**TIGER SHIPYARD, INC.**

CERCLA § 106(b) Petition No. 96-3

**PRELIMINARY DECISION**

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April 24, 2001

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

***Opinion of the Board by Judge Stein:***

## I. *INTRODUCTION*

Tiger Shipyard, Inc. ("Tiger") seeks reimbursement, pursuant to section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(2), of costs it incurred in connection with a remedial action for the removal of drums containing hazardous substances from the bed of the Mississippi River adjacent to a barge cleaning and repair facility (the "Shipyard"), owned and operated by Tiger. The Shipyard is located on the Mississippi River just north of Port Allen, Louisiana.

On March 15, 1995, U.S. EPA Region VI (the "Region") issued to Tiger a unilateral administrative order ("UAO") pursuant to CERCLA section 106(a), 42 U.S.C. § 9606(a).[1] The UAO directed Tiger to locate and remove from the bed of the Mississippi River certain objects that had been identified by an earlier sonar scan of the riverbed and which were suspected to be drums containing hazardous substances. Tiger complied with the order, removing 35 drums from the river bottom. On April 9, 1996, Tiger timely filed a petition under CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(a), for reimbursement of $1,402,180.65, the costs it contends it incurred in complying with the UAO.

Under CERCLA § 106(b)(2)(A), parties who have complied with a section 106 order to respond to a release or threatened release of a hazardous substance may be eligible for reimbursement from the Hazardous Substance Superfund for reasonable costs incurred.[2]

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[1]Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), authorizes the President to issue orders "necessary to protect public health and welfare and the environment" when "an actual or threatened release of a hazardous substance from a facility" poses "an imminent and substantial endangerment to the public health or welfare or the environment." The President has delegated the authority to issue such orders to the EPA. *See* Executive Order No. 12,580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987); *see also* Ex. Order No. 13,016 (Aug. 28, 1996), 61 Fed. Reg. 45,871 (1996) (delegating such authority to certain other federal agencies).

[2]A petitioner must also meet certain statutory prerequisites for obtaining review of the merits of a reimbursement petition.

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To obtain reimbursement, a petitioner bears the burden of proof "that it is not liable for response costs under section 107(a)." CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). Section 107(a) establishes four categories of persons who are liable for response costs, subject only to certain defenses set forth in section 107(b). CERCLA § 107(a), 42 U.S.C. § 9607(a). If a petitioner fails to demonstrate that it is not liable, the statute nevertheless allows reimbursement to the extent that the petitioner "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).

In the present case, Tiger argued in its petition (1) that it is not within any of the categories of persons who are liable for response costs (*see* CERCLA § 106(b) Reimbursement Petition at 22-40 (the "Petition")), (2) that the decision selecting the response action ordered in the UAO was arbitrary and capricious

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[2](...continued)
These are: 1) that the petitioner received and complied with an administrative order issued under CERCLA § 106(a); 2) the petitioner completed the required action; 3) the petitioner submitted a petition for reimbursement within 60 days after completing the required action. CERCLA § 106(b), 42 U.S.C. § 9606(b). There is no dispute in the present case that Tiger has satisfied these prerequisites for obtaining review of its petition. U.S. Environmental Protection Agency Region VI Response to Petitioner's CERCLA 106(B) Reimbursement Petition at 10 ("Region's Response").

(*id.* at 52-62), and (3) that, even if Tiger is found liable, it nevertheless is entitled to reimbursement of a portion of its response costs on the alleged grounds that the liability is divisible (*id.* at 63-66). On the question of liability under section 107(a), Tiger argues, as its central factual issue, that it did not dispose of any drums containing hazardous materials at the "facility," which the parties have agreed is the bed of the Mississippi River. Instead, Tiger argues both that there is insufficient proof that the drums retrieved from the bed of the Mississippi River contained hazardous substances and that any drums containing hazardous material were deposited there by other persons, including the prior owner of the Shipyard.

As will be explained in greater detail below, the Board ordered that an evidentiary hearing be conducted to allow the parties to present their evidence pertaining to liability and the statutory defenses raised by Tiger that it is an "innocent landowner" and that the disposal was caused by a third party. The Board also requested that the hearing officer prepare a recommended decision on the questions of liability (but not on Tiger's arguments that the liability is divisible nor on Tiger's argument that issuance of the UAO was arbitrary and capricious). The Board designated Evan L. Pearson, the Regional Judicial Officer for U.S. EPA Region VI, to serve as the hearing officer

(the "Presiding Officer") for the evidentiary hearing, which was conducted in April 1999. The Presiding Officer issued his recommended decision in July 1999 (the "Recommended Decision") and, pursuant to an order of the Board, the parties subsequently filed comments on the Presiding Officer's Recommended Decision.

Before the Board for decision at this time are (1) the question of liability under section 107(a) of CERCLA, (2) the question of whether the Region acted arbitrarily and capriciously in issuing the UAO; and (3) Tiger's argument that the response costs can be divided. For the following reasons, it is the preliminary decision of this Board that the first of these issues is dispositive of Tiger's entitlement to reimbursement of its reasonable costs incurred in complying with the UAO. Because we conclude, as explained below, that Tiger has sustained its burden of proof that it is not liable under section 107(a) of CERCLA, we do not reach the second and third issues identified above.

The analysis set forth below represents the Board's preliminary conclusions on the question of liability. Consistent with the Board's practice, the parties shall have an opportunity to comment on this preliminary decision. If, after reviewing the parties' comments, the Board's ultimate conclusion remains that Tiger has shown that it is not liable, then the Board will

establish a schedule for Tiger to present its evidence regarding the reasonableness of its claimed expenses and for the Region to respond thereto. *See Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions* at 9-10 (Oct. 9, 1996)("1996 Guidance").

## **II.** *BACKGROUND*

This section describes the factual and procedural background of the case, including Tiger's operating history, allegations of illegal dumping and EPA's investigation, the issuance of the UAO and Tiger's compliance therewith. The factual information described in this section is relevant to the discussion section which follows. In particular, this information is relevant to Tiger's arguments that there was insufficient proof that hazardous substances were found at the facility and its argument that, in any event, it was not the party who disposed of hazardous substances at the facility.

### **A.** *Factual Background*

#### **1.** *Tiger's Operating History*

Tiger operated the Shipyard between November 21, 1990 and October 1996. During this time, among other activities, Tiger

cleaned river barges at the Shipyard.[3] Tiger cleaned barges that primarily had been used to transport liquid chemicals and petroleum products.

Prior to the commencement of Tiger's operations at the Shipyard, Greenville Johnny of Louisiana, Inc. ("Greenville Johnny") conducted similar operations at the same location. During both Greenville Johnny's operations and Tiger's operations, the Shipyard was divided into two sectors: a barge cleaning yard, which comprised the up-river side of the site, and a barge repair maintenance yard, which comprised the down-river side of the site. Joint Ex. 1, ¶¶ 2, 4.

When Tiger began operations at the Shipyard, it acquired some of Greenville Johnny's barges, and it also added barges to the cleaning portion of the site.[4] Tiger made three principal changes to Greenville Johnny's configuration of the site, the first of which is relevant to this proceeding. Approximately one year after it took over operations from Greenville Johnny in November 1991, Tiger installed a boiler barge and moved two deck

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[3]The barge cleaning portion of the Shipyard has subsequently been moved to a different location. Transcript of Hearing held on April 26-30, 1999 at 391 (hereinafter "Tr. at __").

[4]The Region has not alleged that Tiger is a successor to Greenville Johnny such that it would have liability for Greenville Johnny's actions.

barges in the cleaning portion of the Shipyard. Tr. at 393-395, 448-542; Tiger Ex. 30, ¶ 32. As will be discussed more fully below, Tiger argues that since some of the drums were found under the relocated barges, it is most probable that those drums were deposited on the riverbed by Greenville Johnny.

Tiger cleaned barges that carried, among other things, benzene, BTX mix (benzene, toluene and xylene), chloroform, styrene, gasoline, diesel, 1,1,1-trichloromethane, toluene, methyl ethyl ketone (MEK), lube oil, cumene, and ethylene dichloride. Tiger Ex. 9, tbl. 1; Region Ex. 32, 38.

The barges came into the site commercially empty, although they may have contained as much as a few hundred gallons of cargo in the sumps and the barge piping located within the barge compartment or tanks. Tiger's cleaning process consisted of one or more of the following: stripping, venting, butterworthing,[5] and hand washing. Tr. at 407-410; Tiger Ex. 6 at 12; Tiger Ex. 9; Tiger Ex. 18, ¶¶ 8-10.

Wash waters generated in the cleaning process were pumped to vacuum tanks, treated, and discharged to the Mississippi River

[5]Butterworthing refers to washing using a Butterworth power washer.

pursuant to a state water discharge permit. Any rust or scale generated during the cleaning process, including accumulated rust or scale from the vacuum tanks, was placed into drums. These drums would contain hazardous substances as a result of the barge cleaning operation. Tiger alleges that all of the drums were moved onshore, consolidated into a dumpster, and then disposed of offsite. Tr. at 415-416: Tiger Ex. 18 ¶ 11; Tiger Ex. 30 ¶¶ 7-12; Region Ex. 15. In contrast, the Region contends that at least some of the drums were dumped by Tiger into the Mississippi River.

**2.** *Allegations of Illegal Dumping and EPA Investigation*

In 1994, several former Tiger employees made allegations to EPA that drums containing rust and scale from the barge cleaning operations were dumped into the Mississippi River. Tr. at 939; Region Ex. 15. Thereafter, EPA undertook a criminal investigation of the alleged illegal disposal activities at the Tiger Shipyard.

On July 26, 1994, EPA's Criminal Investigation Division (EPA CID) obtained a warrant to search Tiger's Shipyard as part of an investigation of alleged illegal disposal activities. The application for the warrant was supported by an affidavit from

Special Agent James F. Mowatt, III, of EPA CID ("Mowatt Affidavit"). In his affidavit, Special Agent Mowatt stated that former Tiger employees informed him that they either observed or participated in dumping drums that contained rust, scale and residues from barge cleaning operations into the Mississippi River.

The Region executed the criminal search warrant in late July 1994. The Region took samples from drums, barge compartments, river sediments, and soil found at or near the Shipyard. The Region's analytical results revealed that six drums containing rust and scale (three drums found near the parking lot and three drums located on the LTC-66 Barge) contained hazardous waste.[6] Region's Ex. 15; Tiger Ex. 70.[7] The Region also conducted vector

[6]The Region's evidence stated that the material in the drums was hazardous waste within the meaning of section 3001 of the Solid Waste Disposal Act, 42 U.S.C. § 6921, as amended by the Resource Conservation and Recovery Act ("RCRA").

[7]Tiger claims that prior to this waste being shipped off site for disposal, its analysis revealed that the waste was nonhazardous. Tiger's comments to EPA's Proposed Findings of Fact and Conclusions of Law at 4. The Presiding Officer recommended that we conclude that the difference probably results from where the samples were collected. The Region collected its samples from each individual drum. Region's Ex. 15. Tiger's practice was to collect its samples from a dumpster where the contents of numerous drums had been placed. Tr. at 479. The Presiding Officer concluded that in all likelihood, the hazardous wastes in the six drums were not detected in Tiger's samples due to dilution by other material placed in the dumpster prior to disposal. Tiger's comments on the Recommended Decision did not

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and side scan sonar surveys of the Mississippi River bottom in the vicinity of the Tiger Shipyard. Region Ex. 10. The sonar survey identified approximately 23 hard targets and two hard target areas on the riverbed immediately adjacent to the Tiger barge cleaning plant. Tiger Ex. 3 § 2.2. The 23 "hard targets" were believed to be drums, and the two "hard target areas" were believed to be piles of drums. UAO ¶ 26.

