IN RE SOLUTIA INC.

CERCLA § 106(b) Petition No. 00-1

FINAL DECISION AND ORDER GRANTING REIMBURSEMENT

Decided November 6, 2001

Syllabus

In November 1997 and April 1998, the United States Environmental Protection Agency, Region II ("Region") inspected the Buffalo Merchandise Center warehouse, which was being used by Morgan Materials, Inc. ("Morgan") to store off-specification and discontinued chemicals. The warehouse contained approximately 2,000 fifty-five gallon drums containing flammable liquids in the form of various off-specification solvent-based industrial adhesives. The primary hazardous constituents contained in these drums were toluene, vinyl acetate, and styrene. The drums included off-specification non-A-Grade adhesives manufactured by Monsanto Company ("Monsanto") which were sold to Morgan in 1986, more than ten years prior to the Region's inspections.

Petitioner, Solutia Inc., was created as part of a spin-off of Monsanto's chemical business, including its adhesives business. It was the recipient of a unilateral administrative order ("UAO") issued by the Region under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a), that required it to remove and destroy the drums containing non-A-Grade adhesives located at the Buffalo Merchandise Center. Solutia seeks reimbursement of costs in excess of $432,000, plus interest, that it contends were spent in complying with the UAO.

Petitioner contends that it is entitled to reimbursement under section 106(b) of CERCLA, 42 U.S.C. § 9606(b), because it is not liable for the cleanup and because the Region acted arbitrarily and capriciously in issuing the UAO and in selecting the response action ordered by the UAO. On the issue of liability, Petitioner asserts that it is not within the scope of any of the classes of liable persons under CERCLA section 107(a), 42 U.S.C. § 9607(a). The UAO alleged that Petitioner "arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances which came to be located at the Site," and that Petitioner was a responsible party within the meaning of CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). Petitioner contends that it qualifies for the "useful product" defense to "arranger" liability under CERCLA section 107(a)(3). Petitioner submits that the 1986 sale of non-A-Grade adhesives to Morgan by Monsanto was the sale of a useful product.

The Region asserts that the sale to Morgan was really an arrangement for disposal of hazardous waste rather than the sale of a useful product. The Region argues that Solutia failed to meet its burden of proof in showing that all of the Monsanto drums were not in fact hazardous waste within the definition of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. § 6901. According to the Region, the non-A-Grade adhesive was "waste" under the RCRA regulations by virtue of being "abandoned."

Held: With regard to liability, the Environmental Appeals Board concludes that Petitioner is not liable for the removal and destruction of the materials at the Buffalo Merchandise Center warehouse. The Board concludes that Solutia's evidence, which is essentially unrebutted, supports a finding that at the time of the sales agreement in 1986, it is more likely than not that Monsanto and Morgan each intended to consummate a sale of a useful product rather than to arrange for disposal of a hazardous substance. The evidence includes affidavits attesting to the fact that the non-A-Grade adhesive sold by Monsanto to Morgan was a useful product for its normal purpose in its existing state in 1986. While the Region presented speculation-based argument in rebuttal, it presented no evidence to rebut the sworn statements in the record that the materials were a useful product at the time of sale. The Board also finds that the off-specification adhesives were not "abandoned" as the Region asserts, and thus they were not regulated waste under RCRA.

Because Solutia has satisfied its initial burden of going forward on this issue by addressing the condition and usability of the product at the time of sale, and the Region has failed to rebut Solutia's evidence, Solutia has carried its burden of proving that it is not a liable party under CERCLA. The Petition for Reimbursement is therefore granted. Having determined that Solutia is not a liable party, the Board need not address the other issues raised in the Petition.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

Before the Environmental Appeals Board ("Board" or "EAB") is a petition filed by Solutia Inc. ("Petitioner" or "Solutia") requesting reimbursement, pursuant to section 106(b)(2)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(2)(A), for costs incurred while removing and destroying drums containing hazardous substances maintained at the Buffalo Merchandise Center warehouse located at 261 Great Arrow Avenue, Buffalo, New York ("Site"). *See* Petitioner Solutia Inc.'s Petition for Reimbursement of Funds Expended in Complying with United States Environmental Protection Agency CERCLA § 106(a) Administrative Order No. II--CERCLA-98-0213 (filed March 9, 2000) ("Petition"). Petitioner requests approximately $432,000, plus interest,[1] for the costs allegedly expended to comply with a

[1] Petitioner requested additional sums for reimbursement of legal fees and disbursements associated with early contacts with the Region, and responding to the Region's request for information, as well as for coordination of compliance activity under the UAO and preparation of the Petition. Petition at 8-9. In Petitioner's Comments on Preliminary Decision and on Region II's Comments Thereto ("Solutia's Comments"), Petitioner withdrew that portion of its request related to early contacts with the Region and responding to the Region's information request because it conceded that the Region was entitled to conduct investigative activities at the Site. Solutia's Comments at 2.

unilateral administrative order ("UAO") issued by the U.S. Environmental Protection Agency Region II ("Region") on September 28, 1998. Petition at 8-9.

Petitioner presents for resolution the following issues: (1) whether Petitioner is liable for response costs under section 107(a) of CERCLA, and (2) whether the Region acted arbitrarily and capriciously in ordering Petitioner to clean up the Site. On June 29, 2001, the Board issued a Preliminary Decision concluding that the first issue was dispositive of Petitioner's entitlement to reimbursement of the reasonable costs incurred in complying with the Region's UAO, in that the Board had concluded that Petitioner had sustained its burden of proving that it is not a liable party under section 107(a) of CERCLA, and that Petitioner was entitled to reimbursement from the Superfund.

The Region filed comments on the Preliminary Decision on August 20, 2001, and Solutia filed comments on September 7, 2001. After due consideration of the comments received and making such changes as are appropriate, the Board issues this Final Decision and Order Granting Reimbursement. The discussion set forth below represents this Board's Final Decision on the issue of Petitioner's liability for such response costs. Consistent with the Board's practice and in accordance with the instructions provided below, Petitioner shall present evidence of the reasonableness of Petitioner's claimed costs and the Region shall respond thereto. *See Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and On EPA Review of Those Petitions* ("1996 Guidance"), 61 Fed. Reg. 55,298 (Oct. 25, 1996).

II. *BACKGROUND*

This section describes the factual, procedural, and statutory background relevant to the resolution of this case. In particular, the factual information described in this section relates to the production, storage, sale, resale, and condition of the hazardous substances at issue in this case. This information is relevant to the discussion of whether Petitioner has met its burden of proof with respect to its argument that the hazardous substances located at the Site, which Solutia removed and destroyed in complying with the Region's UAO, were "useful products," rather than hazardous wastes, such that Solutia is not liable under section 107(a) of CERCLA for the costs incurred in complying with the UAO.

A. *Factual Background*

1. *The Site*

In November 1997 and April 1998, the Region inspected the Buffalo Merchandise Center warehouse which was being used by Morgan Materials, Inc.

("Morgan")[2] to store "'off-specification' and discontinued chemicals." Petition Ex. 1 ¶ 9 ("P Ex.") (Administrative Order No. II-CERCLA-98-0213 (Sept. 28, 1998)). The warehouse was leased and operated by Buffalo Merchandise Distribution Center, Inc. *Id.* The warehouse, approximately 1,000,000 square feet in size, had a leaking wooden roof and was not climate-controlled. *Id.* ¶¶ 9, 12. The warehouse was situated less than one mile from the Scajaquada Creek which feeds into the Niagara River. *Id.* ¶ 14. A residential area including a public high school was also proximate to the Site. *Id.* ¶ 17.

