IN RE COZINCO, INC.

CERCLA § 106(b) Petition Nos. 95-5 & 96-4

FINAL DECISION

Decided July 7, 1998

Syllabus

CoZinCo, Inc. ("CoZinCo") has filed two petitions for reimbursement of response costs pursuant to § 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b). The petitions concern removal actions ordered by U.S. EPA Region VIII (the "Region") in response to elevated levels of zinc found in certain residential water supplies in the vicinity of CoZinCo's zinc sulfate production facility near Salida, Colorado. In April 1994, the Region issued to CoZinCo a unilateral administrative order ("UAO") under CERCLA section 106(a), 42 U.S.C. § 9606(a), requiring CoZinCo to provide bottled water to some affected residences (the Graff properties), and to replace an irrigation water supply well at another residence (the Kimmett property). The Region issued an amendment to the UAO in November 1994 and what it characterized as an "amendment" in August 1995. In the 1995 "amendment," the Region deleted the statement of work ("SOW") in its entirety and replaced it with a new SOW.

CoZinCo's Petition No. 95-5, filed in October 1995, seeks reimbursement of $98,675 (plus interest) for response costs CoZinCo alleges it incurred in responding to the UAO from April 1994 through the date of the August 1995 amendment. CoZinCo's Petition No. 96-4, filed in June 1996, seeks reimbursement of $40,623 (plus interest) for response costs CoZinCo alleges it incurred in responding to the UAO subsequent to the August 1995 amendment. CoZinCo filed two petitions because it contends that the August 1995 amendment effectively terminated its obligations under the April 1994 UAO (as amended in November 1994), and that the Region thus created two separate orders for which CoZinCo can seek reimbursement.

On each petition, CoZinCo contends that it is entitled to reimbursement because it is not liable for one of the response actions the Region ordered it to undertake, or alternatively, that the Region acted arbitrarily and capriciously in selecting the disputed response action. The Region has responded to CoZinCo's petitions, and opposes treating the August 1995 amendment as a separate order. The Region further contends that CoZinCo has not met the statutory threshold prerequisites to consideration of the merits of the petitions, because CoZinCo neither complied with nor completed a key task required by the original UAO and subsequent amendments. As to the merits, the Region contends that CoZinCo has not met its burden of showing either that it is not liable for the response action ordered or that the Region was arbitrary and capricious in selecting the response action.

Held: The petitions for review are denied.

1) With regard to whether the August 1995 "amendment" to the SOW had the legal effect of creating a new order, a petitioner who seeks to challenge a Region's characterization of an amendment bears the burden of proof. A Region has broad latitude, without creating the legal

equivalent of a new UAO, to amend UAOs in order to accommodate changing needs and circumstances that may arise at a particular site. Except in narrow circumstances, the Board will not be inclined to find that an amendment to a UAO has created a new order. Evaluation of such a claim will be made on a case-by-case basis, with close scrutiny of the particular facts presented, and bearing in mind that the underlying purpose of CERCLA's reimbursement provision is to foster compliance with cleanup orders by deferring issues regarding liability and remedy selection until the recipient has complied with the order. The Board will examine the specific facts presented to determine whether any of the required actions in the original UAO are carried forward to the amended UAO. If the same work is carried forward, or if new work is reasonably related to the original scope of work (such as an alternative approach to the same concern), then the amendment typically will be considered as simply an amendment, and the right to petition for reimbursement under the original order will not be ripe. If the work required in the amended UAO is beyond the scope of work required in the original UAO, or is not reasonably related to it, then the amendment should be deemed a new order for purposes of CERCLA's reimbursement provision. Utilizing the foregoing analytical framework, the Board concludes that under the specific facts presented, the August 1995 "amendment" constituted a new order.

2) The Board rejects CoZinCo's assertion that CoZinCo is not liable for replacement of the Kimmett irrigation well because, according to CoZinCo, it is not liable for the soils removal action that necessitated the replacement of vegetation and the resulting need for irrigation of that vegetation. Rather, the Board agrees with the Region that whether or not CoZinCo is a liable party for the soils removal undertaken at the Kimmett property is irrelevant because CoZinCo is liable for groundwater contamination and the purpose of the UAO is to remedy contamination caused by the elevated zinc levels in the groundwater.

3) CoZinCo's assertion that the Region arbitrarily and capriciously selected the remedy at issue in the 1994 UAO (replacement of the Kimmett's irrigation water supply) is rejected.

4) CoZinCo has not met its burden of showing that it is entitled to reimbursement for the response costs it incurred in responding to the April 1994 UAO, as amended in November 1994. CoZinCo's Petition No. 95-5 is therefore denied.

5) As to Petition 96-4, the Board concludes that CoZinCo failed to fulfill a statutory prerequisite to consideration of that petition on the merits, because CoZinCo failed to comply with the August 1995 UAO. Thus, Petition 96-4 is also denied.

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

Opinion of the Board by Judge Reich:

Pending before the Board are two petitions for reimbursement of response costs filed by CoZinCo, Inc. ("CoZinCo"), pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b). CoZinCo's petitions concern removal actions ordered by U.S. EPA Region VIII (the "Region") in response to elevated levels of zinc found in certain residential water supplies in the vicinity of CoZinCo's zinc sulfate production facility near Salida, Colorado. In April 1994, the Region issued to CoZinCo a unilateral administrative order ("UAO") under CERCLA section 106(a), 42 U.S.C. § 9606(a), requiring CoZinCo to provide bottled water to some affected residences (the Graff properties), and to replace an irrigation water supply well at another resi-

dence (the Kimmett property). The Region issued an amendment to the UAO in November 1994 and what it characterized as an "amendment" in August 1995.[1]

CoZinCo's Petition No. 95-5, filed in October 1995, seeks reimbursement of $98,675 (plus interest) for response costs CoZinCo alleges it incurred in responding to the UAO from April 1994 through the date of the August 1995 amendment. CoZinCo's Petition No. 96-4, filed in June 1996, seeks reimbursement of $40,623 (plus interest) for response costs CoZinCo alleges it incurred in responding to the UAO subsequent to the August 1995 amendment. CoZinCo filed two petitions because it contends that the August 1995 amendment effectively terminated its obligations under the April 1994 UAO (as amended in November 1994), and that the Region thus created two separate orders for which CoZinCo can seek reimbursement.

CoZinCo argues that it has met the statutory threshold prerequisites to consideration of each petition on the merits, and that it is entitled to prevail on the merits of each petition. Specifically, CoZinCo contends that it is entitled to reimbursement because it is not liable for one of the response actions the Region ordered it to undertake, or alternatively, that the Region acted arbitrarily and capriciously in selecting the disputed response action. The Region has responded to CoZinCo's petitions, and opposes treating the August 1995 amendment as a separate order. The Region further contends that CoZinCo has not met the statutory threshold prerequisites to consideration of the merits of the petitions, because CoZinCo neither complied with nor completed a key task required by the original UAO and subsequent amendments. As to the merits, the Region contends that CoZinCo has not met its burden of showing either that it is not liable for the response action ordered or that the Region was arbitrary and capricious in selecting the response action.

For the reasons explained below, we find that for purposes of the CERCLA § 106(b) reimbursement provision, and under the specific facts presented, the Region's August 1995 amendment to the UAO created a new order substantially different from the order originally issued in April 1994 (as amended in November 1994). Under the circumstances presented, it is our conclusion that each of CoZinCo's petitions must be separately reviewed.

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[1] As discussed in detail *infra*, whether the Region's action in August 1995 was in fact an "amendment" to the original UAO is a primary issue in this matter. We use the term here only for simplicity in describing the background of the pending petitions.

As to Petition 95-5, we conclude that CoZinCo complied with and completed the tasks required under the UAO, and therefore fulfilled the statutory prerequisites to review on the merits. We further conclude that as to this petition, CoZinCo has not met its burden of showing either that it is not liable for the response action ordered, or that the Region arbitrarily and capriciously selected the response action, and therefore CoZinCo is not entitled to reimbursement of its response costs. As to Petition 96-4, we conclude that CoZinCo failed to comply with the August 1995 UAO in material respects, and therefore CoZinCo has not fulfilled a statutory prerequisite to review on the merits. Petition 96-4 must therefore be denied.

I. *BACKGROUND*

A. *The Site Investigation*

According to the administrative record ("AR") for the response actions ordered by the Region, CoZinCo's zinc sulfate facility is located on what is known as the Smeltertown Site (the "Site"), occupying about 125 acres near Salida, Colorado.[2] *See* Agency for Toxic Substances and Disease Registry ("ATSDR"), Public Health Assessment for Smeltertown, AR 016484, at 2 (Feb. 5, 1993).[3] The Site was used for metals smelting (gold, silver, copper and lead) from 1902 to 1920, and for railroad-tie treating by Koppers Inc. and other companies from 1926 to 1946. *Id*. At the time the Site came under investigation by U.S. EPA, the railroad-tie treatment area was owned by Butala Construction. *Id*. The Site also included a trucking company and a peat moss packaging operation. *Id*. CoZinCo had operated its facility on the Site since 1977. *Id*. CoZinCo produces zinc sulfate (used in fertilizer and animal feed) by treating galvanizing wastes with sulfuric acid.

In 1992, the Region requested that the U.S. EPA Environmental Response Team perform an assessment of potential human health hazards at the Site, including an assessment along the perimeter of the CoZinCo facility and adjacent residential areas.[4] The assessment found

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[2] The Site was proposed for inclusion on the National Priorities List in February 1992, but was never listed.

[3] The ATSDR was established by CERCLA section 104(i), 42 U.S.C. § 9604(i). It is charged with effectuating and implementing the health-related authorities of CERCLA. CERCLA § 104(i)(1). As part of its duties, ATSDR performs health assessments for sites proposed for inclusion on CERCLA's National Priorities List, which has been established under CERCLA section 105.

[4] The CoZinCo facility itself was already subject to a Resource Conservation and Recovery Act ("RCRA") corrective action order issued by the Colorado Department of Public Health to remediate on-site contamination. *See* Compliance Order on Consent, AR 279373 (June 27, 1989).

elevated concentrations of zinc in soil along the CoZinCo perimeter, and concluded that "[t]wo probable sources for elevated Zn [zinc] along the north-northeastern perimeter are windblown dusts from the CoZinCo manufacturing area and fallout from the CoZinCo smokestack." Final Report, Smeltertown Site Investigation, AR 016486, at 10 (Jan. 1993) ("Final Report I"). Problems were also detected at two residential properties later covered by the UAO issued to CoZinCo, the Graff and Kimmett properties located southwest of the CoZinCo facility. Elevated zinc levels were observed in soil sampled at the Kimmett property. *Id*. at 11. Further, analysis of residential wells and springs near CoZinCo showed that some, including the Graff springs and the Kimmett irrigation well, contained zinc in excess of the acute water quality criterion for the protection of aquatic life. *Id*. at 15.[5]

The assessment noted that zinc concentrations were "significantly correlated with sulfate concentrations, suggesting the presence of zinc sulfate," and that wells and springs to the west and south of CoZinCo contained higher levels of zinc and sulfate than wells to the east and north. *Id*. The assessment observed that "[g]roundwater in this area flows in a southwestern direction from the CoZinCo property through the affected areas, which includes the Hill, Kimmett, and Graff properties." *Id*. at 16. The assessment also found that "[a]n abundant yellowish precipitate was observed at the Graff and Kimmett Springs. Previous investigations have noted the presence of this precipitate in conjunction with elevated aqueous metals and sulfate concentrations. Similar trends were observed in this investigation, supporting the conclusion that these aquifers have been adversely affected by the manufacturing activities at the CoZinCo facility." *Id*. at 16.[6]

Final Report I reached the following conclusions with respect to groundwater contamination emanating from the CoZinCo facility:

> The data from this investigation suggests that the CoZinCo facility is a source of localized groundwater contamination by metals (particularly [zinc] and [cad-

[5] The parties and the administrative record use the terms "spring" and "well" interchangeably, presumably because the water sources at issue in this matter are natural springs that have been appropriated for use as drinking and irrigation wells.

[6] CoZinCo submitted comments to the Region disputing some of the conclusions in Final Report I (as well as a subsequent report). However, as explained *infra*, CoZinCo's liability for elevated zinc levels in groundwater is not in dispute. In order to fully understand the Region's rationale for selecting the response actions contained in the UAO, it is necessary to set forth the conclusions regarding CoZinCo's responsibility for the zinc contamination contained in the site assessment reports.

