IN RE A&W SMELTERS AND REFINERS, INC.

CERCLA §106(b) Petition Nos. 94-14 and 94-15

FINAL DECISION

Decided March 11, 1996

Syllabus

A&W Smelters and Refiners, Inc. ("A&W") has petitioned for reimbursement of the costs associated with its compliance with two clean-up orders issued under CERCLA § 106(a), 42 U.S.C. § 9606(a), by U.S. EPA Region IX. The orders stem from A&W's agreement to sell a pile of material A&W calls "ore" to a concern in Mexico that was interested in extracting the gold and silver from the material. The material, however, also contained slag, a by-product of smelting operations. Lead was found in the slag and in the material itself. Several shipments made it to their Mexican destination, but most did not, and it is these shipments that are the subject of the clean-up orders.

The first clean-up order involved approximately 543 drums of material, which had been detained by United States Customs Service officers and their Mexican counterparts. The Region gave A&W 24 hours notice that the material, which the Region considered "hazardous waste" under the Resource Conservation and Recovery Act ("RCRA"), would be returned to A&W for proper treatment and disposal. Due to alleged financial difficulties, A&W did not accept possession of the material at the designated time, and therefore the Region considered the material abandoned. The Region exercised its emergency authority under CERCLA to transport the material to an authorized hazardous waste storage facility for temporary storage. The Region then ordered A&W to pick up the material from there and lawfully dispose of it. A&W disposed of the material as ordered and now seeks reimbursement of its costs in so doing.

The second clean-up order involved shipments that were diverted prior to reaching the border, and that ultimately ended up in a pile on a residential lot in Nevada. The piles were unsecured, allowing direct access by children on the property. A&W disposed of this material as ordered, and now seeks reimbursement of its costs of compliance.

The shipments that did reach their Mexican destination were repatriated to the United States. Based upon these shipments, A&W was indicted for violating RCRA, but was acquitted. According to A&W, it was acquitted because the jury found that the material was not a hazardous waste. The Region issued an order directing A&W to dispose of these materials, which A&W ignored, and which is not part of the proceedings before the Board.

A&W claims that it is entitled to reimbursement on the grounds that the material at issue is not a hazardous waste, as shown by the jury's finding in the criminal trial and because the material is marketable for its gold and silver content. A&W also claims it is entitled to reimbursement because neither order is based upon a release or threatened release that created an imminent and substantial endangerment to human health, welfare or the environment as required by CERCLA § 106(a). In addition, A&W claims that reimbursement is warranted because of deficiencies in the administrative records underlying the two orders. Specifically, A&W claims that it was denied the

opportunity to review the records, and that the records withheld information under a claim of privilege. A&W claims that it was denied due process by its inability to review the records, including the privileged information, prior to commencing work under the orders.

Held: The petitions for reimbursement are denied.

CERCLA regulates "hazardous substances," which are defined as RCRA "hazardous wastes" or as substances meeting any of five other criteria provided in CERCLA. Even if A&W were correct that the material at issue was not a hazardous waste, it has not demonstrated that the material is not a hazardous substance under the other two statutory criteria relied upon by the Region. It is the presence of lead, a hazardous substance, in the material that makes the material a hazardous substance regardless of the gold and silver content of the material, and regardless of the material's marketability. Even assuming that A&W is intending to argue that the sale of the material does not amount to an arrangement for disposal under CERCLA § 107, the argument lacks merit under the "useful products" doctrine.

CERCLA § 106(b)(2)(D), which allows reimbursement to the extent the remedy selection was arbitrary, capricous, or otherwise not in accordance with law, is broad enough to encompass an argument, like A&W's, that no remedy should have been selected because the statutory prerequisites of a release or threatened release and an imminent and substantial endangerment did not exist. A&W's claims, however, lack merit. With respect to the first order, CERCLA defines release to include abandonment of drums, and the administrative record supports the conclusion that A&W abandoned the drums when it failed to accept their transfer from Mexican and United States Customs officers. The fact that the drums were secured at a hazardous waste storage site when the clean-up was ordered does not negate the fact that the release, that is, the abandonment, caused an imminent and substantial endangerment that the Region started to remedy and ordered A&W to complete. With respect to the second order, there is no dispute that there was a release, and the administrative record shows clearly that the unsecured wastepile of lead-containing material presented an imminent and substantial endangerment.

A&W's administrative record claims do not justify reimbursement. Because A&W does not challenge the Region's decision to select the particular response actions required by these orders, and does not contend that the selection is not supported by the administrative record, reimbursement is not authorized by the statute. A&W's contention that it was denied the opportunity to review the records is without merit because the facts show that the administrative records for both orders were made publicly available in accordance with the applicable regulations. These regulations also allow privileged information to be excluded from the record. Further, due process requires only that access to the administrative record be available when CERCLA orders are subject to legal review, such as in connection with a petition for review, and in this case, they were.

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

Opinion of the Board by Judge Reich:

Before the Board are two petitions for reimbursement filed pursuant to § 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b), by A&W Smelters and Refiners, Inc. ("A&W"). These petitions follow A&W's completion of two clean-ups it was ordered to perform by two unilateral administrative orders issued by U.S. EPA Region IX in December 1992 and January 1993. A&W seeks reimbursement of its costs in complying with the two orders on the grounds that it is not

liable for the clean-up costs and that selection of the required clean-up activity was arbitrary and capricious. Pursuant to the Board's request, Region IX responded to A&W's petitions. Based on these and other submissions,[1] the Board issued a Preliminary Decision on February 2, 1996. A&W filed comments on the Preliminary Decision on February 22 and the Region on March 7. After due consideration of the comments received and making such changes as are appropriate, the Board issues this Final Decision. *See Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions* at 10 (EAB, June 9, 1994) ("1994 Guidance").

I. *BACKGROUND*

For approximately thirty years, A&W operated a smelting operation on United States Bureau of Land Management (BLM) land near Mojave, California. A&W's smelting operation employed heat and chemical additives (known as flux) to recover gold and silver from ore. A waste product from this process is a glass-like substance known as slag.[2] When the BLM ordered A&W to close its operations

---

[1] A&W filed a reply to the Region's response, which we have considered. The Region submitted a reply to A&W's reply, and a motion to have its reply considered, which is hereby granted. A&W subsequently filed a supplemental reply, which we have also considered. Lastly, the Region filed a motion to limit further briefings to those requested by the Board, a motion opposed by A&W. Because no further briefs were filed, the motion is denied as moot. A&W's motion for expedited consideration was denied on March 9, 1995.

A&W also requested an evidentiary hearing in this matter, and the Region opposed this request. The request is denied as there do not appear to be any significant disputed issues of *material* fact that would warrant conducting such a hearing. 1994 Guidance at 9-10. A&W vigorously disputes this conclusion. *See* Comments by Petitioner to Board's Preliminary Decision at 1. However, most of the issues cited by A&W as being in dispute are not material in that they do not affect the outcome or analysis in this decision. They relate largely to the issue of whether the shipments from A&W contained hazardous *waste*. As discussed in section II.C of this decision, the material shipped by A&W would still be a hazardous *substance* subject to CERCLA even if it were not a hazardous waste.

In addition, we note that the mere assertion of a factual dispute by A&W does not amount to a demonstration that a contested factual issue exists and needs to be resolved. Such disputes need to be demonstrated by evidence, not assertions in a brief, and such evidence should be documented in the administrative record or provided with the petition for reimbursement. Unsupported, self-serving conclusions as to what the evidence shows do not warrant a hearing.

[2] Slag is "[t]he more or less completely fused and vitrified matter separated during the reduction of metal from its ore." *Environmental Regulatory Glossary* 511 (Thomas F.P. Sullivan, ed., 6th ed.) Slag produced from smelting contains the flux and "gangue materials," which are the undesired and/or valueless portion of the ore. U.S. Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* (Paul W. Thrush, ed., U.S. Dept. of the Interior 1968). *See also Louisiana-Pacific Corp. v. Asarco Inc.*, 24 F.3d 1565, 1570 (9th Cir. 1994) ("Smelting * * * produces large amounts of a by-product called slag.").

in 1991, A&W segregated its mining ore and located purchasers for it.[3] By 1992, one pile of material, approximately 350 tons, remained.[4] BLM denied A&W's request to process this material on site. In September 1992, A&W entered into an agreement to sell this material to Roelof Mining, a Mexican mining concern operating the Union Mine in Guerrero Negro, Mexico.[5] According to A&W, this material was mining ore containing recoverable concentrations of gold and silver, and Roelof Mining purchased this material intending to recover these valuable minerals.

A&W's entanglement with CERCLA began in the fall of 1992 when it shipped this material to Roelof Mining. The material was packed in drums and transported in eleven truckloads by L&Z Trucking. The first two truckloads were shipped on September 15, 1992, and made it from California to their Mexican destination, although they were eventually repatriated to the United States upon the request of the Mexican government. On October 7, 1992, A&W shipped three more truckloads to Roelof Mining. These shipments were halted in Mexico by Mexican customs officials, and detained. On October 8, 1992, A&W shipped four truckloads to Roelof Mining, but these shipments were stopped and seized by United States Customs Service officials. Around the same time, two other truckloads destined for Mexico were diverted before they reached the border. It appears that this material was stored temporarily at a location in Escondido, California, before being shipped to its eventual destination in Sandy Valley, Nevada. These eleven truckloads became the subject of three clean-up orders issued to A&W under CERCLA § 106(a).[6] The factual circumstances surrounding each of the clean-up orders is discussed in more detail below.[7]

---

[3] *See* Toxics Law Reporter (BNA, May 25, 1994) (contained in Reply to EPA Region IX's Opposition to Claim Ex. 4).

[4] *Id.*

[5] *See* Motion to Reply to Petitioner, Ex. 1 (Indictment at 4).

[6] As discussed more fully later in this decision, CERCLA § 106(a) authorizes the Agency to issue administrative orders necessary to protect public health and welfare and the environment from an imminent and substantial endangerment because of an actual or threatened release of a hazardous substance from a facility. 42 U.S.C. § 9606(a).

