinse Cleanup guidance document cited by Petitioners relates more to providing instructions on how to collect wipe samples than it does to designing sampling regimes. Read in the context of the purpose for which the

guidance was written it does not support the Petitioners' position regarding statistical sampling.

I. The Administrative Record

As discussed above, the Region had identified an administrative record supporting selection of the removal action at the time the Action Memo was signed on December 30, 2008, meeting the requirements of 40 C.F.R. 300.820. The administrative record included documents submitted by Petitioners noting their position on various aspects of the removal action. The circumstances under which the Region may add documents to the administrative record after the decision document is signed, i.e., after December 30, 2008, are set forth in 40 C.F.R. 300.825. Summarized briefly, the reasons are: (1) if the Region reserves some part of the decision for later, (2) if an amended decision document is issued, or (3) if the Region requests additional comment. Petitioners point to none of these criteria as a basis for concluding that the administrative record is deficient.

V. CONSTITUTIONAL ARGUMENT

Petitioners raise constitutional claims that the SIM Site UAO as well as CERCLA's overall UAO regime, violate the Constitution of the United States. Petitioners argue CERCLA Section 106 subjects PRPs to a deprivation of property without any opportunity for a pre-deprivation hearing in violation of the Due Process Clause of the Fifth Amendment. In addition to their facial and as applied arguments, Petitioners claim that EPA's pattern and practice in administering Section 106 amounts to an unconstitutional violation of due process.

Petitioners' constitutional challenges to CERCLA in a reimbursement petition under Section 106(b)(2) are misplaced and without merit. First, administrative agencies

lack the authority to rule on the constitutionality of a statute. Second, the Board itself has been asked by a different petitioner in an earlier reimbursement case to consider these same types of constitutional claims, and the Board declined to address them. Third, even if the Board considers and rules on Petitioners' constitutional claims, those claims must fail because federal courts have repeatedly and uniformly rejected these types of challenges to Section 106.

A. The Board Lacks the Authority to Address Petitioners' Constitutional Challenges to CERCLA

The law is very clear on this point: administrative agencies, including adjudicatory bodies such as the EAB, cannot declare a Congressional statute unconstitutional. *See Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974). Thus, to the extent that the Petitioners are asking the EAB to rule that CERCLA's provisions are unconstitutional, Petitioners' claim must fail.

Accordingly, the Board has repeatedly declined to address the constitutionality of a statute or regulation. *See In re City of Irving, Texas Municipal Separate Storm Sewer System*, 10 E.A.D. 111, 124 (EAB 2001) ("as a general rule, constitutional questions of the kind argued by Irving here are reserved to the federal courts"); *In re Britton Constr. Co.*, 8 E.A.D. 261, 279 n.6 (EAB 1999) (noting that the EAB has no authority to review a constitutional challenge to a statute); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 557-58 (EAB 1998) ("constitutional challenges to regulations, even challenges based upon due process claims, are rarely entertained in Agency enforcement proceedings"); *In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) (declining to review a constitutional challenge to a regulation); *In re Echevarria*, 5 E.A.D. 626, 634

(EAB 1994) (finding that a constitutional challenge to a regulation was beyond the Board's purview).

The Board has previously reviewed similar constitutional challenges in a CERCLA reimbursement petition case and declined to address them. *In re Basket Creek Drum Disposal Site Chem-Nuclear Systems, Inc.*, 6 E.A.D. 445, 468 (EAB 1996), *aff'd*, *Chem-Nuclear Systems, Inc. v. Bush*, 139 F. Supp. 2d 30 (D.D.C. 2001), 292 F.3d 254 (D.C. Cir. 2002). Among their many constitutional claims, *In Re Basket Creek* petitioner argued that their 106(b) order was unconstitutional because joint and several liability denied them equal protection and due process of law, that financing the cleanup constituted a taking without compensation in violation of the Fifth Amendment, and that the order violated their right to due process because they were not given a meaningful opportunity to contest the order. *Id.* at 467-68. Many of these arguments were based on objections to the petitioner's liability, which the Board rejected, finding the petitioner jointly and severally liable. *Id.* at 468. The Board also stated "to the extent that CNSI is challenging the constitutionality of CERCLA itself, we decline to address these challenges because the EAB has no authority to rule on the constitutionality of a statute enacted by Congress." *Id.*

The *In re Basket Creek* decision is significant because the EAB was asked to consider similar constitutional claims and declined to address them. The Board should, therefore, decline to review Petitioners' constitutional challenges to CERCLA.

