START

0037925

AUG 1994
RECEIVED
EDMC

U.S. ENVIRONMENTAL PROTECTION AGENCY

RESPONSE TO COMMENTS

U.S. DEPARTMENT OF ENERGY
DRAFT PERMIT FOR TREATMENT, STORAGE AND DISPOSAL
OF DANGEROUS WASTE

AUGUST 29, 1994

9413279.1969

INTRODUCTION

The US Environmental Protection Agency (EPA) is reissuing the federal portion of the draft Resource Conservation and Recovery Act (RCRA) permit for the treatment, storage and disposal of dangerous waste at the Hanford Federal Facility. The federal portion of the permit is primarily concerned with corrective action requirements governed by the Hazardous and Solid Waste Amendments to RCRA (known as HSWA). EPA received additional comments on the corrective action portion of the draft permit which was issued for public comment in February 1994. Based upon a request from the public, the initial sixty (60) day public comment period (from February 9, 1994 through April 11, 1994) was extended for an additional thirty (30) days (from April 11, 1994 through May 11, 1994) by EPA and Ecology. Based on these comments, EPA has revised the HSWA portion of the draft RCRA permit.

The purpose of the Response to Comments (RTC) is to present concerns and issues raised during the public comment period, and to provide responses and corresponding revisions to the final draft permit.

Corrective action for RCRA Past Practice Units (RPP) at the Hanford Federal Facility is generally governed by the Hanford Federal Facility Agreement and Consent Order, commonly known as the "Tri-Party Agreement" or "FFACO." Corrective action on lands leased to other parties and not otherwise subject to RCRA permitting or RCRA corrective action requirements, however, will be conducted in accordance with the terms of the HSWA Portion of the RCRA Permit for Treatment, Storage and Disposal of Dangerous Waste. The Tri-Party Agreement specifically excludes these leased lands from the terms of the Tri-Party Agreement.

COMMENTS RAISED AND EPA RESPONSE

EPA received oral comments on the HSWA portion of the RCRA permit during a series of public hearings conducted by EPA and the Washington State Department of Ecology on March 29, 1994 in Pasco, Washington, on March 30, 1994 in Vancouver, Washington, and on March 31, 1994 in Seattle, Washington. EPA also received substantive written comments from the US Department of Energy-Richland Field Office, US Ecology, Inc., Perkins Coie (representing US Ecology, Inc.), Davis, Wright, Tremaine

representing Envirocare, Inc.), and Envirocare of Utah, Inc., concerning the corrective action portion of the previous draft permit (February 9, 1994 draft). These oral and written comments are paraphrased in the RTC and have been enumerated for subsequent reference. The full set of original comments is included in the Administrative Record for this draft HSWA permit, which is available for review at Hanford Public Information Repositories listed in the Fact Sheet and Focus Sheet for the revised draft permit.

In addition to changes in response to comments, some minor changes and corrections to the draft HSWA permit have been made. These changes have resulted in a HSWA permit which the EPA believes is more enforceable and easier to understand. Energy proposed modified language for certain specific HSWA permit conditions and, where appropriate, EPA accepted that language. Specific changes are discussed in this Response to Comments.

EPA does not believe that the changes which were made to the draft HSWA permit were substantive enough to require an additional public comment period for a revised draft HSWA permit. Therefore, the final HSWA permit is being issued concurrently with this Response to Comments.

This HSWA permit shall become effective 30 days after notification to interested parties of the final HSWA permit decision (40 CFR § 124.15). However, if a petition for review is filed in accordance with 40 CFR § 124.19, then the Administrator may stay the effectiveness of the HSWA permit under federal law. Similarly, if an appeal is filed in accordance with Chapter 43.21B RCW, then the Pollution Control Hearings Board or the Director may stay the effectiveness of the state permit under state law. However, a stay issued pursuant to state law shall not affect the effectiveness of the HSWA permit under federal law. A petition for review or appeal must be filed within 30 days after receipt of the final HSWA permit decision. Under 40 CFR § 124.16, contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. Uncontested conditions which are not severable from those contested conditions shall be stayed together with the contested conditions. Stayed provisions of permits shall be identified by the Regional Administrator. All other provisions of the permit for the facility shall remain fully effective and enforceable.

A copy of the final HSWA permit, and any future modifications to the permit will be maintained at the EPA's Office in Seattle, Ecology's Office in Kennewick, and will be provided to Energy's Richland Operations Office.

RESPONSE TO COMMENTS

COMMENTS BY ENVIROCARE OF UTAH, INC., ON THE RCRA DANGEROUS WASTE PERMIT, FEBRUARY 21, 1994

Comment # 4.0 Status of Closure Plan:

Envirocare of Utah, Inc., provided a comment on the status of the US Ecology RCRA Closure Plan:

> "It is our understanding that US Ecology has received and disposed of hazardous waste at its commercial disposal facility including scintillation vials, elemental mercury, and, due to the absence of an approved waste analysis plan, possibly other hazardous wastes which have not been identified. Consequently, US Ecology has submitted a Part B permit application for the facility. Under 40 CFR Part 265, facilities such as US Ecology are required to prepare and execute a RCRA Closure Plan. The draft HSWA/RCRA Permit outlines corrective actions for the US Ecology facility. However, it is our understanding that such corrective actions do not constitute a closure plan. It is also our understanding that to date US Ecology has no current approved RCRA closure plan for its facility."

Response # 4.0:

EPA disagrees with this comment, in part. EPA has not determined that US Ecology has conducted RCRA regulated waste management activities. Thus, no RCRA regulated units are operated by US Ecology that would subject US Ecology to either the interim status requirements of 40 CFR Part 265, or the permitting requirements of 40 CFR Part 270 or WAC 173-303-800. More specifically, US Ecology has not treated, stored or disposed of hazardous waste after October 21, 1980 (the effective date of the Solid Waste Disposal Act amendments to RCRA) or the effective dates of regulations covering wastes managed by US Ecology. Thus, there is no regulatory authority under RCRA that requires US Ecology to submit a RCRA closure plan for regulated units. Although US Ecology submitted a Part B permit application on October 29, 1985, EPA determined that no waste management activities occurred or were occurring that would subject US Ecology to permit requirements. Similarly, US Ecology has never qualified for interim status pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925.

9413279.1961

The HSWA portion of the RCRA permit does include corrective action requirements for that portion of the Department of Energy facility occupied by US Ecology, as discussed elsewhere in this document. These requirements apply to solid waste management units (SWMUs), not regulated units, at a facility seeking a permit. These corrective action permit conditions are included under the authority of Section 3004(u) of RCRA, 42 U.S.C. § 6924(u), and 40 CFR § 264.101. In contrast, closure requirements are contained in 40 CFR Parts 264 and 265, Subpart G. Corrective action permit conditions are not, nor are they intended to be, a closure plan under RCRA.

Under the Atomic Energy Act, as amended ("AEA"), 42 U.S.C. § 2011 et seq., and the regulations established by the Nuclear Regulatory Commission ("NRC") under the AEA, and under the provisions of US Ecology's own Radioactive Materials License issued by the Washington State Department of Health ("Health"), US Ecology is preparing and plans to submit a revised draft Site Stabilization and Closure Plan to Health. EPA and Ecology have received a letter dated August 10, 1994, from US Ecology which transmitted US Ecology's "Phase I Cap Design, Subsidence Evaluation and Initial Source Term Presentation." In addition, EPA received a copy of an August 10, 1994 letter from US Ecology to Curtis Dahlgren, Acting Manager for Ecology's Policy and Technical Support Section, which letter transmitted US Ecology's "Outline of Richland Ground-water Monitoring Program" and its "Vadose Zone Monitoring Program for the Low-Level Radioactive Waste Disposal Facility in Richland, Washington." These documents, although received after the closure of the formal comment period established for the HSWA Permit, are nevertheless being included in the administrative record for the HSWA Permit as these documents are referenced in EPA's Response to Comments. As such, EPA must include these documents pursuant to 40 CFR § 124.17(b). EPA believes that these documents are relevant to and may be an important part of corrective action at the SWMUs at US Ecology. See HSWA Permit Condition III.B.2.

EPA and Ecology appreciate the opportunity to review these documents. However, neither EPA nor Ecology have completed their review of these documents. A complete agency/department review may identify one or more technical issues which will require additional time to resolve. It must be noted, however, that these documents and US Ecology's site stabilization and closure plan are distinct from closure plans associated with regulated units under RCRA.

HSWA Permit Condition III.B.2 specifies that corrective action may be completed under five alternative

9413279.1962

administrative methods. One such option allows US Ecology to address corrective action at US Ecology's SWMUs by amending its Radioactive Materials License Site Stabilization and Closure Plan.[1] EPA and Ecology will review the revised draft Site Stabilization and Closure Plan, as well as US Ecology's "presentation," which was received by EPA on August 10, 1994. EPA will review the revised Site Stabilization and Closure Plan, which is scheduled to be submitted by US Ecology in August 1994. However, corrective action under the HSWA portion of the RCRA permit must occur according to the terms of HSWA Permit Condition III.B., and not through the terms of a RCRA closure plan.

Permit Change:

No permit change is required in response to this comment.

9413279.1963

---

[1]If this option is pursued, EPA and/or Ecology may also wish to enter into an agreement with the Department of Health regarding enforcement of RCRA requirements through an amended Radioactive Materials License. However, US Ecology's draft revised site stabilization and closure plan has not yet been formally approved by the Department of Health. More importantly, the revised site stabilization and closure plan has not been incorporated into US Ecology's Radioactive Materials License, and is therefore not enforceable at this time.