2. *The Hazardous Substances*

The Site contained "approximately 3,000 drums, as well as 800 pallets of other chemical containers," at the time the Region issued the UAO. *Id.* ¶ 11. Approximately 2,000 fifty-five-gallon drums contained flammable liquids in the form of various off-specification solvent-based industrial adhesives. *Id.* ¶ 13. The primary hazardous constituents contained in these drums were toluene, vinyl acetate, and styrene. *Id.* The Region found that at the time of the inspections, many of the drums were leaking, rusting, and stacked in a manner that could result in their collapse.[3] *Id.* ¶ 14.

a. *Off-Specification Monsanto Adhesives*

The drums at the Site included off-specification adhesives manufactured by Monsanto Company ("Monsanto") which were sold to Morgan in 1986, more than ten years prior to the Region's inspections. *See* P Ex. 42 (Monsanto Sales Agreement (Sept. 2, 1986)). Among Monsanto's many chemical products was a high-specification pressure-sensitive adhesive sold under the brand-name Gelva® ("Gelva"). Gelva is a "multipolymer resin" that was developed by Monsanto beginning in 1956 and available on the market since 1962. *See* P Ex. 50, at Bates No. SOL00154 (Solutia Inc.'s Response to EPA's § 104(e) Information Request

---

[2] At least as of 1998, Morgan Materials, Inc. was a corporation duly organized and existing under the laws of the State of New York. *See* Petition Ex. 1 ¶ 23; U.S. Environmental Protection Agency Region II Response to Solutia Inc.'s Petition for Reimbursement of Funds Expended in Complying with United States Environmental Protection Agency CERCLA § 106(a) Administrative Order No. II-CERCLA-98-0213, at 9 ("Response"); Response Ex. 6 ("R Ex.") (Morgan's Response to 104(e) Request (Apr. 23, 1997)). Morgan operated as a broker of off-specification and discontinued chemicals, and was represented as being "a wholesaler, distributor and exporter of pigments, resins, and crude rubber." *See* Response at 9; Petition at 26-27; P Exs. 39 (Dun & Bradstreet Report for Morgan (June 11, 1997)), 40 (Notification of Hazardous Waste Activity and Hazardous Waste Permit Application (Nov. 7, 1980)).

[3] Also located proximate to these drums were tanks of chlorinated fluorocarbons under 30,000 pounds of air pressure, large quantities of charcoal and lighter fluid, improperly stored food products, and phthalic anhydride (a corrosive that should not be exposed to water) covered by plastic sheets on which rainwater had collected. P Ex. 1 ¶¶ 15, 16, & 18.

(Sept. 3, 1998)). Prior to 1997, Monsanto manufactured Gelva at Monsanto's Indian Orchard Plant located in Springfield, Massachusetts. It is the off-specification materials generated in the process of manufacturing Gelva that are at issue here. The Indian Orchard Plant was transferred to Solutia in 1997 as part of a spin-off of Monsanto's chemicals businesses. P Ex. 31, at 70-78 (Solutia Inc.'s Proxy Statement (July 14, 1997)). Solutia currently manufactures the Gelva brand of industrial adhesives.

Gelva was produced in a solvent form (which included various combinations of ethyl acetate, hexane, ethanol, toluene, and isopropanol) and in an aqueous (e.g., water-based) form. P Ex. 50, at Bates No. SOL00155-59. The drums at the Site contained the solvent-based form of Gelva. This Gelva was highly ignitable with flashpoints from -4˚ to 31˚ Fahrenheit. *Id.* at Bates No. SOL00155-56. Because of Gelva's ignitability, Monsanto had historically characterized waste Gelva as hazardous waste and disposed of it by incineration. *Id.* at 8.

Each Gelva product type had a different combination of three performance characteristics (tack, peel adhesion, and shear strength), *id*. at Bates No. SOL00163, and other special features (including, clarity and solids content), *id.* at Bates No. SOL00182. Tack was a measure of "the strength of an adhesive bond very quickly after it is made." *Id.* at Bates No. SOL00163. Peel adhesion was concerned with "ultimate bond strength and the related performance of the adhesive as a fastening device." *Id.* Shear strength measured "the performance of an adhesive bond under shear stress." *Id.* The different types of Gelva were distinguished by a numbering system to identify the particular specifications and solvent content. Petition at 20.

Gelva was "used in a wide variety of applications including high-quality labels and decals, automotive mounting tapes and assembly line aids, medical tapes and sophisticated drug delivery devices, and decorative vinyl as well as a host of other demanding industrial and consumer pressure sensitive bonding applications." P Ex. 50, at Bates No. SOL00154. For example, Gelva was used to apply EKG monitors to patients' chests, as the adhesive backing for Band-Aid-type bandages, or to attach automobile trim to vehicles. Petition at 20. Monsanto focused its Gelva adhesives market for "high end uses and did not develop the wide-specification, lower-end market for its adhesives." *Id.* Examples of lower-end applications are duct tape, labels, and floor tile and carpet adhesives. *Id.* at 20, 24.

b. *Gelva Production*

The production process for Monsanto's Gelva was complex. There were three reactors that produced Gelva. *Id.* at 21. Up to three "batches" from a reactor were placed in a blend tank to produce a "lot." *Id.* The lot was sampled and adjusted in the blend tank to meet particular specifications. *Id.* If the lot met

specifications, it was drummed, and labeled "A-Grade." *Id.* This "A-Grade" Gelva was shipped to a temperature-controlled warehouse in Ludlow, Massachusetts ("Sulco Warehouse") for storage, and ultimately, shipment to the customer.

At times, sampling revealed that Gelva in the blend tank was wide of the narrow specifications of the Gelva being produced, i.e., "non-A-Grade." *Id.* If it could not be adjusted to "A-Grade" product in the tank, it was, depending on the extent of deviation from specifications, either drummed as "reworkable" non-A-Grade Gelva, or deemed "nonreworkable" and disposed of in bulk by incineration. *Id.* at 21-22.

At other times, the sampling results would not be completed while the Gelva was in the blend tank and this Gelva was drummed pending results of the quality assurance tests. *Id.* at 21. Upon receipt of the test results, such drums were either labeled as "A-Grade" Gelva or as reworkable non-A-Grade Gelva and shipped to the Sulco Warehouse.[4] *Id.* at 21. The nonreworkable Gelva in drums was incinerated. *Id.* Monsanto did not store nonreworkable Gelva at the Sulco Warehouse. *Id.* at 26; P Exs. 34 (Affidavit of Gary S. Winfield (Feb. 28, 2000)), 38 (Affidavit of Joseph P. Grabon (Feb. 23, 2000)).

c. *Options for Handling Non-A-Grade Gelva*

Solutia asserts that in light of Monsanto's focus on high end markets for its products, Monsanto had four choices for handling reworkable non-A-Grade Gelva. *See* Petition at 25. First, Monsanto could sell the material to the intended customer, if the specification that "was wide of variance was not critical to the customer's use * * * ." *Id.* However, Solutia admitted that it was not "aware * * * of any particular customer who may have accepted material that did not meet the exact specifications." P Ex. 50, at 7.

Second, Monsanto could rework or blend the non-A-Grade Gelva into new batches of Gelva. *Id.* Reworking non-A-Grade Gelva was an exacting process. First, the type of non-A-Grade Gelva had to be a match for the particular type of Gelva being produced in a new batch. Petition at 22. Only a small percentage of the non-A-Grade Gelva could be used at a time. *Id.*; P Ex. 50, at 6. Reworking was "labor-intensive, * * * expensive, * * * heavily [dependent] on the Gelva production schedule, and carrie[d] the risk of compromising the overall quality of the end product by producing more non-A-Grade product."[5] Petition at 23; P Exs.

---

[4] Another source of non-A-Grade Gelva was "A-Grade" Gelva that aged out of specification due to evaporation of the solvent such that the Gelva became more viscous. Petition at 23-24.

[5] Solutia's Gelva reworking procedures indicate that there were also technical limitations to blending non-A-Grade Gelva into new A-Grade lots. *See* Response at 72, n.67. In particular, the maxi-
Continued

4 (Affidavit of John K. Haynes (Feb. 23, 2000)), 36 (Affidavit of Scott B. Hansen (Feb. 29, 2000)), 37 (Affidavit of Daniel Sanuita (Feb. 18, 2000)), & 38. Solutia asserted in response to the Region's request for information that "Monsanto regularly reworked Gelva product." P Ex. 50, at 6.