> mium]). Previous investigations have also attributed groundwater contamination to the CoZinCo facility. * * * All residential wells and springs south and west of the facility and east of the Arkansas River are potentially affected.
>
> The primary drinking water criterion for cadmium (0.005 mg/l) was exceeded in well water samples from the Hill, Kimmett, and Graff residences, as well as [the] Graff apartments. Several secondary drinking water criteria were met (barium) or exceeded (aluminum, zinc, and hardness) in the Graff residence and apartment wells. These data may suggest that consumption of water from these wells may pose a potential human health threat.
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> The Junkyard, Kimmett irrigation, and Graff springs were in excess of the acute water quality criterion for the protection of aquatic life for [zinc]. In addition, the acute criterion for [copper] was exceeded in the Graff Spring. The chronic water quality criterion for the protection of aquatic life for [lead] was exceeded in the Slag and Graff springs.

Id. at 24-25.

In 1993, EPA conducted an additional three-phase investigation of the Site, in part to "determine the source, extent, and magnitude of inorganic groundwater contamination affecting selected springs, domestic water supplies, and possibly the Arkansas River" and to "evaluate the toxicity of inorganic contamination affecting selected springs and possibly the Arkansas River to selected surrogate biotic receptors[.]" Final Report, Smeltertown Site Investigation II: Extended Site Characterization at 1 (Feb. 1994) ("Final Report II"). The investigation examined relevant drinking water standards and health advisory levels for zinc in drinking water. The Report observed that:

> Where applicable, MCLs ["maximum contaminant levels" established under the Safe Drinking Water Act] are used to describe the relative severity of groundwater contamination by individual chemicals. However, no MCL exists for the dominant groundwater contamination at the site, [zinc]. Thus, a risk-based calculation was required to meet the objective — to evaluate on-site groundwater [zinc] contamination relative to potential adverse human health effects.

Final Report II at 7.[7] The Report included a calculated preliminary remediation goal ("PRG") for zinc, derived on the basis of the procedures outlined in U.S. EPA, Risk Assessment Guidance for Superfund: Volume 1 — Human Health Evaluation Manual (Part B, Development of Risk-Based Preliminary Remediation Goals) ("RAGS").[8] Final Report II at 6. Based on the RAGS, the PRG identified in the Report was 11 milligrams per liter of water (mg/l).[9] *Id*. at 8.[10]

Of particular significance to CoZinCo's pending petitions are the water quality data analyzed with respect to two water sources located on the Kimmett property: a domestic water well and a spring used for irrigation purposes. The data analyzed in the report show that these water sources contained zinc levels as set forth below (expressed in micrograms per liter (μg/l)):

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[7] The Report noted that:

> It is beyond the scope of this project to conduct a formal risk assessment. A formal site-specific risk assessment involves considerable resources and planning for the collection and evaluation of data, identification of receptors and exposure pathways, an assessment of toxicity, and a characterization of risk. Nevertheless, the use of a risk-based concentration was employed to provide a basis for discussion of the on-site groundwater [zinc] contamination relative to potential adverse human health effects.

Final Report II at 6.

[8] PRGs are chemical-specific "'concentration goals for individual chemicals for specific medium and land use combinations at CERCLA sites.'" Final Report II at 7 (quoting RAGS). "A PRG should be used to provide long-term targets to use during remedial planning. These goals should 'both comply with applicable or relevant and appropriate requirements (ARARs) and result in residual risks that fully satisfy the [National Contingency Plan] requirements for the protection of human health and the environment.'" *Id*. "It is emphasized that PRGs are preliminary in nature and can be modified as needed during the Remedial Investigation/Feasibility Study (RI/FS) process based on site-specific information from a baseline risk assessment and that final remediation levels will be included in the Record of Decision (ROD)." *Id*.

[9] The Report often expresses concentrations in terms of micrograms per liter (μg/l), rather than milligrams per liter (mg/l). Expressed in micrograms per liter, the PRG for zinc would be 11,000 μg/l.

[10] The Report noted that the 11 mg/l PRG is less conservative than the secondary maximum contaminant level ("SMCL") for zinc established under the Safe Drinking Water Act ("SDWA"). SMCLs are not health-based levels, but instead are based on the effect of a contaminant on the aesthetic qualities of water, such as taste and odor. The SMCL for zinc is 5 mg/l. *See* Final Report II at 6, 7-8.

LOCATION	DATE	ZINC CONCENTRATION (μg/l)
Kimmett Domestic	9/86	5180
Kimmett Domestic	8/87	4110 (est.)
Kimmett Domestic	2/88	306 (est.)
Kimmett Domestic	9/92	50
Kimmett Domestic	3/93	54
Kimmett Domestic	5/93	38
Kimmett Domestic	6/93	63
Kimmett Domestic	9/93	41
Kimmett Irrigation	9/86	90,500
Kimmett Irrigation	3/87	17,400
Kimmett Irrigation	8/87	140,000 (est.)
Kimmett Irrigation	2/88	17,400 (est.)
Kimmett Irrigation	9/92	9000
Kimmett Irrigation	5/93	1400
Kimmett Irrigation	6/93	7300
Kimmett Irrigation	9/93	10,000

See Final Report II, Table 5.

A technical memorandum prepared by EPA's contractor concluded that based on an evaluation of sampling data, as well as a RCRA facility investigation report for CoZinCo, "[s]trong seasonal trends in groundwater [zinc] concentrations can be observed at the Smeltertown Site. * * * The domestic wells and springs tend to contain high [zinc] concentrations during the summer-early fall season." Memorandum from William Van Derveer, Weston, Inc., to Alan Humphrey, AR 361058 (May 27, 1994). These fluctuations are apparently attributable to increased rainfall or irrigation activity. *See* Final Report II at 56, 63. The technical memorandum concluded that "the [zinc] concentration of the Kimmett Irrigation spring may increase above the 10 mg/l concentration measured during September 1993. The higher [zinc] concentrations in this spring would likely be observed during the late summer/early fall. Moreover, high [zinc] concentrations may also be observed within 1.5 to 3 years in all wells and springs down gradient of the CoZinCo property." AR 361058, at 3.

B. *Notices of Potential Liability and Action Memoranda*

1. *First Notice of Potential Liability*

Based upon the information gathered and analyzed in the Smeltertown Site investigations (as documented in Final Report I and in then-ongoing investigations), in May 1993, the Region issued a "Notice of Potential Liability" to CoZinCo advising CoZinCo of the Region's plans to undertake response actions to abate contamination at the Site by hazardous substances "including arsenic, creosote, lead, pentachlorol, and zinc." Notice of Potential Liability, AR 279033, at 1-2 (May 19, 1993). The notice advised CoZinCo of the Region's intention to undertake certain removal actions at the Site, including soils removal at affected residences and "[t]he providing of alternative water supplies as needed." *Id*. at 2. The notice offered CoZinCo the opportunity to voluntarily conduct the removal actions.

By letter dated June 1, 1993, CoZinCo responded to the notice by expressing its commitment to cooperate with the Region's planned activities, but contending that the response actions contemplated in the notice failed to take into account CoZinCo's ongoing activities under a RCRA compliance order issued by the State of Colorado. Letter from CoZinCo to Region VIII, AR 016453, at 1-3 (June 1, 1993). CoZinCo further contended that the Region lacked jurisdiction to order CoZinCo to undertake the response actions because the administrative record did not support a conclusion that "an imminent and substantial endangerment to the public health or welfare or the environment" existed at the Site (as required by CERCLA § 106(a)). *Id*. at 3. Specifically, CoZinCo contended "[t]o the extent that EPA is basing its assertion of an endangerment on the presence of zinc at low concentrations in private wells, CoZinCo believes that the response measures suggested in the Notice are not necessary for the elimination of any actual or threatened risk to human health or the environment given the relatively low toxicity of zinc." *Id*. at 3-4. CoZinCo contended that slag from historic smelter operations at the Site was the probable source of metals contamination at the Site. *Id*. at 4.

2. *June 1993 Action Memorandum*

In June 1993, the Region prepared an "Action Memorandum" documenting Region VIII's Hazardous Waste Management Division's approval of an emergency removal action under CERCLA to address zinc contamination in residential wells and springs. Action Memorandum, AR 016371 (June 17, 1993). The Action Memorandum focused on the zinc concentrations in the Graff water sources, and it

sought authorization to provide bottled water to the Graff rental apartments for a three- to six-month period. Action Memorandum at 10. Attached to the Action Memorandum was a report from the Region's toxicologist, who had reviewed Final Report I. The Region's toxicologist stated that:

> In my opinion residents should not consume water if the concentration of zinc exceeds 3,000 µg/l. Because zinc does not readily penetrate the skin and is not volatile, water containing zinc in excess of 3,000 µg/l is suitable for all non-ingested domestic uses. If water contains less than 3,000 µg/l of zinc, the total dose (drinking water plus food) to a resident is below the reference dose. In my opinion, water containing less than 3,000 µg/l of zinc is safe for ingestion for a lifetime.

Memorandum from Robert Benson, Ph.D., to Peter Stevenson, On-Scene Coordinator at 1 (Mar. 24, 1993).[11] The Region undertook the task of providing bottled water to the Graff residences.

In July 1993 CoZinCo met with Region VIII to discuss the provision of bottled water to the Graffs. *See* Letter from CoZinCo to Region VIII, AR 016451 (July 29, 1993). Following the meeting, CoZinCo sent the Region a letter setting forth CoZinCo's objections to this proposed action. *Id*. In particular, CoZinCo objected to the identification of 3 mg/l as the concentration at which consumption of water was considered potentially harmful. *Id*. at 3. CoZinCo contended that based on EPA guidance, the concentration of zinc in drinking water at which EPA should begin evaluating whether a removal action is needed is 11 mg/l or above. *Id*. at 4 (citing OSWER Directive 9355.3- 03, Guidance Document for Providing Alternative Water Supplies (Feb. 1988)).

3. *August 1993 Action Memorandum Amendment*

In August 1993, the Region prepared an "Action Memorandum Amendment" documenting approval of additional removal actions at the Site. Action Memorandum Amendment, AR 016373 (Aug. 3, 1993). These proposed actions included residential yard cleanups (soils removal) to remediate lead, arsenic, and creosote contamination. The affected residences included "Kimmetts, Hills, and possibly localized areas on Graff's property." *Id*. at 23. The amendment does not refer-

[11] 3,000 µg/l correlates to 3 mg/l.

ence any proposed removal action with respect to the Kimmett wells, although it does reference the conclusions contained in Final Report I that the acute water quality criterion for the protection of aquatic life for zinc had been exceeded at the Kimmett irrigation spring. *Id*. at 20. The soils removal action referenced in the amendment was initiated and completed by the Region in 1993.

4. *Second Notice of Potential Liability*

On October 7, 1993, the Region issued a "Second Notice of Potential Liability" to CoZinCo (as well as other potentially responsible parties), advising CoZinCo of its potential liability for additional removal actions at the Site, including "removal of lead contaminated soils from residential areas south of the smelter, and removal of creosote sludge from a few properties." Second Notice of Potential Liability, AR 017495, at 1 (Oct. 7, 1993). CoZinCo responded to the second notice by contending, *inter alia*, that "[i]t is CoZinCo's understanding that the EPA's removal actions at the proposed Smeltertown Site have no relationship whatsoever to CoZinCo or the CoZinCo facility." Letter from CoZinCo to Region VIII, AR 017478 (Oct. 25, 1993). The Region never took further steps to require CoZinCo to perform any soils removal action at the Site.

5. *The April 1994 UAO*

On April 28, 1994, the Region issued to CoZinCo the UAO that is the subject of the pending petitions. The UAO required CoZinCo to undertake certain removal actions in connection with elevated zinc levels in groundwater. In particular, the Statement of Work ("SOW") appended to the UAO ordered CoZinCo to undertake four primary tasks. Under the heading "Domestic Water Supply," the SOW required provision of "domestic water service" to the Graff residences (via bottled water or other approved means). Under the heading "Irrigation Water Supply," the SOW required submission of a work plan for installation of a "domestic water/irrigation supply well" for the Kimmett property, submission of a permit application for a domestic water supply well to the State for the Kimmett irrigation well, and installation of the Kimmett irrigation well within two weeks of permit approval. The stated purpose of the SOW was:

> [T]o outline the requirements Respondent must comply with to provide alternative water supplies to residents affected by the zinc contamination from the Site. This not only includes domestic water supplies for five rental units owned by Jack and Cara Graff, *but also irri-*

> *gation water supplies for the Kimmetts['] one residence located near the Site. This irrigation well also will serve as a back-up residential water supply and is required for grass and shrub irrigation which were planted by EPA during the October, 1993 Removal action that served as the remedy for this area of the Site.*

April 1994 UAO SOW at 1 (emphasis added). The UAO established a PRG for zinc of 11 mg/l. The UAO stated that water quality data for the Kimmett irrigation spring showed that it "recently contained 10,000 mg/l. At a concentration of 4300 mg/l, zinc causes cessation of new growth in lettuce in a five day exposure period." April 1994 UAO at 5. However, as noted in the table *supra*, Part I.A., the September 1993 data referred to in the UAO actually showed that the zinc concentration was 10,000 µg/l (equivalent to 10 mg/l), a level that was below the 11 mg/l PRG selected by the Region in ordering the response.[12]

6. *May 1994 Action Memorandum Amendment*

On May 13, 1994 (subsequent to issuance of the UAO to CoZinCo), the Region prepared another "Action Memorandum Amendment" with respect to the Smeltertown Site. In the section of the memorandum documenting "Threats to Public Health or Welfare," the amendment (referring to the Kimmett irrigation spring) states as follows:

> A spring, used for irrigation, contains enough zinc to kill vegetation and/or stunt growth in a variety of plant species. Literature sources indicate that 4 ppm of zinc in water kills lettuce. The affected residents cannot maintain a lawn, garden, hedges, or other plants and grasses. Some of these have been or will be planted by EPA as replacements to plantings removed during the October 1993 Removal Action and are required to protect EPA removal actions; therefore it is necessary to have a reliable water source installed.