COMMENTS BY SAM CLIFFORD, AT RCRA FACILITY WIDE PERMIT PUBLIC HEARING CONDUCTED ON MARCH 29, 1994 IN PASCO, WASHINGTON.

Comment# 11.2 Consistency with the FFACO, Condition III.A, Page 23:

Mr. Sam Clifford provided a comment that the revised RCRA permit fails to "use the processes and personnel that have been established in the Federal Facility Agreement and Consent Order (FFACO)." The commenter also stated that the consistency with the FFACO is the "major problem with the second-draft RCRA Permit." In addition, the commenter stated that a "single RCRA Permit should be issued by the Agency and the Department" since "the second-draft RCRA Permit with its two dissimilar portions from the Department and Agency, demonstrates that the Department's and Agency's FFACO obligations remain unfulfilled."

Response #11.2:

EPA disagrees with this comment, in part. The RCRA Permit is being issued in two portions by the Washington State Department of Ecology (Ecology) and EPA. These two portions collectively constitute the RCRA Permit. These two portions are distinct since Ecology is not yet authorized to issue the corrective action portion of the RCRA permit. As such, EPA is required to issue the corrective action portion of the permit. Specifically, Section 3004(u) of RCRA and regulations promulgated thereunder (40 CFR § 264.101) require corrective action, as necessary, be included in all permits issued after November 8, 1984, to protect human health and the environment for all releases of hazardous waste or hazardous constituents from any solid waste management unit (SWMU) at a facility seeking a RCRA permit.

In addition, there is no requirement under RCRA that the Hanford facility be issued a single permit. In fact, EPA has issued separate HSWA permits to facilities in states in which the state was authorized to issue RCRA permits. Together, the State-issued and EPA-issued permits form the complete RCRA permit for the Hanford Federal Facility. The mere fact that there are two separate permits does not mean that the agencies "FFACO obligations remain unfulfilled" as the commenter suggests. Indeed, since the state of Washington is not yet authorized to issue HSWA permits in the state, EPA has the statutory obligation to issue the HSWA portion of the RCRA permit to the Hanford Federal Facility. The FFACO recognizes this statutory obligation as well. See FFACO, Part II, Article VII, paragraph 27.

9413279.1964

EPA believes that the HSWA Portion of the RCRA Permit is consistent with the FFACO, as amended. As specified in HSWA Condition III.A (Integration with the FFACO), corrective action required under the Hazardous and Solid Waste Amendments (HSWA) for:

> "the Hanford Federal Facility will be satisfied as specified in the FFACO, as amended, except as otherwise provided herein. For those solid waste management units not covered by the FFACO, RCRA corrective action requirements will be addressed by HSWA permit conditions III.B through III.I."

Therefore, EPA is not requiring duplicative actions for SWMUs being addressed by the FFACO. See also HSWA Permit Condition I.C., and Response to Comment #18.166.

Permit Change:

No permit change is required in response to this comment.

9413279.1965

COMMENTS BY BARRY BEDE, US ECOLOGY AT HANFORD SITEWIDE RCRA PERMIT HEARING CONDUCTED ON MARCH 29, 1994 IN PASCO, WASHINGTON.

Comment #12.1 Inclusion of US Ecology:

Mr Barry Bede of US Ecology, Inc., provided a comment regarding the US Ecology site in Richland, Washington. The comment states that the US Ecology Low-Level Radioactive Waste Disposal Facility is "comprehensively regulated by the Department of Health" under the Washington State Nuclear Energy and Radioactive Control Act and 40 CFR Part 20 and 61. In addition the comment states that US Ecology is "not a permittee under the US DOE Permit" and that the site is not "controlled by the Department of Energy in any manner." The comment also notes the implementation of RCRA oversight under the Department of Energy "may and is inconsistent and duplicative with the Atomic Energy Act requirements..."

Response #12.1:

EPA disagrees with this comment and has provided detailed responses to the written comments received from Perkins-Coie representing US Ecology, Inc. See Response to Perkins-Coie Comments #22.1 through #22.11, infra.

Permit Change:

See EPA's Responses to Comments #22.1 through #22.11 (Comments submitted by Perkins-Coie representing U.S. Ecology, Inc.).

9413279.1966

COMMENTS BY MR. BOB COOK, RICHLAND, WASHINGTON, AT SITEWIDE RCRA PERMIT HEARING CONDUCTED ON MARCH 29, 1994 IN PASCO, WASHINGTON.

Comment 12.2 Designation of the United States Department of Energy-Richland Operations Office as "Permittee"

Mr Bob Cook provided a comment regarding the United States Department of Energy being designated as the Permittee for the Hazardous and Solid Waste Amendments Portion of the RCRA Permit. Specifically, the comment stated in part that "we think that the Department of Energy is in fact the responsible party in this regard and that Energy is responsible for putting the materials, the hazardous materials, [at Hanford] in the first place" and that "the [Department of Energy] DOE should be the permittee being the owner in this case for the U.S. Ecology Site." The commenter also states that the Nuclear Regulatory Commission (NRC) requirements (do not) address hazardous materials and that 10 CFR Part 61.41 requires site specific performance assessments to be completed. The commenter also requested that the RCRA permit include consideration of the "natural resources and restoration of natural resources and that all trustees that are involved; US Ecology, DOE, and Yakama Nation ought to be properly notified... of the issues associated with the potential damage to natural resources."

9413279.1967

Response #12.2:

EPA agrees in part with these comments and is issuing the HSWA Portion of the RCRA Permit to the United States Department of Energy-Richland Operations Office as the "Permittee" as noted on Page 1, and in the Introduction, page 3, of the HSWA Portion of the Permit. In addition, EPA has also defined the "Permittee", on Page 6, in the Definitions Section of the HSWA Portion of the RCRA Permit as follows:

> **"Permittee"** shall mean the United States Department of Energy, the owner of the "facility" (as that term is defined in this permit) seeking a permit under Section 3005(c) of RCRA, 42 U.S.C. § 6925(c).

In addition, the HSWA portion of the RCRA permit does consider natural resources. The purpose of the HSWA portion of the RCRA permit is to address corrective action required to protect human health and the environment for all releases or threatened releases of hazardous waste or hazardous constituents from any solid waste management unit (SWMU) at or from a facility seeking a RCRA permit. Under the provisions of 40 CFR § 270.3, certain Federal laws may apply

to issuance of permits, and if it is determined that such laws are applicable, the procedures of such laws must be followed. These Federal laws include Section 7 of the Wild and Scenic Rivers Act (16 U.S.C. § 1273 et seq.); Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. § 470 et seq.) and its implementing regulations at 36 CFR Part 800;, Section 7 of the Endangered Species Act (16 U.S.C. § 1531 et seq.) and its implementing regulations at 50 CFR Part 402; Section 307(c) of the Coastal Zone Management Act (16 U.S.C. § 1451 et seq.) and its implementing regulations at 15 CFR Part 930; and the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.). It is EPA's intent that corrective actions under the HSWA permit will protect the natural resources located at the Hanford facility.

It should be noted that RCRA does not provide EPA with the authority to require restoration for natural resource damages. Such restoration actions are more commonly taken under the authorities contained in the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9601 et seq., or other available state or federal authority.

Finally, the public participation provisions contained in 40 CFR Part 270 allow the public the opportunity to comment on the proposed permit. In addition, HSWA Permit Condition I.V.2 requires the Permittee to place a copy of all reports, notifications and submissions required by the permit into the public information repository located near the facility. This permit condition will ensure that the public will have the opportunity to review all of the information required to be kept by the HSWA permit so that any potential damage to natural resources should be detected by EPA and the public in general. In addition, EPA also recognizes that, as an agency of the federal government, it has a trust responsibility to American Indian Tribes to consult with the tribes and whenever possible, protect tribal resources which may be affected by agency decision-making. EPA has also adopted policies which recognize tribal sovereignty and commit to a government-to-government relationship with the tribes. In order to facilitate this relationship, EPA will involve the tribes in cleanup and management processes at the Hanford Site. See Section 10.10 of the FFACO Action Plan, as amended, p. 10-6.

Permit Change:

The definitions section of the permit has been modified to reflect the definition of permittee cited above in this Response to Comments.

9413279.1968

COMMENTS BY DIRK DUNNING, OREGON DEPARTMENT OF ENERGY, AT RCRA FACILITY WIDE PERMIT HEARING CONDUCTED ON MARCH 30, 1994 IN VANCOUVER, WASHINGTON.

Comment # 13.1 Definition of Facility, Page 5:

Mr. Dirk Dunning of the Oregon Department of Energy provided a comment on the definition of facility that it referred to the 560 square miles in southeastern Washington State. He believed that it was appropriate for the definition of facility to include all portions of Hanford site which are owned by other Federal Agencies or Departments; i.e., the Bureau of Land Management and the Bonneville Power Administration.