Third, Monsanto could sell the non-A-Grade Gelva to a chemicals broker for resale for lower-end applications.[6] Petition at 25. Fourth, Monsanto could incinerate the non-A-Grade Gelva. *Id.* The disposition of drums by incineration cost approximately $238 per drum in 1986. P Ex. 50, at 8.

d. *Sale of Non-A-Grade Gelva to Morgan*

In 1986, Monsanto had an inventory of approximately 1,000,000 pounds of non-A-Grade Gelva stored at the Sulco Warehouse. Petition at 26; Response at 72, n.67 (noting an accumulation of 1,300,000 pounds of 22 different types of non-A-Grade Gelva). A portion of the non-A-Grade Gelva inventory was as old as seven years of age, and possibly older. Response at 69 (90 drums were seven years old, 102 drums were five years old, and 1,000 were undated).

At that time, Morgan's President, Donald Sadkin, inquired as to whether Monsanto had any industrial materials available that Morgan could purchase for resale.[7] Petition at 27. Monsanto made a "business decision" to sell Morgan its inventory of non-A-Grade Gelva. *Id.* at 27-28. The decision involved consideration of: 1) the ability to blend the Gelva into A-Grade product; 2) the time required to re-blend the Gelva; 3) the costs of carrying the inventory while awaiting blending; 4) the risk of accidentally shipping non-A-Grade Gelva to a customer; and 5) the costs of storage in the Sulco Warehouse. *Id.* at 28. Mr. Sadkin inspected the materials at the Sulco Warehouse and negotiated with Monsanto to purchase the materials for five cents per pound. *Id.;* P Ex. 42; P Ex. 50, at 3. This price purportedly reflected about one-twenty-fifth of the retail price Monsanto obtained for A-Grade Gelva. Response at 76 n.74, 77.

This transaction was memorialized in a sales agreement dated September 2, 1986. P Ex. 42. Monsanto utilized a standard sales agreement tailored for the

---

(continued)
mum ratio of non-A-Grade Gelva that could be blended into a new batch was limited. *Id.*; P Ex. 50, at Bates No. SOL01072. Also, if multiple specifications were off, then reworking became "geometrically more difficult." Response at 72, n.67.

[6] However, Monsanto had not itself undertaken to develop markets for these lower-end applications. *See* Petition at 20.

[7] This was not the first time that Monsanto had sold chemicals to Morgan. Between 1973 and 1986, Morgan purchased Gelva V 1½ (a chewing gum base), Gelvatol, tertiary butylamine, santophen, santosite, and phthalic anhydride flakes from Monsanto. Petition at 27; P Ex. 50, att. 1.

terms of the sale. *See* P Ex. 44, at ¶ 5 (Affidavit of Holly Nylander Stuber, Esq. (Feb. 23, 2000)). Exhibit A of the sales agreement described the material as "Solvent-based acrylic pressure-sensitive adhesives * * * [e]stimated to be between 1,000,000 and 1,500,000 pounds." P Ex. 42.[8]

Between 1987 and 1997, Morgan sold some of the non-A-Grade Gelva, at times representing it as an "A-Grade" Monsanto product. Petition at 37-38. Based on invoices provided by Morgan to the Region, approximately 245 drums were sold by Morgan to 12 different customers. P Ex. 51, at Bates Nos. 008-36 (Morgan's Gelva Sales Invoices (various dates)). Of these customers, half were repeat customers, i.e., they purchased non-A-Grade Gelva drums from Morgan at least twice. *Id.* These customers were located in the United States, Canada, New Zealand and Tunisia. *Id.;* Petition at 40-41. One of these customers, Canada Decal, Inc., purchased non-A-Grade Gelva types 2450 and 2480 which were recommended for use in decal applications. *See* P Ex. 50, at Bates Nos. SOL00244, 46. Morgan obtained anywhere from 30 to 77 cents per pound for these sales. P Ex. 51, at Bates Nos. 008-36*;* Petition at 40-41. Solutia claims that these sales were for use as adhesives and not "for reclaiming or for fuel value." *Id.* at 41.

3. *The Unilateral Administrative Order*

On September 28, 1998, the Region issued a UAO pursuant to CERCLA section 106(a), 42 U.S.C. § 9606(a), ordering Solutia, Buffalo Merchandise Distribution Center, Inc., and Morgan to conduct certain removal actions at the Site. *See* P Ex. 1. The UAO, citing Solutia's August 31, 1998 response to the Region's Request for Information, alleged that Solutia was the successor-in-interest to the chemical manufacturing division of Monsanto. *Id.* at ¶ 19. Furthermore, the UAO alleged that Monsanto's sale of non-A-Grade Gelva to Morgan was a sale of "1.3 million pounds of material from 29 defective lots. Such defective lots were an unintended byproduct of the manufacturing process." *Id.* The UAO also alleged that "[o]ther than the sale to Morgan, neither Monsanto nor Solutia has ever sold such off-specification adhesive." *Id.* The UAO concluded by alleging that Petitioner "arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances which came to be located at the Site," *id.* ¶ 26, and that Petitioner was a responsible party within the meaning of CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). P Ex. 1, ¶ 20.

---

[8] The inventory purchased by Morgan was composed of a wide variety of Gelva types, including: Gelva 270T (promoted for adhesive, specialty coatings and printing applications), Gelva 276 (recommended for use in labels, decals and tape applications), Gelva 1215 (used for dielectric paper coatings), Gelva 2067 (used as a binder for electrofax coatings), Gelva 2407 (recommended for use in decals, tapes, and laminating applications), Gelva 2437/2450/2480 (utilized in polyester and metallized polyester decals applications), Gelva 2465 (suggested for use in mounting tapes, electrical tape, transfer films and decals for automobiles and appliances) and Gelva 2497 (used in permanent labels and decals). P Ex. 50, at 11-12 & Bates Nos. SOL00236-69.

The UAO ordered the three respondents to stabilize, segregate and inventory all materials, and to dispose of all "Monsanto drums" at the Site. *Id.* ¶ 36. Based upon the condition of the warehouse, the types and conditions of the hazardous substances stored at the Site, as well as the proximity of the creek, river, and residential neighborhood, the Region concluded that a substantial threat of release of hazardous substances existed, and that adverse human health effects could be caused by such threat of release. *Id.* ¶¶ 20-21.

Petitioner complied with the UAO, stabilizing, segregating, and disposing of 2,409 fifty-five-gallon drums containing solvent-based acrylic pressure-sensitive Gelva adhesives. R Ex. 50 (Notice of Completion (Apr. 5, 2000)); P Ex. 8, at 1, 4 (Final Report Filed on Behalf of Solutia (Feb. 4, 2000)). Petitioner's contractor, Maverick Construction Management Service, Inc., reported that personnel probed each drum with a rod to "ascertain its general consistency." P Ex. 8, at 2. Drums were labeled as "pumpable" if found to be "suitably liquid." *Id.* Only 27 of the drums were nonpumpable, i.e., 2,382 drums were "suitably liquid." *Id.* On February 4, 2000, Petitioner submitted its final report, as required by paragraph 51 of the UAO. *See* Petition at 8; P Ex. 8.

B. *Procedural Background*

On March 9, 1999, Solutia filed its Petition under CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). The Petition consists of 84 pages of briefing, 63 exhibits, and a motion for entry of a protective order regarding the disclosure of confidential business information, including a proposed protective order for the Board's signature.[9] The Petition argues that Solutia is entitled to reimbursement because, among other things, it is not liable under section 107(a) of CERCLA. Solutia asserts that the non-A-Grade Gelva located at the Site had been sold as a "useful product" by Monsanto to Morgan for resale; thus neither Monsanto nor Solutia (as Monsanto's alleged successor) was liable under section 107(a)(3) of CERCLA.[10] Petition at 58-77.

---

[9] The Board has maintained the documents claimed as confidential business information ("CBI") under seal during the pendency of this matter and, as necessary, reviewed the documents *in camera*. The Board has handled the documents as CBI in accordance with the procedures of 40 C.F.R. pt. 2, subpt. B. In the event any person seeks disclosure of the claimed CBI documents, the Board will follow these procedures to determine whether such documents are CBI and should continue to be accorded protection from disclosure.

[10] Because we conclude, as explained below, that Solutia has demonstrated on the record of this case that it is more likely than not that Monsanto sold a useful product to Morgan for resale in 1986 (and therefore no liability attached) we do not need to decide the other issues raised in the Petition, including whether Solutia was Monsanto's successor-in-interest, and whether the Region was arbitrary or capricious in issuing the UAO.