[12] The Region has acknowledged that the misstatement in the UAO was due to a transcription error. Instead of micrograms per liter, the data were reported in the UAO as milligrams per liter. Region's Response to CoZinCo's Comments on April 1994 UAO, AR 361057 (Oct. 28, 1994). This error apparently extended to the data for lettuce growth as well (*i.e.* "4300 mg/l" should have been 4300 µg/l, which is equivalent to 4.3 mg/l).

Action Memorandum Amendment, AR 361018, at 9 (May 13, 1994). The memorandum further states that:

> Currently, [the Graff residence and rental units], and a spring well used for water supply/irrigation [the Kimmett irrigation well] are contaminated by zinc sulfate. EPA has identified the probable source of the zinc sulfate in the groundwater. EPA will negotiate a permanent solution or issue a [UAO] to provide all affected residences with alternative water supplies. If negotiations are not successful, two deep wells will be installed for drinking and irrigation water.

Id. at 11-12.

7. *CoZinCo's Actions in Response to April 1994 UAO*

CoZinCo provided comments to the Region objecting to the requirements of the April 1994 UAO. Letter from CoZinCo to Region VIII, AR 361066, (June 6, 1994). With respect to the Kimmett well requirement, CoZinCo argued that the UAO was erroneously based on mis-reported analytical data, and that the Region's use of its CERCLA § 106 authority to order construction of a well "solely to *water the grass*" was improper. *Id*. at 1. CoZinCo also alleged that the 11 mg/l PRG identified in the UAO was overly conservative, and CoZinCo provided a memorandum from its technical consultant in support of that claim. *Id*. at 2. Nevertheless, CoZinCo expressed its intention to comply with the UAO. *Id*.

CoZinCo's work plan (as required by the UAO) was approved by EPA in July 1994. CoZinCo assumed the task of providing bottled water to the Graff residences, and in August 1994 CoZinCo submitted applications to the State of Colorado seeking to register the use of the Kimmett's existing domestic and irrigation springs. The applications to register the wells were returned "for a field inspection and clarification" in September 1994. Letter from Colorado State Engineer to Kimmett, AR 361227, (Sept. 13, 1994). The State did not approve the application concerning the irrigation well, because it did not meet State criteria either for registration of an existing irrigation use or permitting of a new irrigation use.[13] In October 1994, the State also denied registration of the existing domestic spring, but indicated that

[13] Under Colorado law, the terms "irrigation" well, "domestic" well and "household use only" well have specific meanings. An "irrigation" well is one that is exclusively intended for irrigation of cropland. A "domestic" well is one intended to serve up to 3 single family dwellings,

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it might be possible to permit the existing spring for "household use only" (*i.e.*, no irrigation permitted). Letter from Colorado State Engineer to Kimmett (Oct. 7, 1994) (Appended as Exhibit 3D to CoZinCo's Reply to Region VIII's Response to Petition 96-4).

8. *November 1994 Amendment to UAO*

In November 1994, the Region amended the April 1994 UAO. The amendment had two main effects. First, the amendment replaced the heading "irrigation water supply" in the original SOW with "household water supply well," in view of the State's rejection of the original irrigation well and domestic well applications.[14] However, the primary purpose of the UAO as it related to the Kimmett property and as expressed in the SOW remained the same: to provide a source of water to irrigate plants replaced by the Region following the soils removal action. The first paragraph of the SOW was amended to read:

> This alternative water supply not only includes providing household water supplies for five rental units owned by Jack and Cara Graff, *but also a household water supply well for the Kimmett residence so that their current domestic water supply spring can be dedicated for irrigation purposes. The irrigation water supply is required for irrigating grass and shrubs planted by EPA during the October, 1993 Removal Action that served as the remedy for this area of the Site.*

November 1994 SOW (emphasis added). The second effect of the November 1994 amendment was to change the 11 mg/l PRG in the original order to a 3 mg/l removal action level ("RAL"). The revised RAL was based U.S. EPA, Final Guidance on Numeric Removal Action Levels for Contaminated Drinking Water Sites (Oct. 25, 1993) ("RAL Guidance").[15]

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the irrigation of up to one acre of home gardens and lawns, and the watering of domestic animals. A "household use only" well is "for use only inside one single family dwelling [*no* outside use, lawn or garden irrigation (watering), stock or the watering of non-commercial domestic animals]." State of Colorado General Well Permit Application Instructions at 2 (Appended as Exhibit 18 to Region's Response to CoZinCo's Petition No. 95-5).

[14] The Region has said that after considering CoZinCo's contention that the Kimmetts did not meet the criteria for an irrigation well, "but without issuing a formal opinion as to its validity, the Region amended the SOW." Region's Brief in Response to Petition No. 95-5, at n.60.

[15] "RALs are drinking water concentrations of contaminants that are considered, along with other factors, in determining whether to provide alternate water supplies under Superfund removal authority." RAL Guidance at 1. EPA's RAL Guidance established health-based numeric limits for 165 substances (including zinc) that apply generally across most Superfund sites. *Id*.

9. *Events Following November 1994 Amendment*

In November 1994, CoZinCo, on behalf of the Kimmetts, submitted an application to the State for a "household use only" well permit. CoZinCo also certified to the Region that the irrigation well task required under the UAO was "complete," since the State had denied the irrigation well permit application, and approval for installation of an irrigation well was no longer being sought. Letter from CoZinCo to Region VIII, AR 361224 (Nov. 23, 1994). Further, beginning with its "Weekly Progress Report" for November 17 through November 24, CoZinCo began reporting the irrigation well task as "100% complete." Weekly Progress Report for Nov. 17 to Nov. 24, AR 361228.[16] The Region rejected CoZinCo's certification of completion of the irrigation well task, since a "household water supply well" as required by the November 1994 amendment had not yet been installed. Letter from Region VIII to CoZinCo, AR 361054 (Dec. 2, 1994).

During the State's review of the household use only well permit application, the State obtained from David Kimmett a commitment to vacate and abandon all existing spring wells on the property. *See* Memorandum from Colorado State Engineer to Kimmett at 2 (Dec. 29, 1994) (Appended as Exhibit 3C to CoZinCo's Reply to Region VIII's Response to Petition 96-4). A household use only well permit was finally issued to David Kimmett in March 1995, and the terms of the permit were such that no irrigation of the property was permitted. The permit formalizes Kimmett's agreement to discontinue use of the existing springs on the property. *See* Colorado Division of Water Resources Well Permit Number 185470, AR 361174 (Mar. 20, 1995). However, the Region never took steps, once the permit was obtained, to enforce the requirement that CoZinCo install a household use only well. *See* Oral Argument Transcript ("Tr.") at 9-10.[17]

In April 1995, CoZinCo submitted a Notice of Completion to the Region, contending that the UAO was "complete" as to the Kimmett household use only well requirement. Certification of Notice of Completion, AR 279434 (Apr. 3, 1995). CoZinCo has contended that

[16] The terms of the UAO required CoZinCo to file weekly reports on the status of the removal action.

[17] At oral argument, counsel for the Region suggested that it didn't enforce the requirement because of "seasonal" concerns, and that CoZinCo was sending "mixed signals" by telling the Region it intended to comply with the UAO, but then filing a petition for reimbursement. Counsel finally concluded that "I think that there's nothing that I can clearly point to in the record that would tell you what was going on in the Agency's mind at that time." Tr. at 10.

the Region withdrew the requirement at a meeting that month, and that its notice documents the withdrawal. The Region denies that it was withdrawn. *See* Tr. at 12. Yet, in denying CoZinCo's notice of completion, the Region referred only to the fact that the ongoing Graff bottled water requirement under the UAO was not complete. Letter from Region VIII to CoZinCo, AR 279769 (May 24, 1995).

10. *CoZinCo's May 1995 Reimbursement Petition*

Prior to filing the two petitions for reimbursement that are the subject of this proceeding, CoZinCo filed a petition for reimbursement in May 1995 (Petition No. 95-2). The May 1995 petition sought reimbursement for its costs in responding to the UAO with respect to the requirement that it furnish an alternative water supply to the Kimmett residence. CoZinCo asserted that the obligation in the UAO to construct a well at the Kimmett property was withdrawn by the Region at an April 4, 1995 meeting. The petition did not assert that CoZinCo had "completed" the requirement that it furnish bottled water to the Graff residences. The petition contended that CoZinCo was entitled to reimbursement both because it was not liable for response costs, and because the response action ordered by the Region was arbitrary and capricious. In its response to that petition, the Region argued only that the required action under the UAO was not "complete" because the Graff bottled water requirement was ongoing. The Region never argued at that time that the Kimmett well requirement was not complete.

11. *Region's Issuance of New SOW in August 1995*

During the pendency of CoZinCo's first reimbursement petition (and on the same day that the Region filed its response to the petition with the Board), the Region issued a new SOW to CoZinCo, ostensibly as an amendment to the UAO. The Region's "amendment" was accomplished by "deleting the statement of work in its entirety" and replacing it with a new SOW. Letter from Region VIII to CoZinCo (Aug. 16, 1995), AR 361231.

The new SOW had three primary effects. First, it wholly abandoned the irrigation purpose of the April 1994 UAO and November 1994 amendment. Instead, CoZinCo was directed to:

> [P]rovide permanent water supplies to the Kimmett, Graff and salvage yard residences that are acceptable in quantity and quality for all household uses, including but not limited to drinking, cooking, bathing, and washing of clothes.

August 1995 SOW, AR 361231. According to the Region's letter transmitting the August 1995 SOW, the requirement to replace the Kimmett's domestic water use was predicated on data from September 1986 and August 1987 showing that zinc concentrations in the domestic well were above the 3 mg/l RAL, a May 1994 report that the Region contends suggested that the zinc plume was expanding and might "in the future again impact the Kimmett's domestic spring," an EPA hydrogeological report concerning the potential for an increase in zinc concentration in the domestic spring, June 1995 data showing an increase in zinc concentration in the domestic spring, and an inadequate flow of water from the domestic spring. *Id*. The new requirement was not predicated on the elevated zinc concentration in the irrigation well, which was the predicate for the Kimmett well requirement in the original order. *See id*.

Second, the August 1995 SOW expressly prohibited regular provision of bottled water as a means of complying with the order, which was the very action required under the April 1994 UAO as to the Graff units, and approved by the Region.[18] Third, the August 1995 SOW adds a new site, the salvage yard residence, as an additional site at which CoZinCo was ordered to conduct response activities. The April 1994 UAO, as amended in November 1994, included no requirements whatsoever with respect to the salvage yard residence.

12. *Dismissal of May 1995 Reimbursement Petition*

The Board ordered briefing on the threshold issue of "completion" raised by CoZinCo's May 1995 reimbursement petition, and subsequently issued an order dismissing the petition without prejudice as premature. *See In re CoZinCo, Inc.*, CERCLA 106(b) Petition No. 95-2 (EAB, Sept. 11, 1995) (Order Dismissing Petition).[19] In the order, the Board concluded that CoZinCo's petition represented an impermissible attempt to "bifurcate" the UAO and obtain reimbursement for costs incurred in responding to only part of the order (the Kimmett well requirement), when other response actions required by the order

[18] Although the April 1994 UAO allowed provision of alternative water supplies to the Graffs by bottled water or other approved means, the Region had been providing the Graffs with bottled water, and CoZinCo assumed that responsibility with the Region's approval. The Region has justified the August 1995 SOW as to the Graff units by noting that a more permanent remedy than bottled water is favored. The Region's rationale as to the Graff requirement is not in dispute here.

[19] As explained *infra*, completion of the required action is a statutory prerequisite to a reimbursement petition. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A).

remained incomplete (provision of bottled water to the Graff units). Order Dismissing Petition at 8-9. The Board concluded that since the task relative to the Graff units had not been completed when the petition was filed, CoZinCo had failed to meet a statutory prerequisite to filing a petition for reimbursement. *Id*. at 7-9 (citing *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995)). In a footnote, the Board noted with respect to the timing of CoZinCo's petition that "[s]ince the new [SOW] contains no obligation to provide bottled water (even in the interim until a permanent alternative is developed), that particular obligation would appear to be completed as of the date the earlier [SOW] is deleted." Order Dismissing Petition at 9.

