IN RE WILLIAM H. OLIVER

CERCLA §106(b) Petition No. 94-8

FINAL ORDER

Decided July 5, 1995

Syllabus

William H. Oliver petitioned pursuant to CERCLA § 106(b) for reimbursement of response costs he incurred pursuant to an administrative order issued by U.S. EPA Region V that required him to participate in the cleanup of hazardous substances at the St. John's furniture manufacturing complex in Cadillac, Michigan. Mr. Oliver claims that he is not liable for response costs because he does not fall within any class of persons responsible for CERCLA response costs; that if he is held liable for any response costs, his liability should not be joint and several; and that in any event he should be reimbursed for those portions of the required response action which he contends were arbitrary and capricious.

Held: Oliver's petition is denied. Mr. Oliver is not entitled to reimbursement for his response costs because he has failed to establish by a preponderance of the evidence that he is not liable for response costs under Sections 107(a)(1) and (3) of CERCLA. In particular, the evidence showed that Mr. Oliver had purchased cans and drums of hazardous substances which later became the subject of a 106 Order. Mr. Oliver was not able to prove that he was not the owner of these cans or drums under § 107(a)(1) or that he had not abandoned the cans and drums of hazardous substances under § 107(a)(3). In addition, Mr. Oliver failed to provide the Board with any basis for apportioning liability and thus he failed to establish that his liability is not joint and several. Finally, Mr. Oliver failed to prove that the scope of the required response action was arbitrary and capricious.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

This petition for reimbursement arises from an Administrative Order ("the Administrative Order" or "Order") issued by U.S. EPA Region V, pursuant to § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] The March

---

[1] CERCLA § 106(a), 42 U.S.C. § 9606(a), authorizes the President to issue orders "necessary to protect public health and welfare and the environment" when "an actual or threatened release of a hazardous substance from a facility" poses "an imminent and substantial endangerment

Continued

16, 1989 Order, which was amended on April 11, 1989, required six persons, including William H. Oliver, to abate a threat of harm to the public health, welfare, and the environment caused by the release and threatened release of several hundred cans and drums of hazardous chemicals at the St. John's Inc. furniture manufacturing complex in Cadillac, Michigan. All of the named parties were directed to participate in the response action. Mr. Oliver did participate and has now filed a timely petition with the Agency pursuant to § 106(b)(2)(A) of CERCLA seeking reimbursement of the response costs he claims to have incurred in complying with the Administrative Order.[2] In support of his petition, Mr. Oliver argues: (1) that he is not liable for any cleanup costs because he does not fall within any class of persons liable for such costs under § 107(a) of CERCLA;[3] (2) that if he is liable for cleanup costs, his liability should not be joint and several; and

---

to public health or welfare or the environment." The President has delegated the authority to issue such orders to the EPA. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2,923 (Jan. 29, 1987).

[2] CERCLA § 106(b)(2)(A) provides that:

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

Oliver's October 23, 1991 Petition for Reimbursement sought reimbursement of response costs of $52,366.04. He subsequently increased the requested amount to $61,389.58. See Letter to Office of Waste Programs Enforcement ("OWPE") dated September 16, 1992, Att. I.

[3] Section 107(a) establishes 4 broad classes of responsible parties:

> (1) the owner and operator of a vessel or a facility;
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
>
> (3) 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 any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance * * *.

42 U.S.C. § 9607(a).

(3) that he should not be required to pay for any costs incurred in investigating and remediating groundwater contamination or in assessing and demolishing a small building at the site because those costs were not reasonably related to the risk posed by the release or threatened release of any hazardous substances at the St. John's site. As provided for in § 106(b)(2)(C) of CERCLA, Mr. Oliver can obtain reimbursement if he can "establish by a preponderance of the evidence that [he] is not liable for response costs under § 107(a) * * *." 42 U.S.C. § 9606(b)(2)(C). In addition, even if Mr. Oliver is liable he may nevertheless recover his costs to the extent that he can demonstrate that the Region's decision in selecting certain response actions was arbitrary and capricious or otherwise not in accordance with law. CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D).

The Agency's Office of Waste Programs Management (OWPE) issued a preliminary decision on August 10, 1992, proposing to deny Mr. Oliver's petition.[4] The authority to decide reimbursement petitions was subsequently transferred to the Environmental Appeals Board in June 1994.[5] In accordance with a December 2, 1994 Order issued by the Board, the parties submitted supplemental briefs focusing on the issue of Mr. Oliver's liability for response costs. The Board has reviewed the administrative record and the supplemental briefs, and has concluded that Mr. Oliver's petition should be denied. Specifically, the Board finds that Mr. Oliver has not met his burden of proving that he is not liable for response costs under § 107(a) of CERCLA; that his liability should not be joint and several; or that the required response actions were arbitrary and capricious.

I. *BACKGROUND*

A. *Factual Background*

The facts leading up to Mr. Oliver's petition may be summarized as follows. For several years, St. John's, Inc. ("St. John's") operated a furniture manufacturing facility in Cadillac, Michigan ("the St. John's site"), that consisted of a three-story building and two smaller buildings on approximately eight acres of land.[6] St. John's ceased operating in late 1985, and filed a petition for relief under Chapter 11 of the

---

[4] The authority to make determinations on petitions for reimbursement has been delegated by the President to the Administrator of EPA (*see* Executive Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987) and was initially re-delegated to OWPE.

[5] *See* EPA Delegation of Authority 14-27 ("Petitions for Reimbursement"), June 1994.

[6] *See* Letter from Roy F. Weston, Inc. to Region V, April 10, 1989.

Bankruptcy Code on December 3, 1985. The Chapter 11 proceeding was converted to a Chapter 7 liquidation proceeding on March 27, 1986, and David G. Kipley was appointed trustee of the estate in bankruptcy.