Response 13.1:

EPA disagrees with this comment. The HSWA Portion of the RCRA Permit was revised to exclude land owned by the Bonneville Power Administration, such as the Midway Substation and Community. These lands, which are owned by a separate federal agency, were removed to conform with EPA's notice of policy and interpretation published in the Federal Register on March 5, 1986 (51 Fed. Reg. 7722). In that policy, EPA stated in relevant part that:

> "[u]nder EPA's interpretation of the definition of 'facility' for section 3004(u), contiguous tracts of federal lands owned by the United States but administered by different federal agencies could be considered a single 'facility' for corrective action purposes. A permit for a hazardous waste unit located anywhere on this collective federal 'facility' would trigger corrective action requirements for every solid waste management unit found within its boundaries. In the western half of the United States, contiguous federal lands cover large portions of several states. Moreover, the agency that operates a hazardous waste unit might not have authority to require or manage cleanup of solid waste units on lands administered by other agencies. The size of the facility and the administrative limitations could make corrective action very difficult."
>
> "EPA believes that Congress did not intend section 3004(u) to require such wide-ranging cleanups on federal lands. Congress has consistently expected individual federal departments and agencies to obtain RCRA permits and manage hazardous waste. For example, section 6001 of RCRA specifically requires 'departments, agencies and instrumentalities of the

9413279.1969

Federal government' to comply with RCRA requirements....Consequently, EPA is today interpreting the concept of ownership for the purposes of section 3004(u) as referring to individual federal departments, agencies, and instrumentalities." Id. at 7722.

Thus, in order to avoid the situation where a federal agency which operates a hazardous waste management unit would be forced to require or manage cleanup of SWMUs on lands owned or otherwise administered by other federal agencies, EPA at the Hanford Federal Facility has excluded lands owned by other federal agencies (e.g., the BPA Midway Substation). This was done to conform to EPA's 1986 Notice of Policy and Interpretation, supra.

The definition of facility for the purposes of the HSWA Portion of the RCRA Permit for the Hanford Federal Facility is consistent with RCRA for the purposes of corrective action and includes all contiguous land under the ownership or control of the Permittee, the United States Department of Energy-Richland Operations Office (Energy).

See also EPA's Response to Comment #22.4, infra.

Permit Change:

No permit change is required in response to this comment.

Comment #13.2, Duty to Comply, Condition I.E., Page 10:

Dirk Dunning provided a comment that the language of this condition be clarified to ensure that any of the natural resource trustee provisions under the Superfund law, 42 U.S.C. § 9601 et seq., are upheld and that "none of those provisions are waived away as irrevocable and irreversible commitments of any facilities or portion of land or otherwise as a portion of this commentary." The commenter also stated that the treaty rights under the Treaty of 1855 with the Yakama Nation, the Confederated Tribes Umatilla Indian Reservation and the Nez Pierce Indian Tribe include the rights of the use of land for the normal accustomed purpose of tribal members and must be protected under the tribal treaty rights both as recognized by the federal government and recognized by the centennial proclamation of the state of Washington.

Response #13.2:

HSWA Permit Condition I.E.2 clearly states that compliance with the terms of the HSWA permit shall not automatically constitute a defense to any action under Section 107 of

9412279.1970

CERCLA, as amended, 42 U.S.C. § 9607. The broad reference to all of Section 107 of CERCLA includes a reference to Section 107(f) of CERCLA, which is the subsection in CERCLA dealing with liability for natural resource damages. As such, the commenter's concerns about waiving liability for such potential liability under the permit is addressed.

EPA also believes that while the rights of the Yakama, Umatilla and Nez Pierce Indian Tribes are guaranteed under the Constitution of the United States and the specific treaties between these tribes and the United States Government, the RCRA permit for the Hanford Federal Facility does not infringe upon those treaty rights. The purpose of issuing a RCRA permit to a facility is to increase the safety and protection of human health and the environment through improved hazardous waste management procedures and by requiring the Permittee to conduct corrective action for releases or threatened releases of hazardous waste or hazardous constituents from the permitted facility. As such, EPA expects that the treaty rights of the Yakama, Umatilla and the Nez Pierce Indian tribes will be protected by the issuance of the RCRA permit for the Hanford Federal Facility, as the permit contains provisions for addressing releases or threatened releases of hazardous waste and hazardous constituents. In addition, any corrective actions selected under the terms of the HSWA Permit will be subject to review and comment by all interested parties before implementation under the terms of the HSWA Permit.

Permit Change:

No permit change is required in response to this comment.

Comment #13.3, Condition I.K.1.d., Inspection and Entry, Page 12:

Dirk Dunning provided a comment on sampling and monitoring "at reasonable times" for the purpose of ensuring permit compliance or as otherwise authorized by RCRA. The commenter suggests access should not be limited to reasonable times but access should be provided for at "anytime."

Response #13.3:

EPA believes that access as specified in HSWA Permit Condition I.K.1.d is consistent with 40 CFR § 270.30(i) and the provisions of Section 173-303-810(10) of the Washington Administrative Code (WAC), which include language allowing access at reasonable times. It has been EPA's experience that by allowing for access at "reasonable" times, the required sampling and monitoring to insure permit compliance

9413279.1971

can be accomplished. Thus, EPA does not believe that it is necessary to deviate from the normal permit language used in other permits with respect to access issues.

Permit Change:

No permit change is required as a result of this comment.

Comment #13.4, Conditions I.L, Monitoring, Item 2:

Dirk Dunning provided a comment on the retention of monitoring point records. The commenter believes that monitoring records should be retained in perpetuity or until "such times as these materials have been permanently rendered nonhazardous."

Response #13.4:

The regulations codified at 40 CFR § 270.30(j) and WAC 173-303-810(11) require owners and operators of a permitted facility to maintain such monitoring records for at least three years, and data from groundwater-monitoring wells and associated ground-water surface elevations for the active life of the facility. HSWA Permit Condition I.L. is consistent with both the federal and state regulations regarding this period of retention. The activities conducted by the permittee under the HSWA permit are predominantly corrective actions, which involve the investigation and, if necessary, remediation of releases or threatened releases of hazardous waste or hazardous constituents. These activities do not involve the long-term storage or disposal of hazardous wastes, which would require retention of records for the life of the facility and any applicable post-closure period. Any such long-term disposal unit would be a permitted unit governed by the RCRA portion of the Hanford permit issued by the state of Washington.

EPA has included HSWA Permit Condition I.L., Monitoring and Records, which specifies in part:

> "...[that] all data used to complete the application for this permit [shall be maintained] for a period of at least five (5) years from the date of sample, measurement, report, or certification of recording, unless a longer retention period for certain information is required by other conditions of this permit."

In addition, this five year period may be extended by the Administrator at any time by notification in writing to the Permittee.

9413279.1972

Permit Change:

HSWA Permit Condition I.L.2. has been modified to specify that groundwater monitoring data, and associated groundwater surface elevation data be retained for the active life of the facility pursuant to 40 CFR § 270.30(j)(2). The revised permit condition reads:

"The Permittee shall retain, or ensure the retention of, at the facility, or other approved location, all records of all sampling and analysis information (including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation), records and results of inspections, copies of all reports required by this permit, and records of all data used to complete the application for this permit. These records shall be retained for a period of at least five (5) years from the date of sample, measurement, report, or certification of recording, unless a longer retention period for certain information is required by other conditions of this permit. This five (5) year period may be extended by the Administrator at any time by notification, in writing, to the Permittee, and is automatically extended to five (5) years after the successful conclusion of any enforcement action. Unless authorized pursuant to 40 CFR § 264.552, this requirement shall apply to other documentation produced pursuant to 40 CFR Part 268 (land disposal restrictions) and related portions of Section 6.0 of the FFACO, as amended. The Permittee shall maintain records from all ground-water monitoring wells and associated ground-water surface elevations for the active life of the facility."

Comment #13.5, Conditions I.N.1 and I.P.1., Notification:

Dirk Dunning provided a comment that the reporting to the National Emergency Response Notification Center which "has been interpreted to mean with-in one hour" be referenced in the HSWA Portion of the RCRA Permit.

Response #13.5:

EPA believes that HSWA Permit Conditions I.N.1. and I.P.1 regarding Notification are consistent with Twenty-four hour requirements under 40 CFR § 270.31(l)(6). The Hanford Contingency Plan also provides specific notification requirements. In addition, HSWA Permit Condition I.E.2 has been modified to indicate that the Permittee is required to comply with Section 103 of CERCLA as well as other federal law, including the Emergency Planning and Community Right-To-Know Act of 1986, as amended ("EPCRTKA"), 42 U.S.C. §§ 11001 et seq., notwithstanding compliance with the terms

9413279.1973

of the HSWA Permit. The one-hour notification requirement in EPCRTKA is a separate requirement, distinct from the twenty-four hour reporting requirement of 40 CFR § 270.31(l)(6).

Permit Change:

HSWA Permit Condition I.E.2 has been modified to indicate that the Permittee is required to comply with Section 103 of CERCLA as well as other federal law, including the Emergency Planning and Community Right-To-Know Act of 1986, as amended ("EPCRTKA"), 42 U.S.C. §§ 11001 et seq., notwithstanding compliance with the terms of the HSWA Permit.

Comment #13.6, Condition I.O.1, Transfer of Permit:

Dirk Dunning provided a comment regarding transfer of this permit to a new owner or operator. The commenter was concerned about transfers of the permit might allow the facilities at the Hanford Site to be used for general waste disposal and stated that it would be appropriate to "limit the use of the permit and disposal to only those materials generated on the Hanford site and to only those materials generated by the Federal Government or its contractors." In addition he stated that the permit should be "disallowed without reissuance from the beginning."

Response #13.6:

EPA believes that Condition I.O.1 regarding the transfer of the permit is consistent with 40 CFR §§ 270.30(l)(3), 270.40 and 270.41. These regulations allow the transfer of a permit to a new owner or operator provided the permit is either modified, or revoked and reissued to the new owner/operator, and the other provisions of the regulations are followed.

The issue regarding limiting the scope of the permit to allow only disposal of wastes generated on the Hanford Federal Facility is governed by RCRA Permit Condition II.N, "Receipt of Waste Generated Off-Site", in the state of Washington's RCRA permit for the Hanford Federal Facility. EPA directs the reader's attention to that permit condition for further discussion. In addition, the HSWA Permit currently does not provide for use of the Hanford Federal Facility for disposal of hazardous waste or hazardous constituents from off-site generators.