13. *CoZinCo's Actions Under August 1995 SOW*

Pursuant to the August 1995 SOW, CoZinCo submitted its first draft work plan to the Region in September 1995, within the time frame provided in the SOW. For reasons explained in more detail in Part II.D. of this decision, in October 1995 the Region advised CoZinCo that it disapproved the work plan. The Region set forth a number of work plan revisions that it required CoZinCo to make, and instructed CoZinCo to submit a revised plan within 14 days. In particular, the Region set forth specific elements to be included in the revised work plan. On October 19, 1995, CoZinCo submitted a second draft work plan for the Region's approval. The Region again found the work plan deficient in certain respects, and rejected it as "unacceptable." The Region issued a Notice of Violation to CoZinCo on November 6, 1995, and advised CoZinCo that it was taking over the response actions at the Kimmett and salvage yard residences.[20] The Region ultimately completed the removal action in February 1996, by installing a household use only well at the Kimmett residence and a zinc filtration system at the salvage yard residence.

14. *The Pending Petitions*

CoZinCo filed the first of the pending petitions (Petition 95-5) in October 1995, seeking reimbursement of costs incurred in responding to the Kimmett well requirement under the April 1994 UAO through August 1995. CoZinCo's petition contends that "[s]ince EPA withdrew all required actions specified in the April 1994 UAO," by way of the

[20] Pursuant to an agreement among the State, Region VIII, and CoZinCo, the State amended its RCRA compliance order to include provision of an alternative water supply to the Graffs, and the Region agreed to defer that task to the State. CoZinCo was ultimately released from this obligation following the sale of the Graff property.

August 1995 amendment, "the actions are 'complete' for the purposes of reimbursement under CERCLA section 106(b)(2)." Petition No. 95-5 at 2. CoZinCo also contends that it is not liable for replacement of the Kimmett well, and that the Region's selection of that remedy was arbitrary and capricious. As noted above, the Region objected to CoZinCo's claim that the August 1995 SOW created a new UAO. In December 1995, the Board issued an order requiring the parties to brief the threshold issue of whether the Region created a separate UAO by issuing the August 24, 1995 SOW, such that Petition No. 95-5 was ripe when filed. Without ruling on that issue, the Board required the Region to submit a substantive response to Petition No. 95-5. The Region's substantive response argues in part that CoZinCo has failed to fulfill a threshold requirement for reimbursement because it failed to "complete" the task with respect to installation of a well at the Kimmett residence. Response to Petition No. 95-5 at 12-13.

On June 27, 1995, CoZinCo filed Petition No. 96-4, seeking reimbursement of costs incurred in responding to the UAO subsequent to the August 24, 1995 amendment. The Region moved the Board to dismiss Petition No. 96-4 on the grounds that CoZinCo had failed to "comply" with the terms of the UAO, or in the alternative, to consolidate the petitions. The Board granted the Region's motion to consolidate for administrative purposes only, and ordered oral argument on the issue of whether the second amendment created a new order. Oral argument was held on January 29, 1997.

The Board issued its Preliminary Decision on both petitions on April 22, 1998. CoZinCo filed comments on the Preliminary Decision on May 29, 1998. Petitioner's Comments on the Environmental Appeals Board's Preliminary Decision Denying Petitioner's Petitions for Reimbursement of Response Costs ("Petitioner's Comments"). The Region filed its comments, as well as a response to CoZinCo's comments, on June 23, 1998. Respondent's Comments on the Environmental Appeals Board's Preliminary Decision ("Region's Comments"). After due consideration of the comments received and making such changes as are appropriate, the Board issues this Final Decision. *See* Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions, 61 Fed. Reg. 55,298, 55,301 (Oct. 25, 1996).

II. *ANALYSIS*

Where there may be an imminent and substantial endangerment to the public health or welfare, or to the environment, from a release or threatened release of a hazardous substance from a facility, the

Agency may, under CERCLA section 106(a), 42 U.S.C. § 9606(a),[21] initiate a civil judicial action or issue an administrative order seeking to abate such danger or threat.[22] *In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434 (EAB 1997). Those who comply with such administrative orders may petition the Agency for reimbursement of their costs in that effort, according to CERCLA section 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). *Id*. That section provides in pertinent part:

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

To obtain reimbursement, a petitioner:

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

CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). In addition, a petitioner who is liable, and therefore is not entitled to reimbursement under the provision quoted above, may nevertheless recover costs it expended to the extent that:

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[21] That section provides, in pertinent part:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he * * * may also * * * take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

[22] Although the statute gives the President the authority to issue such orders, the President has delegated this authority to certain agencies, including the EPA. *See* Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (Aug. 31, 1996); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987). The authority to make determinations regarding petitions for reimbursement was delegated by the Administrator of EPA to the Board in 1994. *See* Delegation of Authority 14-27 ("Petitions for Reimbursement").

> [I]t can 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.

CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D).[23] Under either statutory basis for reimbursement, the petitioner bears the burden of proving its claim. *Cyprus Amax*, slip op. at 20; *In re Asarco Inc. and Federated Metals Corp.*, 6 E.A.D. 410, 413 (EAB 1996).

In addition, the Agency has interpreted CERCLA § 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* Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions, 61 Fed. Reg. 55,298 (Oct. 25, 1996); *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996), *aff'd*, *A&W Smelter and Refiners, Inc. v. Clinton*, 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part, rev'd in part*, 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. *Id*. 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), and *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 718-19 (EAB 1995)).

A. *Separate Review of Petitions 95-5 and 96-4*

We must determine at the outset whether it is appropriate to review CoZinCo's petitions separately, that is whether the August 1995 amendment to the SOW had the legal effect of creating a new order, such that CoZinCo's Petition 95-5 was ripe when it was filed and thus should be considered separately from Petition 96-4. As the Board explained in the order scheduling oral argument:

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[23] The "administrative record" for the purposes of this provision is the one developed pursuant to CERCLA section 113(k)(1), 42 U.S.C. § 9613(k)(1), which provides that the Agency "shall establish an administrative record upon which the [Agency] shall base the selection of a response action."

> The issue of the legal effect of the August 24, 1995 amendment to the April 26, 1994 UAO could substantially affect CoZinCo's claims for reimbursement. For example, if the amendment created a separate order under § 106(a) of the Act, then costs incurred for work performed under the UAO prior to August 24, 1995, would be potentially recoverable by CoZinCo notwithstanding any alleged non-compliance with the UAO following the amendment on August 24, 1995. Conversely, if the amendment did not effect such a change to the UAO, such a failure to comply with the amended UAO would potentially bar recovery of all costs incurred under the UAO both prior to and after August 24, 1995.

Order Scheduling Oral Argument at 4 (Nov. 5, 1996).

1. *Parties' Arguments*

The parties' positions on this issue, as articulated in briefs received by the Board in response to the Board's Order Scheduling Oral Argument, may be summarized as follows:

a. *CoZinCo's Arguments*

CoZinCo contends that the August 1995 amendment to the SOW "created a new unilateral order with new schedules and a new work plan which imposed new obligations on CoZinCo." Brief in Support of Petition for Reimbursement ("CoZinCo's Brief") at 3. CoZinCo argues that the Region chose to "amend" the order as an expedient means of avoiding preparing and issuing a new UAO. CoZinCo argues that deletion of the SOW amounted to a "novation" of a contract, because the Region extinguished all obligations imposed upon CoZinCo in the April 1994 SOW (as amended in November 1994). *Id*. at 3 & 4 (citing *Wausau*, 52 F.3d at 664).

CoZinCo also contends that the language of CERCLA § 106(b)(2) supports its view. That section provides, *inter alia*, that:

> Any person who receives and complies with the terms of any order issued under [§ 106(a)] may, *within 60 days after completion of the required action*, petition the President for reimbursement from the fund * * *.

CERCLA § 106(b)(2)(A) (quoted in CoZinCo's Brief at 4, emphasis in brief). CoZinCo contends that "completion of the required action"

does not mean the same thing as "completion of the required order." CoZinCo's Brief at 4. Since the "required action" in the 1994 UAO was contained in the SOW, deleting the SOW means that the actions specified in the SOW were no longer required. *Id*. In CoZinCo's view, the fact that the subject matter of the deleted SOW and the new SOW may be "related or potentially overlap" does not render the new SOW merely an amendment of the old. CoZinCo argues that:

> To treat an "amendment of a unilateral order" which extinguishes a prior statement of work and replaces it with a new statement of work differently from a new unilateral order which does the same, is to elevate form over substance. This is precisely the situation that the Seventh Circuit was concerned with in *Employers Insurance of Wausau*. In that case, the court stated that in instances where EPA issues a series of Section 106 orders with separate statements of work, a party's right to seek reimbursement of costs incurred complying with one of several orders is not diminished and need not be delayed until final completion of all pending orders involving the petitioner.

Id. at 5 (citing *Wausau,* 52 F.3d at 663).

b. *The Region's Arguments*

The Region contends that amending the SOW did not *de facto* create a new order, that the "reasons for and circumstances surrounding" the amendment support the conclusion that a new order was not created and "most fundamentally, the fact that the 1995 Amendment did not change the overall purpose of the Order supports the view that it did not create a new order." EPA's Reply to Petitioner's Response Brief, Motion for Dismissal, and Motion in the Alternative for Stay of Petition ("Region's Reply Brief") at 5 (Feb. 19, 1996). Specifically, the Region argues that:

> The SOW after the 1995 Amendment required the identical action — provision of alternative water supplies until zinc concentrations in groundwater fall to safe levels — as did the SOW prior to the 1995 Amendment. For these reasons, the 1995 Amendment should be seen not as a "new" order, but rather an amendment made to take into account new information and objections and comments by the Petitioner, and to facilitate accomplishing the action required by

> the Order. Since that action had not been completed as of the date of CoZinCo's Petition, the Petition is premature and should be dismissed.

Id. at 5-6. In the Region's view, the SOW is simply one of many essential components of a section 106 order, and although the SOW was replaced, "crucial portions of the order remain unchanged." *Id*. at 7.

With respect to CoZinCo's statutory argument, the Region contends that CoZinCo misreads the "required action" language in section 106. The Region disputes that "required action" can be read to only refer to the tasks in the SOW, when the statute also requires compliance "with the *terms* of any order." *Id*. at 7-8 (quoting CERCLA § 106(b)(2)(A)) (emphasis in brief). The Region argues that the statute should be read to require compliance with *all* terms of an order, whether found in the SOW or elsewhere. *Id*. at 8. The Region also says that CoZinCo's reliance on contract law mischaracterizes the holding in the *Wausau* case. *Id*.

As to the facts and circumstances surrounding the second amendment to the SOW, the Region argues that because the objective of the UAO had not yet been achieved (abatement of zinc contamination), it is reasonable to view the new SOW as only an amendment and not a new order. *Id*. at 10. The Region says that "[f]rom a policy perspective, viewing such an amendment as a new order would frustrate the intent of the [reimbursement] provision by allowing petitions regardless of the progress of the cleanup. The purpose of the reimbursement provision is to encourage compliance with administrative orders and promote expeditious cleanup." *Id*. (citing *Findley Adhesives*, 5 E.A.D. at 718 (EAB 1995)). Further, the Region contends that some of the changes to the SOW were the result of CoZinCo's contention that it was prevented under Colorado law from installing a well at the Kimmett residence, and that "[w]here changes to an order are in part prompted by and responsive to arguments raised by its recipient, the recipient should not benefit by then being able to exercise its reimbursement rights." Region's Reply Brief at 11. The Region also says that the second amendment to the SOW did not increase CoZinCo's burden under the UAO, but rather facilitated compliance (for example, by authorizing "any legal means" of providing alternative water supplies). *Id*.

Finally, the Region argues that the second amendment to the SOW did not create a new order because it made no change in the "required action" of the UAO. The Region says that the Board should look to the broad remedial purposes of the order in determining what

the "required action" is, and that viewed in such a way the "required action" has always been to provide alternative water supplies until zinc concentrations are at safe levels. *Id*. at 12-13 (citing *Wausau*, 52 F.3d at 667).

2. *Resolution of Issue*

As described above, CERCLA's reimbursement provision states that:

> Any person who receives and complies with the terms of any order issued under subsection (A) of this section may, within 60 days after *completion of the required action*, petition the President for reimbursement from the fund * * *.

CERCLA § 106(b)(2)(B) (emphasis added). The statute does not, on its face, expressly provide an answer to the questions faced here: What is "required action" within the meaning of the statute and when should it be deemed "complete" such that a petition for reimbursement may be ripe notwithstanding the pendency of a related order requiring further cleanup activity? Neither term is expressly defined in the statute, nor does CERCLA's legislative history provide meaningful guidance.