At the time St. John's ceased operations, a miscellaneous collection of finished and unfinished furniture, furniture parts, hardware and supplies remained at the site. Also remaining at the site were several hundred cans and drums, many of which bore labels identifying their contents as paints, lacquers, cleaning products, and fuel oil.[7]

On March 22, 1986, the Bank of Cadillac held a public auction to liquidate the "inventory and stock" of St. John's. The items that were advertised for sale in the auction flyer included furniture, hardware, and "[m]any other items too numerous to mention." Mr. Oliver bought many of the items at the March 22, 1986 auction, and was given permission to store them at the St. John's site pending final disposition of the real property.[8] Thereafter, Mr. Kipley, the bankruptcy trustee, filed a petition with the U.S. Bankruptcy Court seeking permission to sell the remaining *inventory* and *personalty* of the St. John's estate. In August 1986, Mr. Oliver purchased from Mr. Kipley, for $5,000:

> All remaining inventory, which also includes work in progress and damaged goods which were returned to the Debtor, miscellaneous items and other personalty as located on the premises of the Debtor in Cadillac. Inventory equipment and personal property of St. John's, Inc. were subject to a prior public auction sale as conducted by a secured creditor of the Debtor and the personal property subject to this sale are those items which were not disposed of via the prior auction.

Order Confirming Sale, U.S. Bankruptcy Court for the Western District of Michigan, August 18, 1986 ("Order Confirming Sale"). As set forth in the Order Confirming Sale, the items were sold "without any warranty whatsoever, as is, where is, including warranties of merchantability,

---

[7] The Administrative Order refers to the presence of "approximately 100 containers" at the site. However, a report based on an inventory conducted between May 16 and May 23, 1989, states that investigators found 663 containers, consisting of 133 55-gallon drums and 530 small cans. Report, Dames & Moore, Farmington Hills, Michigan, June 19, 1989.

[8] A March 26, 1986 letter from R.A. Hamilton, City Manager, City of Cadillac, Michigan, to Mr. Oliver states that Mr. Oliver may store at the St. John's site the "unfinished inventory" he bought at the auction "until final disposition of the building is established."

habitability, or fitness for a particular purpose."[9] Mr. Oliver apparently did not remove any of these materials from the site but decided instead to store the "inventory and personalty" he had acquired at the site.[10]

In mid-November, 1986, David S. McCurdy and Cynthia Howard Dehnke purchased the St. John's real property and buildings from the City of Cadillac and asked Mr. Oliver to remove his possessions. Mr. Oliver failed to comply with their request and Mr. McCurdy obtained an eviction order against him on December 1, 1986. Mr. Oliver claims that he had removed from the site everything he purchased by the end of December 1986.[11] There is no evidence in the record as to what he removed but it is not disputed that he did not take the cans and drums of paints, stains, lacquers, and thinners which eventually became the subject of the § 106(a) Administrative Order.

By October 1987, the materials remaining on site had deteriorated to such a degree that the Cadillac authorities had concluded that the site posed a hazard to the public.[12] The Cadillac police department notified the Michigan Department of Natural Resources ("MDNR") on May 24, 1988, that open and leaking cans and drums at the St. John's site that contained varnish, thinner, and paint posed a threat to the public health and the environment.[13] Thereafter, MDNR and city officials met on June 10, 1988, to discuss the site.[14] Mr. McCurdy attended the meeting and maintained that Mr. Oliver was responsible for the cans and drums because they had been sold to Mr. Oliver.

MDNR staff inspected the site in June 1988 and found many cans and drums that were corroded, uncovered, or tipped over.[15] In a letter to the MDNR following the inspection Mr. McCurdy stated that:

---

[9] *See also* Trustee's Petition to Sell Assets in Open Court (July 15, 1986), stating that "[t]he property is being sold on an 'as is' and 'where is' basis, with no warranty as to merchantability or fitness for a particular purpose, or any other matter."

[10] *See* Letter from David McCurdy to Mr. Oliver, Nov. 10, 1986.

[11] Letter from Oliver to EPA Region V, April 26, 1989; Oliver's Supplemental Brief (Feb. 20, 1995) at 3 and Reply Brief (March 30, 1995) at 4.

[12] *See* October 27, 1987 memorandum from the City Building Official to the City Manager stating that the site had become a "public nuisance."

[13] *See* MDNR Activity Report, Sept. 23, 1988.

[14] *Id.*

[15] *Id.*; Letter from MDNR to David McCurdy and William Oliver, June 21, 1988; MDNR Cadillac District Office Staff Report, September 26, 1988. A RCRA/ACT 64 Inspection Report

Continued

> It is my understanding that Mr. Oliver agrees that these barrels and containers were purchased by him from the Bankruptcy Court. It is also my understanding that he is diligently pursuing a means of disposing of and/or using some of the barrels for finishing and/or gluing furniture.
>
> * * * * * * *
>
> It is my intention to cooperate with the DNR and Mr. Oliver in getting his barrels and containers out of the building as soon as possible. I have advised Mr. Oliver that I will make keys available to him at times when he is ready to move the barrels out of our facility. Mr. Oliver * * * is certainly looking for direction from you to facilitate the quick and proper removal of the items from our building.[16]

Thereafter, MDNR notified both Mr. Oliver and Mr. McCurdy on October 5, 1988, that "hazardous wastes" were being stored on the site in violation of the Resource Conservation Recovery Act and the Michigan Hazardous Waste Management Act and directed them to correct the violations. MDNR sent Mr. Oliver and Mr. McCurdy another letter on October 5, 1988, notifying them that the site was contaminated and directing them to undertake a cleanup.