B. CERCLA's UAO Regime is Constitutional

Even if the Board decides to address the Petitioners' constitutional claims, those claims should be dismissed because the federal courts have consistently upheld CERCLA and found constitutional challenges without merit.

1. Courts Agree that CERCLA, on its Face, is Constitutional and Provides Due Process

Courts have uniformly rejected facial constitutional challenges to CERCLA, and to Section 106 specifically. The D.C. Circuit recently joined three other Circuit Courts in holding that CERCLA provides due process and EPA's UAO regime does not violate the Fifth Amendment of the Constitution. *General Electric Co. v. Jackson*, 2010 WL 2572955, at *6 (D.C. Cir., June 29, 2010); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995); *Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 391-92 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir.1986); *see also City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 872 (discussing favorably the Seventh Circuit's holding that UAOs do not violate due process).

Petitioners argue the CERCLA UAO regime violates due process because parties are denied any opportunity for pre-deprivation hearings to challenge the orders. Pet. at 65. But as Petitioners note, parties do have a right to a pre-deprivation hearing if they choose not to comply with the order and force EPA to enforce the order in federal court. Those parties that do comply, can get their day in front of a neutral decision maker by petitioning for reimbursement under Section 106(b)(2). If the agency denies the petition, the petitioning party may seek judicial review, at which time a federal court will rule on that party's challenge to the underlying UAO. As noted above, courts that have reviewed due process challenges to CERCLA have found that Section 106 provides adequate safeguards and does not deprive parties of due process rights. *E.g. Employers Ins. of*

Wausau, 52 F.3d at 660 (“the remedies that the Superfund law creates against invalid clean-up orders fully satisfy the requirements of due process.”)

Petitioners point to the threat of penalties and damages if they refuse to comply with the UAO, but as the D.C. Circuit noted, “the statute offers noncomplying PRPs several levels of protection: a PRP faces daily fines and treble damages only if a federal court finds (1) that the UAO was proper; (2) that the PRP ‘willfully’ failed to comply ‘without sufficient cause’; and (3) that, in the court’s discretion, fines and treble damages are appropriate. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3).” *General Electric Co.*, 2010 WL 2572955 at *6. Petitioners also claim that they suffer a deprivation “through the impacts on the PRP’s market value, cost of financing and brand value.” Pet. at 67. The D.C. Circuit concluded that these “consequential injuries,” standing alone, do not merit due process protection. *See General Electric Co.* at *8. As the court stated, longstanding Supreme Court precedent establishes that “stigma alone is insufficient to invoke due process protections.” *Id.* at *9. Although the so-called “stigma plus” rule may trigger due process protections for some injuries that accompany reputational harms, to satisfy this rule plaintiffs must show, “in addition to reputational harm, that (1) the government has deprived them of some benefit to which they have a legal right . . . ; or (2) the government-imposed stigma is so severe that it ‘broadly precludes’ plaintiffs from pursuing ‘a chosen trade or business.’” *General Electric Co.* at *9 (quoting *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003)). Petitioners have not even alleged the necessary additional injuries. Therefore, these deprivation claims lack merit.

2. The Challenge to EPA’s Pattern and Practice is Beyond the Scope of this Proceeding

Review of UAOs beyond the one at issue is beyond the scope of the EAB's authority. CERCLA provides for post-cleanup reimbursement proceedings at the EAB under Section 106(b)(2) or pre-cleanup enforcement hearings at the district court in the event of non-compliance and an EPA enforcement proceeding. To the extent that Petitioners are challenging other UAOs, that challenge is not appropriately brought before the Board because it is irrelevant.