The Region filed a Response to the Petition on May 30, 2000, which consisted of 115 pages of briefing and 58 exhibits. The Region argues that Petitioner failed to show that Monsanto sold a useful product because "some, if not all of" the non-A-Grade Gelva was a regulated hazardous waste at the time of sale. Response at 66. The Region further argues that Solutia failed to demonstrate by a preponderance of the evidence that each of the 3,097 drums sold to Morgan was a useful product. *Id.* at 66-67, 69. Specifically, the Region asserts that it "is [justified] in assuming that Gelva which was not A-Grade, but off-specification in 1980 to begin with, degraded over [time]. Solutia has provided nothing to rebut its own admissions in this regard." *Id.* at 71. Furthermore, the Region asserts that the Gelva sold to Morgan was a hazardous waste because it was "abandoned" by Monsanto. *Id.* at 73-77.[11]

Upon consideration of the briefs and exhibits submitted, the Board ordered oral argument to be heard on the application of the "useful product" defense to CERCLA liability. *See* Order Scheduling Oral Argument, CERCLA § 106(b) Pet. No. 00-1 (EAB, Feb. 28, 2001). Oral arguments were presented on April 12, 2001.

On June 29, 2001, the Board issued a Preliminary Decision in which it proposed to grant the Petition for Reimbursement. On August 20, 2001, the Region commented on the Preliminary Decision, and Solutia filed comments on September 7, 2001, in which Solutia responded to the Region's comments. Having considered the comments, and other submissions by the parties in support of, and in opposition to, the Petition for Reimbursement, and making such changes as are appropriate, the Board issues this Final Decision and Order Granting Reimbursement. *See* 1996 Guidance at 55,301.

C. *Statutory Background*

Under section 106(a) of CERCLA, the President is authorized to issue administrative orders as may be necessary to protect the public health and welfare, and the environment, when 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. CERCLA § 106(a), 42 U.S.C. § 9606(a). The President's authority to issue section 106(a) administrative orders has been delegated to various agencies, including the U.S. Environmental Protection Agency ("EPA" or "Agency"). *See* Exec. Order 13,016, 61 Fed.

---

[11] Petitioner subsequently moved for leave to file a reply to the Region's Response. The Region opposed the motion. The Board, upon consideration of the motions, granted the Petitioner an opportunity to file a reply limited to 20 pages, and the Region was permitted to file a surreply of 10 pages. Petitioner's Reply was filed on August 2, 2000, and the Region's Surreply was filed on August 24, 2000.

Reg. 45,871 (Aug. 28, 1996); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987); *In re Atl. Richfield Co.*, 8 E.A.D. 394, 404 n.13 (EAB 1999). The authority delegated to the EPA Administrator has, in turn, been redelegated to the EPA's Regional Administrators. *See* U.S. Envtl. Prot. Agency, *Delegation of Authority 14-14-A, Determinations of Imminent and Substantial Endangerment* (Apr. 1994); U.S. Envtl. Prot. Agency, *Delegation of Authority 14-14-B, Administrative Actions Through Unilateral Orders* (May 1994).

Parties who comply with an administrative order issued under CERCLA section 106(a) may petition for reimbursement of the reasonable costs, plus interest, of compliance. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). The President's authority to decide claims for reimbursement under section 106(b) has been delegated to the EPA Administrator, and the Administrator has redelegated that authority to the Board. *See* Exec. Order 12580; U.S. Envtl. Prot. Agency, *Delegation of Authority 14-27, Petitions for Reimbursement* (June 2000); *Atl. Richfield*, slip op. at 28 n.27. The Board is also authorized, as appropriate, to authorize payments of such claims. *See Delegation of Authority 14-27* § 1.a.

To obtain reimbursement, petitioning parties may either establish that they are not liable for response costs, CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C), or demonstrate "on the administrative record, that the [Agency's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." *Id.* § 9606(b)(2)(D). Additionally, the Agency interprets CERCLA section 106(b)(2)(A) as setting forth prerequisites that must be met before the Agency will consider a petition for reimbursement on its merits. *See* 1996 Guidance, 61 Fed. Reg. 55,298, 55,299 (Oct. 25, 1996); *In re A & W Smelters & Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996), *aff'd in part & rev'd in part on other grounds*, 146 F.3d 1107 (9th Cir. 1998). These statutory prerequisites are that the petitioner must have: (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. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). As the Board has explained, "[t]he failure to satisfy any one of these conditions justifies denial of the petition without any consideration of the merits of petitioner's claim." *A & W Smelters*, 6 E.A.D. at 315 (citing *Employers Ins. 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); *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 718-19 (EAB 1995)). There is no dispute in the present case that Petitioner has satisfied these prerequisites for obtaining review of its petition. *See* Response at 1-2.

III. *DISCUSSION*

This section first discusses the legal standard required for obtaining reimbursement under section 106(b)(2)(C) of CERCLA. It then examines whether Pe-

titioner has met this standard with respect to its argument that it is not liable under section 107(a)(3) of CERCLA because the sale of non-A-Grade Gelva by Monsanto to Morgan satisfies the "useful product" defense to liability.

A. *Legal Standard for Reimbursement Under CERCLA Section 106(b)(2)(C)*

In order to obtain reimbursement under CERCLA section 106(b)(2)(C), a petitioner

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

42 U.S.C. § 9606(b)(2)(C). The statute places the burden of proof on petitioners to obtain reimbursement. *In re Atl. Richfield Co.*, 8 E.A.D. 394, 414 (EAB 1999) (citing *A & W Smelters*, 6 E.A.D. at 314 (EAB 1996), *aff'd in part & rev'd in part on other grounds*, 146 F.3d 1107 (9th Cir. 1998)); *In re Cozinco, Inc.*, 7 E.A.D. 708, 728 (EAB 1998). Specifically, petitioners challenging the Agency's allegations of liability must prove by a preponderance of the evidence that they are not liable under CERCLA section 107(a). 42 U.S.C. § 9606(b)(2)(C); *see A & W Smelters*, 6 E.A.D. at 314. The petitioner's burden of proof includes the burden of initially going forward with the evidence and the ultimate burden of persuasion. *In re Chem-Nuclear Sys., Inc.*, 6 E.A.D. 445, 454 (EAB 1996), *aff'd* 139 F. Supp.2d 30, (D.D.C., Mar. 26, 2001); *see also In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434, 447-48 (EAB 1997); *In re B & C Towing Site*, 6 E.A.D. 199, 207 (EAB 1995). Accordingly, to obtain reimbursement under section 106(b)(2)(C), Solutia must demonstrate that, more likely than not, it is not liable for response costs under section 107(a).[12]

B. *Responsible Persons Under CERCLA § 107(a)*

Section 107(a) of CERCLA establishes the following four broad classes of parties that, subject only to the defenses set forth in section 107(b), are liable for response costs:

---

[12] Solutia also has the burden to establish by a preponderance of the evidence "that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order." 42 U.S.C. § 9606(b)(2)(C). In the event that the Board enters a final order determining that Solutia has met its burden of establishing that it is not a liable party, the Board will then establish a schedule for the parties to file briefs and supporting documentation regarding the reasonableness of Solutia's claimed expenses. *See* 1996 Guidance, 61 Fed. Reg. 55,301.

> (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 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 threatened release, which causes the incurrence of response costs, of a hazardous substance * * *.

CERCLA § 107(a), 42 U.S.C. § 9607(a).

The Board and many courts have held that liability for cleanup costs attaches under Section 107 if: "(1) the site [in] question is a 'facility'; (2) a 'release' or threatened release of a 'hazardous substance' has occurred at the facility; and (3) the recipient of the administrative order is a responsible person under Section 107(a) of CERCLA." *In re Chem-Nuclear Sys., Inc.*, 6 E.A.D. 445, 455 (EAB 1996) (citations omitted). At the heart of the dispute here is Petitioner's status as a responsible person under section 107(a) of CERCLA.

1. *Facility*

With respect to the first of the requirements noted above, the Board concludes, based upon the facts set forth in the UAO, that the warehouse at 261 Great Arrow Avenue, Buffalo, New York, where the drums of non-A-Grade Gelva at issue in this case were located, is a "facility" within the meaning of section 107(a) of CERCLA. *See* P Ex. 1, ¶ 22.[13] Furthermore, Petitioner did not, nor does it now, dispute that the Site is the relevant "facility" for the purposes of this action.