**3.** *Issuance of the Unilateral Administrative Order (UAO)*

Soon after the search, EPA CID notified the Region VI Superfund Division "of the conditions at the Tiger facility." U.S. Environmental Protection Agency Region VI Response to Petitioner's CERCLA 106(B) Reimbursement Petition at 4 ("Region's Response"). "Based on the information in Agent Mowatt's affidavit, the test results showing that drums containing rust and scale also contained hazardous substances, and the sonar scans, the [Region VI] Superfund Division prepared and signed an Action Memorandum" on November 29, 1994 (four months after the search warrant was executed). Response at 4. The action memorandum explained that:

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[7](...continued)
identify any alleged errors in this proposed analysis. Having reviewed the record of this case, we conclude that the six drums found by EPA pursuant to the criminal search warrant in fact contained hazardous substances.

> Former employees of Tiger have made statements that suggested that numerous drums containing hazardous substances including benzene, caustic soda, glycol, jet fuel, toluene, styrene and other wastes, were dumped in various locations within the Mississippi River in the immediate vicinity of the docks, piers and barges of the Tiger Marine facility. The statements of those former employees indicated that the residues from barges cleaned by Tiger, including some residues from some or all of the wastes listed in the preceding sentence, were placed in barrels along with rust and scale from barge cleaning and disposed of by dumping the drums into the Mississippi River from Tiger barges. The information in this paragraph is consistent with the sonar investigations conducted by ERT.

Action Memorandum from E. Wallace Cooper, On-Scene Coordinator, to Russell F. Rhoades, Division Director, Environmental Services Division, at 3 (Nov. 29, 1994). The action memorandum selected a response that would require Tiger to retrieve from the Mississippi River bed the drums tentatively identified by the sonar and to identify the contents of those drums so that proper disposal could occur.

The Region informed Tiger of its tentative decision and attempted to negotiate with Tiger regarding an appropriate cleanup order. After attempts to negotiate an administrative order on consent were unsuccessful, the Region issued the UAO to Tiger on March 15, 1995, directing Tiger to find and remove the suspected drums. Tiger Ex. 1. The Region's sonar results were used in planning the scope of the removal action. Tr. at 582-583.

**4.** *Tiger's Compliance with the UAO*

Between August 3 and September 10, 1995, Tiger performed the removal operation. The dive area was a 100 foot by 540 foot area around Tiger's cleaning facility. Tr. at 586; Tiger Ex. 56. The dive area was divided into grid sectors with 10 foot by 10 foot dimensions. The grids were labeled on one axis as A, B, C, etc., and numbered on the other axis as 1, 2, 3, etc. Thus, if a drum were found in grid D.4, it would be identified as Drum D4-1. If a second drum were found in grid D.4, it would be identified as Drum D4-2. Tr. at 440-442; Tiger Ex. 56.

Fifty (50) drums were located as a result of the diving operation. However, fifteen of the drums were in such bad condition that they could not be recovered. Region's Ex. 12 at 2. Tiger retrieved 35 drums from the dive area. The recovered drums were each encased in overpack drums and sealed until it was time to sample the drums' contents. Tr. at 153-154.

The drums were sampled on September 19 and 20, 1995. Tr. at 83-90. The main purpose of the sampling was to determine whether the recovered drums contained characteristic hazardous waste for

the purpose of determining the required disposal procedure. Tiger Ex. 3 app. B at 8-1 to 8-2. Samples were taken from each of the 35 drums. The Region selected 13 drums to receive split samples (D27-1, D27-2, D55-1, D55-2, D55-3, D55-4, D55-5, G29-1, G31-1,[8] H32-1, I26-1, J17-1, and J48-1). Tiger Ex. 4 at 2-3 to 2-5.[9]

Tiger analyzed its samples for hazardous waste characteristics of ignitability, corrosivity, reactivity, and toxicity characteristic leaching procedure (TCLP) for metals, volatile organic compounds ("VOCs") and semivolatile organic compounds (SVOCs). Tiger's analytical results under the TCLP protocol showed that samples from eight of the drums (C5-1, D55-1, D55-2, D55-3, D55-4, D55-5, I26-1, and J17-1) exceeded the TCLP regulatory limits for certain VOCs.[10] Tiger Ex. 4 at 2-5 to 2-8, 3-2, tbls. 4, 6, 7, 8; 40 C.F.R. § 261.24. Four other drums

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[8]Samples G31-1A and G31-1B represent the contents of the container and an absorbent sock. Tiger Ex. 4 at 2-5.

[9]Although samples were taken from each drum, some of the samples were composited prior to analysis. Tiger Ex. 4 at 2-5 to 2-8. Samples from the 13 drums were collected on September 19, 1995, and samples of the remaining drums were collected on September 20, 1995. Tiger Ex. 5 at 2-11 to 2-12.

[10]TCLP is an analytical method for determining whether a substance is a hazardous waste for purposes of RCRA. 40 C.F.R. pt. 261, app. II. By definition, RCRA hazardous waste is a hazardous substance within the meaning of CERCLA. CERCLA § 101(14), 42 U.S.C. § 9601(14).

(D27-2, F35-1, F40-1 and J48-1) were found to contain hazardous substances, but below the TCLP standards. Tiger Ex. 4, tbls. 4, 6, 7, 8. Thus, Tiger's sampling results demonstrated that 12 of the 35 recovered drums contained hazardous substances.

Rather than conducting the same tests as Tiger, the Region analyzed its samples for total VOCs and SVOCs. The Region's results confirmed that Drums D27-2, D55-1, D55-2, D55-3, D55-5, I26-1 and J17-1 contained hazardous substances. EPA did not detect any hazardous substances in Drum J48-1. Region's Ex 16. On September 21, 1995, the drums were removed from their overpack containers and the exterior of the drums were examined. Tr. at 90-91. All of the drums were disposed of at a later date. Tiger Ex. 5, app. B. As required by the UAO, Tiger submitted a Final Report to EPA, contending that it had fully complied with all requirements of the UAO. Tiger Ex. 5.

**B.** *Procedural Background*

**1.** *Tiger's Petition and the Region's Response*

As noted in the Introduction, on April 9, 1996, Tiger filed a petition for reimbursement, asserting that Tiger is entitled to reimbursement because Tiger is not a liable party under CERCLA § 107(a), and because the Region allegedly acted arbitrarily and

capriciously in selecting the response action contained in the UAO, among other arguments. In its Petition, Tiger argued both that there is insufficient evidence that "Hazardous Substances" were present in the drums and that Tiger is not within any of the categories of liable parties under CERCLA § 107(a). In particular, Tiger argued that it is not liable under CERCLA § 107(a)(1) or (2) because it is neither an owner nor an operator of the facility which, in this case, is the bottom of the Mississippi River. Tiger also argued that it is not liable under CERCLA § 107(a)(3) as a generator because it did not "arrange" for drums containing hazardous substances to be dumped into the Mississippi River.[11] Lastly, Tiger contended that it is not liable as a "transporter" under CERCLA § 107(a)(4) because it did not dump drums containing hazardous substances into the Mississippi River.

To support its claim that it is not liable, Tiger initially provided, among other documents, eleven affidavits from Tiger employees (providing information about Tiger's barge cleaning operations, Tiger's disposal policies and practices, and purported inconsistences between Tiger's operations and the recovered drums) and from several experts (explaining that two of

[11]Persons liable under CERCLA § 107(a)(3) are sometimes referred to as "generators" or as "arrangers."

the hazardous substances found in the recovered drums are routinely found in Mississippi River sediments, another explaining that the corrosion on the recovered drums is most likely five or more years old, which would predate Tiger's operations at that location, and another explaining that the river's currents and the geography of the area would cause drums floating down river to become lodged near Tiger's facility).

Finally, Tiger argued in its Petition that, if it is liable, the liability should be apportioned based upon a drum-by-drum division of the costs of retrieval and analysis. Petition at 63. Tiger argued that the costs can be reasonably apportioned based on any responsibility Tiger may have as to each drum. *Id.*

In its response to Tiger's Petition,[12] the Region stipulated that Tiger complied with the UAO, that it completed the required action and that the Petition was timely filed after the completion of the required action. The Region also agreed that

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[12]Shortly after the Petition was filed, the Region moved for a stay of this case pending the outcome of a then-ongoing EPA criminal investigation of Tiger. *See* Motion for Stay Pending Criminal Proceeding or, in the Alternative, Request for Additional Time to Respond (June 4, 1996). The Board granted several extensions of time for the Region to file its Response, which was ultimately filed on April 25, 1997. Subsequently, the Region again moved for a stay of this case, which was granted based on the information provided in the motion. *See infra* note 13.

Tiger is not an owner of the facility and that the facility for purposes of CERCLA reimbursement and liability is the Mississippi River bed adjacent to Tiger's shipyard. However, the Region argued that Tiger is liable for the response costs as a generator or arranger under CERCLA § 107(a)(3), as a transporter under CERCLA § 107(a)(4), and as an operator of the "facility" where the hazardous substances have been deposited – the bed of the Mississippi River. The Region argued that Tiger has the status of an operator because "Tiger had the authority to control the disposal of its waste into the area of the Mississippi River that is now the CERCLA facility." Region's Response at 22. The Region also argued that there is sufficient evidence regarding the presence of hazardous substances in the drums removed by Tiger from the river bed.

To support its contention that Tiger is liable, the Region originally relied upon the Mowatt Affidavit, which had been prepared to support issuance of the criminal search warrant. However, in response to a motion by Tiger to strike the Mowatt Affidavit, the Region withdrew such reliance, and instead claimed it would rely on summaries of conversations with former Tiger employees prepared by EPA investigators (the summaries are known collectively as "Exhibit 1"). *See* EPA Region VI Opposition to Tiger's Motion to Strike Exhibit Seven, Ex. 1 (Jan. 12, 1998)

(Copy of Memorandum of Interview). Then, in response to Tiger's motion to strike Exhibit 1, the Region again withdrew its reliance upon that evidence, indicating it would now rely upon declarations from former Tiger employees. *See* EPA Region VI's Response to Tiger's Request for an Evidentiary Hearing, Exs. 1, 2 (Mar. 4, 1998). Two such declarations were filed with this Board: one by Mr. Troy Courville (the "Courville Declaration") and one by Mr. Thomas J. Firman (the "Firman Declaration").

**2.** *The Evidentiary Hearing and the Presiding Officer's Recommended Decision*

In April 1998, we entered an order scheduling an evidentiary hearing to be held before the Presiding Officer to provide the parties with an opportunity to present their evidence regarding whether Tiger is a liable party under CERCLA § 107(a)(2), (3), and (4), and whether Tiger has established any of its claimed statutory defenses. The Board's Order also directed the Presiding Officer to make recommended findings on these issues.[13]

[13]On May 13, 1998, the Region moved for a stay of the evidentiary hearing pending the resolution of criminal indictments brought by the State of Louisiana, in conjunction with the Region, against Tiger and seven of its employees. The Board issued a stay by Order dated May 21, 1998. Upon being notified that the criminal proceeding was concluded by a plea agreement, the Board issued an order dated January 6, 1999, lifting the stay and directing that the evidentiary hearing

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The Presiding Officer held the evidentiary hearing on April 26 to 30, 1999, in Baton Rouge, Louisiana. Tiger called 18 witnesses, and EPA called 11 witnesses. Eighty exhibits were received into evidence and three sets of joint stipulations were reached and admitted into evidence. The transcript of the hearing consists of 1,202 pages. After considering the parties' post-hearing briefs and proposed findings of fact and conclusions of law, the Presiding Officer filed his Recommended Decision with this Board on July 27, 1999, in which he recommends that we find Tiger liable under CERCLA § 107. The Presiding Officer made this recommendation based on his conclusion that Tiger failed to sustain its burden of proving that it did not dump three drums (identified as D27-2, F35-1 and F40-1) into the Mississippi River.[14] Both Tiger and the Region have filed comments that dispute the correctness of various aspects of the Presiding

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[13](...continued)
proceedings be resumed. (The plea agreement, which was signed by the EPA and which provided for dismissal of all but one of the counts of the criminal complaint and entry of a "no contest" plea to the remaining count, expressly stated that "[n]othing in this agreement shall in any way limit Tiger Shipyard Inc. from pursuing response costs * * * from or against the federal Superfund * * *." Plea Agreement at 2 ¶ C (Sept. 25, 1998).)

[14]The Presiding Officer, however, found that Tiger did sustain its burden of proof with respect to nine other drums containing hazardous substances. (As noted above in Part II.A.4, only 12 of the 35 drums were identified by Tiger's data, and found by the Presiding Officer, to contain hazardous substances.)