[7] A&W's petitions for reimbursement cover only two of these three orders. A&W, however, relies in this proceeding upon its acquittal of criminal charges respecting the shipments covered by the third order, and therefore it is helpful to understand the facts and circumstances surrounding that order, which are described in section I.C of this decision.

A. *The Applied Technologies (AP) Site*

The clean-up order for the AP Site (Order No. 93-06) pertains to the truckloads of material detained by the Mexican and United States governments. As noted above, on October 7, 1992, the Mexican government detained three truckloads headed for Roelof Mining, and the next day, the United States government detained another four at the Customs Service yard in San Ysidro, California. The drums detained in Mexico were tested by the Mexican government, which determined that the material did not contain precious metals as claimed in the shipping documentation; import into that country was therefore denied. *See* Translation of letter from Jose Luis Calderon, Procuraduria Federal de Proteccion al Ambiente to Allyn M. Davis, Region IX (May 19, 1993) ("PFPA Letter"). Consequently, these three truckloads of drums were impounded at the impoundment yard in Tijuana, Mexico. In mid-November, the County of San Diego Hazardous Materials Team, at the request of United States Customs Service officials, sampled the contents of the drums held by the United States in San Ysidro. These lab reports, dated December and January 1992, indicate that the material contained a total lead concentration of 4,000-20,000 mg/kg and a TCLP lead concentration[8] of 70-770 mg/l. The presence of lead in the material made the material a hazardous substance under CERCLA.[9] Moreover, it appears that at this time, the Agency was treating the material as a hazardous waste under the Resource Conservation and Recovery Act ("RCRA").[10] Armed with this informa-

---

[8] TCLP stands for toxic characteristic leaching procedure, and refers to a method of testing used to "identify waste which, if improperly disposed of, may release toxic materials in sufficient amounts to pose a substantial hazard to human health or the environment." 43 Fed. Reg. 58,952 (1978) (discussing precursor of current TCLP test methods). For example, according to 40 C.F.R. § 261.24, a regulation implementing the Resource Conservation and Recovery Act, "[a] solid waste exhibits the characteristic of toxicity if, using the [TCLP] * * * the extract from a representative sample of the waste contains any of the contaminants listed in table 1 [including lead] at the concentration equal to or greater than the respective value given in that table." The value for lead is 5 mg/l.

A&W contends that the TCLP test is invalid for sampling mining ore, and therefore the TCLP results should be ignored by the Board. Comments by Petitioner to Board's Preliminary Decision at 4. This argument misses the point. The TCLP tests the *concentration* of lead in a substance. As explained in the text *infra*, the concentration of lead in the material at issue is not relevant to determining if the material is a hazardous substance within CERCLA's purview. What matters is whether the material contains lead in any amount, and A&W does not dispute the conclusion that some lead was present in the material.

[9] *See infra* section II.C.

[10] This legislation embodies a national program for the treatment, storage and disposal of hazardous waste. *See* RCRA § 1003(b), 42 U.S.C. § 6902(b) ("The Congress hereby declares it to
Continued

tion, United States Customs Service officials directed that the four truckloads of drums then being held at the San Ysidro Customs Service yard be transferred for temporary storage to the L&Z Trucking facility near the border. *See* Letter from Michael L. Bundy, Technical Assistance Team Member, to William E. Lewis, Deputy Project Officer at 1 (Jan. 21, 1993) ("Bundy Memorandum"). This facility was not licensed to store hazardous waste under RCRA. *Id.*

On January 11, the Mexican government informed Region IX that it intended to return the three impounded truckloads of drums to the United States on January 14. At that time, there was no comprehensive national policy in the United States for handling rejected hazardous waste loads. *See* Memorandum from Amy Sokolov to Terry Brubaker, Chief, Emergency Response Section, Region IX (Jan. 12, 1993). Instead, the Agency's policy was to defer to the State on how such loads should be handled. *Id.* In this case, California would allow the material to be returned to A&W, but only if A&W would make arrangements to send the material to an authorized treatment, storage or disposal facility as soon as possible. *Id.*

Soon thereafter, the Region notified A&W that on January 14 the Mexican government would be returning the three truckloads of material it had detained, which, as noted above, the Agency considered to be hazardous waste. The Region also notified A&W that on the same date, these truckloads of drums, as well as the four truckloads of drums temporarily impounded by the United States, would be released to A&W. The Region expected A&W to assume custody of and responsibility for its seven truckloads of drums on January 14. Indeed, the Region proposed allowing L&Z Trucking to transport the three truckloads from Mexico and the four truckloads held by the United States (at L&Z Trucking's facility) back to A&W's facility on January 14. Bundy Memorandum at 1. The Region and the State of California were prepared to grant the permit variances and/or exceptions necessary for this to happen. A&W had not been provided copies of the laboratory tests indicating the lead concentrations in the material, and disagreed with the Agency's characterization of the material as "hazardous waste." Nevertheless, A&W seemed willing to proceed with the Region's proposal.

---

be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.").

Things changed on January 13 when L&Z informed A&W that it would not transport the seven truckloads back to the A&W facility until A&W paid L&Z $35,000 for storage and transportation of the material. A&W was apparently unable to pay this sum on such short notice, and therefore L&Z refused to transport the material for A&W.[11] Bundy Memorandum at 2. As a result of this development, A&W informed the Region on January 13 that it would not take custody of the seven truckloads of drums on January 14. *Id.* The Region then advised A&W that if it did not take custody of the material on January 14, the Region would consider the seven truckloads of drums abandoned. Action Memorandum from Robert E. Bornstein, On-Scene-Coordinator, to Jeff Zelikson, Director, Hazardous Waste Management Division at 2 (Jan. 19, 1993).

On January 14, the three truckloads from Mexico were returned to the United States. Because A&W did not assume responsibility for these truckloads, and the four being released by the United States, the Region considered them abandoned, and exercised its emergency response authority under CERCLA[12] to arrange for these truckloads to be transported to a nearby RCRA-approved hazardous waste treatment, storage and disposal facility,[13] the AP Site, where the material was stored at the Agency's expense.[14]

The next day, the Region issued Order No. 93-06 under CERCLA § 106(a) directing A&W to assume responsibility for the proper storage and disposal of the seven truckloads of material, approximately 543 drums, then stored at the AP Site. Order No. 93-06 at 10. The order identified A&W as a person "who by contract, agreement, or

[11] L&Z ultimately did transport the material to the AP Site, but did so pursuant to an agreement with the Agency and not with A&W.

[12] *See* CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) ("Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act * * * to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time * * * or take any other response measure * * * which the President deems necessary to protect the public health or welfare or the environment.").

[13] RCRA § 3004, 42 U.S.C. § 6924, sets forth standards applicable to owners and operators of hazardous waste treatment, storage or disposal facilities. In order to operate, such facilities must obtain a permit under RCRA § 3005, 42 U.S.C. § 6925. The AP Site had such a permit.

[14] Only five of the seven truckloads were transported on January 14. The two remaining trucks required repairs which were not completed until the next day, and those truckloads were transported on January 15.

otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances," and therefore was responsible for the ordered clean-up. According to the order, the 543 drums contained hazardous substances as that term is defined in CERCLA § 101(14) because the material in the drums contained lead. Further, the order indicated that a "release" of this hazardous substance occurred by virtue of the abandonment of the 543 drums, that is, when A&W failed to assume responsibility for them on January 14. An index attached to the order states that the administrative record supporting the order consists of the laboratory reports prepared by the County of San Diego and nine Agency guidance documents. These laboratory reports, however, were not made publicly available (or even available to A&W) at the time the order was issued because of a pending criminal investigation arising from A&W's shipments. A later administrative record, dated January 26, 1993, identifies the same documents and also contains an action memorandum, dated January 19, issued after the order itself.[15]

A&W complied with the order, shipping the drummed material from the AP Site to the Chemical Waste Management facility in Kettlemen Hills, California, and to the EnviroSafe, Inc. facility in Idaho for disposal. These shipments were completed by February 19. *See* Letter from Michael L. Bundy, Technical Assistance Team Member, to William E. Lewis, Deputy Project Officer, Region IX (March 2, 1993). In March 1994, A&W submitted the final report required by Order No. 93-06, and on April 12, 1994 filed this petition for reimbursement of $122,528 it claims to have spent to comply with that order. By letter dated August 6, 1993, the Region acknowledged that A&W had completed the work required by the order.

B. *Bergstrom Site*

The clean-up order for this site (Order No. 93-03) involves the two truckloads of drummed material that were diverted prior to reaching the border. Apparently, the drummed material was stored temporarily at a site in Escondido, California, before being shipped to the Bergstrom Site. The Bergstrom Site, a 2.5 acre residential property, is located in Sandy Valley, Nevada, a small mining community near the border between California and Nevada. On the site is a mobile home occupied by the Bergstrom family, including three small children. It is not clear how the material came to rest at this site; A&W denies that

[15] This action memorandum, issued after the clean-up order, does not request the issuance of a clean-up order to A&W. Instead, it requests authorization for the Region to act if A&W again failed to assume responsibility for the 543 drums.

it shipped the material to Nevada, *see* Letter from Matthew J. Nasuti, counsel for A&W, to John Rothman, Office of Regional Counsel (Dec. 29, 1992), and nothing in the documents provided with these petitions explains exactly how the material was removed from its drums and placed in the waste pile at the Bergstrom Site. Nevertheless, A&W does not dispute that it was A&W's material at the Bergstrom Site.[16] Nor does A&W contend that this material is any different from the material involved at the AP Site.