Mr. Oliver responded to MDNR by letter of October 18, 1988, with a copy to Mr. McCurdy, in which he stated that:

> Upon my return [from a vacation] I will go to the St. John's building and get the information I need and contact you after that. Please send me all information regarding transporters available in the Cadillac area.[17]

Apparently, neither Mr. Oliver nor Mr. McCurdy took any action in response to the October MDNR letter. This led EPA Region V to

---

attached to the June 21, 1988 letter states that "[a]pparently, Mr. David McCurdy is now the property owner and Mr. Bill Oliver is owner of any inventory."

[16] Letter from David McCurdy to MDNR, June 30, 1988.

[17] Mr. Oliver's letter refers to an October 17, 1988 telephone conversation between Mr. Oliver and MDNR staff, but does not indicate what was said.

become involved,[18] and on March 16, 1989, Region V issued an Administrative Order to Mr. Oliver and five other parties, including Mr. McCurdy,[19] requiring them to undertake a cleanup of the St. John's site on the grounds that the release and threatened release of hazardous substances at the St. John's site constituted an imminent and substantial endangerment under CERCLA § 106. (Administrative Order, March 16, 1989, as amended April 11, 1989.) More specifically, the Order required the Respondents to secure the site, inventory and characterize all containers of hazardous waste; dispose of the waste; and evaluate the floors of the structures where spills had occurred, the soils and the groundwater to determine whether they had been affected by the releases. Mr. Oliver sent a letter to the Region on April 26, 1989, in which he agreed to participate in the cleanup but denied responsibility for the release of the hazardous substances that had given rise to the Administrative Order.[20]

In an apparent effort to support Mr. Oliver's contention that he was not responsible for any of the hazardous substances at the St. John's site, Mr. Oliver filed suit against Mr. Kipley, the bankruptcy trustee, on August 4, 1989, seeking, *inter alia*, a declaratory judgment to the effect that Mr. Oliver had not purchased at the bankruptcy sale the materials which gave rise to response costs.[21] The litigation settled and on January 12, 1990, the U.S. District Court issued an Order of Dismissal at the parties' request, based on their joint stipulation that the Bankruptcy Court's Order Confirming Sale (August 18, 1986), be amended to add a provision that "hazardous wastes, * * * waste, rubbish or debris were [n]ot included in the [August 1986] sale" and that "[a]ny alleged sale of [these] materials is void *ab initio*."[22]

---

[18] *See* Letter from MDNR to U.S. EPA Emergency Response Section, Grosse Ile, MI, Feb. 14, 1989.

[19] The order named Mr. McCurdy, Ms. Dehnke, and the three other parties: the St. John's estate, the City of Cadillac, and Day-Timers, Inc. (which had sold the real property to St. John's in 1983).

[20] *See also* Letter from Oliver to Region V, March 31, 1989.

[21] Mr. Oliver's complaint against Mr. Kipley asked, in the alternative, for an order requiring Mr. Kipley to reimburse Mr. Oliver for his response costs under CERCLA, or damages based on Mr. Kipley's alleged negligence in failing to inform Mr. Oliver that the St. John's assets included hazardous substances, wastes or hazardous wastes. Mr. Kipley's Answer alleged that Mr. Oliver was not entitled to the relief he sought because he had knowingly bought all the hazardous substances at the site.

[22] Mr. Oliver originally filed suit in U.S. Bankruptcy Court. The case was transferred to the U.S. District Court. *See* Order of Withdrawal of Reference, U.S. District Court, Oct. 27, 1989.

Mr. Oliver continued to participate in the response action.[23] EPA certified that the cleanup was complete on October 3, 1991.

B. *The Petition for Reimbursement*

On October 23, 1991, Mr. Oliver filed a timely petition under § 106(b) seeking reimbursement of $52,366.04 in response costs he claimed to have incurred as of that date in responding to the Administrative Order.[24] As noted above, Mr. Oliver argues in the petition that he is not liable for any cleanup costs because he did not buy any "hazardous wastes" at the St. John's bankruptcy sale and did not make any arrangements for their disposal. He further states that, even if it is determined that he bought hazardous wastes, he is not liable for cleanup costs because ownership of hazardous waste is not by itself a basis for CERCLA liability and he did not own a hazardous waste facility. Mr. Oliver also alleges that if he is held liable for some response costs, he is not jointly and severally liable because the harm was divisible. Finally, Mr. Oliver alleges that he should not be held liable for any costs incurred for groundwater testing and remediation or for any costs incurred in evaluating and demolishing a small building at the site on the grounds that there was no relationship between either of these response actions and the alleged threat of environmental harm.[25] The Region responded to Mr. Oliver's comments on April 17, 1992, stating that Mr. Oliver is liable for cleanup costs "based on the fact that he was the owner of hazardous materials located at the [St. John's] facility * * *."

C. *Preliminary Decision*

In accordance with an earlier delegation,[26] OWPE issued a preliminary decision, proposing to deny Oliver's petition, on August 10, 1992.[27] OWPE determined that Mr. Oliver is liable for response costs

---

[23] Mr. Oliver reiterated his denial of liability in a letter to Region V dated April 12, 1990.

[24] As amended, the petition seeks $61,389.58.

[25] Mr. Oliver makes the additional argument that the Region's conclusion that Mr. Oliver is the owner of a facility from which a hazardous substance was released is arbitrary and capricious. Letter from Mr. Oliver to OWPE, Sept. 11, 1992, at 9-11. We agree with the Region that this argument is merely a restatement of Mr. Oliver's argument that he is not the owner of a "facility" and therefore does not require additional discussion.

[26] *See supra* n.4.