Officer's Recommended Decision. We discuss the parties' arguments below.

## **III.** *DISCUSSION*

Our analysis of the Presiding Officer's recommendations and the parties' comments will proceed in the following order: First, in Part III.A, we will discuss as a preliminary matter the Region's argument that its case was substantially hampered by the Presiding Officer's decision improperly denying the issuance of a subpoena compelling Mr. Thomas J. Firman to testify at the hearing and by the Presiding Officer's exclusion of the Firman Declaration from evidence in this case.

Next, in Part III.B, we will discuss the legal standards governing reimbursement under section 106(b)(2)(C) and, in particular, the standards governing liability under section 107(a), and we will summarize the analytical framework and principal conclusions stated in the Presiding Officer's Recommended Decision. In this part of our discussion, we explain that we will not need to fully analyze all of the issues addressed by the Presiding Officer and raised in the parties' comments, but instead that our analysis of the evidence pertaining to whether Tiger is within one of the four categories

of liable parties under section 107(a) is dispositive of Tiger's entitlement to recovery of its reasonable response costs.

In Part III.C, we consider Tiger's argument that the Presiding Officer gave too little weight to the testimony of Tiger's employees regarding their observations of drum handling at the Shipyard. In Part III.D, we consider Tiger's evidence pertaining to drums D27-2, F35-1 and F40-1. Finally, in Part III.E, we consider the Region's arguments and we explain our conclusions based on the totality of evidence in the record.

**A.** *The Denial of a Subpoena for Mr. Firman and Exclusion of the Firman Declaration*

**1.** *Background*

On April 20, 1999, just six days before the evidentiary hearing was scheduled to commence, the Region filed a motion with the Presiding Officer requesting that he issue a subpoena to compel four witnesses, including Mr. Firman, to testify at the hearing.[15] The Region's motion did not identify any legal

[15]The other three witnesses named in the Region's motion were Mr. Courville, Mr. Eric R. Minor, and Mr. Otto J. Zuelke, III. Both Mr. Courville and Mr. Zuelke testified voluntarily at the hearing, and the Region has not explained the absence of Mr. Minor or argued that it was prejudiced by the denial of its request for a subpoena of Mr. Minor.

authority upon which the motion was based;[16] it merely identified the persons[17] to whom the subpoenas should be issued and described the facts upon which the witnesses would be able to testify. On April 21, 1999, the day after the Region filed its motion, the Presiding Officer issued his order denying the Region's motion.

In his order, the Presiding Officer explained that the Agency's rules of administrative practice at 40 C.F.R. § 22.04(c)(9) only permit a presiding officer to issue subpoenas that are authorized under the statute governing the particular proceeding.[18] The Presiding Officer then discussed the authority granted under various sections of CERCLA, the statute that governs this proceeding, and concluded that he was unable to identify any authority for issuing an administrative subpoena in connection with a petition under CERCLA § 106. The Presiding Officer, however, stated that "[i]f EPA is able to bring to the Presiding Officer's attention any other provision of CERCLA which

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[16]The form subpoena attached to the Region's motion did, however, refer to authority under CERCLA § 122(e)(3).

[17]The Region's comments on the Recommended Decision focus solely on the alleged prejudice to it of the failure to obtain a subpoena compelling the testimony of Mr. Firman.

[18]In our order scheduling the evidentiary hearing, we instructed the Presiding Officer to use 40 C.F.R. part 22 as guidance in conducting the hearing. *See infra* Part III.A.2.

would authorize the issuance of subpoenas in this instance, the Presiding Officer will reconsider its decision." Order Denying EPA's Motion for Subpoenas at 4 (RJO, Apr. 21, 1999).

On Friday, April 23, 1999, the Region filed a motion for reconsideration in which the Region argued that CERCLA § 122(e)(3)(B) authorizes issuance of the requested subpoenas. At the commencement of the hearing on April 26, 1999, the Presiding Officer ruled from the bench denying the Region's motion for reconsideration.

Thereafter, during the hearing, the Region sought to question an EPA criminal investigator, Mr. Ricky Langlois, regarding statements made to him by Mr. Firman and other former employees of Tiger, tr. 939-40, 946-48, 950-51, and to introduce into evidence a signed declaration made by Mr. Firman. Tr. at 953-54. Tiger objected that Mr. Langlois' testimony regarding Mr. Firman's alleged statements was hearsay that should not be admitted in this proceeding. Tr. at 940.[19] The Presiding Officer concluded that such testimony should be excluded on the grounds that, in this particular case, "the reliability needs to

[19]As explained below in Part III.A.2 & 4, we directed the Presiding Officer to look for guidance to 40 C.F.R. part 22, which provides that, in appropriate circumstances, hearsay evidence may be admissible in proceedings governed by those rules. *See* 40 C.F.R. §22.22.

be questioned under cross-examination." Tr. at 947. The Presiding Officer also stated that, although Mr. Firman is an unavailable witness, nevertheless his declaration would not be admitted on the grounds that "the [B]oard has basically determined that the credibility of these two witnesses [Mr. Firman and Mr. Courville] in particular need to be tested through an evidentiary hearing through cross-examination and since this person is not here and offering his affidavit into evidence as being unavailable would, in essence, circumvent the entire process * * *." Tr. at 962.

In its comments on the Recommended Decision, the Region argues that the denial of its request to subpoena Mr. Firman was error, which "substantially hampered EPA in presenting its case." Region's Comments at 19-20. The Region also argues in the alternative that the Presiding Officer erred by denying admission of the Firman Declaration. *Id.* at 20. For the following reasons, we conclude that the Region has not shown that we should reverse the Presiding Officer's rulings denying issuance of the subpoena and excluding the Firman Declaration from evidence.

**2.** *Legal Standard*

In our order scheduling the evidentiary hearing, we stated that "[i]n conducting the prehearing proceedings and the evidentiary hearing, the Presiding Officer is authorized to make any necessary decisions including decisions regarding the admission of evidence." Order Scheduling Evidentiary Hearing at 2 (EAB, Apr. 20, 1998); *see also* Order Granting, in Part, Request for an Evidentiary Hearing and Denying Motions to Strike at 14 (EAB, Apr. 2, 1998).[20] We also instructed the Presiding Officer to "look for guidance to the Consolidated Rules of Practice set forth at 40 C.F.R. Part 22." Order Scheduling Evidentiary Hearing at 2 (EAB, Apr. 20, 1998).

Under the Consolidated Rules of Practice, we have traditionally granted considerable deference to a presiding officer's determinations regarding the admission of evidence and

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[20]In denying a subsequent request by Tiger for this Board to clarify one of the Presiding Officer's rulings, we reiterated that the parties must look to the Presiding Officer to conduct the pre-hearing and evidentiary hearing proceedings. We stated that the parties could not look to this Board for clarification of an order issued by the Presiding Officer, but instead were required to make their arguments to the Presiding Officer. Moreover, we stated that we would not engage in interlocutory review where arguments had not been presented first to the Presiding Officer and the issue certified by the Presiding Officer pursuant to 40 C.F.R. § 22.29 (1998) as appropriate for interlocutory review. *See* Order (EAB, Jan. 6, 1999).

discovery. *See, e.g., In re Chempace Corp.,* FIFRA App. Nos. 99-2 & 99-3, slip op. at 24 (EAB, May 18, 2000), 9 E.A.D. __ (discovery); *In re J.V. Peters and Co.,* 7 E.A.D. 77, 99 (EAB 1997) ("A presiding officer has broad discretion in determining what evidence is properly admissible and his rulings on such matters are entitled to substantial deference."); *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987).

In *Chempace*, we looked to federal court precedent[21] concerning the appropriate standard of review for discovery orders when we concluded that the "Presiding Officer's determination is appropriately entitled to considerable deference." *Chempace Corp.,* slip op. at 24. Under that case law, a determination quashing a subpoena – the federal analogue to the request in this case for issuance of a subpoena – is reviewed only for abuse of discretion. *See, e.g., Konop v. Hawaiian Airlines, Inc.,* 236 F.3d 1035, 1053 (9th Cir. 2001); *Dill v. City of Edmond, Oklahoma,* 155 F.3d 1193, 1210 (10th Cir. 1998); *Logan v. Bennington College Corp.,* 72 F.3d 1017, 1027 (2nd Cir. 1996).

[21]We are not bound by these precedents or the Federal Rules of Civil Procedure upon which they are based; however, these rules and related practice can be used to inform our analysis of the relevant issues. *Chempace Corp.,* slip op at 24 n.22; *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997).

Similarly, decisions made by a federal trial court to admit or exclude evidence are typically reviewed under an abuse-of-discretion standard. *See, e.g., Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999) (concerning expert witness evidence); *Palmquist v. Selvik,* 111 F.3d 1332, 1339 (7th Cir. 1997) ("The appellant carries a heavy burden in challenging a trial court's evidentiary rulings on appeal because a reviewing court gives special deference to the evidentiary rulings of the trial court."). Moreover, Rule 103 of the Federal Rules of Evidence expressly states that an error in admitting or excluding evidence shall not be found unless a substantial right is affected and:

> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked.

Fed. R. Evid. 103(a)(2). The Advisory Committee's Note for this rule explains that "the nature of the error [must be] called to the attention of the judge, so as to alert him [or her] to the proper course of action and enable opposing counsel to take proper corrective measures." Conference Committee Notes, H. R. No. 93-1597. Thus, federal appellate courts frequently refuse to reverse a trial court's evidentiary rulings where the nature of,

and purpose for, the excluded evidence was not adequately explained to the trial court. *See, e.g., Badami v. Flood,* 214 F.3d 994, 998-99 (8th Cir. 2000) ("In order to challenge a trial court's exclusion of evidence, the issue must be preserved for appeal by making an offer of proof on the record."); *Seatrax, Inc. v. Sonbeck Int'l, Inc.,* 200 F.3d 358, 370 (5th Cir. 2000) (proffer of evidence "must show in some fashion the substance of the proposed testimony."); *Williams v. Drake,* 146 F.3d 44, 49 (1st Cir. 1998) ("[T]he aggrieved party must ensure that the record sufficiently reflects the content of the proposed evidence.").

Although we are not bound by these precedents in the present case, we are persuaded that they express the sound principle that a new trial or supplemental hearing generally should not be ordered unless there is a showing of abuse of discretion or clear error in the presiding officer's evidentiary or discovery rulings. As discussed below, we conclude that the Region has not met this showing of clear error or abuse of discretion with respect to either the denial of the request for a subpoena for Mr. Firman or the exclusion of the Firman Declaration.

**3.** *The Request for a Subpoena*

In the present case, the Region has not articulated a sufficient basis for us to conclude that the Presiding Officer's denial of the Region's request for a subpoena for Mr. Firman constituted clear error or an abuse of discretion warranting a new or supplemental hearing at this stage of this case. As noted above, the Region argued in its motion for reconsideration that section 122(e)(3)(B) of CERCLA allegedly provides statutory authority for the requested subpoenas. The Presiding Officer rejected this argument stating that he did not see that section 122(e)(3)(B) had application to "this type of hearing." Tr. at 10. The Presiding Officer also stated that he had reviewed two Agency guidance documents, which, according to the Presiding Officer, indicate that a subpoena under section 122 is not intended for a contested hearing such as the hearing in the present case. *Id.* Neither the Region's comments on the Recommended Decision, nor its arguments before the Presiding Officer, persuade us that the Presiding Officer's denial of issuance of the subpoena constitutes an abuse of discretion or clear error.

The CERCLA statute provides two alternative bases for issuance of a subpoena under section 122(e)(3)(B) --

specifically, a subpoena may be issued under section 122(e)(3)(B) "[t]o collect information necessary or appropriate for performing the allocation under subparagraph (A) or for otherwise implementing" section 122. CERCLA § 122(e)(3)(B), 42 U.S.C. § 9622(e)(3)(B).[22] With respect to the first basis -- the "allocation" -- subparagraph (A) states that, in order to expedite settlement and remedial action, the Agency is authorized to "provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility." CERCLA § 122(e)(3)(A), 42 U.S.C. § 9622(e)(3)(A). The Region does not contend that the present section 106(b) cost recovery proceeding is a "nonbinding preliminary allocation of responsibility" under section 122(e)(3)(A) that would expedite a pre-remediation settlement.