In the context of the Section 106(b)(2) petition, the issue is whether Petitioners may obtain reimbursement for this UAO. This is not a forum for the EAB to review EPA's entire UAO "pattern and practice," even assuming that in any appeal of a denial of their reimbursement petition Petitioners would have standing to argue that those patterns and practices were unconstitutional as applied to them in this instance.³⁷ In fact there is no relief this Board may provide. The Board has two basic alternatives for deciding on this petition. First, this Board may find that Petitioners are entitled to reimbursement (in whole or in part). Alternatively, the Board may find that the Petitioners are not entitled to reimbursement because EPA acted appropriately under the law, which may include a determination that EPA acted in accordance with the Constitution in this instance. Under either alternative, whether EPA engages in a "pattern and practice" of unconstitutional conduct for other UAOs makes no difference to this case because whether EPA has acted unconstitutionally in any other UAO situation cannot affect Petitioners' reimbursement rights.³⁸

3. In this Case EPA Provided Petitioners with Due Process

³⁷ EPA reserves all jurisdictional and other defenses to any appeal to federal court in this case, including but not limited to any appeal that raises either a facial or "pattern and practice" constitutional challenge.

³⁸ To the extent this Board believes that it should consider a "pattern and practice" challenge, EPA respectfully requests that the Board provide it with an opportunity to brief the issue further.

In issuing the SIM Site UAO, EPA applied Section 106 in accordance with the statute and the necessary due process. EPA has complied with all statutory provisions, which courts have universally found constitutional. *See* Section B.1. EPA offered to negotiate, but petitioners declined; EPA made a determination on the record that there was an imminent and substantial endangerment at the SIM Site due to the release of PCBs from the contaminated steel beams, and under its CERCLA Section 106(a) authority, ordered Petitioners to perform the removal; and Petitioners chose to comply and then timely petitioned for reimbursement. They now have a hearing before a neutral decision-maker. Petitioners are currently receiving process before the Board under Section 106(b)(2). If the EAB denies their petition, they have the right to file an action in district court. Petitioners also could have obtained a pre-deprivation hearing by refusing to comply with the Order and forcing EPA to sue for cost recovery in district court.

As discussed in Section B.1, the EPA's UAO regime is constitutional. EPA applied that regime in issuing the Order to the Petitioners, and Petitioners point to no specific facts to support their "as-applied" challenge. EPA's enforcement activities at the SIM Site provided all the process noted by the courts and complied with all of the necessary provisions of the statute. Petitioner's allegation that "Section 106 is unconstitutional, as applied in this case" amounts to a restatement of an invalid claim, namely that the statute itself is unconstitutional. *See* Pet. at 65.

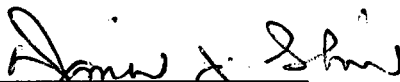
VI. Conclusions

Petitioners have failed to demonstrate by a preponderance of the evidence that they are not liable for response costs as arrangers under Section 107(a) of CERCLA, 42 U.S.C. 9607(a). They have also failed to show that the Region's actions in selecting the

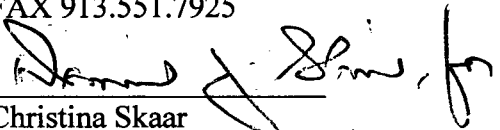
SIM Site removal action and issuing them the SIM Site UAO were arbitrary or capricious or not in accordance with law. Finally, this action before the Board is not an appropriate forum for Petitioners to make claims based on constitutional issues. Therefore, Petitioners are not entitled to reimbursement for any costs associated with the SIM Site cleanup action as they have not met their burden under Section 106(b)(2).

Dated this 15 day of September 2010.

Respectfully submitted:

By: 

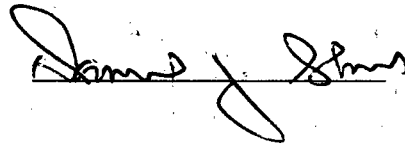
Daniel J. Shiel
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 7
901 N. 5th Street
Kansas City, KS 66101
913.551.7278
FAX 913.551.7925



Christina Skaar
Office of Enforcement and Compliance
Assurance
U.S. EPA (2272A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
202.564.0895
FAX 202.501.0269

CERTIFICATE OF SERVICE

I hereby certify that on the 15th of September, 2010, I served a true and correct copy of the above Motion to Dismiss by transmitting a copy via overnight express mail to Mark Johnson, Stinson Morrison Hecker LLP, 1201 Walnut, Suite 2900, Kansas City, Missouri 64106-2150.