[27] Letter from Bruce M. Diamond, Director, OWPE, to David E. Preston, August 10, 1992. OWPE concluded that Mr. Oliver met the threshold requirements for filing a reimbursement petition, in that he received an administrative order under CERCLA § 106(b); he completed the action required by the order; and he submitted a petition for reimbursement within 60 days after completing the required action.

because "EPA correctly identified [Oliver] as a potentially responsible party, *specifically an owner or operator [of a facility] under § 107(a)(1) of CERCLA.*" (Emphasis added.) Preliminary Decision at 9. OWPE's Preliminary Decision stated that Mr. Oliver had not demonstrated, based on a preponderance of the evidence, that he was not the owner of hazardous substances at the St. John's site. Therefore, OWPE concluded that Mr. Oliver was the owner of a "facility" under § 107(a)(1), as the owner of the drums and cans of hazardous substances. OWPE also rejected Mr. Oliver's contention that the harm at the site was divisible and, therefore, joint and several liability should not attach. Finally, OWPE concluded that Mr. Oliver had not established that the scope of the cleanup order was arbitrary and capricious.

Mr. Oliver submitted comments to OWPE on September 11, 1992, and September 24, 1992,[28] essentially reiterating and expanding upon the arguments in his petition. Additionally, Mr. Oliver argued that even if the bankruptcy trustee had attempted to sell the hazardous wastes at the St. John's site to him, such a sale would be illegal and therefore would have been void *ab initio.* He contended that a bankruptcy trustee cannot legally transfer hazardous wastes in violation of legal requirements for hazardous waste management. Letter from Oliver to OWPE, Sept. 16, 1992, at 2. The Region did not file a response to Mr. Oliver's comments.

In December 1994, after the Administrator transferred to the Environmental Appeals Board the authority to rule on CERCLA § 106(b) petitions, the Board issued an order directing the parties to submit supplementary briefs focusing on the issue of Mr. Oliver's ownership of hazardous substances at the St. John's site. Mr. Oliver submitted a brief dated February 20, 1995, in which he again argues that he is not liable for response costs because (1) "the only materials subject to U.S. EPA's Administrative Order were waste materials that were never purchased by Mr. Oliver;" and (2) even if he had purchased the hazardous waste at the site, he is not liable because he "never owned *the St. John's facility*" (emphasis added). Oliver's Supplemental Brief at 5-6 and 13. The Region filed a brief on March 13, 1995, in which it argues that Oliver is liable for response costs because he falls within the classes of persons enumerated in § 107(a). In particular, the Region filed a brief in which, in addition to noting OWPE's decision, it argues that Mr. Oliver is also liable under

[28] The first page of Mr. Oliver's letter is dated September 16, 1992, while the other pages are dated September 24. The latter date is correct. *See* Letter from David E. Preston to OWPE, September 25, 1992.

§ 107(a)(3) as a person who "arranged for disposal" of hazardous substances because he bought the cans and drums and abandoned the cans and drums of hazardous substances found at the St. John's site.[29] Mr. Oliver filed a Reply Brief on March 30, 1995. This petition is now ready for final disposition.

II. *DISCUSSION*

A. *Liability Under CERCLA Section 107*

In accordance with CERCLA § 106(b)(2), a party who complies with an administrative order issued under CERCLA § 106(a) is entitled to reimbursement under § 106(b) if that party can "establish by a preponderance of the evidence that it is not liable for response costs under § 107(a)." *See Employers Insurance of Wausau v. Browner*, 52 F.3d 656, (7th Cir. 1995); *Dico, Inc. v. Diamond*, 35 F.3d 348, 351 (8th Cir. 1994). The statute makes it clear that the party seeking reimbursement has the burden of establishing that he or she is not liable under § 107(a). As noted above, CERCLA § 107(a) extends liability to a large number of parties, including among others: (1) current owners and operators of a facility, including owners of "storage containers" (The term "facility" means "any * * * storage container." CERCLA § 101(9), 42 U.S.C. § 9601(9)). *See infra* n.37; (2) past owners and operators of a facility who owned or operated the facility at the time of disposal; and (3) persons who arranged for the disposal of hazardous substances belonging to that person. *See supra* n.3. In addition, under the guidance setting forth the procedures for Board review ("CERCLA § 106(b) Guidance"),[30] the petitioner must set forth the facts and circumstances supporting his liability claim in sufficient detail in his pleadings to allow the Board to make its decision on the record. More specifically, the Board's CERCLA § 106(b) Guidance provides that in most instances the Board intends to evaluate liability claims, "based solely on the petition, the response, and other documents received from the petitioner and the regional office." CERCLA § 106(b) Guidance at 9.

---

[29] The Region also argues that Mr. Oliver is liable under Section 107(a)(2) as an owner/operator of the St. John's site at the time hazardous substances were released there by virtue of a lease of space at St. John's from March through December 1986. Region V Supplemental Brief (March 25, 1995), at 25. Mr. Oliver denies that he entered into such a lease. Oliver Reply Brief (March 30, 1995), at 4, 14-15. Since the Region has not established that hazardous releases occurred between March and December 1986, regardless of whether a lease existed the Region has not provided us with a basis for concluding that Oliver is liable under CERCLA § 107(a)(2).

[30] Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions, June 9, 1994. *See* 59 Fed. Reg. 38465 (July 28, 1994), Notice of Availability of Guidance Document.