The Region argued, however, that a subpoena may be issued in this section 106 proceeding under the second basis -- the "otherwise implementing" language of section 122(e)(3)(B). The Region argued in its motion for reconsideration before the Presiding Officer that "[t]he scope of information 'necessary or appropriate' for implementing Section 122 [] clearly encompasses

[22]Section 122 of CERCLA generally provides authority and procedures for the settlement of certain claims arising under CERCLA.

the identification of potentially responsible parties and the kind and amount of hazardous substances each potentially responsible party contributed in a particular case." Motion for Reconsideration of Order Denying EPA's Motion for Subpoenas and for the Issuance of Subpoenas at 3-4. The Region argued further that since this proceeding concerns whether Tiger is liable for response costs and since the requested witnesses have information relevant to the identification of a potentially responsible party, the requested subpoenas fall within the authority of section 122(e)(3)(B).

We need not address the broader argument of whether a subpoena could ever be issued under the "otherwise implementing" clause in the context of a section 106(b) proceeding. Rather we conclude, as explained below, that in this case this argument does not have sufficient force on its own merit or support from prior Agency interpretation for us to order, at this stage of this case, a new or supplemental hearing based on a finding that the Presiding Officer committed clear error or abused his discretion in declining to issue the subpoena to Mr. Firman.

The only part of section 122 that the Region specifically identified as potentially being "otherwise implemented" by issuance of a subpoena in this case is section 122(h). *See* EPA's

Motion for Reconsideration of Order Denying EPA's Motion for Subpoenas at 3 n.2. Paragraph (h) of section 122 discusses the Agency's authority to compromise and settle claims for the recovery of costs incurred by the United States arising under CERCLA § 107. In its motion for reconsideration, the Region stated, without further elaboration, that "This 106(b) reimbursement action is a *prelude to addressing* cost recovery settlement issues related to [the] response action involved in this proceeding." *Id.* (emphasis added).

While characterizing this proceeding as a "prelude to addressing" cost recovery under section 107, the Region did not identify the existence or nature of any section 107 cost recovery claim.[23] Indeed, the Region did not represent to the Presiding Officer in connection with the Region's request for issuance of the subpoena that it had begun to implement a process, whether by informal discussions or otherwise, to settle any section 107 claim arising from the remedial action in this case or that there were favorable prospects for settlement of any such claims for recovery of costs incurred by the Agency. Agency guidance concerning the use of section 122 subpoenas specifically advises Agency personnel that they must "identify and document the

[23]The Region also has not made any such representations to this Board.

reasons relied upon in deciding to use the authority" for a section 122 subpoena. *See* EPA Office of Solid Waste and Emergency Response ("OSWER") Directive 9834.4A, "Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" at 14 (August 25, 1988) ("OSWER 1988 Guidance"). That guidance also states that a section 122 "subpoena may be used once the Agency has begun to implement the settlement process under section 122 (e.g., through initiation of informal discussions or formal negotiations with some or all affected PRPs, or where the Agency judges that available information points to favorable prospects for settlement)." OSWER 1988 Guidance at 13-14. Given the Region's failure to articulate to the Presiding Officer how issuance of a section 122 subpoena would otherwise implement the Agency's authority to settle its claims under paragraph (h) or more generally under section 122, we cannot conclude that the Presiding Officer's decision not to issue the subpoena for Mr. Firman was clearly erroneous or an abuse of discretion.

Moreover, as noted by the Presiding Officer, existing Agency guidance regarding the use of section 122 subpoenas appears to contemplate an investigative proceeding, not an adversarial proceeding, such as the present case, resulting in a binding determination of parties' rights. Tr. at 10 (discussing OSWER

1988 Guidance). Notably, in discussing the procedural requirements for the various CERCLA investigative tools, the OSWER 1998 Guidance specifically distinguishes between Agency adjudications and investigations and states that "when an agency issues an administrative subpoena pursuant to section 122(e)(3)(B), its purpose is only to investigate or gather information." OSWER 1988 Guidance at 15. We do not hold that this statement in the OSWER 1988 Guidance sets forth the only appropriate use of a section 122 subpoena; nor do we hold that such subpoenas may never be issued for evidence collection in a section 106(b) proceeding. Instead, we merely hold that given this Agency guidance, which suggests that a section 122 subpoena is reserved for non-adversarial investigative proceedings, and given the failure of the Region to articulate a more detailed or compelling rationale for reversal of the Presiding Officer's ruling,[24] we are disinclined to conclude that any error by the Presiding Officer is sufficiently clear for us to order a new or supplemental hearing at this late stage of this proceeding.[25] Accordingly, we decline to reverse the Presiding

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[24]Moreover, while the Region was aware as early as April 1998 of the need to procure Mr. Firman's presence at trial, it inexplicably waited until six days prior to the evidentiary hearing to file its motion for issuance of the subpoenas, thereby leaving little time for full development and consideration of the issues prior to the scheduled trial date.

[25]If the Agency intends to rely upon this rationale for

(continued...)

Officer's denial of the motion for issuance of a subpoena for Mr. Firman.

**4.** *The Firman Declaration*

We also conclude that the Region has not articulated a sufficient basis for us to reverse as clear error or an abuse of discretion the Presiding Officer's exclusion of the Firman Declaration. The Region's comments on the Recommended Decision merely recite that it had requested the Firman Declaration be admitted into evidence and that the Presiding Officer denied the request. Region's Comments at 20. Significantly, the Region's comments do not explain why the Region believes that the Presiding Officer's ruling was erroneous.[26]

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[25](...continued)
issuance of a section 122 subpoena under similar circumstances in the future, the Agency should consider promulgating an interpretive rule to that effect.

[26]The Region's only apparent explanation of its position is an oblique reference to 40 C.F.R. § 22.22(d), which permits a presiding officer to admit into evidence an affidavit from a witness who is "unavailable" within the meaning of Rule 804(a) of the Federal Rules of Evidence. *See* Region's Comments at 20 (asserting that the Presiding Officer agreed "with EPA that Mr. Firman was unavailable within the meaning of Rule 804(a)(5)."). The Region, however, has not explained what "circumstantial guarantees of trustworthiness," Fed. R. Evid. 804(a)(5), concerning the Firman Declaration would obviate our previous determination that without a hearing to test the credibility of the witnesses, "this Board would lack a sufficient basis for determining whose affidavits * * * will ultimately
(continued...)

As noted above, the Presiding Officer ordered that the reliability of Mr. Firman's statements need to be tested through cross-examination, Tr. at 947, which is consistent with our order determining that an evidentiary hearing should be held. In that order, we rejected the Region's suggestion that the signed declarations of Mr. Firman and Mr. Courville, which had been submitted by the Region as proof that Tiger is liable, can be relied upon in this case to resolve the liability dispute. Order Granting, in Part, Request for an Evidentiary Hearing and Denying Motions to Strike at 12 (EAB, Apr. 2, 1998). We explained as follows:

> The Region maintains that the affidavits [the Firman Declaration and a declaration by Mr. Courville], and others the Region plans to obtain, are sufficient to establish Tiger's liability, and that no evidentiary hearing is necessary. * * * The Region has not, however, sought to directly challenge the credibility of Tiger's affidavits and the other evidence Tiger submitted. Presumably, the Region is contending that the Firman and Courville affidavits are patently more credible than Tiger's affidavits, and consequently, they resolve the dispute as to whether Tiger is a liable party.
>
> At this stage of the proceedings, our review of the materials provided by each party to date indicates that the evidentiary record before us contains competing and/or conflicting accounts of how the drums at issue came to rest at the bottom of the Mississippi

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[26](...continued)
prevail." Order Granting, in Part, Request for an Evidentiary Hearing and Denying Motions to Strike at 12 (EAB, Apr. 2, 1998).

> River, such that the ultimate issue of Tiger's liability can be resolved only after an evidentiary hearing, where the affidavits (and other evidence), and the credibility of the witnesses, can be tested in a trial-like forum. Absent such a hearing, this Board would lack a sufficient basis for determining whose affidavits and evidentiary presentation will ultimately prevail, and for resolving the disputed question of Tiger's liability.

*Id.* at 11-12. Now, at this later stage of this proceeding after an evidentiary hearing has been held, the evidentiary record shows, as discussed below, that Tiger's account of how the drums came to rest on the riverbed has not been significantly challenged and has been supported by credible evidence admitted into the record. *See infra* Part III.C & D. In contrast, the Region's version has been shown, under cross-examination, to be unreliable in material respects. *See infra* Part III.E.2. In particular, as explained below, Mr. Courville, one of the Region's main witnesses in support of its liability theory, was subject to cross-examination that, as the Presiding Officer found and as we agree, demonstrated the statements in his Declaration to be unreliable. *Id.*

In addition, Tiger introduced testimony regarding statements made by Mr. Firman that appear inconsistent with the statements made in the Firman Declaration. During the hearing, one of Tiger's employees, Mr. Arthur Turner, stated that he sought employment with Tiger after being told by Mr. Firman that Tiger

had a "good environmental program." Tr. at 492. Mr. Turner stated that "one of the things that [Mr. Firman] informed me was that, at Tiger Shipyard, they had a policy there that nothing could enter the water, if it did, it must be reported * * *." Tr. at 493. At the very least, these statements appear inconsistent with the statements made by Mr. Firman in his declaration that, at the instruction and under the supervision of Tiger managers and supervisors, he dumped six to ten 55-gallon drums into the Mississippi River. Therefore, Mr. Turner's statement raises questions regarding the reliability of Mr. Firman's out-of-court statements. Under these circumstances, we must conclude that the statements made by Mr. Firman are not admissible without some opportunity for Tiger to test their reliability through cross-examination.[27] Accordingly, the Region has not shown that we should reverse the Presiding Officer's exclusion of the Firman Declaration from evidence in this case.

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[27]The Region attempted to elicit testimony from EPA's criminal investigation agent, Mr. Langlois, concerning why he concluded that Mr. Firman's statement is reliable. *See* Tr. at 947-48. Tiger objected to this line of questioning and the Presiding Officer sustained Tiger's objection. *Id.* The Region then purported to make an offer of proof concerning Mr. Langlois' testimony, tr. at 948-49; however, the Region's offer of proof did not set forth the content of the proposed testimony and the offer of proof did not distinguish between statements made by Mr. Firman and those of other former Tiger employees. Therefore, the Region's purported offer of proof is insufficient for us to determine whether the testimony would have provided adequate indicia of trustworthiness to support the Firman Declaration without an opportunity for Tiger to cross examine Mr. Firman.

We are mindful that the statements made by Mr. Firman in his declaration, had they withstood scrutiny under cross examination, could have resulted in the Board reaching a different conclusion regarding liability in this case. Nonetheless, we are not at liberty to allow the admission of evidence so thoroughly untested as to reliability. Where, as in this case, the liability turns on resolving the conflicting affidavits, it would be unduly prejudicial and unfair to allow the admission of the Firman Declaration under such circumstances.

Having resolved the preliminary procedural matters, we now turn to consideration of the legal standard, summary of the Presiding Officer's recommendations, and the evidence that was admitted at the evidentiary hearing.

**B.** *Legal Standard for Reimbursement Under Section 106(b)(2)(C) and Summary of the Presiding Officer's Recommendation*

In order to obtain reimbursement under CERCLA § 106(b)(2)(C), the petitioner:

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

42 U.S.C. § 9606(b)(2)(C). The petitioner "bears the burden of proof (including the burden of initially going forward with the evidence and the ultimate burden of persuasion)." *In re Chem-Nuclear Systems, Inc.*, 6 E.A.D. 445, 454 (EAB 1996), *aff'd* No. CIV.A. 96-1233, 2001 WL 300352 (D.D.C., Mar. 26, 2001); *see also In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434, 447-48 (EAB 1997); *In re the B & C Towing Site, The Sherwin-Williams Co.*, 6 E.A.D. 199, 207 (EAB 1995). Accordingly, to obtain reimbursement under section 106(b)(2)(C), Tiger must prove that it is not liable for response costs under section 107(a).[28]

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

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

[28]Tiger also has the burden to establish by a preponderance of the evidence "that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order." CERCLA § 106(b)(2)(C). In the event that the Board enters a final order determining that Tiger has met its burden of establishing that it is not a liable party, the Board will then establish a schedule for the parties to file briefs and supporting documentation regarding the reasonableness of Tiger's claimed expenses.