Permit Change:

No permit change is required as a result of this comment.

9413279.1974

Comment #13.7, Condition I.U., Confidential Information:

Dirk Dunning provided a comment regarding confidential information and stated that this section should be "removed and confidentiality not be allowed."

Response #13.7:

EPA believes that HSWA Permit Condition I.U. is consistent with 40 CFR §§ 260.2 and 270.12, which in general allow any person submitting information to the Agency to assert a claim of confidentiality over such information. Any information generated as part of this permit may be requested under the provisions of the Freedom of Information Act, 5 U.S.C. §§ 552 et seq. The procedures and regulations developed under FOIA, 40 CFR Part 2, and 40 CFR §§ 260.2 and 270.12 will govern whether the information can be released to the requestor.

Permit Change:

No permit change is required as a result of this comment.

Comment #13.8, Page 40, Section 6.B.(1)(a)(i):

Dirk Dunning provided a comment regarding the requirement in a RFI Workplan which requires the Permittee to provide a description of the horizontal and vertical extent of any immiscible or dissolved contaminants originating from the Facility. The commenter stated that "there is a problem on the Hanford Site with materials which have been disposed of to the soils which have descended through the soil column and into the waters and groundwaters" and that "there has been some consideration given to deciding that it is not practicable to remove those materials because there is no known technology today to get at them." The commenter then stated that "I think it's appropriate that requirements be put in place as part of the permit that technologies must be developed" to address such contaminants as "one of my principle concerns is the natural resource trust rights on the site as administered under the Superfund laws be protected."

Response #13.8:

EPA agrees in part and disagrees in part with this comment. This comment refers, in part, to the requirement of paragraph (6)(B)(1)(a)(i) of Attachment A to the HSWA permit. This paragraph requires the Permittee to characterize groundwater contamination at or from the

9413279.1875

facility, including the vertical and horizontal extent of contamination, rate of present and future migration, and factors influencing migration. Attachment A to the HSWA permit also contains similar requirements for characterizing contamination of soil and fill materials, including a requirement to extend such characterization both vertically and horizontally as necessary to determine the full extent of soil contamination.

The RCRA corrective action program, and the site-specific corrective action permit conditions in the HSWA permit, use a RCRA Facility Investigation (RFI), or remedial investigation, to characterize the nature and extent of potential releases from solid waste management units. Results of this investigation are used, in turn, to determine what, if any, corrective measures are required to address such releases as necessary to protect human health and the environment. As described in EPA's proposed Subpart S rule (55 Fed. Reg. 30798, 30835, July 27, 1990), both RFI investigations and the overall corrective action process are intended to be phased processes. That is, each phase or task should be consistent with existing data or information needs, and of appropriate rigor and focus to support decision points of each phase. The need for, and nature of, subsequent phases should be based on results of previous phases.

At the time the draft HSWA permit was issued for public comment, insufficient data were available to sufficiently characterize releases from SWMUs identified in the permit for purposes of determining the need for, or nature of, corrective action. Thus, the HSWA permit does not impose specific remedial requirements, but only lays out a generic, conditional framework for remedy selection and implementation. Final remedy selection is intended to be based on site-specific conditions at each SWMU pursuant to HSWA Permit Condition III.D.

EPA agrees in part that cleanup of releases from SWMUs to groundwater may prove technically challenging, and that in some instances, proven remedial technology may not be immediately available, to address particular releases, if at all. In the context of a phased investigation and remediation program, however, a decision with regard to specific remedial technologies, or technical impracticability, is generally premature in advance of RFI data and a corrective measures study (CMS). A permit condition directing the Permittee to develop technology to address releases of specific contaminants would be inappropriate before data are available documenting a release warranting corrective action of such constituents.

9W4279.1979

While the HSWA permit does not require the Permittee to develop or implement any specific remedial technology at this time, nothing in the permit prohibits EPA from requiring the Permittee from evaluating new or innovative technologies at such time as a corrective measures study is imposed pursuant to HSWA Permit Condition III.D.

EPA does agree that disposal of materials to the soils, with subsequent transport of contaminants to the soil column and to groundwater, is a potential release mechanism at certain SWMUs at the Hanford Federal Facility. EPA believes that the technical requirements of Attachment A to the HSWA permit specifically address this scenario, and that appropriate data will be obtained during the RFI process. Additionally, HSWA Permit Condition III.D and Attachment C to the HSWA permit insure that the results from the RFI will be incorporated into the CMS study.

EPA agrees in part with this comment in that there currently are limited technologies for removing groundwater contaminants such as dense non-aqueous phase liquids (DNAPLs). EPA has specified in HSWA Permit Condition III.H. the requirements for determining if compliance with a remedy is not technically practicable. HSWA Permit Condition III.H. specifies the information to be provided by the Permittee to the Agency to determine technical impracticability. Such information includes, but is not limited to, measures to control exposures and alternative measures for cleanup.

9413279.1977

Permit Change:

No permit change is required as a result of this comment.

Comment #13.9, Natural Resource Trust Rights:

Dirk Dunning provided a comment regarding the potential conflicts between Superfund law and the Clean Water Act and the Oil Spill Prevention Act. The commenter requested that any such potential conflicts be clarified, as one of his concerns was that "should the state of Washington enter into a permit of this sort and fail to protect the natural resource trust rights and commit what under the law might be considered an irrevocable or irretrievable commitment of resources, that then [if the state's] failure to uphold the trust rights [occurs,] that those financial obligations may well transfer to the state of Washington from the federal government. I believe that it's in the interests of the citizens of the state of Washington that not be allowed to happen."

Response #13.9:

The commenter appears to be referring to Section 107(f)(1) of CERCLA, 42 U.S.C. § 9607(f)(1), which states that liability to the United States or State or Indian tribe for damages to natural resources will not be imposed on a permittee if the permittee can demonstrate that such damages were:

> "specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe."

The HSWA portion of the RCRA permit for the Hanford Federal Facility, issued by EPA, does not "authorize such commitment of natural resources" such that damages to natural resources have been deemed necessary in order to comply with the terms of the HSWA permit. Indeed, it is the intent of EPA that compliance with the terms of the HSWA permit will protect the natural resources at the Hanford Federal Facility. Corrective action that may occur under the terms of the HSWA permit will address the releases or threatened releases of hazardous waste or hazardous constituents at the Hanford Federal Facility. Any such corrective actions that may result in damages to natural resources will be strictly scrutinized and be subject to public comment before approved by EPA or Ecology under the terms of the HSWA permit. Therefore, the commenter's concerns regarding protection of natural resources at the Hanford Federal Facility are addressed under the current terms of the HSWA permit. For further explanation see EPA's Response to Comment #13.1.

Permit Change:

No permit change is required as a result of this comment.

9413279.978

SUPPLEMENTAL COMMENTS BY U.S. ECOLOGY, SUBMITTED MARCH 31, 1994.

U.S. Ecology, Inc., provided supplemental comments on March 31, 1994 to EPA regarding the low-level radioactive waste regional disposal facility located in Richland, Washington. The responses to these supplemental comments, Section 15.0, on EPA's Hazardous and Solid Waste Amendments (HSWA) Portion of the RCRA Permit are addressed by EPA's Response to Comments, Section 22.0. This letter requested a meeting with EPA Region 10 which was held on May 12, 1994 in Seattle, Washington with U.S. Ecology, Inc., representatives. A copy of EPA's response to U.S. Ecology's March 31, 1994 letter is contained in the Administrative Record for the HSWA Portion of the RCRA Permit issued by EPA.

9413279.1979

COMMENTS BY DEPARTMENT OF ENERGY - RICHLAND OPERATIONS OFFICE (ENERGY) SUBMITTED APRIL 11, 1994.

Comment #18.165: Definitions, Page 5 and 6:

Department of Energy - Richland Operations Office (Energy) provided a specific comment on the definition of "facility" or "site" on pages 5 and 6 of the Definitions Section of the HSWA Portion of the RCRA Permit. Specifically, Energy stated that the definitions were ambiguous since the reference to Attachment 2 of the Dangerous Waste Permit was incorrect, i.e., "Parcel "C" is not reflected in the Attachment." In addition Energy stated that the definition of "facility" and "site" should be rewritten to exclude specific portions of the Hanford Federal Facility, i.e., the North Slope lands, the 100 acre site leased to the state of Washington and then subleased to US Ecology, Inc., and the BPA-owned Midway site.

Response # 18.165:

EPA agrees in part and disagrees in part with this comment. EPA disagrees that the 100-acre site leased to the state of Washington and subleased to US Ecology, Inc., should be excluded from the definition of "facility." In response, EPA has clarified the reference to the legal description for Parcel "C" (i.e., 100 acres of land leased to the State of Washington and subleased to the US Ecology, Inc.). EPA also disagrees that the North Slope lands should be excluded from the definition of "facility." This area is contiguous property under the ownership or control of the Permittee, the Department of Energy, and is thus properly included in the Hanford Federal Facility. As discussed in EPA's Response to Comment 22.4, corrective action at the North Slope lands is addressed through the FFACO. Past practice units at this area are therefore not addressed under the HSWA permit.

EPA agrees that certain portions of the Hanford Federal Facility should be excluded from the definition of "facility." For example, the legal description in Attachment F to the HSWA Permit excludes the BPA-owned Midway site and lands owned by the state of Washington. <u>See also</u> EPA's Response to Comment #22.4 (Perkins-Coie representing US Ecology) for further discussion of the definition of "facility" and "site."