---

[13] The term "facility" is defined by CERCLA to mean "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe in a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9).

2. *Release or Threat of Release*

Regarding the second requirement that a release or threatened release of a hazardous substance occurred at the facility, we conclude that at the time of the inspections the facility contained hazardous substances within the meaning of CERCLA. The 2,409 drums removed and destroyed by Petitioner contained hazardous substances in the form of non-A-Grade Gelva (characterized as flammable solvent-based pressure-sensitive adhesives). P Ex. 8, at app. F. Furthermore, there was at a minimum a threat of release, based on the dilapidated condition of the facility, the assorted variety of chemicals and other materials stored in the warehouse in proximity to the non-A-Grade Gelva drums, and the improper storage of such chemicals, products, and drums. *See* P Ex. 1, ¶¶ 13-16, 18.

3. *Responsible Persons*

With respect to the third requirement, that Solutia fall within one of the four categories of responsible persons under section 107(a), the central issue is whether Monsanto arranged for the disposal or treatment of a hazardous substance when it sold the non-A-Grade Gelva to Morgan in 1986. *See* Petition at 43, 59. The Region alleged in the UAO that Solutia "arranged for the disposal or treatment, or arranged with a transporter for transport or disposal or treatment, of hazardous substances which came to be located at the Site * * * within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3)." P Ex. 1, ¶ 26. Petitioner argues that Monsanto's sale to Morgan satisfies the CERCLA "useful product" defense. The Region counters that the non-A-Grade Gelva was a hazardous waste at the time of sale, thus making the "useful product" defense inapplicable. We evaluate these arguments below.

a. *Application of the Useful Product Defense*

The "useful product" defense has evolved as a defense to CERCLA section 107(a)(3) "arranger" liability. *See A & W Smelters v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998) (citing *Cal. v. Summer Del Caribe, Inc.*, 821 F. Supp. 574, 581 (N.D. Cal. 1993)). A party is liable under CERCLA section 107(a)(3) if it arranged for "disposal or treatment" of hazardous substances. "Disposal" as defined in the Solid Waste Disposal Act[14] is "the discharge * * * of any *solid waste or hazardous waste* * * *," 42 U.S.C. § 6903(3) (emphasis added), and "treatment" is defined as "any method, technique, or process * * * designed to change the * * * character or composition of any *hazardous waste* so as to neutralize such waste or so as to render such *waste* nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. § 6903(34)

[14] CERCLA provides that the definitions of "disposal," "hazardous waste," and "treatment" shall have the same meanings as provided in the Solid Waste Disposal Act. 42 U.S.C. § 9601(20).

(emphasis added). Thus, arranger liability only attaches if the material at issue was a solid or hazardous waste that was disposed of or treated. Sale of a useful product is not considered disposal or treatment of a hazardous waste. *See A & W Smelters v. Clinton*, 146 F.3d at 1112.

i. *The Board's Precedent*

The Board has applied the "useful product" defense in two cases. *See In re A & W Smelters & Refiners, Inc.*, 6 E.A.D. 302 (EAB 1996), *aff'd*, 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part & rev'd in part on other grounds*, 146 F.3d 1107 (9th Cir. 1998); *In re Micronutrients Int'l, Inc.*, 6 E.A.D. 352 (EAB 1996).

In *A & W Smelters*, we concluded that A & W Smelters had arranged for disposal or treatment of a hazardous substance (lead) when it sold secondary ore (containing trace amounts of gold and silver) mixed with slag (a by-product of the smelting process) to Roelof Mining. *A & W Smelters*, 6 E.A.D. at 323-24 (relying on *United States v. Md. Sand, Gravel & Stone Co.*, 39 Env't Rep. Cas. (BNA) 1761, 1766 (D. Md. 1994) (sale of industrial wastes to a recycler for solvent recovery); *United States v. Pesses*, 794 F. Supp. 151, 156 (W.D. Pa. 1992) (sale of scrap metal to a metal alloy producer); *Cal. v. Summer del Caribe*, 821 F. Supp. 574, 581-82 (N.D. Cal. 1993) (sale of solder dross to a metal reclamation facility); and *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752 (9th Cir. 1994) (sale of spent automotive batteries to a lead reclamation plant)).

Our conclusion there rested primarily on an analysis of the "nature of the material exchanged." *See A & W Smelters*, 6 E.A.D. at 321 (citing *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1140 (N.D. Fla. 1994)). Accordingly, we framed the legal standard as follows:

> [A]n 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.

Id. at 322. The Ninth Circuit reversed a district court conclusion (which had affirmed the Board's opinion, *see* 962 F. Supp. 1232 (N.D. Cal. 1997)) that theore was a by-product or waste and remanded the case for further evaluation of the ore's value as a product. *A & W Smelters v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998). The Ninth Circuit did not disagree with the Board's legal analysis but

did question the application of the legal principles to the facts.[15] The parties subsequently settled for a $188,700 reimbursement.

The other Board decision reaching the question of the "useful product" defense, *Micronutrients International*, held the defense was not available to petitioners who sold electric arc furnace dust generated as waste by-products of the electric melting of metals. The Board again relied on *Maryland Sand* and *Catellus Development Corp.* We also relied on *Ekotek Site PRP Committee v. Self*, 881 F. Supp. 1516 (D. Utah 1995) (sale of used oil for recycling) and *Tippins Inc. v. USX Corp.*, 37 F.3d 87 (3d Cir. 1994) (sale of electric arc furnace dust, removed from a used baghouse, to an intermediary for resale).

We specifically applied the analysis of *Catellus* to determine "whether the substance in question is or is not a 'waste,' under [the Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6992K ("RCRA")] and its implementing regulations, when it leaves the hands of the alleged arranger * * *," *Micronutrients*, 6 E.A.D. at 365, and concluded that petitioners arranged for disposal because the electric arc furnace dust sold by the petitioners were RCRA wastes upon generation, regardless of their commercial value.

Since the Board's decisions in 1996, there have been two circuit court opinions, unrelated to the Board's precedents recited above, analyzing the "useful product" defense.[16] They are consistent with the framework laid out in *A & W Smelters.*

---

[15] The Ninth Circuit, also citing *Catellus*, focused on whether the pile of ore at issue was a waste or a useful product. 146 F.3d at 1112. The court stated:

> If the ore was mixed with enough slag so that it was no longer usable for A & W's principal business, then it was a waste. This can be determined by looking both to A & W's actions and to commercial reality. * * *[M]arket value, if any would also be quite relevant.

Id. at 1113 (citing *Louisiana-Pacific Corp. v. Asarco, Inc.*, 24 F.3d 1565, 1575 (9th Cir. 1994)). The court remanded on this factual issue, noting that the contract for sale of the ore to a mining processor in Baja, Mexico, suggested that the ore was a useful product but that A & W's attempt to dispose of the ore in a landfill before selling it cut the other way.

[16] The first is *Pneumo Abex Corp. v. High Point*, 142 F.3d 769 (4th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998). In this contribution action between potentially responsible parties, the court concluded that defendants were not liable as arrangers for disposal by selling plaintiff used wheel bearings that plaintiff melted down to mold into new bearings because "removal of contaminants was not the purpose of the transaction * * * [and] was incidental to the molding of new bearings, just as it would have been incidental to the molding of new bearings from virgin materials." *Id.* at 775. The court also found that the metals were contained when delivered for sale, the parties intended reuse of the used bearings, and they treated them as a valuable product for which plaintiff paid a competitive price. *Id.* at 775-76.