> (3) any person who by contract, agreement, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release, which causes the incurrence of response costs, of a hazardous substance * * *.

CERCLA § 107(a), 42 U.S.C. § 9607(a).

The Recommended Decision notes that the Board and many courts have held that "liability for cleanup costs attaches under Section 107 if: (1) the site [in] question is a 'facility'; (2) a 'release' or threatened release of a 'hazardous substance' has occurred at the facility; and (3) the recipient of the administrative order is a responsible person under Section 107(a) of CERCLA." Recommended Decision at 14, citing *In re Chem-Nuclear Systems, Inc.*, 6 E.A.D. 445 (EAB 1996). In their comments on the Recommended Decision, the parties do not dispute this general characterization of the applicable test.[29]

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[29]Tiger, however, does in effect argue that the Fifth Circuit Court of Appeals requires an additional determination that the release or threatened release "caused" the incurrence of response costs. *See* Tiger's Comments at 10-12, citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989); *Licciardi v. Murphy Oil USA, Inc.*, 111 F.3d 396 (5th Cir. 1997). As a general (continued...)

With respect to the first of the requirements noted above, the Recommended Decision concludes, based upon the parties' earlier agreement, that the bed of the Mississippi River adjacent to Tiger's Shipyard, where the drums at issue in this case were located, is a "facility" within the meaning of CERCLA § 107(a). Recommended Decision at 14; *see* Petition at 33; Region's Response at 14.[30] Accordingly, based on the parties' agreement, the

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[29](...continued)
proposition, this statement is consistent with our prior decisions. *See In re B & C Towing Site, the Sherwin Williams Co.*, 6 E.A.D. 199, 213 (EAB 1995) (noting that CERCLA § 107(a) requires that "the release or threatened release has caused the plaintiff or government to incur response costs."). Tiger, however, argues that the Fifth Circuit cases cited above stand for the proposition that a finding of liability may not be based solely on *any* detectable concentration of a hazardous substance, but that there must also be a demonstration that a "*regulatory standard has been breached.*" Tiger's Comments at 11, *quoting Licciardi*, 111 F.3d at 399 (emphasis added by Tiger). Tiger argues that the small amount of hazardous substances detected in three drums (D27-2, F35-1, and F40-1) is not sufficient for Tiger to be liable for the clean-up costs where the EPA-approved work plan for the remedial action provided that drums with such small quantities of hazardous substances could be sent for disposal to a non-hazardous waste landfill, and Tiger ultimately disposed of them in this manner without any objection from the Agency. Tiger's Comments at 11 & n.22. In essence, Tiger asks how it can be held liable for the substantial costs of clean-up where the only substances found by the Presiding Officer to be attributable to Tiger were ultimately disposed of in an ordinary landfill with the Region's approval. We do not decide this issue in the present case because we conclude, for the reasons explained below, that Tiger has sustained its burden of proving that it is not within any of the four categories of responsible persons listed under section 107(a).

[30]The term "facility" is defined by CERCLA to mean "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe in a sewer or publicly owned treatment
(continued...)

Mississippi River bed adjacent to Tiger's Shipyard is the relevant "facility" for the purposes of this action.

Regarding the second requirement that a release or threatened release of a hazardous substance occurred at the facility, the Presiding Officer recommended that we conclude that 12 of the drums retrieved from the Mississippi River contained hazardous substances within the meaning of CERCLA. Recommended Decision at 15-18. These 12 drums are identified as C5-1, D55-1, D55-2, D55-3, D55-4, D55-5, I26-1, J17-1, D27-2, F35-1, F40-1 and J48-1. The Presiding Officer also stated that "the dumping of these drums into the Mississippi River meets the definition of 'release.'" Recommended Decision at 15. In its comments on the recommended ruling, Tiger does not object to the conclusion that dumping of the drums into the river is a "release" within the meaning of CERCLA. However, it does raise a number of objections to the Presiding Officer's conclusions that these 12 drums contained hazardous substances. Tiger's Comments at 10-16.[31]

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[30](...continued)
works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." CERCLA § 101(9), 42 U.S.C. § 9601(9).

[31]Tiger argues that the Presiding Officer's recommendations err in two respects: (1) with respect to three drums, identified
(continued...)

Because we conclude, as explained below, that Tiger has demonstrated on the record of this case that it is more likely than not that Tiger did not dump any of the drums identified in this case into the Mississippi River (and therefore is not liable) we do not need to decide these issues going to whether the indicated drums contained hazardous substances.

With respect to the third requirement of whether Tiger is within one of the four categories of responsible parties under section 107(a), the central factual issue is whether Tiger disposed of any drums containing hazardous substances in the Mississippi River.[32] The Presiding Officer focused primarily on

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[31](...continued)
as D27-2, F35-1, and F40-1, Tiger argues that its data did not detect sufficient concentrations of the substances to trigger any standard under the TCLP testing protocol; and (2) Tiger argues that none of the data showing hazardous substances in the drums are reliable because an EPA employee, Mr. Robert Sullivan, compromised the integrity of the sampling operation by certain of his actions.

[32]The Recommended Decision states that the questions of whether Tiger is a responsible person as an "operator," as a "generator" or "arranger," or as a "transporter," all turn in this case on the question of whether Tiger disposed of drums containing hazardous substances by dumping them in the Mississippi River. Recommended Decision at 28-30. For the question of "operator" status, the parties stipulated that Tiger's liability "results *only* from one or more acts of disposal of hazardous substances on the [Mississippi River bed] by Tiger" and that "if Tiger is not found to have disposed of *any* of the drums containing hazardous substances found on the [Mississippi River bed], then Tiger is not liable as a CERCLA operator." Recommended Decision at 28, quoting Joint Exhibit No. 3
(continued...)

the evidence pertaining to whether Tiger was the source of any of the 12 drums that the Presiding Officer had concluded contained hazardous substances. The Presiding Officer stated that "the evidence shows that [a] majority of the 12 drums originated from the barge cleaning facility." Recommended Decision at 34. He based this conclusion on the lack of lids on all 12 drums, which would have allowed the drums to sink fast once dumped into the river, the proximity of the drums to the barge cleaning facility, the high iron content of the material in the drums (from 19% to 38%, which is consistent with removal of rust and scale from barge cleaning operations), and the similar physical appearance of the contents and analytical results from many of the drums. *Id.* at 34-35. The Presiding Officer, however, noted that these conclusions do not establish whether the drums were dumped by Tiger or by Greenville Johnny, both of which operated barge cleaning facilities at that location. *Id.* at 35.

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[32](...continued)
(modifications made by Recommended Decision). For the question of "generator" or "arranger" status, the Recommended Decision notes that the proof need only show that Tiger disposed of hazardous substances in the Mississippi River that were "like" those found in the drums on the Mississippi River bed. Recommended Decision at 28-29. For "transporter" liability, the Recommended Decision states that "Tiger must have (a) accepted hazardous substances for transport; (b) transported the drums containing the hazardous substances to the bed of the Mississippi River; and (c) selected the bed of the Mississippi River as the disposal site." *Id.* at 30.

In reviewing the evidence bearing upon whether *Tiger* dumped drums containing hazardous substances into the Mississippi River, the Presiding Officer recommended that we give "very little weight" to the testimony from Tiger's current employees that no drums were discarded into the river while Tiger operated the Shipyard. Recommended Decision at 38. The Presiding Officer concluded that "other evidence (*e.g.*, where the drum was found, the content of the drum, why certain materials in the drum are consistent or not consistent with Tiger's operation, etc.) is much more reliable and probative than the testimony of Tiger's employees who stated that they did not dump drums into the river." *Id.* at 38-39. As noted above, the Presiding Officer also concluded that the Region's witness who testified regarding Tiger's involvement in dumping, Mr. Courville, "is not credible." Recommended Decision at 40.

After concluding that neither the testimony of Tiger's employees nor the testimony of Mr. Courville can be relied upon to establish whether Tiger dumped drums into the Mississippi River, the Presiding Officer proceeded to analyze the specific facts and circumstances of each drum in order to determine the likely source of that drum. In performing this drum-by-drum analysis, the Presiding Officer concluded that Tiger had shown that it is more likely than not that Tiger was not responsible

for nine of the 12 drums, but that Tiger had failed to prove that it was not responsible for the three remaining drums (D27-2, F35-1 and F40-1). The Presiding Officer rejected Tiger's claim that the extent of the corrosion of the drums indicates that the drums were in the river for a number of years, pre-dating the time that Tiger began operation of the Shipyard. The Presiding Officer reasoned that the extent of corrosion of the drums is not a reliable indication of the length of time that the drums have been in the river as there is no way to determine whether any of the corrosion occurred prior to the drums being dumped into the river. Recommended Decision at 37, 50-54.

In its comments on the Recommended Decision, Tiger objects that (1) the Presiding Officer's recommendation improperly gives little or no weight to the testimony of Tiger's employees (Tiger's Comments at 1-4); and (2) the Presiding Officer allegedly reached an erroneous conclusion in weighing the evidence with respect to drums D27-2, F35-1 and F40-1 (*id.* at 7-10).[33] With respect to the second issue, Tiger argues that

[33]Tiger also argues that the Presiding Officer's analysis allegedly misstates and misapplies the burden of proof. *Id.* at 4-7. Tiger argues that, with respect to the three drums as to which the Presiding Officer concluded Tiger had failed to carry the burden of proof, the evidence is "not unique to Tiger" and does not "singularly point to Tiger as the source," *Id.* at 8. We reject Tiger's argument as a mischaracterization of the burden of proof. In particular, Tiger may be found liable if Tiger

(continued...)

greater weight should have been given to the testimony of Tiger's expert regarding metal corrosion rates and that the Presiding Officer failed to consider evidence that Tiger can account for all of the ring-topped drums purchased by it. In contrast, the Region argues that the Presiding Officer misapplied the burden of proof and that a proper application would lead to the conclusion that Tiger failed to show that it did not dump drums containing hazardous substances into the Mississippi River.[34]

After fully considering the Presiding Officer's recommendations and the parties' comments and the evidentiary record, we conclude for the reasons stated below that the Presiding Officer's recommended factual findings on the question of liability under section 107(a) are correct in all but two respects. Upon consideration, we first conclude that the

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[33](...continued)
fails to prove by a preponderance of the evidence that it is not the source of any of the drums containing hazardous substances. Thus, even if the evidence is common to, or points to, both Tiger and some other person, Tiger may be found liable if that evidence, taken as a whole, leads us to the conclusion that Tiger has not shown that it is more likely than not that Tiger is not the source. However, as discussed below, we conclude that the evidence taken as a whole leads to the conclusion that Tiger is not liable.

[34]As noted earlier, the Region also argues that the presentation of its case was impeded by the Presiding Officer's decision not to issue a subpoena compelling Mr. Firman to testify and by his exclusion of the Firman Declaration from evidence. *See supra* Part III.A.

Presiding Officer gave too little weight to the testimony of Tiger's managers and employees, who testified that they did not observe any dumping of drums by Tiger, and to Tiger's metallurgical and corrosion expert, who testified to his opinion that the drums had been in the river for a long time. The Presiding Officer also should have considered Tiger's evidence regarding its use of ring-top drums. We conclude that when this evidence is more fully considered, Tiger has sustained its burden of proof that it is not liable under CERCLA § 107(a). Our reasons follow.