Permit Change:

EPA has added the Hanford Legal description as Attachment F to the HSWA portion of the RCRA permit. Attachment F to the HSWA Permit excludes Parcel "A" (BPA-owned Midway Site) and

9413279.1980

Parcel "B" (state of Washington-owned land) from the jurisdiction of the HSWA Permit. All other land owned by the Department of Energy is included within the scope of the HSWA Permit, but some of the SWMUs on Energy-owned land are not addressed under HSWA Permit Condition III.B. because corrective action at those SWMUs are, or will be, addressed under alternative, enforceable mechanisms.

Comment #18.166: Conditions I.C.3, III.A.2.a, III.A.2.f.(vi), Pages 9, 23 and 24:

Energy provided a specific comment on the incorporation of schedules into the HSWA Portion of the RCRA Permit through a permit modification. Energy stated that the schedule for implementation should be established and maintained within the FFACO. Specifically Energy stated "[it] is the intent of the FFACO to maintain RCRA/CERCLA integration and to ensure that the work is properly prioritized and carried out based on environmental significance, and the overall strategy towards cleanup of the Hanford Site. This cannot be effectively achieved if the clean up schedules, and the ability to modify such schedules for RCRA corrective action operable units, are controlled through a separate process from the CERCLA response action operable units."

Response # 18.166:

EPA disagrees with this comment. The FFACO Action Plan, Section 6.2, "Treatment, Storage, and Disposal Permitting Process," on Page AP 6-4 states:

> "Section 3004(u) of RCRA requires that all solid waste management units be investigated as part of the permit process. The statute provides that the timing for investigation of such units may be in accordance with a schedule of compliance specified in the permit. [EPA and Energy] have addressed the statutory requirement through preliminary identification and assignment of all known past-practice units to specific operable units. These operable units have been prioritized and scheduled for investigation in accordance with the work schedule (Appendix D)."

Section 6.2, "Treatment, Storage, and Disposal Permitting Process," Page 6-4 of the Action Plan, also states that:

> "It is the intent of all parties that this requirement be met through incorporation of applicable portions of this action plan into the RCRA permit. This will include reference to

9413279.1981

specific schedules for completion of investigations and corrective actions."

The FFACO identifies all known RCRA past practice ("RPP") units to be addressed through RCRA corrective action authority. A major milestone, M-15-00, is included for completion of all RCRA Facility Investigation/Corrective Measures Study (RFI/CMS) activities, with intermediate milestones specified on a unit-specific basis. According to the language quoted above from the FFACO and HSWA Permit Condition III.A.2.a, all activities through the CMS stage at RPP units identified in Appendix C of the FFACO will be performed under the FFACO and the schedules included therein. Since no schedule of compliance for RFI or CMS activities for RPP units are included in the HSWA Permit, there is no "separate process from the CERCLA response action operable units" for schedule modification during the RFI/CMS process for RPP units.

Section 7.4.3 of the FFACO Action Plan notes that "the CMS report will become the basis for revision of the RCRA permit through the modification... process...." The Corrective Measures Implementation (CMI) phase will be conducted once the remedy for a RPP unit is incorporated into the permit according to HSWA Permit Condition III.A.2.e, along with the schedule of compliance required by Section 3004(u) of RCRA. Section 7.4.4 of the Action Plan states that "the CMI phase will be conducted in accordance with the schedule of compliance specified in the RCRA permit and the work schedule (Appendix D)." Thus, the FFACO clearly states a dual schedule of compliance is to govern each RPP unit following incorporation of the respective remedy for each RPP unit into the HSWA Permit. Energy's comment, therefore, is in opposition to the express language in the FFACO for incorporation of a remedy into a RCRA permit for RPP units during the CMI phase.

While schedule changes for RPP units during the CMI phase may entail modification of the FFACO and the HSWA permit, EPA believes that the administrative processes for these modifications can and should be concurrent. This approach will minimize administrative overhead, and promote effective public involvement.

Schedules of compliance for RFI, CMS, and CMI phases of corrective action at solid waste management units not addressed by the FFACO will be addressed entirely in the HSWA Permit.

Permit Change:

No permit change required in response to this comment.

9417279.1982

Comment #18.167: Condition I.I.1, Page 11, lines 30-38:

Department of Energy - Richland Operations Office (Energy) provided a specific comment to delete the last sentence of HSWA Permit Condition I.I.1, as Energy believes that the last sentence is inconsistent with the regulatory language of 40 CFR § 270.30(d). Specifically, Energy stated that "the Agency does not have the regulatory authority to prohibit permittees use of any legal defense to which they are entitled by law. Jurisdiction to determine legal defense rests with the courts and the legislature, not administrative agencies."

Response #18.167:

EPA agrees with this comment and has revised the Final HSWA Permit Condition I.I.1 to be consistent with 40 CFR § 270.30(d) and WAC 173-303-810(5).

Permit Change:

EPA has changed the Final HSWA Portion of the RCRA Permit Condition I.I.1 to read as follows: "In the event of noncompliance with this permit, the Permittee shall take all reasonable steps to minimize releases to the environment, and shall carry out such measures as are reasonable to prevent significant adverse impacts on human health and the environment."

Comment #18.168: Condition I.L.5, Lines 1-17, Page 14:

Energy commented that it is unclear whether the specific information to be included in the Permit Information repository would be included in one repository near the Hanford Facility, or in all four repositories. The last sentence of the Draft Permit condition I.L.5 describes the inclusion of raw data with all corrective action reports and investigations included in the information repository, unless it is a part of the report. Adding raw data to the information repository collection could increase the size to a level that will become unmanageable.

Response #18.168:

Due to the intense public interest in Hanford and the importance of raw data in the establishment of the decision record at Hanford, EPA believes it is appropriate to include the requirements envisioned in the proposed rule in the revised draft permit. However, EPA believes that it is more appropriately incorporated into the permit under specific

9413279.1983

report requirements. In this fashion, raw data will be closely associated with the appropriate decision documents. See HSWA Permit Condition I.L.5.

This approach is also consistent with EPA's proposed Subpart S corrective action rule (55 Fed. Reg. 30,798, July 27, 1990), in particular, proposed 40 CFR §§ 264.513(e) and 264.528(b). These proposed regulations state in part that:

> "All raw data, such as laboratory reports, drilling logs and other supporting information generated from [investigations required under 40 CFR § 264.510] or the remedial activities shall be maintained at the facility (or other location approved by the Administrator) during the life of the permit, including the term of any reissued permits."

EPA uses the proposed Subpart S rule as guidance for permitting purposes on a case-by-case basis. EPA believes that HSWA Permit Condition I.L.5, which is of similar scope to the cited proposed regulation, is fully justified on the site-specific considerations discussed in the previous paragraph.

HSWA Permit Condition I.L.5 requires that the Permittee establish and maintain an information repository for the purpose of making accessible to interested parties documents, reports, and other public information developed pursuant to investigations and activities under the HSWA permit. This repository must be located "within a reasonable distance from the facility." For the purposes of the HSWA permit, the public information repository located at or near Richland, Washington, shall be the repository referred to in HSWA Permit Condition I.L.5.

Permit Change:

No permit change is required in response to this comment.

Comment #18.169: Condition I.M.1, Lines 22-26, Page 24:

Energy stated that Draft Permit Condition I.M.1 is unnecessary and should be deleted since the condition pertains only to the dangerous waste portion of the RCRA permit.

Response #18.169:

EPA agrees in part with this comment. HSWA Permit Condition I.M.1 could be interpreted to apply to any changes or alterations to the permitted facility for the management of

9412279.1984

hazardous waste, even to changes not related to the permittees HSWA obligations. When EPA issues only the HSWA portion of a permit (that is, where the State is authorized to issue the non-HSWA portion on its own), EPA must "tailor" a provision such as this "so that it would apply only to those changes in plant operations affecting [the permittee's] HSWA obligations." See In re General Motors Corporation, Inland Fisher Guide Division, RCRA Permit No. IND 980 700 801, RCRA Appeal No. 93-5 (July 11, 1994), p. 14. In this sense, EPA agrees that the draft permit language in the HSWA Permit is overly broad.

EPA notes, however, that portion of the RCRA permit issued by the Washington Department of Ecology contains a similar change notification provision. The Ecology-issued RCRA Permit document, combined with the EPA-issued HSWA Permit document, constitute the entire RCRA permit for the Hanford Federal Facility. Regardless of any narrowing in scope of the HSWA Permit Condition I.M.1, the Permittee is effectively required to provide notification of any planned physical alteration or addition to either EPA or Ecology. In some cases, joint notification would be required. For example, if wastes generated pursuant to corrective action obligations were managed in a regulated unit permitted by the Department of Ecology, changes to the regulated unit would require joint notification to EPA and Ecology.

Finally, EPA notes that this issue is partially moot, as HSWA Permit Condition I.V.1 requires notifications pursuant to the HSWA Permit to be sent to the Department of Ecology. Thus, Ecology will effectively receive notification of all planned changes to the facility, including those required by the HSWA Permit. EPA, however, need receive only notifications pursuant to the HSWA Permit.

Permit Change:

HSWA Permit Condition I.M.1 is changed to read as follows:

"I.M.1 The Permittee shall give prior notice to the Administrator, as soon as possible, of any planned physical alterations or additions to the portions of the facility subject to this HSWA Permit."

The Permittee is required to report planned changes in accordance with 40 CFR §§ 264.56(d)(1), 264.56(j), 270.30(l)(2), 270.41, 270.42, 270.65, and/or WAC 173-303-809, -830(3), and -830(4).