On December 4, EPA's Technical Assistance Team (TAT) visited the site and collected samples from the waste pile located there. The waste pile was located in a corner of the site approximately 50-100 feet from the Bergstrom residence, and approximately 100 yards from other residences. The pile, which was unsecured, contained a sand-like soil and black, red and green glass-like material, which had the appearance of vitrified slag. *See* Letter from Robert L. Wise, Technical Assistance Team Member, to William E. Lewis, Deputy Project Officer, Region IX (Jan. 13, 1993) ("Wise Letter"). In particular, the TAT found a pile "of primarily sandy soil with small rocks and what appeared to be vitrified chunks interspersed. Most of these chunks were two cubic inches or less, but there were granular sized pieces of the same material, as well. The glass-like material appeared to be uniformly interspersed throughout the waste piles." Letter from John D. Rothman, Office of Regional Counsel, to Matthew J. Nasuti, counsel for A&W at 1 (Jan. 15, 1993).[17]

The TAT conducted a superficial X-Ray Florescence (XRF) survey of the waste pile. As a result of this survey, "[c]oncentrations of lead were found to [be] very uniform at an average of approximately 7,000 mg/kg throughout roughly 80% of the pile." Wise Letter at 2. The TAT report noted the importance of the consistent lead concentrations: "It is important to note that the lead concentrations found during the survey were very consistent and indicated the piles were the product of a specific process and not untreated soils." *Id.* More specifically, "the findings of the site assessment indicate that the waste piles were gen-

---

[16] *See* Letter from Matthew J. Nasuti, counsel for A&W, to Caroline Ireson, Removal Enforcement Section, at 1 (Dec. 11, 1992) ("[T]here was a shipment of mining ore from property owned by the U.S. Bureau of Land Management (BLM) which apparently is now in storage on Mr. Bergstrom's property in Sandy Valley, Nevada * * *. The material was originally destined for a mine processing facility in Mexico.").

[17] This quotation refers to "waste piles." The documents describing the Bergstrom Site refer to both a singular "waste pile" and the plural "waste piles." The site diagram attached to the TAT report shows only one pile divided into two parts. *See* Wise Letter, Attachment A. We find this distinction without significance for the purposes of our analysis.

erated by an unknown process involving melting or burning." Letter from Anthony Talamantz, TAT Member, to Robert Mandel, On-Scene Coordinator, Region IX (Dec. 16, 1992). The remaining 20% of the pile indicated concentrations of lead exceeding 10,000 ppm and thus above the XRF calibration range. Wise Letter at 2. On the day of the assessment, wind was blowing material from the pile towards the Bergstrom residence. Wise Letter Attachment A.

The TAT collected 14 samples from the pile. The TAT also collected three samples of the glass-like material, segregated by its red, green or black color. Testing of these samples showed that the glass-like material had a total lead concentration of 13,000 mg/kg, and a TCLP lead concentration of 9.9 mg/l. The other samples, which we assume contained both sandy soil and the glass-like chunks uniformly interspersed therein, tested at a total lead concentration of 6,500 to 7,100 mg/kg and a TCLP lead concentration of 300 to 320 mg/l. Wise Letter Attachment C. These test results were transmitted to Region IX on December 10.

On December 17, the Region issued Order No. 93-03 directing A&W to clean up the Bergstrom Site on the basis that A&W "arranged for disposal and/or transport for disposal of hazardous substances at the Site." Order No. 93-03 at 5. Specifically, A&W was ordered to remove all contaminated soils and sediments with a lead content greater than 500 ppm to a RCRA-authorized treatment, storage or disposal facility, and restore the site to its original condition. The order indicates that the release of a hazardous substance, lead, had occurred at the site, and might occur again due to wind and rain. The administrative record issued with the order, and made available to A&W, contained eight Agency guidance documents, a December 11, 1992 action memorandum, and the testing results and site map prepared by the TAT.

On December 29, A&W, through counsel, asked the Region for permission to sell the material in the pile, which A&W has consistently argued was mining ore, to Durga Mining, located near Sandy Valley. *See* Letter from Matthew J. Nasuti, counsel for A&W, to John Rothman, Office of Regional Counsel at 2 (Dec. 29, 1992). Durga Mining was prepared to accept this material provided it received written assurances from EPA that this material would not expose Durga Mining to CERCLA liability. *Id.* The Region denied this request, restating its opinion that the material in the Bergstrom Site waste pile was hazardous waste and could be handled only at a RCRA-approved treatment, storage or disposal facility. The Region also stated that the material was not mining ore because, as observed by the TAT, it contained glass-

like chunks not found in ore, and therefore the material was not beyond the Agency's oversight under RCRA.[18] Letter from John D. Rothman, Office of Regional Counsel, to Matthew J. Nasuti, counsel for A&W (Jan. 5, 1993).

The material at the Bergstrom Site was transported for disposal at an authorized facility in Nevada in March 1993. On April 21, 1993, A&W filed this petition seeking "over $50,000.00" for its costs in complying with this order. By letter dated July 12, 1994, the Region acknowledged A&W's completion of the work required by the order.

C. *Guerrero Negro Site*

The clean-up order (Order No. 94-03) for this site involves the two truckloads of drummed material that made it to their Mexican destination. In January 1993, Region IX informed the Mexican government that it considered the material shipped by A&W to Roelof Mining to be hazardous waste. The Region explained that although most of the shipments had been stopped at the border, two truckloads, approximately 173 drums, did reach their destination.

On May 19, 1993, the Mexican government, relying upon its October 1992 tests of the materials and the identification of A&W drums at an April 1993 inspection of the Guerrero Negro Site, asked the United States to repatriate the material. PFPA Letter. Soon thereafter, United States officials conducted a preliminary assessment of the drums at the Guerrero Negro Site and determined that they were of U.S. origin. *See* Action Memorandum from Richard Wm. Martyn, On-Scene-Coordinator, to Jeffrey Zelikson, Director, Hazardous Waste Management Division at 2 (Oct. 20, 1993). Accordingly, the Agency agreed to the request of the Mexican government, the first such request under the Guidelines for Repatriation of Illegally Imported/Exported Hazardous Wastes. *See* Letter from Allyn M. Davis, U.S. Co-Chair, Hazardous Waste Workgroup, to Jose Luis Calderon, Environmental Prosecutor's Office (July 1, 1993). Repatriation took place on December 8. Motion to Reply to Petitioner at 2 n.1. On that same date, the Region issued Order No. 94-03 directing A&W to assume custody of the material upon its repatriation. *Id.* A&W refused to comply with this order, and consequently, the Region assumed custody of this material and disposed of it using funds from the Hazardous Substance Superfund in January 1994. *Id.* EPA has yet to

[18] As mentioned above, only hazardous wastes are regulated under RCRA. True mining ore is not a waste.

seek reimbursement from A&W of the $111,534.38 it spent in this effort. *Id.*

Meanwhile, before repatriation took place, a federal grand jury indicted A&W for, *inter alia*, the unlawful export of hazardous waste under RCRA based upon the shipment of these two truckloads to the Mexican mine.[19] EPA tested the material upon its return to the United States, and a fire-assay test showed that the material contained concentrations of gold and silver. Reply to EPA Region IX's Opposition to Claim Ex.2. At the criminal trial of A&W, a former director of the U.S. Bureau of Mines testified that the material was valuable mining ore and not waste. Reply to EPA Region IX's Opposition to Claim at 6. A&W claims that he testified that mining ore often contains "debris" as well as lead. *Id.* A&W was acquitted of violating RCRA. According to A&W, the acquittal stemmed from the jury's conclusion that the drummed material was mining ore valuable for its gold and silver content, and not a hazardous waste.[20]

II. *DISCUSSION*

A. *Statutory Background*

Congress enacted CERCLA "to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties." *Dico, Inc. v. Diamond*, 35 F.3d 348 (8th Cir. 1994). CERCLA requires a clean-up whenever there is a release or a threatened release of any hazardous substance from a facility into the environment. *See* CERCLA §§ 104(a), 106(a). When the release or threatened release of a hazardous substance from a facility presents an imminent and substantial endangerment to the public health or welfare, or to the environment, the Agency may unilaterally order a party to remedy, or clean up, the release or threatened release. CERCLA § 106(a). Generally, under CERCLA § 107(a) those responsible for clean-ups are:

---

[19] Specifically, the indictment alleged that A&W illegally shipped hazardous waste, namely the lead-contaminated soil and slag, without a manifest in violation of 42 U.S.C. § 6928(d)(5), and in contravention of an international agreement between the United States and Mexico, a violation of 42 U.S.C. § 6928(d)(6).

[20] The Region does not specifically dispute this characterization of the basis for the acquittal, but indicates that because there were no special verdicts, it "does not know what conclusions, if any, were reached by the jury." Comments by EPA Region IX on Board's Preliminary Decision at 3. In any event, it argues instead that this determination would not be conclusive in a civil proceeding and further that even if the material is not a hazardous waste under RCRA, it can still be a hazardous substance under CERCLA. *See infra* section II.C.

> (1) those who own and operate the facility at the time a release or threatened release exists; (2) those who owned or operated the facility at any time when hazardous substances were disposed of at the facility, (3) those who arranged for disposal or treatment, or arranged for transport for disposal or treatment, of hazardous substances which they owned or possessed; and (4) those who transported the hazardous substances to the facility.

United States v. TIC Investment Corp., 68 F.3d 1082, 1086 (8th Cir. 1995).

Those who comply with an administrative order may petition for the reimbursement of their costs in that effort in accordance with CERCLA § 106(b)(2)(A). That section provides in part:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the [Agency] for reimbursement from the Fund for the reasonable costs of such action, plus interest.

Once the requirements of CERCLA § 106(b)(2)(A) are met, a petitioner, to obtain reimbursement:

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

CERCLA § 106(b)(2)(C). The statute thus places upon the petitioner the burden of proving that it is not responsible under CERCLA § 107(a) for the ordered clean-up in order for the petitioner to prevail. *See In re The Sherwin-Williams Company*, 6 E.A.D. 199, 208 (EAB 1995) (petitioner "can establish its right to reimbursement * * * if it can prove by a preponderance of the evidence that it did not generate the waste disposed of at the B&C Towing Site"); *In re William H. Oliver*, 6 E.A.D. 85, 87 (EAB 1995) (petitioner "has not met his burden of proving that he is not liable for response costs under § 107(a)"). If a petitioner fails to meet this burden, and is indeed liable, it may nevertheless recover costs expended to the extent that:

> [I]t can demonstrate, on the administrative record, that the [Agency's] decision in selecting the response action

> was arbitrary and capricious or was otherwise not in accordance with law.

CERCLA § 106(b)(2)(D). Again, the burden is upon the petitioner to establish his claim. *William H. Oliver*, 6 E.A.D. at 94.