**C.** *Testimony of Tiger's Employees*

As noted above, Tiger produced 11 witnesses (and proffered the testimony of two additional witnesses), all of whom were Tiger employees and testified regarding various aspects of Tiger's operations. Many of these employees had personal knowledge of the cleaning plant operations and testified that they worked in or around the barge cleaning area, that drums containing rust and scale are very heavy and cannot be moved by one person, that each witness did not participate in dumping of any drums into the river, did not see anyone else dump drums into the river and did not hear of any other employees dumping drums into the river, and that Tiger had a policy against dumping in

the river and the policy was implemented. Tr. at 463, 493-94, 502-03, 506-07, 508, 510, 524, 531. One of Tiger's witnesses also testified that he had been employed by Greenville Johnny and saw drums dumped into the river by Greenville Johnny's employees.

The Presiding Officer recommended that we give "very little weight" to the testimony from Tiger's current employees. Recommended Decision at 38. The Presiding Officer explained that he viewed the testimony from Tiger's employees as "obviously self serving" and that "[n]o attorney is going to put a person on the stand (having previously interviewed this person) who is going to admit that they dumped drums into the river, an act for which they could be fired." *Id*.

The Presiding Officer did not explain why he concluded that the testimony was self-serving other than his reference to the possibility that the employee could be fired; nor did he specify whose interests were being served by the testimony, i.e., that of the employee or Tiger or both. Significantly, the Presiding Officer did not base his conclusion on the demeanor of the witnesses, their tone of voice, or other aspects of their testimony not reflected in the written transcript. In reviewing the transcript, we can discern no basis other than the employment status of the witnesses that served as grounds for the Presiding

Officer's questioning their credibility. Thus, we must conclude that the Presiding Officer's recommendation is based solely on the witnesses' employment status.

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

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

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

In the present case, we are confronted with a number of countervailing considerations. On the one hand, as noted by both the Presiding Officer and the case-law discussed above, Tiger's

employees may have, by virtue of their status as employees, an interest in Tiger prevailing in this litigation. That interest in the outcome of the litigation may be grounds for questioning the witnesses' credibility. Conversely, Tiger's own employees, who were on-site on a daily basis throughout the period in question, were in a good position (perhaps, the best position) to directly observe whether drums containing hazardous substances were dumped by Tiger into the Mississippi River. Thus, the employees' testimony, if truthful, would be highly probative of the central factual question in this case. When we ordered that an evidentiary hearing should be held in this case, we did so in part out of our recognition of these competing considerations and the need, in this case, for the employees' credibility and testimony to be tested on the record.

After a thorough review of the entire factual record in this case, we are persuaded that the testimony of Tiger's employees should not be discredited solely on the grounds of the employees' employment status. As noted above, the Presiding Officer did not indicate that he observed anything in the demeanor of the witnesses or the tone of their voices that lead him to question their credibility. In addition, Tiger's eleven employee witnesses (and the proffer of testimony from two more employees, Tr. at 514-15) served to corroborate each other through their

duplicative testimony regarding the same facts and circumstances. *Compare,* Tr. at 463, 493-94, 502-03, 506-07, 508, 510, 524, 531. The Region's cross-examination of these witnesses did not reveal any inconsistent testimony among the employee witnesses, nor did the cross-examination draw into question whether the employees were in a position to make the observations stated by them, nor did it reveal any uncertainty in their memory or their confidence. *See* Tr. at 500-01, 504-05, 507-08, 511-15, 525-26, 534.

In addition, other than the testimony of Mr. Courville (which we discuss below in connection with the Region's comments and rebuttal evidence), the Region did not introduce rebuttal evidence demonstrating error in the testimony of any particular witness, nor any evidence that would otherwise cause us to question the veracity of Tiger's employee witnesses with respect to their statements regarding dumping of drums by Tiger. In the face of this overwhelming failure to demonstrate any basis, other than the witnesses' employment status, for questioning their credibility, combined with their corroboration of each other, we are persuaded that Tiger's employee witnesses should not be discredited solely based on their employment status.

We note, however, that the employee testimony cannot be relied upon as removing all doubt that Tiger is not liable – Tiger did not purport to offer a witness from every shift during the entire time of its operation of the Shipyard. Without witnesses who, combined together, were present and in a position to observe the barge cleaning operation during the entire time of Tiger's control, Tiger has not presented conclusive testimony of direct observation that no employee ever dumped any drums into the river.[35] Nevertheless, while the direct observations of these witnesses is not conclusive, their testimony on these matters, taken as a whole, and further supported as discussed below, tends to show that it is more likely than not that Tiger did not dump any drums into the river.

In addition, the testimony of one of the employee witnesses, Mr. Myron Porsche, further supports the conclusion that it is more likely than not that the drums retrieved from the riverbed had been dumped there prior to Tiger's control of the Shipyard. Mr. Porsche was employed by both Tiger and Greenville Johnny. Tr. at 549-50. While employed by Greenville Johnny, Mr. Porsche

[35]The testimony regarding the difficulty of moving drums filled with rust and scale and the testimony that none of the testifying employees heard of other employees dumping drums into the river (Tr. at 463, 493-94, 502-03, 506-07) tends to show that drums most likely were not dumped even during times when these witnesses were not able to directly observe the Shipyard.

testified that he helped another employee dump two or three drums into the river. *Id.* at 550. Mr. Porsche also testified that, during one of the years when he worked for Greenville Johnny, the Mississippi River had an exceptionally low water level. At that time, Mr. Porsche saw "barrels or drums sticking up out of the mud;" he testified that he saw "quite a few" barrels sticking up where the water had receded. Tr. at 554-55. Although this testimony is also not conclusive in that it does not demonstrate that Tiger did not dump any additional drums into the river, it does show that "quite a few" drums were already on the riverbed prior to Tiger taking control of the Shipyard. Thus, this testimony tends to show that it is more likely than not that the drums retrieved from the river in 1994 were dumped there by Greenville Johnny or, more generally, were drums observed by Mr. Porsche when the river was low prior to Tiger's control of the Shipyard.

Next, we consider two issues raised by Tiger with specific bearing upon the three drums as to which the Presiding Officer believed Tiger had not sustained its burden of proof.

**D.** *Evidence Pertaining to Whether Tiger Disposed of Drums D27-2, F35-1 and F40-1*

As noted above, when the Presiding Officer turned to a drum-by-drum analysis, he concluded that Tiger had failed to sustain its burden of proof that it did not dump three drums, D27-2, F35-1 and F40-1, into the Mississippi River. In reaching this conclusion, the Presiding Officer not only rejected the testimony of Tiger's employee witnesses as discussed above, but he also rejected two additional arguments made by Tiger. He rejected Tiger's arguments that the extent of corrosion of the three drums showed that the drums had been in the river for a long time, and he rejected Tiger's argument that it was not responsible for the three drums because they were ring-top drums. Recommended Decision at 49-55. In its comments on the Recommended Decision, Tiger argues that the Presiding Officer gave too little weight to the opinion of Tiger's metallurgical and corrosion expert and failed to consider evidence in the record that Tiger could account for all of the ring-top drums purchased by it.

As discussed below, we conclude that the opinion of Tiger's metallurgical and corrosion expert should be more fully considered and that evidence in the record regarding Tiger's use of ring-top drums also must be considered, both of which tend to

show that it is more likely than not that Tiger did not dump drums D27-2, F35-1 and F40-1 into the Mississippi River.

**1.** *Tiger's Metallurgical and Corrosion Expert*

Tiger called Mr. Gerhardus Koch to testify as a metallurgical and corrosion engineering expert. Mr. Koch testified that "[m]any of the drums were severely corroded" and that "corrosion had penetrated the drum wall." Tr. at 1085. Mr. Koch testified that he conducted tests designed to simulate the conditions of the drums in the river in order to determine the rate of corrosion. Based on the corrosion rate derived from his tests and his knowledge regarding metal corrosion, he formed an opinion as to the length of time that the drums had been in the river. Tr. at 1085-96. Mr. Koch testified that, based on his tests and his knowledge of corrosion characteristics, it was his opinion that the drums had been in the river for "a period of years," and with respect to many of the drums he stated that, in his opinion, the drums had been in the river from seven to more than fifty years. *Id.* at 1097-1108; *see also* Tiger Ex. 23, ex. B (Report of Gerhardus Koch). When the drums were removed from the riverbed, Tiger had operated the Shipyard for only approximately four years.

In rejecting Mr. Koch's testimony, the Presiding Officer stated that "the extent of corrosion is not necessarily a reliable indiction of how long a drum had been in the river" because "no one knows the condition (e.g., whether it was severely corroded, or had holes) or age of the drums at the time they were dumped in the river." Recommended Decision at 37, 51-54.[36] For this reason, the Presiding Officer disregarded Mr. Koch's expert testimony and did not give that testimony any weight in evaluating whether Tiger has shown that the drums were dumped into the river prior to Tiger's operation of the Shipyard. Tiger argues that Mr. Koch's testimony should not be disregarded and that there is evidence in the record that Tiger purchased only new or reconditioned drums. Tiger's Comments at 9-10.

We conclude that Mr. Koch's expert opinion regarding the length of time the drums were in the river should not be disregarded. In order to disregard Mr. Koch's testimony on the grounds stated by the Presiding Officer, one must assume that Tiger had heavily corroded drums, which it dumped into the river. However, this assumption is contrary to Tiger's undisputed evidence that it purchased only new or reconditioned drums.

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[36]The Region's cross-examination of Mr. Koch did not demonstrate any flaw in Mr. Koch's reasoning or analysis; the Region only obtained Mr. Koch's admission that he did not know the condition of the drums when they were dumped into the river.

Tiger Ex. 28, ¶ 10. While this evidence does not eliminate the possibility that Tiger may have acquired a heavily corroded drum at some time and then dumped that drum into the river, nevertheless, the combination of these two pieces of evidence (Mr. Koch's expert opinion and the evidence that Tiger purchased only new or reconditioned drums) tends to show that it is more likely than not that the drums retrieved from the riverbed were dumped into the river prior to Tiger's operation of the Shipyard. This conclusion is supported by the testimony of Mr. Porsche, who as noted above testified that the Mississippi River had an exceptionally low water level during one of the years when Greenville Johnny operated the Shipyard and that he saw "quite a few" "barrels or drums sticking up out of the mud" at that time. Tr. at 554-55.

Mr. Koch's testimony is particularly relevant to two of the three drums (numbers F35-1 and F40-1) for which the Presiding Officer recommended that we find Tiger failed to sustain its burden of proof. Mr. Koch specifically described drum F35-1 as having "severe" corrosion and expressed the opinion that it had been in the water "for many years." Tr. at 1102. Mr. Koch also stated that Drum F40-1 had corrosion holes in the drum wall and that it was likely to have been in the river for "several years." *Id.* In his report, Mr. Koch stated that by "several years" he

means "more than 5 years." Tiger Ex. 23, ex. B at 3 (Report of Gerhardus Koch) ("[T]he drums had been in the water for several years (i.e. more than 5 years) before corrosion penetration of the walls occurred."). Thus, Mr. Koch's testimony tends to show that it is more likely than not that the drums retrieved from the river in 1994, and in particular drums F35-1 and F40-1, were dumped there prior to Tiger's operation of the Shipyard.

**2.** *Evidence Regarding Tiger's Use of Ring-Top Drums*

In concluding that Tiger had failed to prove that it did not dump drums D27-2 and F35-1 into the Mississippi River, the Presiding Officer considered and rejected Tiger's argument that these drums were ring-top drums and that Tiger did not use ring-top drums. Recommended Decision at 51, 53. In particular, the Presiding Officer explained as follows:

> Tiger has argued that it did not handle ring-top drums. However, the evidence presented shows that Tiger purchased some ring-top drums.

Recommended Decision at 53, citing Tr. at 434 and Tiger Ex. 28 ¶ 11.

In its comments on the Recommended Decision, Tiger argues that all three drums F40-1, F35-1 and D27-2 were ring-top drums.

Tiger's Comments at 9, citing Tiger Ex. 60 at 11, 18-19, 35 and EPA Ex. 45, photos 805, 901. Tiger argues further that the Presiding Officer failed to consider evidence in the record that "while Tiger did purchase some ring-top drums, such was for a specific purpose and that *Tiger has accounted for the ring-topped drums it did purchase.*" Tiger's Comments at 9, citing Tiger Ex. 30 ¶¶ 16, 17 (Aff. of Patrick Rouse). Tiger concludes that "as the three drums at issue were all ring-top drums, as evidenced by their photographs, and as Tiger has accounted for the ring-topped drums that it did purchase, it is more likely that these drums did not come from Tiger." Tiger's Comments at 9.