Only one case has directly addressed when "completion of the required action" might be deemed to occur for purposes of seeking reimbursement. In *Wausau*, 52 F.3d at 664, the Seventh Circuit affirmed the district court's decision denying a petition for reimbursement where the petitioner had not "complied" with the section 106 order issued to it. At issue was an order requiring Wausau to remediate contamination at a facility to which its insured had sent polychlorinated biphenyls ("PCBs"). Wausau cleaned up PCB contamination at the site, but not contamination caused by other hazardous wastes, and then sought reimbursement from the fund. EPA denied reimbursement, contending that the order required the cleanup of *all* hazardous waste, not just PCB material. The court's decision affirming denial of the petition turned on the court's deference to EPA's interpretation of its order. However, the court engaged in a lengthy discussion of the issue of "completion" for purposes of the reimbursement provision. The court noted the difficulties that can arise when a recipient of a section 106 cleanup order performs some of the ordered cleanup, but does not complete the cleanup. In particular, the court considered the following:

> A more troublesome case is where the agency takes steps to postpone completion, making it impossible for

> the party to argue that it has completed the action required of it by the agency. [Wausau] argues that it complied fully with the clean-up order, which it interprets as being limited to PCB contamination, but that when it finished the EPA told it to do more. Like the miller's daughter in "Rumpelstiltskin," the company worries that if it did the more the EPA would find something else for it to do, thus postponing indefinitely the time when it could obtain reimbursement.
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> * * * * * * *
>
> [T]he party's right to reimbursement could (in principle anyway) still be delayed indefinitely, each successfully challenged order being succeeded by another order. That cannot have been the intention of the statute's draftsmen, as we can show by attending carefully to the statutory language. The right of reimbursement extends to "any person who receives and complies with the terms of [any order]" and ripens into a right to petition and to sue "after completion of the required action." * * * Obviously "required" means "required by the order." Once a party completes whatever action is required by the terms of any order, it can seek reimbursement for the costs of *that* action. The fact that the agency issues another order (which the party is free to ignore if it is willing to run the risk of being made the defendant in an enforcement action) does not diminish the party's right to challenge the previous order.

Wausau, 52 F.3d at 663. The court went on to explain its view that it would be "harsh" to deny *any* reimbursement to an otherwise nonliable party simply because (perhaps for reasons beyond the party's control) it had not completed the required action. *Id*. Further, the court observed that:

> And remember that one ground for reimbursement is that "the President's decision in selecting the response action ordered was arbitrary and capricious." * * * If the term "selecting" is allowed to extend forward in time from the initial order, unreasonable insistence on full compliance might be thought a ground for invoking the provision.

Id.

Wausau does not expressly address the issue of how "completion of the required action" should be interpreted when an "amendment" to a UAO relates to the same general purpose as the original UAO (here, remediation of zinc contamination), but the amendment deletes the original SOW, and imposes a new SOW containing different requirements based on different evidentiary predicates. Some of the court's discussion appears to be *dicta*, since its decision rested on its conclusion that Wausau had not complied with the cleanup order, as interpreted by EPA. Nevertheless, the concerns expressed by the *Wausau* court with respect to when a required action is complete for reimbursement purposes and the court's discussion of those concerns informs our analysis. In the context of this case, the *Wausau* decision provides authority for the following propositions: (1) the right to petition for reimbursement is ripe once the *action* required by the terms of an order is complete; and (2) a party may seek reimbursement once the action required by an order is complete, regardless of whether a subsequent order is issued to that party. *See Wausau*, 52 F.3d at 663.

The issue thus becomes: What standard should be applied in determining whether an amended UAO creates circumstances, such as those referred to in *Wausau*, where the action required by the terms of the original order should be deemed "complete," and treating the amendment as a bar to a petition for reimbursement could unfairly prejudice a party's right to seek reimbursement? In the instant case, we are not considering merely whether the right to reimbursement will be "delayed," but whether it may be had at all since, if the amendment is treated as only a continuation of the original order, a failure to comply with the requirements of the amendment could infect the right to consideration of the merits of a reimbursement petition filed upon compliance with, and completion of, the requirements of the original order.

The Region has made the argument that "required action" in CERCLA § 106(b) refers to the "broad remedial purpose" underlying the administrative orders, and encompasses all components of the order, not just the SOW. In the Region's view, until the broad remedial purpose is achieved, the right to seek reimbursement is not ripe. The Region finds support for its argument in the policy underlying the reimbursement provision, which is to promote the goal of "cleanup first, litigate later." *See* H.R. Rep. No. 99-253, pt. 1, at 83 (1985). Further, the Region argues that since the reimbursement provision is a waiver of sovereign immunity, it should be narrowly construed. CoZinCo argues that "required action" in CERCLA § 106(b) refers specifically to the "response action" required in an order (as

described in a SOW). As noted above, the *Wausau* court would focus on completion of the *action* required of the recipient of the section 106 order.

On balance, we agree with the Region that the broad remedial purpose and the other terms of an order can be important to an analysis of what action is being required of the recipient of a section 106 order since they provide the context for such action. However, as a practical matter, the analysis will usually focus on the actual work that is required, which ordinarily is described in the order's Statement of Work. The Region itself has explained that it looks to whether the capital portion of a project (*i.e.*, the work required) has been implemented in determining when a cleanup order has been completed.[24] Thus, an amendment to a SOW may, under certain circumstances, give rise to a claim that the recipient has fulfilled the required actions of the original SOW, even though the broad purpose underlying the order and other terms of the order are not altered by the amendment to the SOW. As to determining when such circumstances may arise, we agree with an approach that was articulated by counsel for the Region at oral argument. The Region's counsel suggested that whether a right to seek reimbursement is ripe under one of a series of sequential amendments should be determined on a fact-specific and case-by-case basis. *See* Tr. at 24-25. In considering whether an amendment should be deemed to create a new order, counsel for the Region noted that amendments to the work required under UAOs were not "uncommon," and that "as long as that work is within the scope of what could reasonably have been anticipated up front, that should be considered an amendment, not a new order." *Id*. at 17.

A Region has broad latitude, without creating the legal equivalent of a new UAO, to amend UAOs in order to accommodate changing needs and circumstances that may arise at a particular site. We recognize that many factors can affect an ongoing cleanup effort, and that it is a dynamic process in which adjustments are often necessary as the cleanup proceeds. A Region should be allowed to address changing site conditions through UAO amendments that are reasonably related to the original scope of work, without precipitating petitions for reimbursement that require the Region to prematurely defend its liability determinations or remedy selections. Therefore, we start with

[24] In response to questioning as to when an order that contained ongoing oversight, reporting, or other obligations might be deemed "complete" by the Region, the Region's counsel responded that "[t]he practice is to treat respondents in the order the same way EPA treats ourselves. *So we would count completion when the capital portion of a project is complete, when implementation is done.*" Tr. at 78 (emphasis added).

a presumption that an amendment to a UAO is simply an amendment, and does not create a new order.[25]

If a petitioner seeks to challenge a Region's characterization of an amendment, then (as with other aspects of a CERCLA section 106(b) reimbursement claim) the petitioner bears the burden of proof. Except in narrow circumstances, we will not be inclined to find that an amendment to a UAO has created a new order. Evaluation of such a claim will be made on a case-by-case basis, with close scrutiny of the particular facts presented, and bearing in mind that the underlying purpose of CERCLA's reimbursement provision is to foster compliance with cleanup orders by deferring issues regarding liability and remedy selection until the recipient has complied with the order. *Findley Adhesives*, 5 E.A.D. at 718 (citing H.R. Rep. No. 99-253, pt. 1, at 83). The Board will examine the specific facts presented to determine whether any of the required actions in the original UAO are carried forward to the amended UAO. If the same work is carried forward, or if new work is reasonably related to the original scope of work (such as an alternative approach to the same concern), then the amendment typically will be considered as simply an amendment, and the right to petition for reimbursement under the original order will not be ripe. If the work required in the amended UAO is beyond the scope of work required in the original UAO, or is not reasonably related to it, then the amendment should be deemed a new order for purposes of CERCLA's reimbursement provision. Provided that the required actions under the original order are complete, the right to seek reimbursement under the original order may be deemed ripe. Ultimately, the determination is fact-and-case specific.

Utilizing the foregoing analytical framework, we conclude that under the specific facts presented, the August 1995 "amendment" constituted a new order. Thus, CoZinCo's Petition 95-5, covering the actions required by the April 1994 UAO (as amended in November 1994), was ripe when it was filed.

In this case, the Region elected to amend the UAO by deleting the existing SOW in its entirety, and replacing it with a new SOW. As explained *supra*, Part I of this opinion, prior to the amendment there

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[25] In addition, since a recipient's right to petition for reimbursement is limited by statute to a period within 60 days of completion of an order, 42 U.S.C. § 9606(b)(2)(A), a recipient must be entitled to rely upon the Region's characterization of a change as an "amendment" that does not trigger the need to file a petition for reimbursement based on the original order. Thus, UAO recipients do not need to file "protective" petitions to preserve reimbursement claims arising out of an original order when a Region issues an amendment to an order.

were three primary tasks required of CoZinCo relating to the Kimmett property in the April 1994 UAO. First, CoZinCo was required to submit a work plan for installation of the Kimmett irrigation well. CoZinCo submitted a plan and it was approved by the Region. The Region effectively undid the approval when it issued the August 1995 SOW, which called for submission of a new work plan that no longer contemplated an irrigation well. Second, CoZinCo was required to submit a well permit application to the State. CoZinCo completed this task, and the task was not carried forward into the August 1995 SOW. Third, CoZinCo (in the April 1994 UAO and November 1994 amendment) was required to install a well at the Kimmett residence, the purpose of which was to provide a means of irrigating plants replaced by the Region following the soils removal action, because the existing irrigation spring had contained zinc in excess of the action level chosen by the Region. In the August 1995 SOW, the Region abandoned the irrigation purpose entirely, required no further remediation for the irrigation spring, and instead required installation of a household use only well because the Region concluded that the household spring was contaminated or threatened. The August 1995 SOW also added the new requirement that CoZinCo remedy contamination at the salvage yard residence.

Moreover, the circumstances surrounding the Region's issuance of the August 1995 SOW are unusual. The Region issued the August 1995 SOW on the very day that it filed its response to CoZinCo's May 1995 petition for reimbursement (in which CoZinCo sought recovery of costs relating only to the Kimmett task). This certainly could create the appearance that, as to the Kimmett task, the amendment was intended to bolster the Region's defense to CoZinCo's reimbursement claim. As explained in more detail below, the facts show that as of the date of the August 1995 SOW the Kimmett well task under the April 1994 UAO (as amended in November 1994) was no longer extant. The timing of the "amendment" could be seen as an attempt by the Region to revive the requirement.

Based on all of the foregoing facts, it is reasonable to conclude that the April 1994 UAO, as amended in November 1994, should be treated separately from the August 1995 UAO for purposes of the reimbursement provision of CERCLA § 106(b).[26]

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[26] As to the Graff task, although the Region approved of bottled water as the remedy under the April 1994 UAO and then expressly disallowed bottled water as a means of complying with the August 1995 SOW (which required a permanent remedy), we believe that the two remedies are reasonably related, since they had the same goal (provision of safe drinking water) and relied

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B. *"Completion" of the Required Actions*

As to "completion" of the required actions under the April 1994 UAO, the only real issue concerns the Kimmett well requirement.[27] The Region argues that this requirement was not completed, because CoZinCo never installed a well under any version of the order. As explained *supra*, CoZinCo contends that the Region withdrew the requirement at a meeting in April 1995.

While it is true that CoZinCo never installed a well, we disagree that the requirement was not "complete" for purposes of § 106(b). The Region never raised completion of the Kimmett well requirement as an issue when it was most incumbent on it to do so: when it denied CoZinCo's April 1995 notice of completion and when it responded to CoZinCo's May 1995 petition for reimbursement. In both of these documents the Region stated only that the Graff requirement was incomplete. The Region's failure to raise completion of the Kimmett well requirement as an issue at those points raises the strong inference that the Region either told CoZinCo that it was withdrawing the Kimmett well requirement, or that the Region had simply decided to treat the requirement as withdrawn or completed. This inference is supported by notes in the administrative record from a meeting between representatives from the Region and counsel for CoZinCo. These notes were recorded by Andrew Lee, an Assistant Regional Counsel for Region VIII, at a meeting on April 4, 1995. The notes state that "Rick" (Rick Baird, another Assistant Regional Counsel) "withdraws demand

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on the same factual predicate (contamination of drinking water). However, the fact that the new Graff task was reasonably related to the original UAO does not persuade us that under the totality of the circumstances in this case, CoZinCo should be deprived of its right to seek reimbursement under the original UAO. The most substantial actions required by the April 1994 UAO related to the Kimmett property and Petition 95-5 relates exclusively to the Kimmett property.