Continued

ii. *Application of A & W Smelters*

Upon reflection on the most recent law on the "useful product" defense, and consistent with the framework of our analysis in *A & W Smelters*, we now focus on the following factors to determine whether Monsanto "arranged for disposal or treatment" rather than sold a useful product.[17] First, the "critical inquiry * * * is the reason for the transaction." *A & W Smelters*, 6 E.A.D. at 321. We will also examine the "nature of the material exchanged." *Id.* at 321-22.[18]

(a) *The Reason for the Transaction*

Solutia claims that Morgan "clearly considers [the non-A-Grade Gelva to be] a product," Petition at 75, pointing to the 1986 contract between Monsanto and Morgan for "Solvent-based acrylic pressure sensitive adhesives,"[19] *id.* at 74; the fact that a sales contract, rather than a disposal contract, was used to consummate the sale;[20] Morgan's status as a chemicals broker; and Morgan's advertise-

---

(continued)

In *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999), plaintiffs appealed a summary judgment order dismissing their complaint on the ground that defendants did not arrange for disposal of hazardous substances. *Id.* at 161-62. Affirming the district court, the court found "no evidence in the record * * * to support an inference that the transaction at issue was anything more than a sale." *Id.* at 164. Glaxo had sold various chemical reagents to Freeman to avoid the trouble of complying with interstate transport requirements when Glaxo relocated its facility from New York to North Carolina. The court relied on the principles articulated in *A & W Smelters*, 146 F.3d 1107, 1112 ("Because the definition of 'disposal' refers to 'waste,' only transactions that involve 'waste' constitute arrangements for disposal within the meaning of CERCLA."), and *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) ("'if a party merely sells a product, without additional evidence that the transaction includes an 'arrangement' for the ultimate disposal of a hazardous substance, CERCLA liability [will] not be imposed.'"). *Freeman*, 189 F.3d at 164. The court found that Freeman conceded it bought the chemicals for its own use and for resale and that the chemicals were virgin and not waste at the time of purchase. *Id.*

[17] The parties do not dispute the law to be applied in this case. *See* Oral Argument Transcript at 44 (Apr. 12, 2001) ("Tr.") (Counsel for the Region stating, "The parties generally agree on the useful product case law.").

[18] In *A & W Smelters*, the Board also examined whether the petitioner "made the 'crucial decision' as to how the hazardous substance would be treated or disposed of * * * ." 6 E.A.D. at 324. Because we conclude, based on a preponderance of the evidence, that the material at issue was a useful product, we need not decide whether Monsanto made such a decision.

[19] Solutia relies on the 1986 contract between Monsanto and Morgan, claiming it is the "best evidence" of the parties' intent. Petition at 77. Solutia claims that the description of the material sold (e.g., solvent-base acrylic pressure-sensitive adhesives) and a provision forbidding Morgan from using Monsanto's trademarks to prevent direct competition are evidence that Monsanto sold a useful product.

[20] It is important to note that while the terms of a contract may provide evidence of the parties' intent, merely "characterizing a transaction as a 'sale' * * * does not protect a party from liability." *See Summer Del Caribe*, 821 F. Supp. at 297.

ment and sale of the adhesives without alteration, reprocessing, or reclamation, as evidence of the purpose of the transaction. *Id.* at 75. Solutia also points to Morgan's sales invoices as proof that reworkable non-A-Grade Gelva was treated as a useful product and resold as adhesives — the same purpose as originally intended when manufactured. *Id.* Lastly, Solutia notes that Morgan sold the product to actual and potential Monsanto customers. *Id.* at 75-76.

In assessing the reason for the transaction, we will look at the interests and intentions of the parties to the transaction. We agree that the following undisputed facts demonstrate that more likely than not *Morgan* had the intent to purchase a useful product. First, Morgan was a chemicals broker in the business of buying off-specification chemicals for resale. This fact offers the strongest support of Morgan's intent because the purchase of Monsanto's non-A-Grade Gelva would be consistent with Morgan's business purpose. Second, Morgan did not treat or process the chemicals it purchased. Third, Morgan subsequently did sell to twelve different customers some of the reworkable non-A-Grade Gelva.

Evidence of *Monsanto's* intent in this respect also tends to favor Solutia's argument that Monsanto viewed this as a sale of a useful product, rather than as an arrangement for disposal.

First, there is undisputed evidence that Monsanto had previously had sales transactions with Morgan between 1973 and 1986. *See* Petition at 27 (stating Monsanto sold to Morgan the following industrial materials: Gelvatol, Gelva V 11/2, tertiary butylamine, Santophen, Santosite, and phthalic anhydride flakes); P Ex. 50, at 5 & attach. 1. While these transactions were not for non-A-Grade Gelva, they evidence an ongoing, although infrequent, business relationship between Monsanto as seller and Morgan as purchaser of industrial chemicals. This relationship sufficiently establishes Monsanto's practice of treating Morgan as a purchaser of goods and accordingly supports an inference of Monsanto's intent to sell non-A-Grade Gelva as a useful product to Morgan in 1986.

Furthermore, Petitioner submitted evidence in the form of affidavits by former Monsanto and current Solutia employees, outlining and confirming Monsanto's decision to sell the reworkable non-A-Grade Gelva to Morgan in 1986. *See* P Exs. 4, 34, 36-38, 44. These affidavits have gone unrebutted by the Region. While the Region asserts that Petitioner's affidavits lack specificity, *see* Response at 88 n.91, it has failed to provide us with any concrete evidence that would cause us to call into question the evidence submitted, nor has the Region

given us any reason to question the veracity of the affiants.[21]

In particular, the affidavit of Gary S. Winfield provides the Board with the clearest evidence of Monsanto's intent to sell Morgan a useful product in the form of non-A-Grade Gelva. *See* P Ex. 34. Mr. Winfield is currently employed by Petitioner as Business Manager of Resins. *Id.* ¶ 2. In 1986, he was employed by Monsanto at the Indian Orchard Plant serving as an employee in Marketing Technical Services, and was responsible for "interfacing with Gelva customers regarding technical issues." *Id.* ¶ 3. Mr. Winfield was contacted by Morgan's president, Mr. Donald Sadkin, regarding "any product he could purchase for resale." *Id.* ¶ 9. In response, Morgan was "informed of the non-A-Grade Gelva product." *Id.* ¶ 10. Mr. Sadkin informed Mr. Winfield that "in his business judgment he could succeed in selling the material as an adhesive." *Id.* ¶ 12. Mr. Winfield testified that based upon his "knowledge of the product, this representation seemed reasonable." *Id.* Some time after the sale was completed, Mr. Winfield was informed by Mr. Sadkin that "he had succeeded in selling some of the product." *Id.* ¶ 14. Mr. Winfield's affidavit demonstrates his knowledge of the technical aspects of Gelva, and that his business interactions with Mr. Sadkin contemplated a sale of useful product for resale by Morgan, rather than an arrangement for disposal of hazardous substances. Furthermore, Mr. Winfield testified that such resale by Morgan had been realized.[22]

---

[21] We note here that although the employment status of a witness may be considered in weighing the witness' credibility, it is well established that employment status alone is not a sufficient basis for wholly disregarding the witness' testimony. The Fifth Circuit has stated as follows:

> [The witnesses'] testimony is candid, clear, and reasonable, and unopposed by other witnesses or by circumstances which are irreconcilable with it. They are not impeached by any of the modes known to the law. Their evidence cannot be disregarded just because they are employees of the mill. Employment or other relationship of a witness may be considered on the point of his credibility in weighing his against opposing evidence, but is not by itself a sufficient reason for disregarding his testimony.

Kuykendall v. United Gas Pipe Line Co., 208 F.2d 921, 923-24 (5th Cir. 1953); *accord Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1024 (5th Cir. 1979); *see also Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 216-17 (1931).

[22] The Region objects, in its Comments on the Preliminary Decision, to the Board's reliance on Petitioner's affidavit evidence, arguing that "such testimony is legally inadequate * * * with respect to either the reason for the transaction or the nature of the material." Region's Comments at 23.

The Region urges that the Board weigh the evidence in light of Federal Rule of Evidence 702 (Testimony by Experts) and the four factors delineated in the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). The Region posits that the affidavit evidence presented by Petitioner fails to satisfy the *Daubert* admissibility standards and is inadequate as expert testimony. We disagree for several reasons. First, while it is appropriate for us to look to the federal rules and court guidance in determining the weight to be given the evidence presented, it is a

Continued

Another piece of evidence supporting Monsanto's intent to sell a useful product is the fact that the reworkable non-A-Grade Gelva was stored at the Sulco Warehouse along with the "A-Grade" Gelva. *See* P Exs. 4, 34, 36-38. Thus, the non-A-Grade Gelva was stored, and thus treated, in the same manner as valuable "A-Grade" Gelva. While the non-A-Grade Gelva was admittedly difficult to blend into new product such that the storage of thousands of drums, according to Solutia, necessitated Monsanto's decision to sell it all to Morgan for approximately one twenty-fifth of its retail "A-Grade" value, Petitioner submitted unrebutted evidence that the non-A-Grade Gelva was pourable and useful as an adhesive. *See id.*

Thus, we conclude that Solutia's evidence, which is essentially unrebutted, supports a finding that at the time of the sales agreement in 1986 it is more likely than not that Monsanto and Morgan each intended to trade in a useful product rather than to arrange for disposal of a hazardous substance. We now turn to our analysis of the nature of the material sold to Morgan in 1986.