Mr. Oliver requests the opportunity to provide evidence at an evidentiary hearing as to his understanding of the August 21, 1986 sales contract whereby he allegedly took title to the hazardous substances at issue in this case. Since the contract is in the record, and Mr. Oliver has provided us with his view of its construction, a hearing would serve no purpose. Accordingly, we are denying his hearing request. As the CERCLA § 106(b) Guidance explains, "CERCLA does not require that EPA provide hearings on section 106(b) reimbursement petitions." *Id.* Therefore, whether an evidentiary hearing will be held is within "EPA's discretion." The Board expects that the circumstances warranting an evidentiary hearing will be usually confined to those cases where witness credibility is a very important factor. In most cases the Board expects that it will decide whether the petitioner has met his burden by a preponderance of the evidence based on the record presented to the Agency. Here, we conclude that an evidentiary hearing is not necessary, especially since there are no credibility issues presented. Rather, for the reasons set forth below we find on the record presented to us by the parties that Mr. Oliver has not met his burden with regard to his liability claim.

Mr. Oliver asks us to find that he is not liable on the ground that he never purchased any of the cans and drums of "hazardous wastes" at the 1986 bankruptcy sale and therefore he does not fit into any class of responsible party under section 107(a). Mr. Oliver argues that absent proof of ownership he is not liable as a current owner of such wastes or as a person who arranged for disposal of any wastes. The Region argues in response that Mr. Oliver did in fact purchase cans and drums of "hazardous substances"[31] at the 1986 bankruptcy sale. The Region contends that the cans and drums of hazardous substances were sold to Mr. Oliver, as part of the "inventory" or "personalty" of the St. John's bankruptcy estate and that Mr. Oliver abandoned the cans and drums at a later date. Thus, the Region argues that Mr. Oliver is liable under several provisions of § 107(a), including § 107(a)(3), which makes parties who arrange for the disposal of hazardous substances through abandonment liable under CERCLA.

Given the arguments of both sides, it is apparent that this case turns on our determining what materials were sold at the August 21, 1986 bankruptcy sale and the significance, if any, of the subsequent

[31] Liability under CERCLA is triggered by the release or threatened release of "hazardous substances," which covers any substance identified under CERCLA § 101(14), including RCRA "hazardous wastes." *See* 42 U.S.C. § 9601(14). There is no dispute that the leaking cans and drums of paints, thinners, stain and lacquers were properly characterized by the Region as CERCLA hazardous substances.

amendment to the sale agreement, provided for in the stipulation of dismissal in Mr. Oliver's lawsuit against the bankruptcy trustee.

There is no dispute that at the August 1986 bankruptcy sale Mr. Oliver purchased "all remaining inventory * * * and other personalty located on the premises of the Debtor in Cadillac," both "as is" and "without warranty." It is also undisputed that, under Michigan law, included in any transfer of inventory of a business are the supplies that are used to produce the finished product the business manufactures (in this case, for example, paints and lacquers applied to furniture).[32] Accordingly, unless Mr. Oliver can establish, consistent with his burden of proof, that none of the cans and drums which became the subject of the 106 Order in 1989 contained raw materials or materials "used or consumed" in the St. John's furniture business at the time of the bankruptcy sale, we must conclude that the cans and drums were sold to Mr. Oliver at the bankruptcy sale.

There is no direct evidence as to what specific items were included in the St. John's inventory at the time of the 1986 bankruptcy sale; accordingly we can only infer from subsequent events what was included in the sale. Mr. Oliver argues that because the MDNR inspectors who first viewed the St. John's facility in 1988 noted that the leaking drums and cans of lacquers, thinners, stains and paints, were "hazardous wastes," the drums and cans did not contain useable or valuable materials and thus these materials were not included in the sale. Mr. Oliver further argues that the description of the inventory that was sold at the bankruptcy sale did not include any reference to "hazardous wastes" and that the Order Confirming the Sale did not mention the purchase of any such "wastes." Accordingly, he argues, there is no evidence to show that he has any connection with the release or threatened release of "hazardous waste" that led to issuance of the 106 Order. He also argues that the stipulation he obtained from the bankruptcy trustee as part of a settlement of litigation confirms his

---

[32] Michigan has enacted the provision of the Uniform Commercial Code that defines goods as "inventory":

> If they are held by a person who holds them for sale or lease or * * * if they are raw materials, work in process or materials used or consumed in a business.

Ch. 190a, Art. 9 (Mich. Comp. Laws Annot. 440.9109(4). *See* 77 A.L.R.2d 1266, Annot. Secured Transactions: What Constitutes 'Inventory' Under UCC § 9-109(4). *See, e.g., In re Upright*, 1 Bankr. 694 (Bankr. N.D. N.Y. 1979) (inventory from a flower shop business consisted of "artificial flowers, pottery objects and floral supplies").

contention and further proves that Mr. Oliver did not purchase any hazardous wastes at the sale.

The Region argues in response that whether the cans and drums of materials found at the facility in 1988 and 1989 were properly described by the MDNR as containing hazardous wastes does not answer whether those materials were in fact sold to Mr. Oliver in 1986. In this connection, the Region argues that Mr. Oliver makes too much of EPA's and MDNR's references to hazardous waste in 1988 and 1989. The Region argues that the relevant question is whether the materials were useable and consumable as raw materials or supplies in 1986. The Region contends that if the record shows that at least some of the cans and drums of lacquers, thinners, paints, stains, and other substances which became the subject of the 106 Order were raw materials or supplies "useable and consumable" in the furniture business in 1986, then they were sold as "inventory" under established Michigan law. In such circumstances, the Region asserts that Mr. Oliver is responsible for releases and threatened releases from those cans and drums of hazardous substances in 1989. In the Region's view, the fact that this "inventory" became a "waste" after it was left on site to deteriorate is of no moment. Under the Region's analysis, if Mr. Oliver bought the cans and drums of hazardous substances, he is a responsible party under several provisions of CERCLA § 107(a), which make those who own or arrange for disposal (by abandonment, or otherwise) of cans and drums of hazardous substances liable for responding to releases and threatened releases of such substances.