Upon consideration of the evidence in the record, we conclude that drums F40-1, F35-1 and D27-2 are properly described as ring-top drums. Two of Tiger's witnesses, in their affidavits, described ring-top drums as follows:

> Ring-topped drums are drums with a rounded top edge which have a separate lid piece which is secured to the drum with a ring, which is bolted or clamped down over the edge of the lid and the top of the drum.

Tiger Ex. 28 ¶ 11 (Aff. of Michael Rago); Tiger Ex. 30 ¶ 16 (Aff. of Patrick Rouse). Both of these affidavits were admitted into evidence without any objection by the Region. Tr. at 525, 540.

The Presiding Officer described drums D27-2 and F35-1 as ring-top drums. Recommended Decision at 51, 53. In addition, from the pictures of all three drums, it is apparent that all three drums have the same type of top, which appear consistent with the description of a ring-top drum quoted above. *Compare* Tiger Ex. 60 at 11, 18-19, 35 and EPA Ex. 45, photos 805, 901. Accordingly, we conclude that drums F40-1, F35-1 and D27-2 are all ring-top drums.

Mr. Rouse stated in his affidavit that Tiger has accounted for all of the ring-topped drums purchased by it. Tiger Ex. 30 ¶ 17. As noted above, Mr. Rouse's affidavit was admitted into evidence without any objection by the Region. Tr. at 540. Mr. Rouse was available for cross-examination regarding his statements made in his affidavit. However, the Region declined to ask Mr. Rouse any questions on cross-examination. Tr. at 540. Further, the Region did not introduce any other evidence into the record that would challenge the veracity of Mr. Rouse's statement that Tiger has accounted for all ring-top drums purchased by it. In short, despite the generality of Mr. Rouse's statement, it was admitted into evidence and remains unrefuted. Thus, in determining whether drums F40-1, F35-1 and D27-2 were dumped into the Mississippi River by Tiger, Mr. Rouse's statement that Tiger has accounted for all ring-top drums purchased by it must be

considered and weighed. This evidence, although not conclusive, tends to show that it is more likely than not that Tiger did not dump these ring-topped drums into the river.

In the foregoing discussion, we have concluded that certain evidence in the record (namely the testimony of Tiger's employees, the expert opinion of Mr. Koch, and the evidence that Tiger can account for all ring-topped drums) was not fully considered by the Presiding Officer. We have also noted that consideration of this evidence, although not conclusive, tends to show that it is more likely than not that Tiger did not dump the drums into the Mississippi River that were retrieved during the diving operation. Next, we turn to a review of the Region's comments on the Presiding Officer's Recommended Decision and the Region's rebuttal evidence.

**E.** *The Region's Comments and Rebuttal Evidence*

The Region argues that the Presiding Officer's Recommended Decision is erroneous in a number of respects. The Region argues that the Presiding Officer generally applied a heightened burden by considering Tiger's potential liability in a drum-by-drum review of the evidence pertaining to whether Tiger was the likely source of each drum and by not ruling on a more general ground

that Tiger had failed to sustain its burden of proof. More particularly, the Region argues that, in conducting the drum-by-drum analysis, the Presiding Officer accepted speculative and unsupported statements by Tiger while simultaneously rejecting a number of the Region's theories as being too speculative.

For the following reasons, we conclude that the Region's arguments must be rejected and that the totality of the evidence in the record demonstrates that it is more likely than not that Tiger did not dump any of the drums into the Mississippi River.[37] In reaching this conclusion based on the record of this case, we observe that our conclusion might have been different if the Region had introduced evidence contradicting or impeaching Tiger's witnesses, or if it had introduced credible testimony of direct observation of Tiger dumping one or more drums containing hazardous substances into the river.

[37]We also reject the Region's argument that the Presiding Officer improperly denied consideration of the Region's argument concerning drums D27-1, G29-1, G31-1 and H32-1. *See* Region's Comments at 10-11. The Region has not identified any facts regarding these drums that would point to Tiger as the source or otherwise override Tiger's general evidence demonstrating that it is more likely than not that Tiger did not dump any of the drums into the Mississippi River.

**1.** *Burden of Proof and Drum-by-Drum Analysis*

The Region argues that the Presiding Officer's Recommended Decision errs by engaging in a drum-by-drum analysis to determine Tiger's liability. Region's Comments at 1. The Region argues that "[i]n the drum by drum analysis, the Presiding Officer clearly applies the burden of proof incorrectly as a matter of law by effectively placing the burden of proof on EPA to demonstrate that the source of the drums was Tiger's facility." Region's Comments at 2. The Region argues that the "statutorily mandated burden" is upon Tiger to show that it "is responsible for *none* of the drums recovered during the removal action." *Id.* at 5.

The Region argues that the following four facts, which the Region contends were demonstrated at the hearing, are sufficient to establish Tiger's liability:

> 1) a former Tiger employee stat[ed] that he witnessed illegal dumping of drums into the Mississippi River while employed by Tiger, and that the waste in the drums resulted from Tiger's barge cleaning operations;
>
> 2) sonar surveys identif[ied] targets in a 100 foot by 540 foot area in and around Tiger's barge cleaning operation, where the employee says he witnessed drums being dumped into the river;

> 3) divers recover[ed] drums containing hazardous substances in the area around Tiger's barge cleaning operation; and
>
> 4) hazardous substances found in the drums [] are similar to wastes generated by Tiger's cleaning operation.

Region's Comments at 3. The Region argues that it only needs to establish a similarity between the hazardous substances found in the drums on the riverbed and hazardous substances in Tiger's waste in order to establish Tiger's liability as a "generator" under CERCLA § 107(a). Region's Comments at 4, citing *U.S. v. Monsanto,* 858 F.2d 160, 169 (4th Cir. 1988), *U.S. v. Alcan Aluminum Corp.,* 990 F.2d 711 (2nd Cir. 1993), *U.S. v. Wade,* 577 F. Supp. 1326, 1333 (E.D. Pa 1983).

Upon consideration of the Presiding Officer's analysis and recommendations and the Region's comments, we are persuaded that the Presiding Officer did not misapply the burden of proof by engaging in a drum-by-drum analysis. As noted above in Parts II.A and III.B.1, the statutory right of recovery under section 106(b)(2)(C) requires that the petitioner "establish by a preponderance of the evidence that it is not liable for response costs." CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). The Recommended Decision correctly describes the applicable standard as follows: "In a CERCLA § 106(b) proceeding, the petitioner

bears the burden of proof, which includes both the burden of initially going forward with the evidence and the ultimate burden of persuasion." Recommended Decision at 27, citing *In re B & C Towing Site, The Sherwin-Williams Co.*, 6 E.A.D. 199, 207 (EAB 1995).

We reject the Region's argument that the Presiding Officer's drum-by-drum analysis had the effect of placing the burden of proof on the Region. The determination of whether Tiger is liable must be made based upon a preponderance of *all* of the evidence in the record, which necessarily includes the drum-specific evidence. Thus, an analysis on a drum-by-drum basis of the evidence pertaining to whether Tiger dumped any drums into the Mississippi River is properly considered in determining whether Tiger is liable.

In this case, consideration of the drum-specific evidence was particularly appropriate because we conclude (as implicitly recommended by the Presiding Officer) that the four facts relied upon by the Region (as identified above) were not established with sufficient certainty to obviate the need to review drum-specific evidence. As noted by the Presiding Officer, the questions of whether Tiger is a responsible person as an "operator," or as a "generator" or "arranger," or as a

"transporter," all turn in this case on the question of whether Tiger disposed of drums containing hazardous substances in the Mississippi River. Recommended Decision at 28-30; *see also supra* note 32. For the following reasons, we conclude that the evidence in the record demonstrates that it is more likely than not that Tiger did not dispose of drums containing hazardous substances in the Mississippi River bed.

As noted by the Presiding Officer, the proximity of the drums to the barge cleaning facility, the fact that they would likely sink rapidly due to the absence of lids and their heavy weight, and the similarity of the contents to that of waste from a barge cleaning facility (in particular, the high iron content of many of the drums), all established strong circumstantial evidence that the nine drums identified by the Presiding Officer came from the Shipyard. Recommended Decision at 34-35.[38] This circumstantial evidence, however, does not provide a basis for determining whether the drums came from the Shipyard when operated by Tiger or when operated by Greenville Johnny. *Id.*

[38]The Region argues that an additional four drums (D27-1, G29-1, G31-1 and H32-1) were improperly excluded from consideration by the Presiding Officer. Region's Comments at 10-11. However, the Region has not identified any facts or circumstances concerning these four drums that would even suggest that they came from a barge cleaning operation. For example, the Region has not articulated whether the contents of these drums is similar to that of waste from a barge cleaning facility. Thus, we reject the Region's argument concerning these four drums.

at 34. Notably, if the record contained no other evidence regarding the source of the drums, this circumstantial evidence, which provides no basis to distinguish between Greenville Johnny or Tiger as the source, would not have been sufficient for Tiger to sustain its burden of proof that it was not the source of the drums. Tiger, however, introduced additional evidence into the record, and that evidence tends to show that it is more likely than not that Tiger was not the source of the drums.

Tiger's additional evidence includes the testimony of its employees that they (1) did not dump drums into the river while employed by Tiger, (2) did not see other Tiger employees dump drums into the river, and (3) did not hear about other Tiger employees dumping drums into the river. Tiger's employees also testified that drums containing barge cleaning waste are very heavy and require more than one person to move, which makes it less likely that dumping would occur by other employees without the witnesses having heard about the dumping. Tiger's evidence also includes the testimony of its employees that Tiger had a policy against unauthorized dumping of anything into the river and that its managers enforced this policy. All of this evidence tends to show that it is more likely than not that Tiger did not dump the drums into the river. As discussed above, the Region wholly failed to challenge the truthfulness of the employees'

testimony – the Region's minimal cross-examination of these witnesses did not reveal any inconsistent testimony among the employee witnesses, nor any basis to question whether the employees were in a position to make the observations stated by them, nor any uncertainty in their memory or their confidence; and the Region failed to introduce rebuttal evidence demonstrating error in the testimony of any particular witness.

Tiger's evidence introduced to show that it was not the source of the drums also included the testimony of its metallurgical and corrosion expert. As noted above, this testimony, along with Tiger's evidence that it purchased only new or reconditioned drums, is not conclusive, but does tend to show that it is more likely than not that Tiger was not the source of the drums. Tiger's evidence also includes the affidavit of Mr. Rouse stating that Tiger had accounted for all ring-top drums purchased by it. As noted above, the Region's attorneys did not object to the admission of this statement into evidence and did not challenge it by cross-examination or rebuttal evidence. This evidence, although not conclusive, tends to show that Tiger did not dump the ring-top drums into the river.

Tiger's evidence also includes the drum-specific evidence discussed by the Presiding Officer in reaching his recommended

conclusion that drums C5-1, D55-1, D55-2, D55-3, D55-4, D55-5, I26-1, J17-1, and J48-1 were more likely than not dumped into the river by Greenville Johnny. Recommended Decision at 41-49. This drum-specific evidence relied upon by the Presiding Officer includes the fact that many drums were found in locations that were not areas where Tiger handles drums containing its waste, and in some cases the location of the drums was underneath the semi-permanently moored barges from which Tiger conducts its operations. *Id.* The Presiding Officer also relied on evidence that the drums contained substances not handled by Tiger. *Id.*

In discussing the Presiding Officer's drum-by-drum analysis, the Region argues that "[t]he Presiding Officer accepted insufficient evidence from Tiger in order to find that Tiger had met its burden of proof, often mere unsupported statements by Tiger." Region's Comments at 8. The Region argues further that the Presiding Officer imposed an "overly exacting standard" when considering the Region's evidence and "ignored as 'too speculative' EPA evidence showing that Tiger's evidence was flawed or inconclusive." *Id.* at 9. In particular, the Region argues that it demonstrated that Tiger's evidence of the locations where it generally handled drums containing waste and the evidence that some of the hazardous substances found in the drums were not handled by Tiger or were handled only infrequently

shows that Tiger's evidence is inconclusive and therefore insufficient to show that Tiger did not dump the drums into the river. The Region cites our decision in *In re B & C Towing Site, The Sherwin-Williams Co.*, 6 E.A.D. 199 (EAB 1995), for the proposition that the Region should prevail if it has shown "that the evidence provided by the petitioner was *inconclusive* and therefore insufficient to meet its burden." Region's Comment at 17 (emphasis added). The Region also relies on the *Sherwin-Williams* case as support for its argument that the Region must prevail if it merely shows a chemical similarity between Tiger's waste and the substances found in the drums. We disagree with both of these arguments.