A handwritten signature in black ink, appearing to read "James J. Jones". The signature is written in a cursive style with a horizontal line underneath the name.

EPA EXHIBIT LIST

- EPA Ex. 1-- Des Moines Area Source Control Operable Unit Remedial Investigation Report, Volume I of V, Eckenfelder, Inc., January 1993
- EPA Ex. 2-- Fourth Five-Year Review Report, Des Moines TCE Site, Des Moines, Iowa, February 2008
- EPA Ex. 3-- Building Interior PCB Sampling Workplan, Prepared for Dico, Inc. by Eckenfelder, Inc., January 1992, "Building Interior PCB Sampling Work Plan" EPA Ex. 4-- Building Sampling, Analysis, and Engineering Evaluation Report, Eckenfelder, August 1992, "1992 Building Investigation Report" (Pet. Ex. 7, Att. 2 is an incomplete copy)
- EPA Ex. 5-- Work Plan Removal Action Operable Unit No. 4, December 10, 1993, SDMS doc., "Proposed Building Work Plan"
- EPA Ex. 6-- Glenn Curtis letter to Gary Schuster, December 30, 1993
- EPA Ex. 7-- In the Matter of Dico, Inc., EPA Region 7 Docket No. VII-94-F-0017, issued pursuant to CERCLA Section 106(a) to Dico Inc. on March 8, 1994, ("1994 Building UAO")
- EPA Ex. 8-- Work Plan, Removal Action Operable Unit No. 4 Dico, Inc., Des Moines, Iowa, Prepared By: Titan Wheel International, Inc./Dyneer Corporation Environmental Engineering Department, undated but received by EPA on March 26, 1994, "Building Removal Action Work Plan" SDMS
- EPA Ex. 9-- Fifth Monthly Progress Report – July 10, 1994 through August 6, 1994, dated August 11, 1994, SDMS
- EPA Ex. 10-- Operation and Maintenance Plan for Dico, Inc., Des Moines, Iowa, Buildings No. 1-5, Maintenance Building and Maintenance of Interior Surface Coatings, June 1994, "Building O&M Plan"
- EPA Ex. 11-- Memo dated April 20, 1994, from Robin Wankum, Black & Veatch Waste Science, Inc., to Glenn Curtis, EPA, re Field Observations of Removal Activities
- EPA Ex. 12-- Memo dated June 6, 1994, from Robin Wankum, Black & Veatch Waste Science, Inc., to Glenn Curtis, EPA, re Field Observations of Removal Activities
- EPA Ex. 13-- Dico's Removal Action Final Report, Operable Unit 4 Removal Action, dated April 11, 1997, Pet. Ex. 7, Att. 6 is incomplete copy.
- EPA Ex. 14-- May 8, 1997, EPA Notice of Completion letter
- EPA Ex. 15-- Final Feasibility Study for the Des Moines TCE Site, Operable Unit Nos. 2 and 4, May 30, 1996
- EPA Ex. 16-- Dan Buttars, Dico Environmental Coordinator, letter to Mary Peterson, EPA, dated July 2, 2003
- EPA Ex. 17-- Mary Peterson, EPA, letter to Dr. Gazi George, Titan International, Inc., dated September 3, 2003
- EPA Ex. 18-- Operable Unit 4 Building Removal Action Report for 2005, dated July 25, 2005
- EPA Ex. 19-- Reuse Assessment Report for the DICO Property, EPA Region 7, March 2007