(b) *The Nature of the Material*

Solutia urges the Board to apply the *Summer Del Caribe* framework in this case to determine the nature of the material sold to Morgan in 1986. Petition at

---

(continued)
well-settled rule that "[A]gencies are not bound by the strict rules of evidence governing jury trials." *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Sorenson v. NTSB*, 684 F.2d 683, 686 (10th Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981). Thus, Rule 702 and the *Daubert* factors are not controlling principles.

Second, while our Preliminary Decision may have characterized Mr. Winfield's affidavit as demonstrating an "expertise regarding the technical aspects" of Gelva, we did not intend to characterize him, or his colleagues for that matter, as expert witnesses. Rather, Petitioner's affiants all testified regarding their personal knowledge based on their job requirements and experience. The Region at oral argument agreed with Judge McCallum's characterization of a number of the affiants as people who had held positions in Monsanto that would "place them in a position where they knew a lot about the product and the way it was handled." Tr. at 40. As such, the affidavits represented relevant and material evidence related to the reason for the transaction and the nature of the material involved. *See* 5 U.S.C. § 556(d).

Finally, even if Rule 702 and *Daubert* were applicable, the Region's arguments are untimely because they were not previously raised. As stated in the 1996 Guidance, "the Board will, except in extraordinary circumstances, decline to consider any new claims or new issues sought to be raised during the comment period." 1996 Guidance 61 Fed. Reg. at 55,301. No such extraordinary circumstances exist here. Furthermore, the Region's insistence that an evidentiary hearing be conducted to allow cross-examination of Petitioner's affiants is a new issue not previously raised and is also denied as untimely. *Id.*

In short, we are not moved by the Region's request for an evidentiary hearing at this late stage of the process. The Region had ample opportunity earlier in this proceeding to rebut Petitioner's affidavit testimony with its own affidavit testimony or to request an evidentiary hearing through which it might cross-examine Petitioner's affiants. The Region failed to do either.

67-68. In particular, Solutia argues, the Board should examine if 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.'" *See* Petition at 67 (quoting *Cal. v. Summer Del Caribe, Inc.* 821 F. Supp. 574, 581 (N.D. Cal. 1993) (arrangement for disposal found where a can manufacturer sold solder dross to a metal reclaimer because materials sold were by-product of its manufacturing process and the sale was "accomplished to get rid of or treat" the by-product)). We relied on *Summer Del Caribe* to find that the materials in *A & W Smelters* were a by-product, and thus a waste. *A & W Smelters*, 6 E.A.D. at 322.

Solutia claims there "is no dispute" that the reworkable non-A-Grade Gelva sold by Monsanto to Morgan was "new, and not previously used" since the adhesive was drummed and stored in the Sulco Warehouse. Petition at 78. The Region argues that "in 1986, 90 of the Monsanto drums sold to Morgan were already nearly seven years old, 102 drums were over five years old, and nearly 1,000 had no dates at all and can be reasonably presumed to be over seven years old." Response at 69. Thus, the Region would have us infer from these facts that the reworkable non-A-Grade Gelva was not "new" when it was sold to Morgan in 1986.[23]

Nevertheless, we are of the opinion that the date of manufacture of the product in the drums is not dispositive of whether the non-A-Grade Gelva was a waste in this case. As the court in *Summer Del Caribe* stated, the question is whether 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 (emphasis added). Thus, there are two ways in which Petitioner could demonstrate under *Summer Del Caribe* that the non-A-Grade Gelva was not a waste, the first of which requires a showing that the alleged product was "new [and] manufactured specifically for the purpose of sale." *Id.* The second test requires no such showing, but rather a showing that the material is a "product that remains useful for its normal purpose in its existing state." *Id.*

It is the second prong of *Summer Del Caribe* that is implicated here. The record before us is convincing that the non-A-Grade Gelva sold by Monsanto to Morgan was a useful product for its normal purpose in its existing state in 1986. Petitioner has submitted affidavits attesting to the fact that "[r]e-workable non-A-Grade Gelva is usable in its existing state [and p]roduct that is older than the recommended shelf life * * * remains useful as a solvent-based acrylic pres-

---

[23] We note that the Second Circuit, in looking at this factor, defines "virgin materials" to be "unused" and "unadulterated." *See Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999). Age is not dispositive in determining whether the materials are a useful product under *Glaxo Wellcome*.

sure-sensitive adhesive." P Ex. 4 (Affidavit of John K. Haynes); *see also* P Ex. 34 (Affidavit of Gary S. Winfield, stating "[t]he material that was sold to [Morgan] was useful"); P Ex. 35 (Affidavit of Philip R. Emery, noting "[p]roduct that is older than the recommended shelf life * * * remains useful"); P Ex. 36 (Affidavit of Scott B. Hansen, providing that "the product sold to [Morgan] was pourable, re-workable Gelva, it was useful"). Solutia further claims that the reworkable non-A-Grade Gelva remained useful following the sale in 1986 until it was destroyed under the section 106 order in 1999. Solutia points to the pumpability and pourability of the reworkable non-A-Grade Gelva (except for 27 barrels) during removal from the site in 1999 as evidence that it continued to be useful. Petition at 76-77; P Ex. 8.[24]

We need not decide whether the product remained useful as late as 1999, when it was destroyed pursuant to the UAO. The factually significant question is the condition of the product at the time of sale in 1986,[25] and the affidavits submitted by Solutia satisfy its initial burden of going forward on this issue by addressing the condition and usability of the product at that time. The burden then shifts to the Region to rebut Solutia's evidence. This the Region failed to do. The Region has simply provided speculation-based argument in its briefs regarding the nonusability of the non-A-Grade Gelva in 1986. Response at 88 (arguing, that "a use such as floor tile adhesive for an off-specification, former EKG monitor or band-aid Gelva * * * would be counterintuitive").[26] In response to questioning from Judge McCallum at oral argument, the Region conceded that it did not possess "any evidence" that the material sold in 1986 was not pourable and was not reworkable. Tr. at 41. In addition, the Region conceded that there was no evidence in the record "to indicate that the material was not reworkable or reusable." *Id*. The Region has submitted no evidence to rebut sworn statements that the non-A-Grade Gelva in its existing state was usable as a solvent-based pressure-sensitive acrylic adhesive.[27] Accordingly, we conclude that Petitioner has

---

[24] In other words, if the Gelva sold by Monsanto in 1986 had been nonpourable, and thus nonusable, one would have expected to find many more nonpourable drums at the Site in 1999. We note in this regard that the fact that 27 drums were, in fact, nonpourable in 1999 is not probative of the condition of those same drums at the time of sale in 1986, particularly in view of the poor materials management practices exercised by Morgan at the Site.

[25] *See United States v. Wedzeb Enters., Inc.*, 844 F. Supp. 1328, 1335 (S.D. Ind. 1994).

[26] We also note that an equally plausible inference could be made that the "off-spec EKG monitor or band-aid Gelva" was off-specification precisely because it had adherent properties different from the specifications required for such applications.

[27] For example, if the Region had presented: (1) affidavits of experts in the adhesives industry testifying that the usability of the material was suspect; (2) affidavits of consumers in the low-end market that could testify that such material would be of limited or no use to them; or (3) evidence that Morgan's actual purchasers were unable to use the non-A-Grade Gelva for their intended use, we would have some reason to question Petitioner's affiants.

shown by a preponderance of the evidence that non-A-Grade Gelva sold to Morgan in 1986 was not a waste under the *Summer del Caribe* test.