The Region relies on several facts to support its contention that the subject cans and drums contained "useable and consumable" raw materials and supplies when the cans and drums were sold at the bankruptcy sale. First, the record shows that even as late as 1988 many of the cans and drums were not only properly labeled but also apparently still filled with potentionally useable contents. Certainly, if these materials could be used in 1988 and 1989, we can infer that they were useable in 1986. The uncontradicted record shows that many of the manufacturing supplies (lacquers, thinners, stains, etc.) were in their original containers. The Michigan Department of Natural Resources September 1988 Staff Report states that among the materials found at the site were apparently intact cans and drums of the following:

> 55-gallon black drum; white opaque gluelike consistency; label reads "Perkins Industries; urea formaldehyde liquid resin; L-100; . . ."
>
> 30-gallon purple & white drum; full; clear liquid; labeled "sand belt cleaner; petroleum distillates; . . ."

> 55-gallon blue drum; dark brown transparent liquid; full; labeled "caustic soda;" pH>14 per field litmus test
>
> 55-gallon yellow drum; 5" liquid; labeled "flammable liquid; light oak permanent stain; #21-3808 Guardsman Chemical; 1350 Steel Ave., Grand Rapids 49507; phone 452-5181
>
> 55-gallon drum; white powder; labeled "analytic glass cleaner; caustic; Callahan Company".

MDNR Staff Report - September 26, 1988. In fact, when the removal was conducted in 1989, the PRP's removal contractor was sufficiently confident that 16 of the drums on the site contained the contents for which they were labeled that the contractor relied on the Material Safety Data Sheets (MSDS) for purposes of characterizing the substances they contained in deciding on an appropriate disposal site. Dames & Moore, *Phase I Analytical Results*, (June 19, 1989). More specifically, the Dames and Moore Report explains that those 16 drums were not included as part of any "*waste stream*" because the "drums [could be] characterized using MSDS."[33]

In addition to these facts, the Region also points to several statements in the MDNR report file to the effect that many of the cans and

---

[33] On Table 2 of the Dames and Moore Report the drums of hazardous substances are described as follows:

SUMMARY OF DRUMS FOR WHICH MSDS WILL BE USED
ST. JOHNS, CADILLAC, MI

Label Description	**Number of Drums**
Randustrial F 161*	2
Nalco 7229*	1
Nalco 185*	1
Nalco 8735*	1
Franklin Assembly T-2A	5
ABCO Sand Belt Cleaner 153	1
Garratt-Callahan Co.-Boiler Water	2
Perkins Industries L-100*	2
Analytical Glas Cleaner	1
TOTAL	16

Note: * - MSDS has been obtained.

drums still held a useable product. The site investigation file contains numerous comments from David McCurdy that indicate that Mr. Oliver originally obtained useful hazardous substances through his bankruptcy purchase. Among the statements noted are the following: (1) Michigan Dept. of Natural Resources, *Activity Report* p.2 (June-Sept. 1988) ("Mr. McCurdy considers the materials usable products * * *."); and (2) Letter from David McCurdy to Phillip R. Roycraft, MDNR (June 30, 1988) ("It is my understanding that [Oliver] is diligently pursuing a means of disposing of and/or using some of the barrels for finishing and/or gluing furniture.").

We find the Region's evidence persuasive. On the record before us, an inference can be clearly drawn that Mr. Oliver's purchase at the bankruptcy sale included some cans and drums of "useable and consumable" hazardous substances. The inference can also be clearly drawn that after Mr. Oliver failed to take away these cans and drums they became the subject of the Region's 106 Order. Mr. Oliver has not presented us with any specific evidence to rebut the Region's evidence, and thus Mr. Oliver has not met his burden.

Indeed, even if we were to agree with Mr. Oliver and find that some of the cans and drums may have contained hazardous wastes and therefore were not conveyed as "inventory," Mr. Oliver has not persuaded us that all of the remaining cans and drums were not conveyed as "personalty."[34] To the contrary, it appears from the face of the bankruptcy sale agreement that Mr. Oliver purchased everything at the St. John site as "remaining * * * personalty," even wastes that he did not necessarily want to buy. Indeed, the Trustee's Petition to Sell Assets expressly states that the sale is "without guarantee of * * * usefulness."[35]

Mr. Oliver's suggestion that wastes *cannot be personalty* because they are not "valuable," and therefore could not be (and indeed were

---

[34] "Personalty" means "[p]ersonal property; movable property; chattels." *Clancy v. Oak Park Village Athletic Center*, 140 Mich. Ann. 304, 308, 364 N.W.2d 312, 314 (1985). It includes "everything that is the subject of ownership, not coming under the determination of real estate." Black's Law Dictionary (6th ed. 1990). A debtor's hazardous wastes are included in the personalty of the bankruptcy estate and may be sold by the trustee. *See e.g., In re Great Northern Forest Products, Inc.*, 135 B. R. 46, 61 (Bankr. W.D. Mich. 1991) (the bankruptcy estate is the owner of barrels and drums that released hazardous waste); *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 120 (6th Cir. 1987)(hazardous wastes are part of debtor's estate).