9413279.1985

Comment #18.170: Condition I.T.2, Lines 50-53, Page 15:

Energy stated that "the specific regulation, 40 CFR § 264.73(b)(9), relates to waste minimization certification. To require all the information defined under I.T.2 to be certified (e.g., strip charts) is unrealistic."

Response #18.170:

EPA agrees with this comment. The signature and certification specified by HSWA Permit Condition I.T.2 are required under 40 CFR §§ 270.11, 270.30(k) and WAC 173-303-810(12).

Permit Change:

The Final HSWA Permit Condition has been changed to delete reference to Draft HSWA Permit Condition II.F and 40 CFR § 264.73(b)(9). The reference to 40 CFR §§ 270.11, 270.30(k) and WAC 173-303-810(12) has been added to HSWA Permit Condition I.T.2.

9413279.1986

Comment #18.171: Condition I.V.1, Lines 8-35, Page 16:

Energy stated that "the Department's Project Manager has provided direction for distribution of documentation under the FFACO, which is inconsistent with this condition." Energy also stated that "the FFACO Project Managers have established protocol for transmittals under the FFACO that is different than listed. For example, the Department's Project Manager has requested that most of the transmittals go directly to the appropriate Lacey or Kennewick office. Reference to the protocol under the FFACO will ensure that needs of the Project Managers are met."

Response #18.171:

EPA agrees with this comment for submittals governed by the FFACO protocol. However, for submittals outside the FFACO, HSWA Permit Condition I.V.1 specifies the distribution of documentation to the Agency and to the Department.

Permit Change:

EPA has revised HSWA Permit Condition I.V.1 to specify in part that "All reports, notifications, and submissions that are required by this HSWA permit, for those actions not governed by the FFACO, to be sent or given to the Administrator should be sent or given to:" and "All reports, notifications, and submissions that are required by this Permit for activities governed by the FFACO should be sent

in accordance with transmittal provisions established under Section 9.0, 'Documents and Records' of the FFACO." EPA has also added the name and address on the Ecology Hanford Section Manager currently located in Richland, Washington.

Comment #18.172: Condition I.V.2, Lines 37-43, Page 16:

Energy stated that "if the information repository discussed under this condition and previously discussed under Draft Permit Condition I.L.5 is intended to be the same as one, or all, of the public information repositories defined under the FFACO, it is not realistic to place all records, or notifications, and submissions in the repository. Delete last sentence starting on line 40, or add at the end of the sentence: ", or made available to the public on request."

Response #18.172:

EPA disagrees with this comment, in part. HSWA Permit Condition I.L.5 specifies that information must be placed by the Permittee in an information repository which is accessible to the public. The information repository has been defined in the definitions section of the HSWA Permit. EPA agrees that it is not realistic to file information in all public information repositories as identified in the FFACO. See further explanation under EPA's Response to Comment #18.168, supra.

Permit Change:

No permit change is required in response to this comment.

Comment # 18.173: Condition II.C.1, Lines 50-55, Page 18 and Lines 1-5, Page 19:

Energy stated that "the Agency should reword this condition to eliminate the specified period of time for submittal of permit applications. This condition should be rewritten to be consistent with the Draft Dangerous Waste Permit Condition II.W.1."

Response # 18.173:

EPA disagrees with this comment, in part. However, EPA has revised HSWA Permit Condition II.C.1. to be consistent with the state's Dangerous Waste Permit Condition II.W.1 to read as follows:

> "To the extent work required under Part III of this HSWA Permit must be done under permit(s) or approval(s)

9413279.1987

pursuant to other federal, state, or local regulatory authorities, the Permittee shall use its best efforts to obtain such permits. For the purposes of this permit condition the term 'best efforts' shall, at a minimum, mean submittal of a complete application for the permit(s) and/or approval(s) in accordance with the schedule approved by the Agency. 'Best Efforts' shall also mean submittal of a complete application for the permit(s) and/or approval(s) with lead time for issuance of such permit(s) and/or approval(s) as is typical for that action. Copies of all documents relating to actions taken, pursuant to this permit condition shall be kept in the information repository as specified in HSWA Permit Condition I.L.5."

Permit Change:

EPA has changed HSWA Permit Condition II.C.1. to be consistent with the state's Dangerous Waste Permit Condition II.W.1 regarding other permits and approvals.

Comment # 18.174, Condition II.D, Lines 8-46, Page 19:

Energy stated that "this condition exceeds regulatory requirements without sufficient justification and is ambiguous. Condition II.D.1.a arbitrarily defines 'best efforts.' This condition does not recognize the Energy's right under the FFACO to raise the defense that proper operation or maintenance could not be achieved because of a lack of appropriated funds. DOE-RL cannot violate the provisions of the Anti-Deficiency Act. The Agency is exceeding its regulatory authority by attempting to arbitrarily define the term 'best efforts' in the Draft Permit. Conditions II.D.1 and II.D.1.a, however, are unique to this Draft Permit and are arbitrarily drafted. There is no explanation in the Responsiveness Summary, HSWA Portion, for the uniqueness of this Draft Permit Condition.

"'Best Efforts' should be evaluated on a case-by-case basis, as is done for other Agency permittees. Many of the terms in this arbitrary definition are undefined elsewhere in the Draft Permit, such as the term 'outside contractors.' This leads to ambiguity as to what the Department expects the Permittees to do to satisfy this permit condition.

"The Draft Permit does not recognize that the DOE-RL may raise as a defense that proper operation or maintenance was not possible because of the lack of appropriated funds. The FFACO in Article XLVIII, paragraph 143, preserves the DOE-RL's right to raise this defense and the Department's right

9417279.1988

to dispute it. The Permit needs to parallel the FFACO on this issue."

Response #18.174:

EPA disagrees in part, and agrees in part, with this comment. This condition recognizes and does not preclude Energy's right to raise the defense that proper operation or maintenance could not be achieved because of a lack of appropriated funds, for corrective actions taken by Energy under the FFACO. Also, with respect to the actions taken by Energy which are not governed by the FFACO, EPA recognizes that Energy cannot violate the provisions of the Anti-Deficiency Act. As such, EPA has defined "best efforts" for purposes of HSWA Permit Condition II.D to also mean "adequate planning, staffing, laboratory and process controls, **seeking funding (emphasis added)**, and operation of backup or auxiliary facilities or similar systems as necessary to meet the required schedules."

EPA agrees that best efforts should, in part, be evaluated on a case-by-case basis. Nevertheless, EPA believes that certain actions must be taken by any permittee before a schedule extension request is considered. These actions should be considered a minimum performance threshold on the part of the Permittee before a schedule extension request warrants consideration, as opposed to an exhaustive enumeration of those actions which fully constitute best efforts. HSWA Permit Condition II.D.1.a. reflects this minimum performance threshold. EPA will evaluate on a case-by-case basis the need for additional actions that may be required of the Permittee to fulfill the "best efforts" threshold for consideration of a schedule extension request.

EPA disagrees that the "best efforts" language in this permit condition is arbitrary. In fact, EPA routinely provides similar language in corrective action permits, tailored to site-specific needs, as a means to communicate basic performance expectations. EPA believes that the cited activities represent prudent and common sense actions integral to management of projects for corrective action. Successful management of the corrective action process is necessary to insure protection of human health and the environment. HSWA Permit Condition II.D.1.a, therefore, is not arbitrary, and is fully within the scope of authority in Section 3004(u) of RCRA and 40 CFR § 264.101.

EPA agrees that the term "outside contractors" is not elsewhere defined. This term has been deleted from HSWA Permit Condition II.D.1.a. EPA does not believe that other terms appearing in this permit condition warrant explicit

9413279.1989

definition. As stated in Paragraph v. of the definitions section of the HSWA Permit:

> "Where terms are not defined in the regulations or the permit, the meaning associated with such terms shall be the standard dictionary definition or their generally accepted scientific or industrial meaning."

Should ambiguity remain after application of the standard or generally accepted meaning of terms in issues of best efforts and schedule extension, EPA will evaluate the application of best efforts on a case-by-case basis, as suggested by Energy.

Permit Change:

HSWA Permit Condition II.D.1.a has been revised to read as follows:

> "For the purposes of this permit condition, the term 'best efforts' shall, at a minimum, include performance of all activities necessary to award contract(s) no later than sixty (60) calendar days after the information necessary to award the contract(s) is available to the Permittee, or other such time as approved in advance by the Administrator. 'Best efforts' shall also include, but not be limited to, adequate planning, staffing, laboratory and process controls, seeking funding, and operation of backup or auxiliary facilities or similar systems as necessary to meet the required schedules."

Comment #18.175: Condition III.A.1, lines 16-22, Page 23:

Energy stated that "DOE-RL and its contractors should always be governed by the methods and procedures established in support of the FFACO, and not conditions III.B.1 through III.J. Also, III.I should be III.J at the end of the paragraph." Energy also suggested that the following sentence be added at the end of the paragraph: "If DOE assumes the management of corrective action activities through its contractors for a SWMU(s) listed under Condition III.B.1, the SWMU(s) will be incorporated into the FFACO and corrective actions will be satisfied as specified in the FFACO, and not through conditions III.B through III.J and the supporting attachments." Energy also proposed that the Agency "change III.I to III.J at the end of the existing paragraph." In support of these proposed changes, Energy stated that "to apply two separate processes to the DOE-RL and its contractors for conducting cleanup activities on the Hanford Site would result in confusion and unnecessary added

9413279.1990

costs. Methods, plans, and procedures would have to be significantly revised to address a few SWMUs for which DOE-RL might assume responsibility."