In this case, we conclude that A&W has failed to meet its burden of proving that it is not liable for the clean-ups at the AP and Bergstrom Sites. Further, we conclude that A&W has not met its burden of proving, on the administrative record, that the clean-up orders were arbitrary or capricious or otherwise not in accordance with the law. Our reasons follow.

B. *Preliminary Requirements*

CERCLA § 106(b)(2)(A) provides that those who have incurred costs in complying with the terms of a clean-up order issued under § 106(a) may petition for reimbursement of their reasonable costs within sixty days of completing the required response action. The Agency has interpreted this provision as setting forth prerequisites or conditions that must be satisfied before the merits of a petition will be considered, that is, before the Agency will consider whether the petitioner is liable for the costs and/or whether the removal action was arbitrary, capricious or not in accordance with law. *See*, OWPE, *Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions* at 3 (OSWER Directive No. 9833.5, June 29, 1992) ("1992 Guidance").[21] In sum, the prerequisites are that the petitioner: 1) complied with the order, 2) completed the required action, 3) submitted the petition within sixty days of completing the action, and 4) incurred reasonable costs. *See id.* The failure to satisfy any one of these conditions justifies denial of the petition without any consideration of the merits of petitioner's claim. *Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995) (failure to comply with clean-up order precludes consideration of claim that petitioner is not liable) *cert. denied* 64 U.S.L.W. 3465 (1996); *In re Findley Adhesives, Inc.*, 5 E.A.D. 710 (EAB 1995) (same).

Here, the Region contends that A&W's petitions must fail because "A&W has not demonstrated that the costs for which it seeks reimbursement are reasonable." Response to Claim for Reimbursement at

---

[21] At the time the petitions were filed, the 1992 Guidance on submitting reimbursement petitions was operative. It has since been replaced by a document bearing the same name but issued in June 1994 by the EAB. The 1994 Guidance refers to the same four prerequisites.

7, 11. The Region contends that A&W's petitions should be denied because A&W has failed to support or substantiate the specific amounts sought by its petitions. *Id.* We construe this to be an assertion that A&W has failed to meet the filing prerequisite of incurring reasonable costs.

The 1992 Guidance explains that "[e]ach petition *should* include all information necessary for EPA to evaluate these threshold requirements. This information *should* include * * * proof of the reasonable costs incurred." 1992 Guidance at 3 (emphasis added). A&W's petitions for reimbursement are accompanied only by manifests for the ultimate disposal of the material. These manifests do not demonstrate the cost of the disposal.

Although the Region is correct that A&W's failure to provide documentary support for the costs sought by the petitions contravenes the filing practice suggested in the 1992 Guidance, we do not find this deficiency fatal to A&W's petition. The 1992 Guidance is merely a *guidance*; with respect to this particular issue, it merely states that a petitioner *should* file such documents with a petition, but it does not *require* such an action. What is required by both the 1992 Guidance and CERCLA § 106(b)(2)(A) is that a petitioner *incur* reasonable costs. A&W has provided manifests for the disposal of the material bearing A&W's name as the generator of the material. It is safe to assume that the activities evidenced by these manifests were not performed *gratis* for A&W's benefit, and thus we have no doubt that A&W incurred costs. Indeed, the Region does not contend that A&W did not incur costs. Submission of the documentation supporting the specific amounts claimed by A&W and a determination of whether any or all of those costs are reasonable would be required only if A&W is otherwise entitled to reimbursement,[22] which, for the reasons set forth below, it is not.

C. *Liability*

As previously discussed, under section 106(b) A&W bears the burden of proving that it is not a liable party under CERCLA § 107(a). CERCLA § 107(a) identifies as a liable party "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by anoth-

---

[22] As explained in the 1994 Guidance, the reasonableness of the costs is not evaluated until it has been determined that a petitioner is entitled to reimbursement. 1994 Guidance at 5 n.6, 6.

er party or entity, at any facility * * * owned or operated by another party or entity and containing such hazardous substances." CERCLA § 107(a)(3). The Region issued the clean-up orders to A&W based upon its conclusion that A&W arranged for the disposal or treatment of the material at issue.

With respect to both clean-up orders, A&W contends that it is not liable because the material it shipped to Roelof Mining was not a hazardous waste. To support this claim, A&W relies upon its acquittal on the criminal charges of illegally transporting a hazardous waste into Mexico under RCRA. In addition, A&W cites the fire-assay tests performed by the Region in preparation for the criminal trial that show recoverable quantities of gold and silver in the material. Lastly, referring to its attempted sale of the material to Roelof Mining and its proposed sale of the material to Durga Mining in Nevada, A&W asserts that the material was marketable and therefore was not a hazardous waste. In essence, A&W expressly argues that it is not liable because the material at issue is beyond the scope of CERCLA, and implicitly argues that the transaction at issue, the sale of a marketable material, was also beyond the scope of CERCLA. However, since we find that A&W's arguments are based upon a misunderstanding of the significant differences between CERCLA and RCRA, we are not persuaded that A&W is not liable.

1. CERCLA Hazardous Substances

CERCLA authorizes responses to releases of "hazardous substances." The term "hazardous substance" is defined in CERCLA § 101(14) as follows:

> The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [RCRA] (but not including any waste the regulation of which under [RCRA] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act * * *, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

Thus, CERCLA identifies six different ways something can be classified as a hazardous substance for CERCLA purposes. Identification as a "hazardous waste" under RCRA is only one of those ways. If a material is not a "hazardous waste" for RCRA purposes, it may nevertheless be a "hazardous substance" for CERCLA purposes if it fits within any of the other statutory bases for identifying a CERCLA hazardous substance. For example, mining wastes, such as slag, which by statute have been suspended from regulation as "hazardous wastes" under RCRA,[23] may still be "hazardous substances" and within the scope of CERCLA. *Louisiana-Pacific Corp. v. Asarco Inc.*, 24 F.3d 1565, 1573 (9th Cir. 1994) ("Had Congress intended to except slag from CERCLA regulation * * * it easily could have done so. It did not. * * * [T]he specific exemption for slag in subsection (C) applies only to that subsection, and * * * slag is regulated by CERCLA to the extent that it falls under any other subsection of section [101(14)].") *cert. denied* 115 S.Ct. 780 (1995); *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 922, 927-931 (D.C. Cir. 1985) (same).[24]

Here, the Region claims that the material at issue is a hazardous substance for CERCLA purposes because the material contains lead, and lead is a hazardous substance under three prongs of the statutory definition:

> First, lead is a hazardous substance under subsection (B) of the definition as an element, compound, mixture, solution, or substance designated pursuant to 42 USC § 9602 (CERCLA § 102, and see 40 CFR § 302.4). Second, the lead containing material subject to this cleanup order is a hazardous substance under subsection (C) of the definition as a hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (RCRA § 3001, and see 40 CFR § 261.24). Third, lead is a hazardous substance under subsection (D) of the definition as a toxic pollutant listed under section 1317(a) of Title 33 ([Clean Water Act] § 307(a), and see 40 CFR § 401.15).

---

[23] *See* 42 U.S.C. § 6921(b)(3)(A) ("slag waste" is not subject to RCRA).

[24] This is consistent with the distinct purposes of RCRA and CERCLA. *See California v. Summer del Caribe, Inc.*, 821 F. Supp. 574, 580 (N.D. Cal. 1993) ("An EPA determination that [a substance] is not sufficiently dangerous to justify imposing the most stringent regulations to govern its day to day handling under [RCRA] does not imply that the harm caused by [the substance's] improper disposal is also insufficient to justify regulation under CERCLA.").

Response to Claim for Reimbursement at 5.

While the Region's second contention, above, is premised on the material being a "hazardous waste," which A&W disputes on the basis of the jury's verdict in the criminal prosecution, this contention is only one of the Region's three grounds for concluding that the material at issue is a hazardous substance. Therefore, even if A&W is correct that the material is not a hazardous waste,[25] A&W still has not demonstrated that the material is not a hazardous substance under any of the other statutory prongs cited by the Region. A&W does not dispute that lead is a hazardous substance. Nor does A&W dispute that lead is present in the material it tried to sell to Roelof Mining. It is the presence of lead that makes the entire material a hazardous substance,[26] regardless of the amount of lead, and regardless of the gold and silver content of the material. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1201 (2nd Cir. 1992) ("For us to consider the whole separate from its hazardous constituent parts would be to engage in semantic sophistry. When a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability."); *United States v. Conservation Chemical Company*, 619 F. Supp. 162, 238 (W.D. Mo. 1985) (Something is a CERCLA hazardous substance "if it contains substances listed as hazardous under any of the statutes referenced in CERCLA Section 101(14) regardless of the volumes or concentrations of those substances."). A&W asserts that the material is beyond the scope of CERCLA because it was marketable as valuable mining ore based upon the recoverable amounts of gold and silver in the material. However, the status of a substance as a marketable commodity is irrelevant to its designation as a CER-

[25] In our opinion, A&W has not demonstrated that the material in question is not a hazardous waste. To support its claim, A&W relies upon its acquittal from charges that it illegally transported a hazardous waste under RCRA. The jury's conclusion in the criminal case, however, is not binding upon us here because of the different standards of proof in the criminal trial and in these proceedings. The jury's finding only indicates that in the criminal trial the government did not meet its burden of proving beyond a reasonable doubt that the material was a hazardous waste. Here, the applicable standard of proof is merely a preponderance of the evidence. CERCLA § 106(b)(2)(C). Evidence that fails to satisfy the "beyond a reasonable doubt" standard may nevertheless satisfy the easier "preponderance of the evidence" standard. *See One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (an acquittal of criminal charges of illegally importing one lot of emerald cut stones does not preclude a civil forfeiture action based upon the same transaction because the burdens of proof in the two proceedings are different).

[26] There is no evidence in the record or documents provided in this proceeding that the lead at issue is naturally occurring in the material. If the material was purely ore containing naturally occurring lead, as discussed more fully later in the text, such ore would still be a hazardous substance but A&W would have a stronger argument that the transaction at issue was not an arrangement for disposal, but rather a legitimate sale of a useful product.