Further, our decision that the August 1995 SOW constituted a new order does not run afoul of the "clean-up first, litigate later" philosophy underlying CERCLA. There were no tasks outstanding under the original UAO following the August 1995 amendment (the Graff bottled water task having been completed, and the Kimmett well requirement having been withdrawn, as explained *infra*), and therefore a petition premised on the original order could not impede progress under that order.

[27] There is no dispute that the Graff bottled water requirement under the April 1994 UAO (as amended in November 1994) was complete. We emphasize that we again reject CoZinCo's claim (renewed at oral argument) that each separate task under a UAO is a "required action", the completion of which gives rise to a right to seek reimbursement. *See* Tr. At 48. As we explained in our order dismissing CoZinCo's May 1995 reimbursement petition, tasks ordered under a UAO may not be "bifurcated" for purposes of the CERCLA reimbursement provision. *See* Order Dismissing Petition (Sept. 11, 1995).

for drilling well based on 106." Handwritten Notes of Andrew Lee, U.S. EPA Region VIII, AR 361542, (Apr. 4, 1995).[28] The notes tend to corroborate CoZinCo's claim that the Region withdrew the Kimmett well requirement at a meeting on April 4, 1995.[29] This inference is further supported by the fact that the Region never took steps to enforce the Kimmett well requirement once a permit for a household use only well was obtained by even issuing a Notice of Violation. We note that had the Region enforced the requirement that CoZinCo install a household use only well pursuant to the April 1994 UAO (as amended in November 1994), the August SOW as it related to the Kimmett property would have been unnecessary.

At oral argument, counsel for the Region argued that, by the terms of the UAO, any modifications to the UAO had to be made in writing. Tr. at 12. Counsel suggested that the absence of such a writ-

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[28] When questioned at oral argument about CoZinCo's claim that the requirement had been withdrawn, counsel for the Region acknowledged that notes from an April 1995 meeting existed, but stated that neither the notes nor anything else in the record supported CoZinCo's claim. Tr. at 12-13. Counsel represented to the Board that "[t]here's no discussion of a withdrawal of domestic irrigation wells in the record, internally or externally, that I could find." *Id*. Counsel's statement appears to be inconsistent with the contents of the notes.

[29] In its comments on the Board's Preliminary Decision, the Region suggests that the Board has misinterpreted the April 4 meeting notes. In particular, the Region quotes the meeting notes as stating that Rick Baird "withdraws demand for drilling *domestic/irrigation* well based on 106." Region's Comments at 4 (emphasis in original). According to the Region:

> At the April 4 meeting, the site team informed CoZinCo that the Region would not require installation of a well for *irrigation purposes*, but still intended to pursue a replacement for the Kimmett's *household* use. The team also indicated that the Region would be willing to negotiate an AOC for this task, instead of continuing with the UAO. Counsel for CoZinCo indicated that the company would seriously consider this offer.

Id. at 4-5 (emphasis in original). For the following reasons, the Region's assertion in this regard fails to convince us that any changes to the Board's determination are necessary. First, the Region misquotes the notes from the April 4 meeting by adding the words "domestic/irrigation." As stated above, the notes state that "Rick" "withdraws demands for *drilling* well based on 106." (Emphasis added). The notes do not refer to a "domestic/irrigation" well. Second, it is unclear from the Region's explanation why the Region would offer CoZinCo the opportunity to install a household use well when CoZinCo already had a previously existing obligation to install such a well pursuant to the April 1994 UAO (as amended in November 1994). Finally, although the April 4 meeting notes confirm our conclusion that the Region had withdrawn the Kimmett well requirement, we would reach this same conclusion even without the notes for the reasons cited above, particularly the fact that the Region never raised completion of the Kimmett well requirement when it denied CoZinCo's April 1995 notice of completion and when it responded to CoZinCo's May 1995 petition for reimbursement.

ten modification contradicts CoZinCo's claim that the Kimmett well requirement was withdrawn. *Id*. We reject this contention under the facts of this case. While the absence of a written modification suggests that the Region failed to adhere to its procedures for formally modifying a UAO, the lack of a written modification does not undermine the strong inference that the Region did in fact withdraw the requirement and did not seek to enforce it. CoZinCo should not be prejudiced by the Region's failure to follow its own order.

Further, the Kimmett well requirement as contained in the April 1994 UAO would in any event be deemed complete as of the date the Region deleted the original SOW. At that point, the Region formally abandoned the irrigation purpose for which the requirement was ordered, and the requirement was therefore extinguished. The Kimmett well requirement contained in the August 1995 UAO has a different purpose (provision of a household water supply versus irrigation), and was based on a different factual predicate: the alleged contamination of the domestic spring, instead of alleged contamination of the irrigation spring.

The Board therefore concludes that under the specific facts presented by this case the August 1995 UAO created a separate UAO for purposes of section 106(b), and that all required actions under the April 1994 UAO were complete as of the date the August 1995 UAO became effective. Thus, Petition 95-5 was ripe when filed, and the Board may consider the issues raised therein separately from Petition 96-4.[30]

C. *"Compliance" with the April 1994 UAO*

The Region's main argument with respect to CoZinCo's compliance with the April 1994 UAO concerns CoZinCo's alleged failure to comply with the order (as amended) by installing a well at the Kimmett residence once a well permit was obtained.[31] The Region

[30] Because we have decided this issue on other grounds, it is not necessary for us to address CoZinCo's claim that the Region's deletion of the original SOW is akin to a "novation" of a contract. We note, however, that CoZinCo's claim is not well-supported by *Wausau*, the case that CoZinCo cites in support of a "novation" theory. The *Wausau* court noted only that familiar defenses to nonperformance of a contract (such as "[t]he doctrines of impossibility, impracticability, and frustration") could perhaps be considered implied terms in EPA unilateral orders, but the court did not decide that issue. *See Wausau*, 52 F.3d at 664. The court does not address a theory of "novation" as supporting a claim for compliance with a UAO.

[31] As noted earlier, the Region concedes that CoZinCo complied with the Graff bottled water task at all times until it was deferred to the State.

does not appear to have a bona fide claim that CoZinCo failed to comply with the order in other respects.[32] The Region's argument is largely repetitive of its claim that the Kimmett well requirement was not "complete." The Region specifically alleges that there is no "objective" reason for CoZinCo's failure to comply with the Kimmett well requirement under the April 1994 UAO from March 1995 (when the permit was received) through August 1995 (when the UAO was amended). *See* Tr. at 8.

For the same reasons that the Board concludes that the April 1994 UAO was complete with respect to the Kimmett well requirement, the Board also concludes that CoZinCo "complied" with the requirement for purposes of section 106(b). CoZinCo pursued the well permit process with the State, and the fact that the permit as finally issued did not fulfill the UAO's stated irrigation purpose was not the result of any non-compliance by CoZinCo. The final permit was not issued by the State until March 1995. The Region stated at oral argument that "seasonal" factors would likely have prevented installation of the well before May or June 1995. Tr. at 10. Following receipt of the permit, and prior to amendment of the UAO in August 1995, the Region never took steps to require installation of the well. In fact, as explained *supra*, the record supports a strong inference that the Region, having given up on the stated irrigation purpose of the well, withdrew the requirement or elected to treat the requirement as withdrawn. Under these circumstances, any claim that CoZinCo failed to "comply" with the Kimmett well requirement must be rejected.

D. *Merits of Petition 95-5*

1. *Liability*

CERCLA section 107(a), 42 U.S.C. § 9607(a), establishes four broad classes of parties liable for response actions under CERCLA. One such class consists of any person (including a corporation) who at the time of disposal owned or operated the facility at which a hazardous substance

[32] For example, the Region has suggested that there may have been better ways for CoZinCo to obtain a well permit from the State, but the Region never specifically articulates a better approach, and it has never contended that CoZinCo violated the UAO in this respect. Also, although the Region issued a Notice of Violation to CoZinCo alleging that the original work plan was deficient in some minor respects (such as being submitted one day late with the incorrect number of duplicates), CoZinCo disputed the Region's allegations, and the work plan was subsequently approved with revisions requested by the Region. The Region never pursued the alleged violations, and has not suggested in this proceeding that the alleged violations support a conclusion that CoZinCo did not "comply" with the April 1994 UAO.

was disposed. CERCLA § 107(a)(2); *In re Cyprus Amax Minerals Corp.*, 7 E.A.D. 434, 448 (EAB 1997). Another class, generally referred to as "generators," includes "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." CERCLA § 107(a)(3); *Cyprus Amax*, slip op. at 20. The Region issued the UAO to CoZinCo based on its conclusion that CoZinCo was an owner and operator of a facility at the Smeltertown Site, and/or was a generator of hazardous substances at the Site. April 1994 UAO at 7.

CoZinCo argues that it is not liable for replacement of the Kimmett irrigation well because it is not liable for the soils removal action that necessitated the replacement of vegetation, and the resulting need for irrigation of that vegetation.[33] Petition 95-5 at 4. As explained *supra*, Parts I.A.3 and 4, the Region undertook a soils removal action to remediate contaminated soil in some residential yards. CoZinCo argues that the soil contamination was due to smelter slag "which source is completely unrelated to CoZinCo." Petition No. 95-5 at 4. However, as detailed *supra*, Part I, there is ample evidence in the record to support a conclusion that a release of zinc from CoZinCo's facility caused elevated zinc levels in residential wells, including the Kimmett irrigation water supply.[34]

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[33] We note that CoZinCo has elected not to petition for reimbursement of its costs in providing alternative water supplies to the Graff residences.

[34] In its comments on the Board's Preliminary Decision, CoZinCo once again contends that it is not liable for zinc contamination on the Kimmett property because it was not the source of this contamination. Petitioner's Comments at 14. In support of this assertion, CoZinCo has submitted a new document containing several figures and tables which, according to CoZinCo, were compiled from the administrative record from Smeltertown site and establish that the source of zinc was "smelter slag materials, which were widely distributed throughout the area." *Id*. In response, the Region states that this document is a new exhibit that was compiled, in part, from documents not included in the administrative record for the operable unit (OU3 - the CoZinCo subsite) covered by the orders at issue here. The Region further contends that it has not had an opportunity to review the accuracy of the information in the exhibit. Region's Comments at 9. The Region therefore requests that the Board either decline to accept the "new exhibit" or provide the Region the opportunity to respond at a later date. *Id*. at 10. The Region further states that CoZinCo's description of the location of the smelter slag "seriously misrepresent[s] factual conditions at the site. * * * In fact, there have been no depositions of slag on the Kimmett property at all." *Id*. at 9-10.

We reject CoZinCo's attempt to introduce this new exhibit at this late date. And, in any event, it does not purport to show that CoZinCo did not at least contribute to the zinc contamination. There is ample evidence in the record to support the conclusion that zinc released from CoZinCo's facility resulted in elevated levels of zinc in residential wells, including the Kimmett irrigation water supply. Even if it were true that leachate from the smelter slag at the Smeltertown Site was an additional source of zinc, this would not absolve CoZinCo of liability. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (liability under CERCLA is generally joint and several).

The Region argues that whether CoZinCo is a liable party for the soils removal undertaken at the Kimmett property is irrelevant, because CoZinCo is plainly liable for groundwater contamination and the purpose of the UAO is to remedy contamination caused by the elevated zinc levels in the groundwater. We agree. We reject CoZinCo's argument that the purpose of the Kimmett well requirement was *solely* to provide a source of irrigation for vegetation that the Region planted as part of the soils removal action, and therefore that no liability should attach to CoZinCo. As the Action Memorandum for this removal action makes clear, residents affected by zinc-contaminated groundwater (including the Kimmetts) "cannot maintain a lawn, garden, hedges, or other plants and grasses. Some of these have been or will be planted by EPA as replacements to plantings removed during the October 1993 Removal Action and are required to protect EPA removal actions; therefore it is necessary to have a reliable water source installed." Action Memorandum Amendment, AR 361018, at 9 (May 13, 1994). The administrative record documents that beginning in the 1980s the Kimmetts experienced problems maintaining a garden and other vegetation using water from the irrigation spring. *Id*.; Letter from D. Kimmett to Region VIII, AR 361071 (May 15, 1994). The Kimmetts explained that "during 1987-1988 our lawn died, trees near the spring died and our garden soil was rendered too contaminated to grow vegetables." *Id*. From that point forward the Kimmetts discontinued use of their irrigation spring and had to pump water from the Arkansas River to provide a source of irrigation. Affidavit of D. Kimmett (July 19, 1994) (attached to AR 361285). Thus the need for the actions ordered by the UAO arose before, and extended beyond, the need to provide irrigation to the vegetation associated with the Region's 1993 soils removal action. We therefore reject CoZinCo's claim that it is not liable for replacement of the Kimmett irrigation well solely because it may not be liable for the soils removal action.[35]

[35] The Region has suggested in its briefs that CoZinCo could be a liable party for the soils removal, a suggestion that CoZinCo vigorously disputes. Because CoZinCo's liability is premised on the contamination of the groundwater and the issue of CoZinCo's liability for the soils removal is not before us, it is unnecessary for us to address this claim. We also do not address the Region's argument that even if the sole purpose of the UAO had been to irrigate the vegetation planted as part of the soils removal action, CoZinCo would still be liable because its contamination of the groundwater made necessary the development of an alternative irrigation water supply for that vegetation.