- EPA Ex. 20-- Letter dated March 19, 2007, from Mary Peterson, EPA, to Brian Mills, Dico, w/cc to Cheri Holley, Titan International, transmitting a copy of the Reuse Assessment Report for the Dico Property
- EPA Ex. 21-- Site Inspection Report, Des Moines TCE Site, September 2007
- EPA Ex. 22-- Letter dated November 8, 2007, from Mary Peterson to Brian Mills, Dico, re: Follow-up from September 2007 Site Inspection and Response to Recommendations in PER No. 21
- EPA Ex. 23-- Letter dated January 22, 2008, from Cheri Holley, General Counsel, Dico, Inc. to Mary Peterson, re: Response to USEPA letter dated November 8th, 2007
- EPA Ex. 24-- Mary Peterson's May 8, 2008, memorandum re: Trip Report for Dico Building Demolition Follow-up. April 21-22, 2008
- EPA Ex. 25-- SIM Site QAPP for Beam Wipe and Soil Sampling
- EPA Ex. 26-- RLAB Method No. 3240.2G, Organochlorine Pesticides and PCBs, April 26, 2006
- EPA Ex. 27-- December 30, 2008, Action Memorandum for SIM Site
- EPA Ex. 28-- May 16, 2008, Access Agreement for SIM Site sampling
- EPA Ex. 29-- Todd A. Campbell, OSO/UPR/ERNB, Memo dated December 12, 2008, re Trip Report for Southern Iowa Mechanical Site
- EPA Ex. 30-- Transmittal of Sample Analysis Results for ASR #: 3867, dated May 30, 2008
- EPA Ex. 31-- Sample Storage Access History Log
- EPA Ex. 32-- RLAB Method No. 3210.1D, Extraction of Wipes Samples for PCB Analysis, recertified April 18, 2008
- EPA Ex. 33, Affidavit of Lorraine Iverson
- EPA Ex. 34-- July 25, 2008, letter from Glenn Curtis, EPA, to Cal Lundberg, IDNR, requesting that IDNR identify state ARARs for SIM Site removal action
- EPA Ex. 35-- July 31, 2008, letter from Bob Drustrup, IDNR, to Glenn Curtis, EPA, responding to EPA's request for state ARARs
- EPA Ex. 36-- Southern Iowa Mechanical Site Administrative Record Index
- EPA Ex. 37-- Administrative Record Document Transmittal Acknowledgement Form signed July 6
- EPA Ex. 38-- December 30, 2008 letter from Cecilia Tapia, EPA, to Mark Johnson, Stinson, transmitting proposed AOC and delayed effective date UAO for SIM Site removal action
- EPA Ex. 39-- Letter dated June 10, 2010, from Mary Peterson, EPA, to Mark Johns, Stinson, re Notice of Completion of Work
- EPA Ex. 40-- Letter dated January 22, 2008, from Cheri Holley, General Counsel, Dico, Inc. to Mary Peterson, re: Response to USEPA letter dated November 8th, 2007
- EPA Ex. 41-- CERCLA Section 104(e) Information Request Letter to Dico, Inc., dated April 25, 2008

- EPA Ex. 42-- Mary Peterson's May 8, 2008, memorandum re: Trip Report for Dico Building Demolition Follow-up. April 21-22, 2008
- EPA Ex. 43-- June 6, 2008 letter from May Peterson, EPA, to James Hughes, SIM, transmitting results of analyses for samples collected from SIM's property on May 16, 2008
- EPA Ex. 44-- Dico Performance Evaluation Report No. 20, (January 2005 through December 2005), Groundwater Extraction and Treatment System, Des Moines TCE Site, Des Moines, Iowa, January 2007
- EPA Ex. 45-- Letter dated October 16, 2006, from Cecilia Tapia, EPA, to Honorable Frank Cowie, Mayor of the City of Des Moines re: September 22, 2006, meeting on redeveloping the Dico Property
- EPA Ex. 46-- letter dated August 19, 2010, from Kathy Montalte, EPA Region 7 FOIA Officer, to Mark Johnson
- EPA Ex. 47, Field Log Book, SIM Site sampling May 16, 2008
- EPA Ex. 48-- RLAB Method No. 3240.2G, Organochlorine Pesticides and PCBs, April 26, 2006¹
- EPA Ex. 49, 1992 Building Investigation Raw Data Package 6, 2006
- EPA Ex. 50, Maintenance Log EAQ13, Varian 3800 GC
- EPA Ex. 51, Maintenance Log EAQ028, Varian GC
- EPA Ex. 52, 1992 Building Investigation Raw Data Package

¹ EPA Exhibit 48 is an inadvertent duplicate of EPA Exhibit 26.