CLA hazardous substance. *See B.F. Goodrich*, 958 F.2d at 1200 ("Whether the substance is a consumer product, a manufacturing byproduct, or an element of a waste stream is irrelevant" to determining if it is a hazardous substance); *Conservation Chemical Co.*, 619 F. Supp. at 238 ("Nor has Congress intended to exempt from CERCLA liability hazardous substances which otherwise may have a useful purpose in certain manufacturing or chemical processes."). For these reasons, we conclude that A&W has failed to meet its burden of proving that the material in question was not a hazardous substance and thus was beyond the scope of CERCLA's coverage.

2. Arrangement for Treatment or Disposal

Not all transactions involving hazardous substances are within CERCLA's purview—only those amounting to an "arrangement for disposal or treatment." *Dayton Independent School District v. U.S. Mineral Products Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) ("[T]he sale of a hazardous substance for a purpose other than its disposal does not expose defendant to CERCLA liability."); *United States v. Pesses*, 794 F. Supp. 151, 156 (W.D. Pa. 1992) ("Courts have refused to impose CERCLA liability, however, if a party merely sells a product containing a hazardous substance, without additional evidence that the transaction involved an 'arrangement' for the ultimate disposal or treatment of the substance."); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654 (N.D. Ill. 1988) (the term "arrangement for disposal" "clearly circumscribes the types of transactions in hazardous substances to which liability attaches, narrowing liability to transactions in the disposal or treatment of such substances"). A&W has not expressly argued that its transaction with Roelof Mining did not amount to an arrangement for disposal or treatment. A&W has erroneously focused its energies in these petitions on arguing that the material is not a hazardous waste under RCRA, thus overlooking the substantial differences between RCRA and CERCLA, and in particular the fact that CERCLA regulates hazardous substances, not just hazardous wastes. One of the arguments made by A&W is that its material was not a hazardous waste because it was marketable for its gold and silver content. We are willing to construe this argument as an argument that A&W's transaction with Roelof Mining was not an arrangement for disposal or treatment under CERCLA because it was the sale of a marketable, valuable ore.

We begin our discussion of this issue by noting that the phrase "arrangement for disposal or treatment" must by given a liberal interpretation in order to effectuate CERCLA's remedial purpose. *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th

Cir. 1990) ("a liberal judicial interpretation of the term is required in order that we achieve CERCLA's 'overwhelmingly remedial' statutory scheme"); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (same). We also note that the petitioner's characterization of the transaction is not dispositive. *Aceto Agricultural Chemicals*, 872 F.2d at 1381 ("[C]ourts have not hesitated to look beyond defendant's characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."); *State of California v. Summer Del Caribe, Inc.*, 821 F. Supp. 574, 581 (N.D. Cal. 1993) ("[C]haracterizing a transaction as a 'sale' instead of an 'arrangement for disposal or treatment' does not protect a party from liability."); *State of New York v. General Electric Co.*, 592 F. Supp. 291, 297 (N.D. N.Y. 1984) ("[I]t is equally clear that a waste generator's liability under CERCLA is not to be so facilely circumvented by its characterization of its arrangements as 'sales.'"). Instead, the critical inquiry for determining whether a transaction is an arrangement for disposal or treatment is the reason for the transaction. *Edward Hines Lumber Co.*, 685 F. Supp. at 655 n.3. Whether a party "arranged for the disposal or treatment" of a hazardous substance is a fact-specific inquiry. *Summer del Caribe*, 821 F. Supp. at 581.

"[O]ne factor to consider in assessing the character of a transaction is the nature of the material exchanged." *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1140 (N.D. Fla. 1994). The character of the transaction is typically evaluated under the "useful products" doctrine. This doctrine was discussed at length in *United States v. Maryland Sand, Gravel and Stone Co.*, 39 ERC 1761 (D. Md. 1994). In addressing the liability of a hazardous substance generator based upon an arrangement for disposal or treatment of the hazardous substance, the *Maryland Sand* court concluded that:

> [E]very case reviewed by this Court which addresses the scope of CERCLA's "arranger" liability has adopted the "useful products" doctrine, holding defendants liable for response costs when such defendants transferred toxic substances generated as by-products in their operations, and for which they had no further use, even when the recipients place some residual value on the waste.

Maryland Sand, 39 ERC at 1766. Conversely, "[w]hen a party sells a product incidentally containing a hazardous substance but having value as being useful for the purpose for which it was manufactured, then the transaction is less likely to be an 'arrangement' to dispose of

a hazardous substance." *Chatham Steel Corp.*, 858 F. Supp. at 1140. In other words, there is no CERCLA liability when the transaction involves the sale of a "useful product," that is, "when the sale is of a new product, manufactured specifically for the purpose of sale, or of a product that remains useful for its normal purpose in its existing state." *Summer del Caribe*, 821 F. Supp. at 581. For example, "useful products" include asbestos-containing building supplies,[27] creosote or other chemicals used in manufacturing treated wood,[28] and PCB filled transformers sold for continued use as transformers.[29]

Under this analysis, an arrangement for disposal or treatment can be found when a by-product is not useful in its current state and the generator of that by-product transfers it to another party who will process or treat the by-product to make all or part of it useful. For example, in *Maryland Sand*, the arrangement for disposal or treatment occurred when generators of industrial wastes sold those by-products to a recycler who recovered chemical solvents from the wastes. Consequently, the generators were responsible for costs incurred in connection with the clean-up of the site where the recycler disposed of his still bottoms. In *Pesses*, the arrangement for disposal or treatment was based upon the sale of "scrap" materials to a company that would process it to make useful metal alloys. The court rejected the argument that the transaction involved the sale of a valuable raw material to be used in the manufacturing of metal alloys, and held the generator of the "scrap" liable for the costs associated with cleaning up the processor's facility. In *Summer del Caribe*, a manufacturer that produced "solder dross" as a by-product sold the solder dross to a metal reclamation facility that reclaimed the useable portions of it and buried the remaining unusable portions, which contained hazardous substances, at its facility. The generator of the solder dross was liable for costs of cleaning up the reclamation facility because it arranged for disposal or treatment of hazardous substances when it sold the solder dross to the recycler. According to the court:

> Defendant disposed of hazardous waste when it sold the solder dross to [the reclamation facility]. The only options available to Defendant were to dispose of the solder dross itself, reclaim the useable portion and dispose of the remaining hazardous substance, or transfer it to a

---

[27] *See Prudential Insurance Co. of America v. United States Gypsum*, 711 F. Supp. 1244, 1254 (D. N.J. 1989).

[28] *See Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988).

[29] *See Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990).

> third party. In choosing the third option, Defendant, thus, arranged for treatment and disposal under CERCLA.

Summer del Caribe, 821 F. Supp. at 582. Likewise, in *Catellus Development Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994), a party that sold spent automotive batteries to a lead reclamation plant was liable for the costs of cleaning up the property where the battery casings, which contained lead, were eventually dumped. The court noted that the battery casings were not the subject of the reclamation, and therefore they required disposal at the time of the sale. 34 F.3d at 752. In other words, the sale of the spent batteries encompassed the sale of those parts of the batteries that could be reclaimed, and those parts that could not be and thus required disposal.

We find the facts of this case so similar to the facts of *Maryland Sand, Pesses, Summer del Caribe* and *Catellus Development Corp.* as to justify a conclusion that A&W arranged for disposal or treatment of a hazardous substance (lead) when it sold the material to Roelof Mining. First, it is evident that the material was a by-product of A&W's operations. The material contained slag, a by-product of smelting operations. *See Louisiana-Pacific*, 24 F.3d at 1575 ("slag * * * is at best a by-product"). Lead was found in this slag. Lead was also found in the material itself, at "concentrations [that] were very consistent and indicated that the piles were the product of a specific process and not untreated soils." Wise Letter at 2.[30] Even A&W asserts that the material is "secondary ore," Letter from Matthew J. Nasuti, counsel for A&W, to Melanie Pierson, Assistant U.S. Attorney, at 2 (Jan. 12, 1993), which is ore that has gone through at least one phase of initial processing.[31] If there were any evidence that the lead in the material was naturally occurring, it would help A&W establish that the material was not a by-product. But, such evidence is lacking here. Second, it is equally clear that the material was not useful in its existing state. A&W admits that the material was valuable only if processed to extract its gold and silver concentrations.[32] This processing would still leave the lead to be

---

[30] These facts are made clear in the administrative record supporting the clean-up order for the Bergstrom Site. *See supra* section I. A&W does not contend that the material that ended up at the AP Site is any different from the material that ended up at the Bergstrom Site.

[31] *See* U.S. Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms*, at 978 (Paul W. Thrush, ed., U.S. Dept. of the Interior 1968).

[32] Such processing amounts to "treatment" under CERCLA § 107(a)(3). *Summer del Caribe*, 821 F. Supp. at 580. Under CERCLA, "treatment" is "any method, technique or process, * * * designed to change the physical, chemical, or biological character or composition of an hazardous waste so as to * * * render such waste * * * amenable for recovery * * *." 42 U.S.C. §§ 101(29), 6903(34).

disposed of in accordance with applicable laws. Lastly, this material was no longer useful to A&W. A&W was denied permission to process the material itself, and therefore, it had two choices: to dispose of it itself, or to transfer it to a third party. As in *Summer del Caribe* and *Catellus Development Corp.*, A&W's selection of the latter option amounted to the arrangement for the treatment and disposal of the hazardous substance under CERCLA.

Another factor to consider in determining whether the transaction between A&W and Roelof Mining was an "arrangement for treatment or disposal" is whether A&W made the "crucial decision" as to how the hazardous substance would be treated or disposed of and by whom. *See United States v. A&F Materials Company, Inc.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) ("[L]iability for releases under § 9607(a) is not endless; it ends with the party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated and by whom."). Under this test, the decision to sell the material to Roelof Mining was the crucial decision to place the hazardous substance in the hands of Roelof Mining for treatment and disposal. As explained above, the treatment of the material to recover its gold and silver content would still leave the lead, which would require disposal. Thus, A&W made the crucial decision as to how and by whom the hazardous substance would be treated and disposed. *See Chatham Steel Corp.*, 858 F. Supp. at 1143 (companies that sold spent batteries to battery recycler made crucial decision as to how and by whom battery acid would be treated and disposed, and therefore were liable for cost of cleaning up disposal site). CERCLA does not allow A&W to avoid liability by selling its obligation to properly dispose of a hazardous substance.