[35] *See also* Order Confirming Sale, U.S. Bankr. Ct., W.D. Mich., S.D., August 18, 1986. *See U.S. v. Wedzeb Enterprises, Inc.*, 809 F. Supp. 646, 656 (S.D. Ind. 1992) (In a sale transaction, the purchaser may "accept [] the good with the bad, salvaging what it could * * *.).

not) included in the sale, is without merit. Both CERCLA and the case law interpreting it are based on the assumption that wastes may be sold and are *capable of ownership. See, e.g., United States v. Wade*, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983) (transfer of ownership of waste from the generator to a disposal company does not absolve the generator of liability), and cases cited *supra* at n.35. And it is fundamental that the hazardous substances that create liability under CERCLA § 107 are generally wastes. *See generally United States et al. v. Monsanto et. al.*, 858 F.2d 160, 169 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

In this connection, Mr. Oliver's argument is very similar to the argument made and rejected in another Michigan CERCLA case, *In re Sterling Steel Treating, Inc.*, 94 B. R. 924 (Bankr. E.D. Mich. 1989). In that case, a bankruptcy trustee sold, among other things, a trailer containing hazardous wastes. The purchaser was apparently not aware of the wastes in the trailer and contended that it should not be held responsible under CERCLA for the unknowing purchase of such wastes. The court held that the purchaser was responsible under CERCLA for all items purchased at a bankruptcy sale, including the hazardous waste. In particular, the Court stated that the purchaser bore the burden of any defect in the property that was purchased and had the responsibility to undertake a thorough inspection. Thus, Mr. Oliver's contention that he should not be held responsible for cleaning up hazardous wastes that he would have never knowingly purchased is beside the point. So long as he purchased the hazardous wastes that were on the site he may be held liable.

As noted *supra*, Mr. Oliver also contends that the bankruptcy sale of hazardous wastes was unlawful and therefore was void *ab initio*. We need not consider the merits of Mr. Oliver's arguments with regard to the lawfulness of the sale transaction because they do not affect the outcome of our decision. Regardless of whether the trustee erred in selling any materials that may have been "hazardous waste" in 1986, Mr. Oliver is still liable for the releases from the cans and drums of raw materials and supplies containing hazardous *substances* that were not hazardous *wastes* in 1986. Thus, while Mr. Oliver's arguments regarding the lawfulness of the sale of alleged "hazardous wastes" may give rise to a cause of action for contribution between the purchaser and seller, they do not affect Mr. Oliver's liability to the United States for response costs under CERCLA § 107. *Am International, Inc. v. International Forging Equipment*, 982 F.2d 989, 994-95 (6th Cir. 1993) ("responsible parties * * * may not avoid liability to the government by transferring this liability to another"); *Mardan Corp. et al. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986). For the same

reason Mr. Oliver's settlement with the bankruptcy trustee and the subsequent Order of Dismissal are of no significance in our assessing Mr. Oliver's liability under CERCLA § 107. The fact that the trustee now states in a settlement agreement that he did not sell any hazardous wastes to Mr. Oliver does not affect Mr. Oliver's liability to the United States under CERCLA. As discussed at length above, cans and drums of hazardous substances that were not hazardous wastes were sold to Mr. Oliver at the bankruptcy sale.

Accordingly, we find on this record that Mr. Oliver was correctly named by the Region in the § 106 Order as a person who is liable under several provisions of § 107. First, we find, consistent with OWPE's preliminary decision, that Mr. Oliver purchased the subject cans and drums of hazardous substances and, therefore, he may be held liable under § 107(a)(1) as the present owner of a facility, namely, the "storage containers" of hazardous substances from which there has been a release or threatened release.[36] Second, we agree with the Region that, even if Mr. Oliver were no longer considered the current owner of the cans and drums of hazardous substances on the basis that he elected to abandon the cans and drums, Mr. Oliver is also liable under section 107(a)(3) as a person who arranged for the disposal of such hazardous substances. The abandonment of drummed hazardous substances by their owner qualifies as an arrangement for disposal. CERCLA expressly identifies abandonment as a type of "disposal."[37] 42 U.S.C. § 9601(22) (emphasis added). Although the term "arranged for" is not defined in CERCLA, the courts have consistently

---

[36] Contrary to Mr. Oliver's contention, the definition of facility in § 101(9) includes "storage containers" and thus includes both the storage "container from which a hazardous substance has been released and the site where those hazardous substances have been placed." *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987). *See also T.P. Long Chemicals Inc.*, 45 B. R. 278 (N.D. Ohio 1985) (storage drums are a "facility"); *U.S. v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992), *cert. denied* 113 S. Ct. 967 (1993) (Dumping paint waste from barrels constitutes a release from a facility). Mr. Oliver does not contend that the cans and drums which are "storage containers" fall within the statutory exception of "facility" for "a consumer product in consumer use," and we find no basis for concluding that they do.

[37] See the definition of release, which provides that:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or *disposing* into the environment (*including the abandonment or discarding of barrels, container*, and other closed receptacles containing any hazardous substance or pollutant) * * *.

See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 847 (4th Cir. 1992), (abandonment of tanks is a disposal under CERCLA).

given it a liberal interpretation, stating that: "[I]t is the obligation to exercise control over hazardous waste disposal * * * that makes an entity an arranger under CERCLA's liability provision." *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992). *See also National Railroad Passenger Corp. v. NYC Housing Authority*, 819 F. Supp. 1271, 1277 (S.D.N.Y. 1993). Oliver assumed the obligation to exercise control over the cans and drums at St. John's when he bought them, and therefore he arranged for their disposal when he abandoned them.

Finally, even if we were to conclude that in August 1986 Mr. Oliver only bought cans and drums that contained useable materials, it would not alter our conclusion that he is liable for response costs. It is clear to us that Mr. Oliver bought some cans and drums that contained hazardous substances and that eventually those cans and drums became the subject of the 106 Administrative Order because, by reason of their abandonment, they contributed to the release or threatened release of hazardous substances at the St. John's site. Having decided to disavow liability for every can and drum at the St. John's site, Mr. Oliver ran the risk that CERCLA liability could be established by the Region's showing that Mr. Oliver purchased, as inventory, at least some of the cans and drums of hazardous substances that were found at the site and became the subject of the 106 Administrative Order. As demonstrated above, the Region, in our view, clearly made the requisite showing.