In addition, as the Ninth Circuit observed in *A & W Smelters*, the nature of the materials at issue can be further established "by looking both to A & W's actions and to commercial reality. * * *[M]arket value, if any would also be quite relevant." 146 F.3d at 1113 (citing *Louisiana-Pacific Corp. v. Asarco, Inc.*, 24 F.3d 1565, 1575 (9th Cir. 1994)). Upon examining Monsanto's "actions and commercial reality," we conclude that this evidence further corroborates that the reworkable non-A-Grade Gelva was not a waste. Monsanto stored large quantities of reworkable non-A-Grade Gelva that it intended to blend into its "A-Grade" product. Despite the difficulties of reworking, those stores of reworkable non-A-Grade Gelva were continuously maintained with A-Grade Gelva product in a costly climate-controlled warehouse. With respect to market value, it is undisputed that Morgan purchased the non-A-Grade Gelva for five cents per pound and resold it for between thirty and seventy-seven cents per pound. While Morgan did not sell all of the Gelva it had purchased, it did sell approximately twenty percent of its supply.[28] These facts are not in dispute and support the conclusion that Monsanto and Morgan treated the non-A-Grade Gelva as a product with value, rather than as a waste to be discarded.

(c) *Was the Non-A-Grade Gelva a Regulated RCRA Hazardous Waste?*

The Region argues that Solutia "failed to meet its burden of proof in showing that all of the Monsanto drums were not in fact waste within the definition of RCRA * * * ." Response at 95. According to the Region, the non-A-Grade Gelva was waste for RCRA purposes. In the Region's view, the transfer of such waste material was a disposal transaction for CERCLA purposes, thus frustrating the assertion of the useful product defense.

Under the RCRA regulations, a solid waste is a discarded material, which is defined as including, among other things, abandoned material. 40 C.F.R.

---

[28] In its comments on the Preliminary Decision, the Region argues that the Board's decision "would represent a significant departure from the legal standard in *Wedzeb*." Region's Comments at 32, 33 (citing *United States v. Wedzeb Enters., Inc.*, 844 F. Supp. 1328 (S.D. Ind. 1994)). The Region urges that *Wedzeb* requires a "*prompt* resale of the *vast majority* of each material" to adequately prove the sale of a useful product. *Id.* at 33. However, no such language appears in *Wedzeb* and we do not read *Wedzeb* to stand for such an expansive proposition. Indeed, we find *Wedzeb* to be wholly consistent with the outcome here. For example, the court there stated, "That the Defendants had no use for the capacitors and were willing to part with them for next to nothing in order to avoid holding costs does not alone establish their worth." 844 F. Supp. at 1335. The *Wedzeb* court also stated, "That Wedzeb was unable to sell certain models of capacitor does not warrant the generalization that no market existed for them or that they were worthless." *Id.* at 1336.

§ 261.2(a). The term "abandoned" is defined to include materials that are abandoned by being "accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of * * * or incinerated." *Id.* § 261.2(b)(3). A hazardous waste is a solid waste that, among other things, is characterized as ignitable. *Id.* § 261.3(a)(2)(i). The Region asserts that the non-A-Grade Gelva was a RCRA-regulated waste because Monsanto was "accumulating or storing but not recycl[ing the non-A-Grade Gelva] before or in lieu of [it] being incinerated." Response at 76; Tr. at 30-32. We disagree and find that Monsanto did not abandon the non-A-Grade Gelva, and thus it was not a regulated waste under RCRA.[29]

As the Agency stated in the preamble to the RCRA regulation cited by the Region, "By saying 'abandoned,' we do not intend any complicated concept, but simply mean thrown away." 50 Fed. Reg. 614, 637 (Jan. 4, 1985). The facts show that Monsanto's actions regarding non-A-Grade Gelva were far from "throwing" it away.

First, Monsanto's Gelva production process prior to 1986 contemplated that reworkable non-A-Grade Gelva could result. *See* P Ex. 50, Bates No. SOL1069-78 (Solutia's Rework Guidelines); *see also* Petition at 23. The production process also included the trouble and expense of drumming reworkable non-A-Grade Gelva in anticipation that it would be reworked into a new A-Grade lot. *See* P Exs. 4, 35, 36-38. Unreworkable Gelva was incinerated in bulk and normally not drummed, unless it had been drummed prior to the return of completed sampling results. Petition at 21. Unreworkable Gelva that had been drummed was incinerated. *Id.* The reworkable non-A-Grade Gelva was continu-

---

[29] The Region, in its Comments on the Preliminary Decision, posits that the Board failed to address an argument that the Region "advanced at every opportunity in this proceeding." Region's Comments at 2. Specifically, the Region claims that the Board failed to apply Massachusetts hazardous waste regulations to find that the non-A-Grade Gelva was a hazardous waste. The Region states that although it "accepts for purposes of this discussion that the Board has determined that the Monsanto drums were not abandoned under [RCRA] regulations, the Massachusetts RCRA regulations contain critical differences that nevertheless make the Monsanto drums waste." *Id.* at 2-3.

Upon review of the record we conclude that, even if the Massachusetts definition were relevant despite the fact that CERCLA specifically incorporates the definition of hazardous waste from the federal RCRA statute, *see* CERCLA § 101(29), 42 U.S.C. § 9601(29), the Region did not raise this argument with sufficient specificity in its response to the Petition to be considered timely. *See In re Port Auth. of N.Y. & N.J.*, 10 E.A.D. 61 (EAB 2001) (declining to consider rationale proffered for the first time in comments on the preliminary decision). In contrast to the very lengthy discussion of this issue in its Comments, the only two documentary references to the applicability of the Massachusetts regulations in previous filings were made in footnotes to the Region's briefs. *See* Response at 73-74 n.69; Surreply at 3 n.1. Even there, the Region merely notes that the state regulations "are *largely identical in all pertinent respects* to the RCRA regulation relating to the definition of solid and hazardous waste" and "the argument that the Monsanto drums were regulated 'solid waste' and regulated 'hazardous waste' can *equally* be made by reference to the Massachusetts regulations." Response at 74 n.69 (emphasis added).

ously stored in the Sulco Warehouse — a temperature-controlled environment that was used primarily to store A-Grade products. *See* P Exs. 4, 35-38. These facts clearly tend to establish that the reworkable non-A-Grade Gelva had not been abandoned by Monsanto in 1986.

The Region has not presented any evidence to rebut these facts, other than to argue that the material "was un-reworkable and it should have been incinerated." Response at 76. The Region does not have any evidentiary support for this proposition. This is troublesome because the Region conceded at oral argument that "whether or not the material was a solid waste must be determined by reference to the condition of the material in 1986, at the time of sale." Tr. at 38. Rather, the Region simply infers from an alleged "absence of evidence" that any Gelva material was actually reworked, Tr. at 39, and that the material sold to Morgan was un-reworkable and thus "abandoned." The Region admits that it has no direct evidence in this regard. *Id.* (Counsel for the Region stating, "I don't believe we have direct evidence," in response to Judge McCallum's questioning about evidence in the record that rebuts the fact that Monsanto's policy and practice was to store only reworkable non-A-Grade Gelva). Thus, we conclude that the evidence does not show that Monsanto's reworkable non-A-Grade Gelva was a regulated waste, rather than a useful product, at the time of sale to Morgan.

IV. *CONCLUSION*

For the foregoing reasons, the Board concludes that Solutia's Petition for Reimbursement should be granted. Solutia has demonstrated by a preponderance of the evidence that the sale of non-A-Grade Gelva to Morgan by Monsanto in 1986 was the sale of a useful product, rather than an arrangement for disposal of a hazardous substance. The Region has failed to rebut Solutia's prima facie case.

The Petition for Reimbursement is hereby granted and Petitioners are ordered to file no later than December 7, 2001, a brief, along with supporting materials,[30] documenting the reasonable costs incurred in implementing the Region's UAO. The Region will then have until January 11, 2002, to file any challenge to particular cost items (as unreasonable or otherwise not recoverable). Petitioners will then have until February 1, 2002 to file a response.[31]

---

[30] In the interest of brevity, Petitioner may reference documents in the record before the Board, and no additional copies of those documents need be submitted.

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

The parties are encouraged to discuss settlement of the cost claims, or if settlement is not possible, to resolve as many aspects of the claims through stipulation as possible.

So ordered.