It matters not whether A&W *intended* to arrange for the disposal or treatment of the hazardous substance. "[T]he intent to dispose is not a requirement under CERCLA." *Pesses*, 794 F. Supp. at 157; *see also Chatham Steel Corp.*, 858 F. Supp. at 1138 (intent is irrelevant as CERCLA is strict liability statute). Where the purpose of a sale "is to get rid of or treat a waste or by-product," liability attaches. *Summer del Caribe*, 821 F. Supp. at 581. Based upon the evidence produced in this proceeding, we conclude that A&W's transactions with Roelof Mining amounted to arrangements for disposal or treatment of a hazardous substance, and therefore are not beyond the scope of CERCLA's liability provision.[33] A&W has not met its burden of proving otherwise by a preponderance of the evidence.

---

[33] We note that, as explained in the following text, in connection with the AP Site clean- up order, A&W abandoned the hazardous substance at issue. This abandonment also amounts to an arrangement for disposal of the hazardous substance. *William H. Oliver*, 6 E.A.D. at 101-102.

D. *Statutory Prerequisites of Release and Endangerment*

The Agency's authority to issue a clean-up order under CERCLA § 106(a) is limited to those situations where there has been a determination that "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). Here, A&W argues, with respect to each site, that there was no release or threat of a release creating an imminent and substantial endangerment to the public health or welfare or the environment justifying the clean-up orders.[34] In other words, A&W is contending that the Region's clean-up orders were issued without proper legal authority under CERCLA § 106(a). Because of this alleged lack of legal authority, A&W contends that it is entitled to reimbursement of the costs it incurred in complying with the orders.

A petitioner may prove its entitlement to reimbursement by either of two means specified in CERCLA § 106(b), that is, by showing that "it is not liable for response costs," CERCLA § 106(b)(2)(C), or by showing that the response action selected by the Region was "arbitrary and capricious or was otherwise not in accordance with law," CERCLA § 106(b)(2)(D). In this instance, although A&W has not explicitly stated which of these two means it is pursuing as the basis for its claim of reimbursement, its assertion that there was no release or threatened release or imminent and substantial endangerment justifying the clean-up orders leads us to conclude that A&W is proceeding under the latter of the two. In essence, A&W is arguing that *no* remedy was required, and therefore the Region acted arbitrarily and capriciously in ordering a clean-up. In our view, CERCLA § 106(b)(2)(D) is broad enough to allow an argument that the Agency acted arbitrarily or capriciously in selecting a remedy where no remedy selection was authorized because the statutory prerequisites to the issuance of an order did not exist.[35] To us, such an argument must logically be addressed prior to examining whether the particular remedy ultimately selected was arbitrary, capricious, or otherwise not in accordance with law. Under § 106(b)(2)(D), both questions will be resolved on the "administrative record." That is, when evaluating claims that the Agency acted arbitrarily and capriciously in issuing a

[34] A&W does not make any arguments with respect to the "facility" component of the Agency's authority to issue a clean-up order.

[35] *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991) ("If the provision on suits for reimbursement is not interpreted generously, a firm * * * may find itself without any judicial remedy against arbitrary and capricious agency action, and that was not Congress's intent.").

clean-up order, the Board will consider only that evidence in the "administrative record" established under CERCLA § 113(k), 42 U.S.C. § 9613(k), and 40 C.F.R. § 300.800 *et seq.*, to support the ordered response action. As a general matter, that means the Board's review of a clean-up order will be confined to examining the administrative record as it existed at the time the Region issued the clean-up order. We now turn to the merits of A&W's contentions.

CERCLA defines "release" to include the abandonment of barrels or other closed containers. CERCLA § 101 (22). The order directing A&W to clean up the AP Site states that a release occurred on January 14, 1993, when A&W failed to accept the transfer of the seven truckloads of drums previously impounded by the Customs Service officials of Mexico and the United States. According to the order, A&W's failure to assume custody of and responsibility for these truckloads amounted to an abandonment of the 543 drums. The order indicates that this release created an imminent and substantial endangerment to public health or welfare or the environment.

A&W contends that there was no release of a hazardous substance in connection with the AP Site clean-up order, nor any imminent and substantial endangerment. Specifically, A&W argues that the drums were not abandoned because, as demonstrated by the testimony from its criminal trial, the drums were continuously in the possession of either Mexican or United States Customs Service officials until they were deposited at the AP Site. A&W disputes the Region's conclusion that when seven truckloads of "mining ore" are in the possession of the United States Customs Service officers and "its owner fails after 24 hours notice to arrange for [their] transportation, the material is considered abandoned and automatically becomes an extraordinary threat to the environment." Reply to EPA Region IX's Opposition to Claim at 4. Further, according to A&W, at the time the AP Site clean-up order was issued, the drums did not present an imminent and substantial endangerment to the public health or welfare or the environment because they were securely located at the AP Site, a RCRA-approved treatment, storage and disposal facility. In response, the Region asserts that the fact that the Region commenced the activity to remove this endangerment does not, in the Region's view, preclude A&W's liability for completing the removal activity.

For the following reasons, we are not persuaded by any of A&W's arguments.

The existence of an actual or threatened release is a precondition to the Agency's authority to act under § 106. *United States v. Petersen*

Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992). The concept of a release or threatened release is to be liberally construed to effectuate the broad, remedial purpose of CERCLA. *Rhodes v. County of Darlington, S.C.*, 833 F. Supp. 1163, 1178 (D. S.C. 1992) ("The purpose of broadly construing the term is 'to avoid frustrating the beneficial legislative purposes.'"). CERCLA defines a "release" to include "the abandonment * * * of barrels, containers and other closed receptacles containing any hazardous substance." 42 U.S.C. § 9601(22). Here, the Agency stated in the clean-up order that a release or threatened release occurred when A&W abandoned the seven truckloads of drums containing hazardous substances by failing to take custody of and responsibility for those trucks on January 14, 1993. Under § 106, A&W bears the burden of demonstrating that there was no release, or, in other words, there was no abandonment.

The administrative record in this case, and in particular the clean-up order itself, shows the following. The seven truckloads of drummed hazardous substances, generated by A&W, were impounded by the United States and Mexico. EPA gave A&W notice, albeit only 24 hours, that the impoundment would end on January 14, 1993. EPA informed A&W that it expected A&W to accept custody of the seven truckloads on that date; indeed, the Region secured the approvals and variances necessary for A&W to accept custody. In response, A&W informed EPA that due to financial difficulties it could not accept custody of the truckloads and their contents on January 14. The Agency then informed A&W that if it did not take custody of the truckloads, the Agency would consider the truckloads, all 543 drums, abandoned at that point. There is no evidence that A&W tried to delay the scheduled end to the impoundment so that it could resolve its financial difficulties and accept custody of the drums.[36] Instead, the clean-up order indicates that on January 14, A&W did not accept custody of the drums as the impoundment ended.[37]

In our opinion, the evidence described above shows that A&W abandoned the 543 drums of drummed material on January 14. When provided with notice that the impoundment would end, A&W clearly

---

[36] In its comments on the Preliminary Decision, A&W's counsel states that he "asked [the On-Scene Coordinator] for more time to make arrangements" and that his request was denied. Comments by Petitioner to Board's Preliminary Decision at 7. This statement, however, which is not supported by any affidavit or other documentation, is not part of the administrative record compiled pursuant to CERCLA § 113(k).

[37] As discussed *infra* in connection with the issue of imminent and substantial endangerment, failure to accept custody did not absolve A&W of its *responsibility* for the truckloads.

stated that it would not take custody of the drums at that time. And, when the time came, A&W in fact did not accept the transfer of the drums. The fact that the impounded drums were in the temporary custody of the Customs Service officers immediately prior to their deposit at the AP Site is irrelevant. What is relevant is what A&W did when informed that the temporary custody occasioned by the impoundment was scheduled to end. Contrary to A&W's assertion, the government's custody of the drums after the impoundment ended shows that an abandonment did occur, because but for the abandonment, the government would not have retained custody of the drums. Because A&W did not take custody of the drums of hazardous substances, and because the EPA has an obligation to protect human health and the environment, the drums remained in the physical possession of the United States government until deposited at the AP Site. A&W's suggestion that an abandonment should not be found because it had only 24 hours to make arrangements to take custody of the drums is undermined in part by the absence in the record of any evidence that A&W attempted to secure additional time.[38] It also ignores the fact that, presumably, A&W had known that the drums were being held in temporary impoundment by Customs Service officials since the preceding autumn. In sum, A&W points to no evidence in the administrative record that it intended to take custody of the seven truckloads of hazardous substances when their impoundment ended, and therefore has failed to prove that no abandonment occurred. Because CERCLA defines a "release" to include the abandonment of barrels or other closed receptacles containing hazardous substances, A&W's abandonment of the truckloads of drummed hazardous substances constitutes a release of the hazardous substances under CERCLA, *see United States v. Freter*, 31 F.3d 783 (9th Cir.) (abandonment of drums is a release), *cert. denied* 115 S. Ct. 646 (1994), and A&W has failed to meet its burden of proving otherwise.