2. *Remedy Selection*

a. *"Illegal" Water Use*

CoZinCo's first claim that the Region arbitrarily and capriciously selected the remedy at issue (replacement of the Kimmett's irrigation water supply) is premised upon CoZinCo's contention that pursuant to Colorado water law, the Kimmetts had no right to use the irrigation spring on their property, and further had no right to use the domestic spring for irrigation purposes. Petition 95-5 at 5. As explained *supra*, the State ultimately rejected CoZinCo's efforts to obtain a permit that would allow irrigation of the property, and finally issued a well permit with the proviso that no irrigation use would be permitted.

While the Region's irrigation objective ultimately was not achieved, we cannot say that this fact supports a conclusion that the Region acted arbitrarily and capriciously at the time it ordered CoZinCo to provide an irrigation water supply to the Kimmetts. As we have previously explained, "[t]he arbitrary and capricious standard is not based on hindsight." *In re TH Agric. & Nutrition Co.*, 6 E.A.D. 555, 586 (EAB 1996). It is not apparent from the record that at the time the Region issued the UAO to CoZinCo, it could or should have predicted that the effort to replace the irrigation supply was futile. Although CoZinCo advised the Region after the April 1994 UAO was issued that it did not believe it could obtain irrigation rights for the Kimmetts, the record shows that the Kimmetts provided to the Region an opinion from a Colorado attorney that they did have State-law rights to the springs on their property. *See* Letter from Henry D. Worley to David R. Kimmett), AR 361285 (July 15, 1994) ("Worley letter"). In amending the UAO in November 1994 to carry forward the irrigation objective, the Region relied on this opinion as well as discussions with the Colorado State Engineer's office to justify continuation of the requirement. *See* Memorandum from Pete Stevenson, OSC, to Robin Shearer and Rick Baird, AR 361022 (Nov. 14, 1994). In addition, as previously noted, the Kimmetts had been pumping water for irrigation prior to issuance of the UAO. Indeed, the record indicates that the Kimmetts had been pumping water from 1977 to 1986, when irrigated plants began to die. Affidavit of D. Kimmett (July 19, 1994) (attached to AR 361285). Under these circumstances we do not think it was unreasonable for the Region to assume, at least initially, that the Kimmetts were in compliance with State law and had the legal right to use the water for irrigation. This assumption was reinforced by the above-mentioned Worley letter.

There clearly existed a difference of opinion between CoZinCo and the Region as to the status of the Kimmett's water rights under

State law, a difference of opinion which still exists. CoZinCo argues in its comments on the Preliminary Decision that the Kimmetts had insufficient water rights to irrigate their property, that the Region could have easily verified this "fact" with a single telephone call, and that the Region had the obligation to "conduct an adequate investigation or due diligence *in advance* to ensure that the proposed response action is in accordance with the law." Petitioner's Comments at 6 (emphasis in original); *see also* Petitioner's Comments at 10-12. The Region disputes that it has such a burden, "particularly when dealing with arcane areas of State law such as the water rights questions at issue here." Region's Comments at 7. Instead, the Region argues that:

> [W]hen completion of a CERCLA response requires obtaining permits from a State agency, it is reasonable for EPA to order the respondent to obtain the appropriate permits as part of the response action. If a permit is not available, the respondent can report this information to EPA and the Agency can re-evaluate the response action and make changes as needed.

Id. Further, the Region argues that even though the Kimmetts had not "adjudicated" their water right, although they had "appropriated" them, the Kimmetts could still have "augmented" their use "by replacing water taken by diversion with an equal or greater amount of water obtained from another source. C.R.S. 37-92-302[.]" *Id*. at 8. In fact, the Region had done just that to obtain rights to irrigate the vegetation planted during the soils removal action. *Id*.

It is unnecessary for us to resolve this legal difference of opinion. We believe that at the time the April 1994 UAO was issued, there was no reason for the Region to believe that the Kimmetts did not have State law rights to use the irrigation spring.[36] When the November 1994 amendment was issued, the Region had a basis (documented in the administrative record) to believe that the irrigation purpose underlying the UAO could be fulfilled. We therefore conclude that CoZinCo has not met its burden of showing that the Region arbitrarily and capriciously selected the remedy at issue, solely because the remedy was not attained.

[36] We reject CoZinCo's belated contention that, when faced with an imminent and substantial endangerment, the Region should have delayed issuing its administrative order until all State water rights issues could be explored.

b. *Imminent and Substantial Endangerment*

CoZinCo's second claim that the Region arbitrarily and capriciously selected the remedy at issue is premised on the argument that at the time the April 1994 UAO was issued, the most recent data for the Kimmett's irrigation well showed that the concentration of zinc was 10 mg/l, a level *below* the 11 mg/l PRG identified in the UAO. Petition 95-5 at 5. CoZinCo notes (as explained *supra*) that the Region erroneously transcribed the water quality data from micrograms to milligrams. *Id*. CoZinCo further claims that the Region arbitrarily and capriciously ordered it (in the November 1994 amendment) to replace the Kimmett's existing domestic water supply, when that supply had never shown levels of zinc above the 3 mg/l RAL identified in the November 1994 amendment. CoZinCo contends that the Region based this requirement on concerns that the Kimmett's domestic well produced an insufficient quantity of water to support irrigation, and that such concerns are beyond the scope of CERCLA. CoZinCo's arguments amount to a claim that there was no showing of "imminent and substantial endangerment" in support of the April 1994 UAO or November 1994 amendment.

"The Agency's authority to issue a clean-up order under CERCLA § 106(a) is limited to those situations where there has been a determination that 'there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.'" *Cyprus Amax*, slip op. at 24; *A&W Smelters*, 6 E.A.D. at 325. "This Board interprets an argument that there was no 'imminent and substantial endangerment' underlying a UAO as an argument that no response action should have been selected." *Cyprus Amax*, slip op. at 24; *A&W Smelters*, 6 E.A.D. at 325. Such claims will be evaluated under CERCLA section 106(b)(2)(D), which, in our view, "is broad enough to allow an argument that the Agency acted arbitrarily or capriciously in selecting a remedy where no remedy selection was authorized because the statutory prerequisites to the issuance of an order did not exist." *A&W Smelters*, 6 E.A.D. at 325. "Claims made under CERCLA section 106(b)(2)(D), by the terms of that statute, must be resolved on the administrative record established under CERCLA section 113(k), 42 U.S.C. § 9613(k), and 40 C.F.R. § 300.800 *et seq.*, to support the ordered response action." *Cyprus Amax*, slip op. at 24.

As to CoZinCo's first argument, the Region concedes that water quality data were mis-transcribed in the April 1994 UAO. However, the Region argues that the record nevertheless supports a finding of "imminent and substantial endangerment." The Region points out that

the data for September 1993 still showed high zinc concentrations (at 10 mg/l). Region's Response to Petition 95-5 at 21. The Region further argues that there need not be an actual exceedance of the PRG in order for a section 106 order to issue, "the crucial issue is the presence of an endangerment to human health." *Id*.

The "imminent and substantial endangerment" requirement has been addressed by the Board previously. In particular, the Board has explained that:

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

In re Sherwin Williams Co., 6 E.A.D. 199, 210-211 (EAB 1995).

In this instance, the administrative record amply supports a conclusion that zinc contamination emanating from CoZinCo's facility posed an imminent and substantial endangerment to public health and the environment. This is so, notwithstanding that the September 1993 irrigation well water quality data, referenced in the UAO,

showed a zinc level marginally below the 11 mg/l PRG initially selected by the Region.[37]

The data available for the Kimmett irrigation well when the UAO was issued and amended (set forth *supra* Part I) showed that from 1986 through 1993 zinc levels ranged from a high of 140 mg/l (estimated value) in 1987 to a low of 1.4 mg/l in May 1993. The level had increased to 7.3 mg/l when the water was sampled in June 1993, and risen again to 10 mg/l when sampled in September 1993. The Region's technical consultants concluded that due to seasonal variations in zinc concentrations, the zinc level in the Kimmett irrigation well might increase above 10 mg/l. AR 361058, at 3.

The factual bases for a finding of "imminent and substantial endangerment" were summarized in the amended action memorandum for the Kimmett response action:

> The conditions at the Site continue to present an imminent and substantial endangerment to human health and the environment, and meet the criteria for continuing a Removal Action under 40 CFR Section 300.415(b)(2) of the NCP.
>
> Zinc sulfate, a CERCLA hazardous substance, is the most significant groundwater contaminant in the area of the Site possessing domestic ground water supplies. Zinc concentrations have exceeded U.S. EPA drinking water standards or health advisory levels.
>
> * * * * * * *
>
> A spring, used for irrigation, contains enough zinc to kill vegetation and/or stunt growth in a variety of plant species. Literature sources indicate that 4 ppm of zinc in water kills lettuce.[38] The affected residences cannot maintain a lawn, garden, hedges, or other plants and grasses. Some of these have been or will be planted by EPA as replacements to plantings removed during the October 1993 Removal Action and are required to pro-

[37] CoZinCo's petition does not directly challenge the technical bases for the Region's selection of the 11 mg/l PRG or the 3 mg/l RAL.

[38] A concentration of zinc of 4 parts per million (4 ppm) correlates to 4 milligrams per liter (4 mg/l).

> tect EPA removal actions; therefore it is necessary to have a reliable water source installed.

Amended Action Memorandum, AR 361018, at 9 (May 13, 1994). As documented in the administrative record, as early as 1987, stressed vegetation was observed in the area surrounding the Kimmett's irrigation spring. *See* Analytical Results Report, CoZinCo, Salida, Colorado, Appendix A - EPA Site Inspection Report (Aug. 1987) (Exhibit 4 to EPA's Response to Petition for Reimbursement); *see also* Preliminary Assessment of CoZinCo, Salida, Colorado (May 7, 1987) (Exhibit 9 to EPA's Response to Petition for Reimbursement) (noting reports of stressed vegetation) . Further, a Site Characterization Study prepared by Water, Waste & Land, Inc. ("WWL") for the Salida Homeowners Group in July of 1987 ("Site Characterization Study"), concluded as follows:

> Based on the data collected by the residents of the area and WWL, it is believed that the CoZinCo facility is impacting soils and water in the vicinity. * * * Based on the reaction of the watercress in the springs and vegetation at the former location of the facility, it is likely that long term exposure to metals and other chemicals * * * will definitely have an adverse impact on plant growth.

Site Characterization Study at 52 (Exhibit 6 to EPA's Response to Petition for Reimbursement). In addition we note the evidence shows that the Kimmetts did indeed experience problems maintaining plants or a garden when the water was used for irrigation. *See* Letter from D. Kimmett to Region VIII, AR 361071 (May 15, 1994). The Kimmetts explained that "during 1987-1988 our lawn died, trees near the spring died and our garden soil was rendered too contaminated to grow vegetables." *Id*. In an affidavit given in July 1994, Mr. Kimmett reaffirmed that:

> In May 1977, I placed a pump in another spring on my property (Spring No. 2) [the irrigation spring] and begin [sic] pumping water into a 1-1/2 inch plastic pipe on my property. I used that water source to irrigate 1.5 acres of my 2.7 acre parcel. I continued to utilize this water for irrigation purposes until the plants irrigated from Spring No. 2 began to die. That was in 1986. I had the water from Spring No. 1 and Spring No. 2 tested for contaminants. The test revealed that the water from both springs was contaminated by zinc compounds.

Affidavit of D. Kimmett (July 19, 1994) (attached to AR 361285). Further, there is evidence in the record to support the Region's argument that the Kimmetts viewed the irrigation well as a potential source of drinking water. In a letter to the Region, Mr. Kimmett stated that the flow of water from the domestic well had decreased, and that:

> If the domestic spring continues to drop and not meet our water use needs we have no alternative but to consider using the irrigation springs [sic] for our source of domestic water. We have to consider using this spring as this is the only other significant source of water on our property.

Letter from D. Kimmett to Region VIII, AR 361283 (undated). The levels of zinc contamination in the irrigation well would have precluded this use.