First, the *Sherwin-Williams* case does not support the Region's argument that it must prevail if it has shown that Tiger's evidence is inconclusive. Instead, our conclusion in *Sherwin-Williams* was based on our determination, after a review of all of the conflicting evidence in the record, that the petitioner had failed to show by a preponderance of the evidence that it was not liable. In particular, it was undisputed that the petitioner had sent hazardous waste to the facility. *Sherwin-Williams*, 6 E.A.D. at 213-14. Because it had sent hazardous waste to the facility, the petitioner sought to prove that *all* of its hazardous waste had already been shipped out of

the facility to a different site and, therefore, was not among the waste that posed a threat of release. *Id.* The evidence in the record was conflicting in that there were manifests suggesting that the petitioner's waste had been shipped to another site but also some of the waste at the facility was contained in drums bearing the petitioner's name, the waste was chemically similar to the petitioner's waste, and other evidence showed that the facility operator routinely mixed wastes from several generators. In this context, we did not require the petitioner to conclusively establish that none of its waste remained at the facility – instead, we held based upon all of the evidence that the petitioner had "failed to 'establish by a preponderance of the evidence that it is not liable for response costs under section 107(a)' as required by § 106(b)(2)(C)." *Id.* at 223. In the present case, the Presiding Officer properly applied a preponderance of the evidence standard when analyzing the evidentiary record – it would not have been appropriate for the Presiding Officer to hold Tiger to the more rigorous standard of submitting only "conclusive" evidence.

We also reject the Region's argument that *Sherman-Williams* stands for the proposition that liability is established where there is a chemical similarity between the generator's waste and the waste found at the facility. The *Sherman-Williams* case is

consistent with other cases holding that, *where it has been shown that a generator arranged for its waste to be disposed at the facility*, chemical similarity is sufficient to show that a generator's waste is among the waste that is at risk of being released. *See, e.g., U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *In re Chem-Nuclear Systems, Inc.*, 6 E.A.D. 445, 456 (EAB 1996), *aff'd* No. CIV.A. 96-1233, 2001 WL 300352 (D.D.C., Mar. 26, 2001) ("CERCLA only requires proof that the generator arranged for disposal of hazardous substances that were 'like' those contained in waste found at the site."). However, neither these cases nor *Sherwin-Williams* stand for the proposition that chemical similarity, alone, is sufficient to establish that a generator "arranged" for disposal of its waste at the facility. As noted above, it was undisputed in *Sherwin-Williams*, that the petitioner had sent hazardous waste to the facility and the disputed factual issue was whether any of that waste was among the waste that posed a threat of release. *Sherwin-Williams,* 6 E.A.D. at 213-14. In contrast, in the present case, Tiger does not admit (and we do not find) that any of its waste was ever disposed at the facility; instead, it argues that it did not arrange for disposal on the bed of the Mississippi River.

Since it has not been established in this case that Tiger sent waste to the facility, the Region in essence is relying on

the chemical similarity of the petitioner's waste and the waste found at the facility as circumstantial evidence that Tiger arranged for disposal of its waste on the riverbed. In this case, however, such circumstantial evidence is not sufficient, on its own, to establish liability because other evidence in the record tends to show that Tiger did not send its waste to the facility and the evidence shows that another generator of similar waste did send its waste to the facility. Particularly significant in this case is the evidence that Greenville Johnny previously conducted a similar barge cleaning operation at the same location, that Greenville Johnny's employees were observed dumping drums into the river, and that numerous drums were observed on the riverbed during a period of low water prior to Tiger's operation of the Shipyard. This evidence, along with other evidence discussed above, tends to show that it is more likely than not that Tiger did not dispose of the drums retrieved from the riverbed.

For the foregoing reasons, we conclude that the Region cannot prevail in this case merely by showing that Tiger's evidence is not conclusive, nor can it prevail simply by proving a chemical similarity between Tiger's waste and the contents of the drums found on the riverbed. In this case, Tiger's evidence is sufficient to demonstrate that it is more probable than not

that Tiger did not dump any drums into the Mississippi River and that the drums containing chemically similar waste were probably dumped by Greenville Johnny.

**2.** *Testimony of Mr. Courville*

At this point in our analysis, we have not yet considered the testimony and statements of a former Tiger employee introduced by the Region in an effort to rebut Tiger's evidence. The Region's witness testimony regarding observations of Tiger employees allegedly dumping drums into the river is crucial to the Region's effort to rebut Tiger's evidence since we have concluded that the totality of other evidence in the record tends to show that Tiger did not dump drums into the river.

The Region introduced testimony from Mr. Courville regarding his alleged observation of other Tiger employees dumping drums into the Mississippi River. However, the Presiding Officer found "that Mr. Courville's testimony is not credible." Recommended Decision at 40.

In its comments on the Recommended Decision, the Region briefly argues in a footnote that the Presiding Officer gave too little weight to the testimony of Mr. Courville. Region's

Comments at 20 n.9. For the following reasons, we decline to give Mr. Courville's testimony greater weight than recommended by the Presiding Officer.

The Presiding Officer identified two aspects of Mr. Courville's testimony that led him to conclude that the testimony was not credible. The Presiding Officer explained as follows:

> First, he was unable to recall specific dates of his employment at Greenville Johnny and Tiger and even determine, within two or three years, the date that the drums were disposed of into the river. Thus, the drums that he allegedly saw being dumped into the river could have been dumped while Greenville Johnny operated the site. Second, if several hundred drums of rust were dumped into the river from the cleaning plant (as he testified), more drums would have been discovered during the sonar search. Drums of rust weigh anywhere from 400-600 pounds. Tr. [at] 463. They would sink rather quickly, especially if the lids were off. Thus, they would likely be found close to the cleaning plant. His testimony that no drums of rust were ever disposed of off-site not only contradicts Mr. Buancore's testimony (Tr. [at] 415-416),[39] but what EPA discovered during the execution of the search warrant. Therefore, Mr. Courville's testimony cannot be relied upon to prove that Tiger disposed of drums into the Mississippi River.

Recommended Decision at 40-41 (footnote omitted).

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[39]Mr. Buancore was called by Tiger and testified that Tiger routinely disposed of rust by having it hauled off-site. Tr. at 415-16.

In arguing that the Presiding Officer should have given greater weight to Mr. Courville's testimony, the Region disputes only one of the Presiding Officer's two reasons for rejecting the testimony. The Region seeks to show that Mr. Courville's inability to accurately remember the dates, or even the years, in which he allegedly observed dumping is not crucial to Mr. Courville's credibility. The Region argues that Mr. Courville "had a different job while working with Greenville Johnny than he did with Tiger, and he did not begin working in the cleaning plant until Tiger acquired the facility." Region's Comments at 20 n.9, citing Tr. at 1049.[40]

The Region is correct that Mr. Courville testified that his work location changed from the repair shop to the cleaning part of the Shipyard after Tiger began operation of the Shipyard.

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[40]The Region also argues that Mr. Courville "testified that when he left the facility it was owned by Tiger and the *illegal* activity was still occurring." Region's Comments at 20 n.9 (emphasis added), citing Tr. at 1079-80. However, the pages of the transcript cited by the Region do not show that Mr. Courville testified that "illegal" activity was occurring, instead the question posed by the Region's attorney merely referred to "the same activity" and Mr. Courville's answer stated only that "Yes sir. I – people are back there working." Tr. at 1080. A review of the questions immediately preceding this question do not show a context in which it could be fairly inferred that Mr. Courville understood this question to refer to "illegal" activity. Instead, this question was only the second in a new line of questioning, the first question of which merely referred to Tiger's ownership of the Shipyard and did not refer in any way to "illegal" activity.

Tr. at 1049. This testimony does provide some basis for inferring that Mr. Courville may have had an identifiable reference point that may have provided him with a means to accurately distinguish the observations made by him under Tiger's management from those made under Greenville Johnny's management. However, Mr. Courville did not state that he, in fact, relied on this reference point when he stated that the dumping he saw was during Tiger's operation of the Shipyard. Further, as noted by the Presiding Officer, Mr. Courville's testimony does demonstrate that his recollection of the years in which Tiger operated the Shipyard was wholly unreliable. On a whole, Mr. Courville's testimony was superficial, sketchy and devoid of details that would have helped to demonstrate his reliability. Thus, we are left with considerable uncertainty whether Mr. Courville observed dumping by Tiger or by Greenville Johnny.

More importantly, however, the Region's argument does not address the Presiding Officer's second concern that Mr. Courville's recollection of the extent of drum dumping is contrary to the undisputed evidence in the record regarding the number of drums found during the diving operation. Mr. Courville testified that Tiger dumped anywhere from 100 to 500 drums into the Mississippi River. Tr. at 1074-75. This testimony is directly inconsistent with the undisputed facts that lidless

drums containing rust are very heavy and would sink rapidly and that the diving operation retrieved only 35[41] drums, many of which were lidded, bung-hole type drums that could not have been effectively used for disposal of rust, scale, and other debris generated during barge cleaning.

In addition, as noted by the Presiding Officer, Mr. Courville's testimony contradicts the testimony of Mr. Buancore and the Region's own observations in executing the search warrant. Mr. Courville testified that the only method used by Tiger to dispose of drums of rust was by dumping them in the river and that drums of rust and scale were never hauled off-site in the dumpsters. Tr. at 1073. Mr. Buancore, however, testified that Tiger routinely disposed of rust by having it hauled off-site, Tr. at 415-16, and during execution of the search warrant, Agency personnel observed drums of rust near a dumpster. Region Ex. 15.

We also note that Mr. Courville's testimony that he observed Mr. Donald Bacon dump drums into the river (Tr. at 1060-61) was

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[41]The diving operation identified an additional 15 suspected drums that were too corroded to be retrieved. Based on Mr. Koch's testimony regarding corrosion rates of steel drums in the Mississippi River, it is unlikely that any of these additional 15 suspected drums could have come from Tiger's operation of the Shipyard. *See* Tr. at 1086-97.

contradicted by Mr. Bacon, who denied that he dumped any drums into the river. Tr. at 1200. Further, Mr. Courville testified that dumping of drums into the river by Tiger employees was a common practice and that whoever was instructed to dump drums would do so at any time of the day, up to the end of the second work shift near midnight. Tr. at 1059-69. This testimony directly contradicts the testimony of the numerous Tiger employees who were called by Tiger and testified, as discussed above, that they did not dump drums, did not see others dump drums and did not hear of others dumping drums into the river. Here, where we are called upon to choose whether to believe the testimony of Tiger's employee witnesses or the testimony of Mr. Courville, we are inclined to conclude that neither the employment status of Tiger's witnesses, nor Mr. Courville's testimony, are sufficient to demonstrate that the numerous witnesses produced by Tiger committed perjury, particularly given that Mr. Courville's testimony is contradicted in a number of respects by undisputed evidence in the record. Thus, we find no basis on the record of this case for rejecting the recommendations of the Presiding Officer that he found Mr. Courville's testimony to be not credible.

## **IV.** *CONCLUSION*

For the foregoing reasons, the Board's preliminary decision is that Tiger's petition for reimbursement should be granted. If, after reviewing the parties' comments, the Board's ultimate conclusion remains that Tiger has shown that it is not liable, then the Board will establish a schedule for Tiger to present its evidence regarding the reasonableness of its claimed expenses and for the Region to respond thereto.