Response #18.175:

EPA disagrees with this comment. The definition of the Hanford Site in the FFACO specifically excludes leased lands from being subject to jurisdiction under the FFACO. As such, the SWMUs located on the leased lands at US Ecology must continue to be included in the HSWA Permit in order to insure that there is a legal mechanism (i.e., RCRA corrective action under the HSWA Permit) to ensure that the US Ecology SWMUs are investigated and, if necessary, remediated. EPA cannot defer to the FFACO the corrective action processes and procedures for lands which are not subject to FFACO jurisdiction.

Permit Change:

No permit change is required in response to this comment.

Comment # 18.176: Condition III.B.1.a, lines 20-24, Page 25:

Energy stated that "no benefit will be gained by including the US Ecology, Inc. (US Ecology) site in the Permit, HSWA Portion, because the US Ecology Site will be closed in accordance with a license issued by the state of Washington pursuant to the Nuclear Energy and Radiation Control Act, RCW 70.98. Item 66 of US Ecology's license includes provisions for closure of this site in accordance with the Facility Closure and Stabilization Plan (Closure Plan). Therefore, the site-specific permitting and closure process specified in the US Ecology radioactive materials licenses should take precedence over an investigation of corrective action SWMUs undertaken in accordance with Section 3004(u)." Energy also recommends "that any requirements related to SWMUs on the US Ecology site be incorporated in the Closure Plan. Such an approach can be pursued without resorting to the inclusion of the SWMUs on the US Ecology site in the Permit, HSWA Portion."

"While the land under the US Ecology site is owned by the Federal Government, the land is leased to the state of Washington under a 99-year lease. Because of the broad terms of the lease, the property is not under the 'control of the owner or operator' (see 58 Fed. Reg. 8664, Feb. 16, 1993), which is a necessary predicate for including corrective action provisions in a permit. As noted in the US Ecology comments submitted by Perkins Coie dated March 16, 1992 to the Agency on the initial Draft RCRA Permit, it is US Ecology's position that the DOE-RL has no real measure

9413279.1991

of control over the US Ecology site and that US Ecology and the state of Washington have responsibility for all environmental cleanup activities at the US Ecology site. The DOE-RL should not be placed in a position where it has permit requirements placed on it for an AEA licensed activity where it has absolutely no responsibility for those activities. Because the state of Washington is both US Ecology's landlord and regulatory authority and since the purpose of the AEA license is to assure the site is operated and closed in a manner that is protective of public health and the environment, it is reasonable to expect that the state and NRC will required the US Ecology site to be closed in a environmentally appropriate manner. From a policy standpoint, the DOE-RL and the federal taxpayers should not be required or requested under a RCRA permit to take corrective actions at a licensed commercial radioactive low-level waste disposal site. While DOE-RL will seek to obtain compensation from the state of Washington and US Ecology for any costs DOE-RL is required to incur, this process is inefficient to all parties; any necessary corrective actions should be taken solely under US Ecology's radioactive materials licenses."

"It would appear to be inconsistent with the requirements of the AEA to require investigation and cleanup under RCRA of the US Ecology site when these obligations will be addressed under the US Ecology, Inc. site license and closure plan."

Response #18.176:

EPA disagrees with this comment. See responses to Perkins-Coie comments (representing US Ecology) and US Ecology comments #22.1 through #22.11.

Permit Change:

No permit change is required in response to this comment.

Comment # 18.177: Condition III.C. through III.J, Attachments A through E, Pages 26-77:

Energy proposed "that these conditions be deleted and deferred at this time, as the conditions are not expected to be applied to a corrective action activity conducted by the DOE-RL and its contractors. Refer to comment on Condition III.A.1, HSWA Portion (Page 23, lines 16-22). It is expected that all remaining corrective action activities will be performed in accordance with the FFACO. To maintain these conditions in the Permit, when the conditions have no application, will be confusing to the public, and those responsible for administrating or adhering to the permit

9413279.1992

conditions. Even the Agency has proposed to defer corrective action at the only location (US Ecology site) that would be covered by these conditions. If deferral of corrective action at that site is not changed to a deletion...it still would be appropriate to defer issuance of these conditions until the time at which corrective action is required."

Response # 18.177:

EPA disagrees in part with this comment. As discussed in EPA's Responses to Comments ##18.175, 18.176, and 22.1 through 22.11, and elsewhere in this Response to Comments, SWMUs at that portion of the Hanford Federal Facility occupied by US Ecology must be addressed by the HSWA Permit. In addition, SWMUs identified after the effective date of the HSWA Permit and located on land owned by Energy but leased to other parties will not be covered by the FFACO past practice procedures, as the FFACO by its terms excludes leased lands from being subject to the FFACO. Therefore, HSWA Permit Conditions III.C. through III.J. and Attachments A through E are necessary to ensure that all existing and newly-identified SWMUs which are not subject to the FFACO past practice procedures will be investigated and, if necessary, remediated under the terms of the HSWA Permit.

EPA agrees that actions required by HSWA Permit Conditions III.C. through III.J. to address SWMUs at that portion of the Hanford Federal Facility occupied by US Ecology may be deferred as specified in HSWA Permit Condition III.B.2. However, since this is a conditional deferral, Permit Conditions III.C. through III.J. must remain in the HSWA Permit as a contingency.

The FFACO also provides for incorporation of RCRA past practice units (RPP) into the HSWA Permit at the time of remedy selection. See EPA's Response to Comment #18.166. HSWA Permit Conditions III.D. through III.J. and Attachments B, D and E must remain in the permit to accommodate this regulatory pathway. Since this pathway is already clearly established in the FFACO, there is no basis to support a deletion or deferral of any of the relevant HSWA permit conditions.

Permit Change:

No permit change is required in response to these comments.

9413279.1993

SUPPLEMENTAL COMMENTS BY THE U.S. DEPARTMENT OF ENERGY-RICHLAND OPERATIONS OFFICE, DATED 11 MAY 1994.

The U.S. Department of Energy Richland Operations Office provided supplemental comments on May 11, 1994 to EPA. These supplemental comments, however, contained no additional comments on the Hazardous and Solid Waste Management Act Portion of the RCRA Permit issued by EPA Region 10. The responses to Energy's supplemental comments are addressed by the Washington State Department of Ecology in its Responsiveness Summary, Section 19.0.

9413279.1991

COMMENTS BY DAVIS, WRIGHT, TREMAINE, (REPRESENTING ENVIROCARE, INC.) ON THE HSWA PORTION OF THE DRAFT HANFORD SITEWIDE PERMIT, DATED MAY 11, 1994

Comment# 20.1: Condition III.B.1.a Solid Waste Management Units:

Envirocare of Utah, Inc. ("Envirocare") submitted a comment on the identification of solid waste management units on Conditions III.B.1.a.(i) and III.B.1.a.(ii) subject to corrective action requirements at the US Ecology site as the Chemical Trench (SWMU 1) and Low-Level Radioactive Waste Trenches 1 through 11A (SWMUs 2 through 13). Envirocare specifically commented that the underground resin tank should be added as SWMU 17.

Response # 20.1:

EPA agrees with this comment. The "Hanford Site, US Ecology, Inc., Richland, Washington, RCRA Facility Assessment Report, Final Report" (hereinafter "US Ecology RFA"), dated June 22, 1992, indicated that the underground resin tank area was closed under approval by the state of Washington in 1988. Two tanks were removed, and the remaining three tanks were emptied and filled with concrete. However, there was no secondary containment system associated with these tanks, and there is documentation of at least one leak from one of the tanks in 1985. In addition, the RFA documents that these tanks managed organic and metal-containing wastes. A release from these units was documented, along with a significant potential that these releases included hazardous waste and/or hazardous constituents. Thus, EPA believes that further investigatory work at these tanks is required. However, the RFA also indicates that there are concerns regarding unnecessary worker exposure to radioactive constituents while conducting investigatory work at these tanks. Therefore, EPA believes that due to the exposure of workers to high levels of radioactivity, investigation of this SWMU might be better addressed as part of the US Ecology facility site stabilization and closure plan under its Radioactive Materials License. Thus, EPA will defer implementation of RCRA corrective action at this SWMU as provided in HSWA Permit Condition III.B.2.

Permit Change:

The permit has been modified to identify SWMU #17 in HSWA Permit Condition III.B.1.a.(iii). The various deferral options in HSWA Permit Condition II.B.2 apply to this SWMU as well.

9413279.1995

Comment #20.2: Condition III.B.2, Corrective Action Requirements:

Envirocare submitted a comment on HSWA Permit Condition III.B.2. and specifically requested that this condition be revised to include that the Agency and the Department of Ecology enter into a Memorandum of Understanding (MOU) with the Department of Health requiring US Ecology to implement a RCRA Facility Investigation (RFI), a Corrective Measures Study (CMS) and implementation of corrective and interim measures that meet all applicable requirements under RCRA and the Washington State Administrative Code. In addition, Envirocare also provided the following comments: (1) that US Ecology should be responsible for implementing RCRA Corrective Action and the Department of Ecology should be given the primary oversight role for all RCRA Actions at US Ecology; (2) corrective action should be accomplished under MTCA procedures and cleanup standards; (3) the US Ecology closure and post-closure plan should be overseen by the Department of Ecology and meet RCRA standards; (4) the radioactive materials license should be amended to incorporate all actions required under this condition; and (5) the draft MOU should be revised to include all RCRA actions required at the US Ecology Site.