On this record, we cannot say that the Region arbitrarily or capriciously determined that the zinc levels found in the Kimmett irrigation spring posed an imminent and substantial endangerment to human health or the environment. Upon a determination that a release of a hazardous substance poses an imminent and substantial endangerment, the Agency is authorized by statute to conduct any response action necessary (consistent with the National Contingency Plan), including a removal action, in order to protect the public health or welfare or the environment. CERCLA § 104(a)(1). A CERCLA "removal" can include "provision of alternative water supplies." *Id*. at § 101(23). "'Alternative water supplies' includes, *but is not limited to*, drinking water and household water supplies." *Id*. at § 101(34) (emphasis added).

The Region's action memorandum for the Kimmett irrigation well states that the conditions at the Site met the criteria for a removal action under the National Contingency Plan. Those criteria provide in pertinent part that:

> (2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this section:
>
> > (i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;

> (ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems.
>
> * * * * * * *
>
> (viii) Other situations or factors that may pose threats to public health or welfare of the United States or the environment.

40 C.F.R. § 300.415 (b)(2). As outlined above, the administrative record supports a conclusion that human populations and the environment were actually or potentially exposed to zinc-contaminated groundwater from the Kimmett's irrigation spring. Thus, it was not arbitrary for the Region to decide to initiate a removal action for the Kimmett irrigation spring. Further, as to the specific remedy selected, "[u]nder the arbitrary and capricious standard, 'the critical determination is *not* whether the Region selected the best possible response, or whether another response would also have been an acceptable solution; it is merely whether the Region acted arbitrarily in making its decision.'" *Cyprus Amax*, slip op. at 32 (quoting *TH Agric. & Nutrition*, 6 E.A.D. at 578). The record supports a conclusion that the Region's decision to require replacement of the Kimmett's irrigation well was not arbitrary.

We must also reject CoZinCo's claim that there was no showing of an imminent and substantial endangerment in support of the November 1994 amendment, because that amendment required CoZinCo to replace the Kimmett's uncontaminated domestic well. This claim mischaracterizes the underlying purpose of the amendment, as outlined at length *supra*, which was to provide a source of irrigation since the irrigation supply had shown excessive zinc levels. The Region explained that the new well would free up the existing domestic water supply for irrigation purposes, since the State denied the application to install a new irrigation well. For the same reasons we conclude that the Region's decision to require CoZinCo to install a new irrigation well was not arbitrary, we also conclude that its subsequent decision to require CoZinCo to install a new domestic well, with a view toward replacing the irrigation supply, was not arbitrary.[39]

[39] The Region also justified replacement of the domestic well on the basis that it "has exceeded the 3 mg/l Removal Action Level (RAL) for zinc in past sampling events. Since the RAL for zinc has been exceeded in this spring, the Kimmetts should be provided with an alternative source of drinking water." Memorandum from Pete Stevenson to Robin Shearer and Rick Baird, AR 361156, at 2 (Nov. 14, 1994). CoZinCo disputes that the zinc levels observed in the domestic well posed any threat to human health. Because we have concluded that the Region's remedy selection was not arbitrary since the primary purpose was to provide a source of irrigation water, it is unnecessary for us to address CoZinCo's argument.

For all of the foregoing reasons, we conclude that CoZinCo has not met its burden of showing that it is entitled to reimbursement for the response costs it incurred in responding to the April 1994 UAO, as amended in November 1994. CoZinCo's Petition No. 95-5 is therefore denied.

E. *Petition No. 96-4*

As explained *supra*, compliance with the requirements of a UAO is a threshold prerequisite to consideration of the merits of a petition for reimbursement. *Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995); *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 718-19 (EAB 1995). Based upon our review of the administrative record, we conclude that CoZinCo failed to comply with the August 1995 UAO because it failed to submit a work plan to the Region that was consistent with the requirements of the UAO. The rationale for our conclusion is as follows.

CoZinCo submitted its first draft work plan to the Region on September 18, 1995, within the time frame provided in the August 1995 UAO's SOW. The SOW required CoZinCo to consider alternatives for meeting the requirement in the SOW to provide permanent water supplies to certain residences. The SOW expressly provided that:

> Selection of means to meet this requirement is subject to approval by the EPA On-Scene coordinator. Respondent must submit a written Work Plan for such approval within thirty (30) days of the effective date of this amendment. *The work plan shall contain a detailed rationale for the particular selections, and a detailed discussion of implementation of the selections.*

August 1995 SOW at 1 (emphasis added). However, the work plan submitted by CoZinCo did not set forth proposed alternatives for providing permanent water supplies, but instead laid out CoZinCo's plan for conducting an analysis of alternatives, including obtaining modified access agreements to evaluate and sample existing water supplies.

On September 19, 1995, the day after submission of its work plan, CoZinCo submitted comments on the August 1995 UAO to the Region, raising detailed objections to the Region's issuance of the UAO. In summary, CoZinCo stated that:

> CoZinCo believes that EPA's removal action is unnecessary and does not address any actual or threatened

> endangerment to human health or the environment. CoZinCo also believes the Amended Order contradicts CoZinCo's obligations to comply with the ongoing RCRA corrective action program at the site. CoZinCo questions whether EPA's issuance of the Amended Order is contrary to EPA policy to issue a unilateral order for activities which are already being addressed in a RCRA corrective action order.

Comments on August 1995 UAO, AR 279472 (Sept. 19, 1995). In its comments, CoZinCo challenged the 3 mg/l RAL identified in the UAO as overly conservative, as well as the bases for the Region's conclusion that a removal action was necessary because the quality of the subject water supplies posed a threat to human health and the quantity of the Kimmett's water supply was insufficient. *Id*. CoZinCo also reasserted its claim that the Kimmetts were not authorized to use well water on their property. *Id*.

On October 3, 1995, the Region advised CoZinCo that it disapproved CoZinCo's work plan. The Region set forth a number of work plan revisions that it required CoZinCo to make, and instructed CoZinCo to submit a revised plan within 14 days.[40] In particular, the Region set forth specific elements to include in the revised work plan, including a detailed analysis of alternative water supplies (as required by the SOW), a selection of 2 to 4 alternatives to pursue further, and a rationale for selection of the alternatives. The Region also required CoZinCo to include in its work plan acceptable quality assurance plans (in light of CoZinCo's intention to conduct further sampling), and a definition of "acceptable [water] quality" as containing less than 3 mg/l zinc, and "acceptable quantity" as being at least 2.5 gallons per minute (gpm).

On October 19, 1995, CoZinCo submitted a second work plan for the Region's approval. The plan again did not include an actual analysis of alternatives, but set forth a more-detailed plan for analyzing alternatives. Further, with respect to acceptable water quality and quantity, the plan stated that:

> Acceptable water quality as defined in this Work Plan is that quality consistent with the criterion set forth in EPA's Baseline Risk Assessment for the Smeltertown

[40] In accordance with the terms of the UAO, failure to make requested work plan revisions is a violation of the UAO.

> Site, dated April 20, 1995. EPA's Amended Order identifies acceptable water quality as a concentration of zinc in water at the tap of 3 mg/l or greater [sic]. Acceptable water quantity is that quantity sufficient for all household uses, including, but not limited to, drinking, cooking, bathing, and washing of clothes. * * * The Colorado State Engineers office advised CoZinCo that it issues residential use well permits which specify quantities as low as 0.1 gallons per minute. Therefore, for the purposes of this Work Plan, CoZinCo proposes to use 0.1 gallons per minute as the acceptable minimum quantity.

CoZinCo's Second Draft Work Plan, AR 361235, at 2-2 (Oct. 19, 1995).

The Region rejected CoZinCo's second draft plan as "unacceptable," again because of failure to analyze alternative water supplies, or to include the definition of acceptable water quality/quantity required by the Region, as well as other reasons.[41] The Region issued a Notice of Violation to CoZinCo on November 6, 1995 ("1995 NOV"), and advised CoZinCo that it was taking over the response actions at the Kimmett and salvage yard residences, which the Region ultimately completed in early 1996. The Graff task was deferred to the State in October 1995.

CoZinCo contends that the rejection of its draft work plans does not amount to non-compliance with the UAO. CoZinCo alleges that it could not engage in an actual alternatives analysis, because the UAO prevented it from commencing any work until the work plan was approved. This contention is without merit. As the Region pointed out in responding to this same argument following rejection of the second draft work plan:

> *[E]very* recipient of a UAO is required to perform work prior to Work Plan approval — drafting a proposed Work Plan would be the most obvious example. * * * Second, I can think of no clearer example of EPA "approval" of work than specific instructions that work be performed. For example, EPA's letter [rejecting the first work plan] clearly requires inclusion of certain

[41] The Region says that it offered to meet with CoZinCo following rejection of the first work plan, to ensure that CoZinCo understood what was expected, but that CoZinCo declined to avail itself of this opportunity.

> elements in CoZinCo's second draft Work Plan, including an acceptable Quality Assurance Project Plan (QAPP), a specific definition of acceptable water quality, and an evaluation of response alternatives. It is axiomatic that a specific direction from EPA to perform actions constitutes EPA "approval" of those actions.

Letter to CoZinCo from Region VIII, AR 361245, at 1-2 (Nov. 29, 1995). CoZinCo also alleges that it could not possibly have conducted the required alternatives analysis in 14 days. However, the Region made it clear that it expected CoZinCo to rely on existing data in proposing alternatives, and not conduct extensive further studies. *See* Letter from Region VIII to CoZinCo, AR 279857, at 2 (Oct. 3, 1995). In addition, the record does not reflect that CoZinCo ever sought relief from the 14-day time frame.

CoZinCo has also contended that it was "confused" as to what was required of it, in light of ongoing negotiations with the State and EPA for the State to assume oversight of some of the tasks in the UAO under its ongoing RCRA activities. Specifically, the State asked EPA to defer the Graff obligation to it. The State also expressed its view that the response actions required in the August 1995 UAO as to the Kimmett and salvage yard residences were unnecessary to protect human health. However, the correspondence between EPA and the State makes clear that while EPA would defer the Graff obligation to the State, all remaining requirements under the UAO would remain in effect. *See* Letter from Region VIII to Colorado Department of Public Health, AR 279493 (Nov. 6, 1995). We cannot agree with CoZinCo's claim that the Region's correspondence created any uncertainty as to what was required of CoZinCo.

The August 1995 SOW makes plain that CoZinCo was required to provide a detailed discussion of alternative water supplies in its work plan. Any ambiguity in that regard was resolved when the Region rejected CoZinCo's first work plan. This requirement was a substantive component of the SOW. Further, the Region expressly required CoZinCo to include in its work plan specified definitions as to what constituted acceptable water quality and acceptable water quantity. CoZinCo's use of different definitions appears to be an effort to press its objections to the merits of the Region's decision to issue the UAO. However, the work plan was not the appropriate forum in which to do so. CERCLA's reimbursement scheme is designed to defer challenges to the merits of a UAO until after a cleanup has been accomplished. The purpose of the provision is to:

> [F]oster compliance with orders and promote expeditious cleanup, by allowing potentially responsible parties who agree to undertake cleanup to preserve their arguments concerning liability and the appropriateness of response action.

Findley Adhesives, 5 E.A.D. at 718 (quoting H.R. Rep. No. 99-253, pt. 1, at 83 (1985)).

Because compliance with a UAO is a prerequisite to reimbursement, CoZinCo acted at its peril when it elected to disregard the Region's explicit instructions in preparing its work plan. We cannot conclude that the Region erred in rejecting CoZinCo's non-compliant work plan, and electing to undertake the Kimmett and salvage yard removal activities itself, based upon CoZinCo's twice failing to provide the required alternatives discussion in its work plan, and failing to acceptably revise its work plan in other respects. Because compliance with the UAO is a necessary prerequisite to seeking reimbursement, Petition No. 96-4 must be denied.[42]

III. *CONCLUSION*

For the foregoing reasons, the Board's Final Decision is as follows. The Board concludes that CoZinCo's Petition 95-5 was ripe for consideration when it was filed, and that CoZinCo fulfilled the statutory prerequisites to consideration of that petition on the merits. On the merits, we find that CoZinCo failed to carry its burden of showing either that it was not liable for the groundwater contamination that prompted the April 1994 UAO (as amended in November 1994), or that the Region acted arbitrarily or capriciously in ordering CoZinCo to provide an alternative source of irrigation water at the Kimmett property. Petition 95-5 is therefore denied. As to Petition 96-4, the Board concludes that CoZinCo failed to fulfill a statutory prerequisite to consideration of that petition on the merits, because CoZinCo failed to comply with the August 1995 UAO. Thus, Petition 96-4 is also denied.

So ordered.

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[42] In commenting on the Board's Preliminary Decision, CoZinCo asserts that the Region's 1995 NOV "was nothing more than a calculated tactic by EPA to prevent CoZinCo from seeking reimbursement for its costs to comply with the 1995 UAO." Petitioner's Comments at 19. We find no support in the record for this assertion. On the contrary, for the reasons stated above, we find it more likely that the 1995 NOV was issued in response to CoZinCo's failure to comply with the UAO. CoZinCo's assertion in this regard is therefore rejected.