Next, we turn to A&W's claim that the AP Site clean-up order was not based upon an imminent and substantial endangerment to public

[38] To support its claim that 24 hours is an insufficient time upon which to base a finding of abandonment, A&W cites *Nunley v. M/V Dauntless Colocotronis*, 661 F. Supp. 1096 (E.D. La. 1987) for the proposition that an abandonment should be based upon a longer time period, such as 30 days. This case interprets 33 U.S.C. § 414, which authorizes the Secretary of the Army to remove abandoned vessels obstructing or endangering navigation. The analysis relied upon by A&W was overturned on appeal, where the court rejected the need for a defined time to pass before finding an abandonment. While the context of that case is so different from the issue presented here as to make that case valueless as a legal precedent, it is worth noting that the appellate court cited policy considerations in its decision also applicable in this context, namely, assuring that owners of property creating a hazard are held responsible for the removal of the hazard. *See Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1199 n.2 (5th Cir. 1989).

health or welfare or the environment. The "imminent and substantial endangerment" requirement was recently discussed by this Board in *In re The Sherwin Williams Company*, 6 E.A.D. 199 (EAB 1995), where we said:

> While the phrase "imminent and substantial endangerment" is not specifically defined in CERCLA, the phrase has been scrutinized by the courts. "Endangerment means a threatened or potential harm and does not require proof of actual harm." *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D. N.H. 1985). The "endangerment" need not be an emergency, nor does it have to be immediate to be "imminent." *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 193 (D.C.[sic]Mo. 1985). Given the importance of any threat to public health and the reality that implementing a corrective plan might take years, "imminence" must be considered in light of the time that might be needed to sufficiently protect the public health. *See B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D. Conn. 1988). Thus, an "endangerment" is "imminent" "if factors giving rise to it are present even though the harm may not be realized for years." *Conservation Chemical Co.*, 619 F. Supp. at 194.
>
> Furthermore, the word "substantial" does not require quantification of the endangerment; "an endangerment is 'substantial' if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Id.*

Sherwin Williams, 6 E.A.D. at 210-211 (footnote omitted). In light of the unrefuted information in the clean-up order, we conclude that A&W failed to meet its burden of proving that the release underlying the AP Site clean-up order did not create an imminent and substantial endangerment.

A&W's abandonment of the seven truckloads amounted to a complete failure to take control over the 543 drums of hazardous material to ensure their proper and safe handling and disposal, and, more importantly, to ensure that no leakage occurred. This abandonment constitutes an endangerment; by creating a situation where the drums were left potentially unprotected from forces that could result in a

leak of the drums' contents, the abandonment presented a threat of harm. For example, over time, abandoned drums could be exposed to wind, rain or other conditions that could result in a deterioration of the drums or other spilling of the drums' contents. Because the abandonment actually occurred, there can be no doubt that the endangerment was imminent, and given the magnitude of the hazardous substances, substantial.

A&W argues that the AP Site clean-up order was not based on an imminent and substantial endangerment because at the time the order issued, the 543 drums were secured at the AP Site, a facility approved by EPA to treat and store hazardous waste. In A&W's view, such drums secured at such a location should not be deemed to present an imminent and substantial endangerment. We disagree. Here, as explained above, the release, or the abandonment of 543 drums, created an imminent and substantial endangerment justifying the clean-up order when A&W refused to accept custody of the drums. The Agency could have issued a § 106(a) order to A&W at that time, ordering it to remove the drums, but it did not. Instead, having notice that A&W was not going to claim these drums, the Agency acted reasonably in immediately transporting the 543 drums to the AP Site, a duly licensed hazardous waste storage facility, to assure that they were secure. The removal of the drums to the AP Site did not, however, finally resolve the problem of what to do with the drums. The Agency resolved this problem by promptly issuing a § 106(a) order to A&W to assume responsibility for the proper disposal of the 543 drums of hazardous substances immediately after they had been removed to the AP Site. In essence, the Agency commenced the removal action and ordered A&W to finish the job. Nothing in CERCLA precludes this approach, which is entirely consistent with the broad authority granted to fulfill the statute's remedial goal of obtaining timely clean-ups of environmental threats. Consequently, we conclude that A&W has not shown that there was no "imminent and substantial endangerment" underlying the AP Site clean-up order.

A&W does not contend that a release did not occur with respect to the Bergstrom Site clean-up order.[39] A&W does suggest, however,

---

[39] A&W does assert that "there was no abandonment or basis for a 106 Order for the Bergstrum [sic] property." Request for Hearing; Supplemental Reply to EPA Region IX's Opposition to Claim at 3. The Region, however, has never claimed that there was an abandonment with respect to the Bergstrom Site. Further, if A&W's claim that there is no basis for the clean-up order is really an assertion that there was no release or threatened release, this claim is refuted by the facts in the administrative record underlying the clean-up order. It is undis

Continued

that the there was no imminent and substantial endangerment underlying the clean-up order for the Bergstrom Site. Reply to EPA Region IX's Opposition to Claim at 4 n.4.[40] A&W relies upon the conclusion of the applicable county health department that the site did not present an imminent threat to human health.[41] The Region does not respond to this suggestion. However, we reject A&W's argument.

The administrative record makes clear that the waste pile at the Bergstrom Site, formed from A&W's material, contained lead, a hazardous substance. It also makes clear that at the time the clean-up order was issued, the waste pile was unsecured, so that the lead-contaminated dirt in the pile could be blown to nearby residences. More importantly, the unsecured pile was accessible to the Bergstrom children. A&W does not refute these facts. Obviously, this scenario presents an endangerment of lead exposure to nearby children that was both imminent and substantial under the case law discussed above. A&W cites no authority for finding that the conclusion of the local county health department to the contrary is binding upon the EPA in exercising its CERCLA authority. Nor is the local county's conclusion particularly persuasive where A&W has provided no context or basis for the local county's decision, which appears to be unfounded in

---

puted that the TAT observed wind blowing during their inspection of the unsecured waste pile at the Bergstrom Site. *See* Action Memorandum from Robert M. Mandel, On-Scene- Coordinator, to Jeffrey Zelikson, Director, Hazardous Waste Management Division at 2 (Dec. 11, 1992). Thus, the wind could have blown the hazardous substance around the site and adjacent properties. Such a potential route of exposure amounts to a release or threatened release. *See United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148-49 (D. Ariz. 1984) (threat of release found where asbestos fibers lying on surface of soil that could be transported by wind).

[40] To be precise, in connection with whether the AP Site clean-up order is based upon an imminent and substantial endangerment, A&W provided a footnote to its discussion stating:

> Please note page 3(c) of the 11 Dec. 92 memo contained within the "Bergstrom Administrative Record" wherein it states the Clark County Health Department determined that the material *did not* pose an imminent hazardous [sic] to human health. EPA fails to explain how it reached a conclusion 180 degrees opposite of Clark County.

Reply to EPA Region IX's Opposition to Claim at 4, n.4. A&W is referring to a memorandum from the Region's On-Scene Coordinator to the Region's Hazardous Waste Management Division requesting approval for the removal action at the Bergstrom Site. The memorandum, in explaining any state and local actions to date, states that "Clark County Health Department * * * does not consider this site an imminent threat to human health and has failed to request [State of Nevada] assistance. Without a request from the local jurisdiction the [State of Nevada] cannot respond." Action Memorandum from Robert M. Mandel, On-Scene Coordinator, to Jeffrey Zelikson, Director, Hazardous Waste Management Division at 3 (Dec. 11, 1992).

[41] *See id.*

light of the evidence before us. Based upon the foregoing, we conclude that A&W has failed to meet its burden of demonstrating by a preponderance of the evidence that it is not liable for the clean-up at the Bergstrom Site.

E. *Selection of Response*

CERCLA § 106(b)(2)(D) provides that parties who are liable for clean-up costs may nevertheless recover their costs to the extent they can demonstrate, on the administrative record, that the selection of the response action was arbitrary, capricious or otherwise not in accordance with law. Relying upon this provision, A&W argues that deficiencies in the administrative records supporting the two clean-up orders justify its reimbursement.

CERCLA requires the development of an administrative record upon which to base the selection of a response action. CERCLA § 113(k)(1), 42 U.S.C. § 9613(k)(1); 40 C.F.R. § 300.800. In general terms, the administrative record is to contain documents containing factual information, data and analysis relevant to the site and the release or threat of release; guidance documents, policies or other technical literature relevant to selecting a response action; documents received or made available as part of the public comment process; decision documents, such as action memoranda; any enforcement orders pertaining to a site; and an index. 40 C.F.R. § 300.810. The administrative record serves two equally important functions: to keep the public, including potentially responsible parties, informed and allow its participation in the development of the record which will form the basis for the selection of the response action, and to provide a basis for a reviewing tribunal to review the selection of the response action in connection with reimbursement or enforcement actions. OSWER, *Interim Guidance on Administrative Records for the Selection of CERCLA Response Actions* at 2 (Mar. 1, 1989).

A brief description of the administrative records for each of the clean-up orders involved here will assist understanding of A&W's claims.

The order for the AP Site was issued on January 15, 1993. Attached to the order is an index indicating that the administrative record consisted of the laboratory reports from the County of San Diego Hazardous Materials Team and several guidance documents. The index also noted that the laboratory reports themselves were "enforcement confidential," presumably based upon the pending criminal investigation of A&W arising out of the shipments of materi-

al at issue, and therefore would not be publicly disclosed. Indeed, these reports were not disclosed until one year later when, in December 1993, they were included in the administrative record for the order to clean up the Guerrero Negro Site. On February 2, 1993, the administrative record was made available for review at the EPA Regional Office in San Francisco, and at the Chula Vista Public Library near the AP Site. Local papers carried notices of the availability of this information. From the manifests attached to A&W's petition, we know that the on-site work took place from January 29 to February 19, during which time the administrative record was made available to the public.[42]

The clean-up order for the Bergstrom Site was issued on December 17, 1992. Attached to the order is an index indicating that the administrative record consists of the results of the preliminary site assessment by the TAT, an action memorandum, and several agency guidance documents. The index did not indicate that any part of the administrative record would be withheld. However, an index dated one week later reveals that part of the action memorandum in the record would not be publicly available based upon privileges asserted in connection with the criminal investigation of A&W. The Las Vegas Public Library received a copy of the administrative record on January 4, 1993, and presumably made it available to the public soon thereafter. The record was also available for review at the EPA Regional Office in San Francisco. Again, local papers advertised the availability of the administrative record. It is not clear when on-scene work commenced, but the manifests attached to A&W's petition indicate that the material was shipped from the site between March 5 and March 11, 1993.[43]

Citing an affidavit from its counsel, A&W asserts that upon the issuance of the two orders it asked the Region for a copy of the data it relied upon only to be told that this information could not be released because of the pending criminal investigation. According to A&W, the first time it saw the administrative records for these orders was when it received the Region's response to A&W's petitions. Even if A&W had seen the administrative records previously, it contends that they were inadequate because they did not contain all the information relied upon by the Region—specifically, they did not contain

[42] *See* Order No. 93-06 at 10 (requiring A&W to arrange for and conduct transportation and disposal of the 543 drums within thirty days from receipt of the January 15, 1993 order).

