

4732-90005

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VIA FACSIMILE

January 12, 1993

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Re: A&W Smelter and Refiners
Request for Government Analytical Results

To the above referenced parties:

I have been informed this date by Rob Bornstein and Bob Mandel that EPA has made a decision that the ore at issue is hazardous waste. This decision, if it has actually been made, appears to be based on faulty analysis.

First I again request a copy of the analytical results and supporting QA/QC documents for the 25 samples taken at the Mexican border in November 1992. My verbal request for these documents was turned down this morning. I fail to understand how EPA can make crucial decisions involving my client; decisions which place enormous financial burdens on my client, and then claim privilege regarding those documents which support their decision. My client shipped its ore with a good-faith belief that the material was valuable ore. The intended recipient of the ore also had the same belief. We have supplied the government with the analytical data that supports my client's position. Until contrary data is received by my client, we see no basis for modifying my client's position that the material is valuable ore.

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Second, regarding to the analytical results you have apparently received, our chemist advises us as follows:

- a. A TCLP test is not the proper methodology for identifying the source of lead in soil.
- b. One cannot credibly make the leap that a TCLP result establishes that the lead was from lead batteries and not from natural sources.
- c. Lead ore exposed to the air over 30 years will oxidize. This oxidation will transform lead sulfide into lead sulfate (more susceptible to TCLP).
- d. Lead sulfate does occur naturally and therefore these TCLP results can be produced by naturally occurring lead.
- e. The EPA total metals screen (if used in our case) is not validated for gold or platinum. It is also usually not accurate for silver. The only accurate tests are fire-assays. [note that this was also A&W's position at our Dec. 21 conference].

We would also like to restate our legal positions which we provided in writing to the Government on December 21, 1992.

- (1) The material is not a "solid waste" under 40 C.F.R. 261.2.
- (2) The material is not "spent" under EPA's Jan. 4, 1985 final rule.
- (3) The material, even if "spent", falls under the 40 C.F.R. 261.4(b)(7) exemption.
- (4) The material, even if smelter slag, is considered "secondary ore" by the U.S. Gov't (BLM) and is not RCRA regulated.
- (5) The material, even if it includes some hazardous material, is not subject to the Mixture Rule per the arguments laid out in Exhibit P to our Dec. 21, 1992 report.
- (6) The material was shipped on a bill of lading to Mexico with the express knowledge and approval of the federal government's site manger (Curtis Gunn).

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(7) The material was shipped per A&W's belief that it was valuable ore (see fire assay results in Exhibit I of our December 21, 1992 report - 1ppm gold/which equals .03 oz./ton).

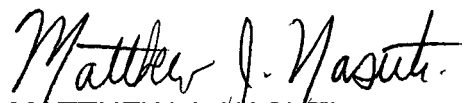
The EPA data, as partially conveyed to us by phone, is inconclusive to say the least. We are in the process of contacting a consultant to fire-assay samples from the Sandy and A&W material. We will be in contact with you in the near future regarding whether you wish a split.

We do need the government's analytical results from both the Sandy property and the barrels at the border. If we do not receive this data we may be forced to repeat the analysis for possible profiling purposes (if such profiling should be ordered by the government). If the government forces us to waste funds on duplicative analytical tests we will push for compensation and/or a credit from the government at a later point.

We thank you for your respective attention to those issues discussed above and remain available to answer any questions you may have regarding this matter.

Sincerely,

VROOMAN, NASUTI & BENETATOS


MATTHEW J. NASUTI

cc: Robert Bornstein - EPA
Robert Mandel - EPA