For all of the above-stated reasons, the Board finds that Mr. Oliver has failed to establish by a preponderance of the evidence that he did not purchase the cans and drums of hazardous substances that became the subject of the Administrative Order. Therefore, we conclude that Mr. Oliver has not established that he is entitled to reimbursement under § 106(b) on the grounds that Mr. Oliver is not a liable person under CERCLA § 107.

B. *Joint and Several Liability*

Having concluded that Mr. Oliver has failed to establish that he is not liable under CERCLA § 107(a), we turn to Mr. Oliver's contention that even if he is liable that he should not be held jointly and severally liable for the costs incurred in complying with the § 106 Order. In support of this argument, Mr. Oliver contends again that he is not liable for any of the "hazardous" materials that were the subject of the 106 administrative order and therefore he should not be held jointly and severally liable for cleaning up those materials with the other parties named in the order. We construe Mr. Oliver's argument as nothing more than a reiteration of his contentions regarding his liability

under § 107 in the first instance and, therefore, we find no basis for granting Mr. Oliver's petition with regard to joint and several liability.

While liability under CERCLA § 107 is joint and several where there is a single harm,[38] the case law also provides that where a liable party can establish that the harm is divisible and there is a reasonable basis for apportionment that apportionment of the liability may be allowed. "In order to warrant apportionment, a [liable party] cannot simply provide some basis on which damages may be divided up, but rather it must show that there is a '*reasonable* basis for determining the *contribution of each cause to a single harm.*'" *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (emphasis in original). The burden, however, is on the liable party to make the requisite showing. *Id.* at 1280;, *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992). Courts have described this burden as "stringent," *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), and "substantial," *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992).

Here, as noted above, Mr. Oliver has not presented us with any factual basis for his claim. Rather, Mr. Oliver simply rests his argument on his earlier contention that he is not liable for anything at the site. This is not a ground for finding divisibility or apportioning liability. Accordingly, we have no choice but to reject Mr. Oliver's request that we find that he is not jointly and severally liable for the costs he incurred in complying with the § 106 Order.

C. *The Response Action*

Finally, Mr. Oliver argues that certain portions of the response action required under the § 106 Order were more extensive than necessary and that he should receive reimbursement for the portions of the cleanup that were not reasonable in light of the releases and threatened releases of hazardous substances from the St. John's site. In particular, Mr. Oliver charges that the portions of the response

[38] In *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), the court held that liability under CERCLA was joint and several. Congress expressly endorsed that view when it reauthorized CERCLA in 1986. H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856. The floor managers of the Superfund Amendment and Reauthorization Act in both the House and Senate also endorsed joint and several liability as described in *Chem-Dyne* after the final bill emerged from the Conference Committee. 132 Cong. Rec. 29716 (Oct. 8, 1986) (Rep. Dingell); 132 Cong. Rec. 29737 (Oct. 8, 1986) (Rep. Glickman); 132 Cong. Rec. 28414 (Oct. 3, 1986) (Sen. Stafford). Numerous Courts of Appeals have affirmed that view. *See, e.g., United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3rd Cir. 1993); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

action relating to the investigation of possible groundwater contamination and to the study and ultimate demolition of a building on site were arbitrary and capricious because they were not reasonably related to any threat of environmental harm.

CERCLA § 106(b)(2)(D) provides that a liable party may receive reimbursement from EPA for those portions of a response action that were arbitrary and capricious or otherwise not in accordance with the law. Under the terms of § 106(b)(2)(D) the burden is on the petitioner to establish a claim. We agree with OWPE that Mr. Oliver has failed to meet his burden.[39]

First, Mr. Oliver asserts that the preliminary decision that was issued by OWPE and which upheld the Region's requirements regarding a groundwater investigation was not supported. Mr. Oliver charges that OWPE improperly relied on the proximity of groundwater contamination from industrial facilities other than St. John's to support the Region's call for an investigation of the groundwater surrounding the St. John's site. Mr. Oliver has misread OWPE's preliminary decision and the Region's administrative order. Although the OWPE preliminary decision does note the existence of groundwater contamination in the area of the St. John's site, the information is mentioned simply to explain why MDNR had already studied the groundwater flow in the Cadillac area. The reason the Region required additional study of the groundwater immediately surrounding the St. John's site was spelled out in the 106 order. Specifically, the Region explained that the City of Cadillac's well fields were only 2000 feet from the St. John's site and the site clearly showed evidence of spills and leaks onto the soil at the site. In such circumstances, the Region's decision to require a study of possible groundwater contamination from the St. John's site was not arbitrary or capricious.[40]

Second, Mr. Oliver argues without any explanation that the Region's decision to require the testing and demolition of a certain

---

[39] *See* OWPE Preliminary Decision at 10.

[40] Whether a response action is arbitrary and capricious depends on whether there is any reasonable basis in the record to support the Region's decision. "The scope of review under the arbitrary and capricious standard is narrow * * *. [T]he Agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (8th Cir. 1993). *Cf. Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995).

Where, as here, the groundwater is likely to be contaminated and is in close proximity to drinking wells, the need for a response action was clearly supported.

building on site was not related to any actual or threatened environmental harm and therefore the costs associated with that response action should be reimbursed. We see no basis for Mr. Oliver's claim. The record clearly shows that there were extensive spills and leaks of hazardous substances onto the floor of the subject structure and that the structure needed to be removed. We therefore do not find the Region's required response action at the building to be arbitrary and capricious.

III. *CONCLUSION*

For all of the above-stated reasons Mr. Oliver's petition for reimbursement is denied.

So ordered.