[43] It is possible that prior to shipment, the material had to be prepared for shipment, and that this preparation predated March 5.

the information withheld under the claim of a privilege. A&W argues that in these circumstances it has been denied the opportunity to review and provide input into the development of the administrative records. A&W also argues that because it did not have the opportunity to review the administrative records before commencing the response action, it did not have the chance to decide to ignore the orders, as it did with respect to the order to clean up the Guerrero Negro Site, and that these circumstances amounted to a denial of A&W's due process rights. For the reasons that follow, we conclude that A&W has not shown that it is entitled to reimbursement under CERCLA § 106(b)(2)(D).

To recover under CERCLA § 106(b)(2)(D), a petitioner must show, on the administrative record, that the decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with law. The "arbitrary and capricious or otherwise not in accordance with law" standard is very narrow. *William H. Oliver*, 6 E.A.D. at 104 n.40. To be upheld, a decision to select a response action need not be the "right" one. *Elf Atochem North America v. United States*, 41 ERC 1669, 1672 (E.D. Pa. 1995). Instead, it need only be made without caprice. *Id.* The Board will apply this test and uphold the Region's selection of a response action as long as it is supported by facts in the administrative record and is not based upon legally impermissible considerations. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (an agency's action is arbitrary and capricious if it is based upon factors Congress did not intend for it to consider or counters the evidence before it). Here, A&W makes no such arguments challenging the Region's decision to select the particular response actions required by these orders. A&W does not argue that the Region did not have the pertinent information when making that decision. Nor does A&W argue that the data in the administrative record are insufficient to support the Region's decisions. A&W fails to make this argument even though it has now had the opportunity to review the laboratory reports underlying the AP Site order, which were made available in connection with the Guerrero Negro Site order,[44] and the Bergstrom Site action memorandum, which was made available in the Region's response to the petitions. Instead, A&W asserts only that it was denied an ability to timely review the administrative record and denied access to the privileged information in the Region's possession that the

---

[44] This information pertained to the concentration of lead in the material. As noted above, the designation of something as a hazardous substance under CERCLA is not based upon concentration, and therefore, the unavailability of this information is of doubtful significance as A&W has never asserted that the material did not contain lead.

Region relied upon in selecting the response action. As will be discussed, A&W has failed to demonstrate that the actions taken by the Region were arbitrary, capricious or otherwise not in accordance with law, and thus has failed to demonstrate that it is entitled to recover any of its costs in complying with these two orders.

With little explanation or briefing, A&W baldly asserts that the Region violated A&W's due process rights. First, A&W contends that the Region violated A&W's due process rights by denying A&W the opportunity to review and provide input into the development of the administrative records underlying these two orders. This argument lacks factual support. Second, A&W argues that the Region violated A&W's due process rights by withholding privileged information that the Region relied upon, thus hampering A&W's ability to decide whether to ignore the clean-up orders, as it did with respect to the Guerrero Negro clean-up order. Because the regulations allow privileged material to be withheld from the administrative record, and because A&W was in fact provided access to this privileged material in time for it to challenge the validity of the orders, its due process rights have not been violated.

There is no factual basis to A&W's assertion that it has been denied due process because it did not have the opportunity to review and provide input into the development of the administrative records for these clean-up orders. The administrative record for the AP site was made publicly available at both the EPA Regional Office and a location near the site, the Chula Vista Public Library.[45] Moreover, although the record was not made available prior to the commencement of on-site work, it was made available during such work, and, more importantly, at a time contemplated by the regulations.[46] The documents in the administrative record for the Bergstrom Site were also made available at locations (Las Vegas Public Library and EPA Regional Office) specified by the regulations.[47] Further, they were made available on January 4, 1993, well before the date that the material was shipped from the site in March 1993, and thus at a time that complies with the applicable regulation.[48] Thus, there is no factual basis for A&W's contention

---

[45] *See* 40 C.F.R. § 300.805(a) (administrative record shall be kept at an office of the "lead agency" and a copy made available at a location at or near the site).

[46] The regulations require that the administrative record be made available to the public within 60 days from when on-site work on the response action commences. 40 C.F.R. § 300.825(b)(1).

[47] *See supra* n.45.

[48] *See supra* n.46.

that it did not have an opportunity to review and provide input into the development of the administrative records in accordance with the applicable regulations. At its own peril, A&W chose not to comment upon the information made available.

In connection with A&W's argument that it has been denied due process by the Agency's failure to provide access to privileged information in the administrative records underlying the clean-up orders, a brief review of the facts is helpful. A&W was provided, as an attachment to each order, an index of the contents of the administrative record underlying that order. According to the index for the AP Site, the only information withheld was the laboratory report prepared by the County of San Diego.[49] With respect to the Bergstrom Site, the only information unavailable for public review were the portions of the action memorandum for which the Region asserted a privilege.

As a matter of law, the regulations specifically allow privileged documents to be excluded from the copy of administrative record made available to the public. 40 C.F.R. § 300.810(c),(d). Thus, the regulations clearly contemplate that there may be instances when the Region, in deciding upon a response action, may have to rely upon privileged and confidential information that cannot be made publicly available. Such was the case here. Further, the regulations specifically contemplate that the administrative record may not be available until after on-site work has commenced.[50] A&W has not challenged the Region's compliance with the applicable regulations. Instead, we interpret A&W's claim more generally, suggesting that the Agency cannot, consistent with due process, withhold privileged information from an administrative record underlying a CERCLA § 106(a) order. This procedure, however, is sanctioned by the applicable regulations discussed above, and A&W's contention amounts to an attack on the regulations that is not cognizable here.[51]

---

[49] The order itself, however, indicates that "[l]aboratory results revealed that the contents of the drums contain elevated concentrations of lead up to 2% (20,000 parts per million). The material exhibited the characteristic of Toxicity through the Total Concentrate Leachate Procedure (TCLP) analysis of greater than 5.0 milligrams per liter (> 5.0 mg/l) pursuant to CFR 261.24 for lead (D008)." Order No. 93-06 at 5. Thus, the order provided some indication of the facts relied upon from the withheld documents.

[50] *See* 40 C.F.R. §§ 300.415(n)(2)(1) and 300.820(b)(1) (Agency has 60 days from the commencement of the on-site response action to make administrative record publicly available).

[51] Absent compelling circumstances, challenges to Agency rules will not be entertained in administrative enforcement proceedings, even if the challenge raises constitutional issues. *In re Norma J. Echevarria and Frank J. Echevarria*, 5 E.A.D. 626, 634 (EAB 1994). There are no compelling circumstances here. The proper avenue for pursuing such claims is a timely challenge to the regulations. *Id.*

We reject A&W's argument that its due process rights were violated because it was denied the ability to review the administrative record, including the privileged information, prior to deciding whether to comply with the clean-up orders. A&W's argument reflects a fundamental misunderstanding of the CERCLA statutory scheme, which can be "described as requiring parties to shoot first (clean up) and ask questions (determine who bears the ultimate liability) later." *Kelley v. EPA*, 15 F.3d 1100, 1106 (D.C. Cir. 1994), *cert. denied* 115 S.Ct. 900 (1995). The primary purpose of CERCLA is to obtain *prompt* clean- ups. To this end, a person may be required to commence a clean-up under a CERCLA § 106(a) order before the administrative record supporting such order is publicly available. 40 C.F.R. § 300.825 (b)(1) (in time-critical removals, the Agency has 60 days from the commencement of on-site removal activity to make the record available). Further, to achieve the same end, the statute prohibits a review of the legality of a CERCLA § 106(a) order prior to a petition for reimbursement (if the potentially responsible party completes the response action) or an action to enforce such an order (if the potentially responsible party does not perform the response action). CERCLA § 113(h), 42 U.S.C. § 9613(h); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383 (8th Cir. 1987). Thus, a party who has received an order it believes is not founded in either law or fact must either comply with the order and then seek reimbursement, or not comply with the order and put the government to its proof in an enforcement action. In either event, the party has an opportunity to make an argument based upon the administrative record. This delayed review of the legality of an order does not violate due process. *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283, 289 (9th Cir. 1993); *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 295 (6th Cir. 1991).

For due process purposes, then, the meaningful time for having access to the administrative record is not when the order is issued,[52] but when the order can be legally reviewed, such as in connection with a petition for reimbursement. That requirement was satisfied here. A&W plainly had access to the administrative record, excluding the privileged information, prior to filing these petitions. Moreover, A&W had access to the privileged information withheld from the AP Site order, the laboratory reports, when it filed its petition with respect to that order. Concerning the privileged information withheld from the Bergstrom Site administrative record, it appears to us that the entire,

[52] *See Cooper Industries, Inc. v. EPA*, 775 F. Supp. 1027, 1039 (W.D. Mich. 1991) (due process does not oblige court to grant writ of mandamus compelling Agency to comply with regulations governing creation of administrative record for CERCLA response actions).

unedited version of the action memorandum was included in the Region's response to A&W's petition, to which A&W has had an opportunity to respond in these proceedings. Now is the time, under CERCLA, for A&W to argue, based upon the information in the administrative record, that the selection of the response action was arbitrary or capricious. A&W has failed to show that the remedy selection at either site was arbitrary or capricious, and therefore is not entitled to recovery.

III. *CONCLUSION*

For the reasons detailed above, the Board concludes that the Region's selection of response actions in the administrative orders underlying A&W's petitions for reimbursement was not arbitrary, capricious, or otherwise not in accordance with the law. Further, the Board concludes that A&W has not proven by a preponderance of the evidence that it is not liable for the response costs under CERCLA § 107(a). Accordingly, A&W's claims for reimbursement in CERCLA Petition Nos. 94-14 and 94-15 must be denied in all respects.

So ordered.