Response #20.2:

EPA agrees in part and disagrees in part with these comments. First, EPA agrees that the corrective actions taken under the HSWA Permit must be conducted in such a manner that is protective of human health and the environment. This will be accomplished by conducting the necessary corrective actions by following the detailed provisions of HSWA Permit Conditions III.C. through III.E.

However, EPA disagrees with the comment that US Ecology should be responsible for corrective action under the terms of the HSWA Permit. While it may be more practical for US Ecology to conduct a RCRA corrective action program within the property that it leases, the fact remains that US Ecology is not a Permittee under the HSWA Permit and is not a party to the FFACO or "Tri-Party Agreement" governing remedial and corrective actions at the Hanford Federal Facility. The SWMUs located at the US Ecology facility are included in the HSWA permit because of the provisions of Section 3004(u) of RCRA, 42 U.S.C. § 6924(u). Section 3004(u) states that any permit issued after November 8, 1984 shall require "corrective action for all releases of hazardous waste or constituents from <u>any solid waste management units at a treatment, storage, or disposal facility</u> seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." (Emphasis added). As such, EPA conducted RCRA Facility

9413279.1996

Investigations ("RFAs") at the Hanford Federal Facility in order to identify all SWMUs that may require further investigation and/or remediation. The "Hanford Site, US Ecology, Inc., Richland, Washington, RCRA Facility Assessment Report, Final Report" (hereinafter "US Ecology RFA"), dated June 22, 1992, identified certain SWMUs that require further investigation at US Ecology. US Ecology leases land from the Washington State Department of Ecology, which in turn leases the property from the U.S. Department of Energy ("Energy"). Thus, Energy owns the land upon which the SWMUs are located at US Ecology. Since the HSWA portion of the RCRA permit is being issued to Energy as the owner and co-operator of the Hanford Federal Facility, Energy is the only party upon whom RCRA corrective action requirements can be imposed under Section 3004(u) of RCRA for the SWMUs at the US Ecology facility.

Ecology has the responsibility to issue RCRA permits in the state of Washington in lieu of EPA, as Ecology has been authorized by EPA to implement many aspects of the federal RCRA program. Ecology is currently seeking authorization for the RCRA corrective action program; however, as of the date of issuance of the HSWA permit, this authorization has not yet been finalized. As such, EPA must issue the HSWA portion of the RCRA permit for the Hanford Federal Facility. If and when the state of Washington receives authorization for the RCRA corrective action program, the state, under the terms of the HSWA permit, must modify its RCRA permit to incorporate the HSWA requirements into its RCRA permit. At that time, Ecology will become the primary regulatory agency in charge of overseeing compliance with the RCRA permit, while EPA will retain an oversight role of the state's enitre authorized program. Until the state of Washington becomes authorized for RCRA corrective action, EPA by statute cannot allow the state to have the "primary oversight role" under the HSWA permit as suggested by the commenter.

Likewise, the state of Washington does not currently have authorization under RCRA to allow the state's Model Toxics Control Act ("MTCA") procedures and cleanup standards to be the process which will govern corrective action under the HSWA permit. As part of the state of Washington's proposed corrective action authorization package, the state proposes to allow facilities to conduct RCRA corrective actions using an alternative state authority, MTCA. Such corrective actions will use a MTCA Order and will follow MTCA procedures and cleanup standards in order to complete the facility's corrective action obligations. The MTCA Order would not be considered to fulfill the RCRA statutory corrective action obligations under Section 3004(u) until the MTCA Order has been incorporated by reference into a

9413279.1997

RCRA permit. However, unless and until the state receives authorization for RCRA corrective action, EPA cannot suggest in the HSWA permit that corrective action at the US Ecology facility must proceed under the MTCA procedures and cleanup standards. However, in HSWA Permit Condition III.G. ("Action Levels"), EPA has stated that the "Permittee shall consider the Washington State Model Toxics Control Act Standards, and Federal regulatory requirements including EPA health-based values," when conducting corrective actions under the HSWA permit. As such, MTCA cleanup standards will be considered as part of corrective actions under the HSWA permit, as suggested by the commenter.

The commenter also stated that it wished to see that the US Ecology site stabilization and closure plan meet RCRA standards and to have closure overseen by Ecology. In support of this comment, the commenter cites specific state statutory language and specific terms of US Ecology's Radioactive Materials License. The commenter then states that closure and corrective action activities must be coordinated in order to ensure that corrective action will be accomplished. EPA agrees that corrective actions under the HSWA permit should be coordinated, as applicable, with the ongoing site stabilization and closure actions under US Ecology's license. However, EPA has no authority under RCRA to require US Ecology to amend its Radioactive Materials License to incorporate RCRA standards. US Ecology's license was issued by the state of Washington Department of Health ("Health") to US Ecology under the authorities granted to Health by the Nuclear Regulatory Commission ("NRC"). The NRC in turn gets its authority from the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C. § 2011 et seq. Under Section 1006 of RCRA, 42 U.S.C. § 6905, EPA cannot regulate "any activity or substance which is subject to" the AEA, "except to the extent that such application (or regulation) [under RCRA] is not inconsistent with the requirements of" the AEA. The US Ecology site stabilization and closure plan is being prepared by US Ecology under the authority of the AEA, the NRC, state law and regulations, and the terms of its NRC license. If the US Ecology site stabilization and closure plan developed pursuant to the Radioactive Materials License eventually includes RCRA-related provisions and requirements, then any RCRA corrective actions that may be required under the HSWA Permit at the US Ecology facility will be performed in such a manner to ensure proper coordination and to limit duplication of effort. However, EPA under the HSWA Permit cannot require that the US Ecology NRC license be amended to incorporate RCRA corrective action requirements.

Regarding the draft MOU, EPA has considered using the MOU as a vehicle to assist the corrective action process for the

9413279.1998

SWMUs located at US Ecology. To date, US Ecology has not shown a willingness to allow deferral of corrective action under the HSWA Permit to one of the five administrative options in HSWA Permit Condition III.B.2 in order to address the investigation and, if necessary, corrective action at the SWMUs at US Ecology. The whole purpose of the draft MOU was to assist EPA, Ecology and Health to coordinate the "circumstances and arrangements under which Health will incorporate and oversee RCRA corrective action requirements in conjunction with Health's oversight responsibilities for the Radioactive Materials License held by US Ecology." See Draft MOU. If US Ecology continues to be unwilling to allow RCRA corrective action to proceed for the SWMUs located at US Ecology under the terms of an amended license, then there is no reason for EPA to enter into a MOU with Health. EPA and Ecology can administer RCRA corrective actions by and through the terms of the HSWA permit.

Permit Change:

No permit change is required in response to these comments.

9413279.1999

COMMENTS BY US ECOLOGY, INC., ON THE PROPOSED RCRA "PART B" PERMIT FOR TREATMENT, STORAGE, AND DISPOSAL OF HAZARDOUS WASTE AT THE UNITED STATES DEPARTMENT OF ENERGY'S HANFORD FEDERAL FACILITY (PERMIT NO. WA7 89000 8967) DATED MAY 9, 1994.

EPA's response to the comments contained herein have been prepared in response to US Ecology's comments dated May 9, 1994. EPA is also attaching its previous Response to Comments, dated February 9, 1994, which were issued as part of the reissuance of the draft HSWA permit. EPA's February 9, 1994, Response to Comments and this Response to Comments are meant to be consistent with each other. This Response to Comments is also intended to supplement and clarify EPA's February 9, 1994, Response to Comments. If any inconsistencies exist between the two responses to comments, then this response will supersede the February, 9, 1994, Response to Comments.

9413279.2000

Comment # 22.1:

US Ecology commented that the "US Ecology site is not subject to RCRA (and has never been) because it does not engage in the treatment, storage or disposal of hazardous waste. As set forth in US Ecology's comments, dated January 13, 1993, on the RCRA Facility Assessment Report prepared by PRC Environmental Management, Inc., (the "PRC" Report), US Ecology has never received a RCRA regulated hazardous or mixed waste at the time of disposal. As a result, there are no SWMUs at the US Ecology site. Therefore, EPA has no RCRA authority to require corrective action at the US Ecology site."

Response #22.1:

EPA disagrees in part with this comment. Section 3004(u) of RCRA, 42 U.S.C. § 6924(u), and regulations promulgated at 40 CFR § 264.101 require corrective action, as necessary, to be included in all permits issued after November 8, 1984, in order to protect human health and the environment for all releases of hazardous waste or hazardous constituents from any solid waste management unit (SWMU) at a facility seeking a RCRA permit. EPA agrees with US Ecology that US Ecology is not subject to the permitting requirements of Section 3005 of RCRA, 40 CFR Part 270, or the authorized state RCRA program at this time. See EPA Response to Comment #4.1, infra.

In response to this comment, the response will first discuss the definitions of "solid waste," "hazardous waste," and "solid waste management unit" under RCRA and its implementing regulations and EPA guidance. The response will then examine the findings of the US Ecology RFA and

discuss those findings in the context of the previous definitions.

A "solid waste" under RCRA is defined under Section 1004(27) (42 U.S.C. § 6903(27)) as being:

> "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended."

A solid waste is further defined under 40 CFR § 261.2 as being:

> "any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
>
> > "(2) a *discarded material* is any material which is:
> >
> > > (i) *Abandoned*, as explained in paragraph (b) of this section; or
> > >
> > > (ii) *Recycled*, as explained in paragraph (c) of this section; or
> > >
> > > (iii) Considered *inherently waste-like*, as explained in paragraph (d) of this section.
>
> "(b) Materials are solid waste if they are *abandoned* by being:
>
> > (1) Disposed of; or
> >
> > (2) Burned or incinerated; or
> >
> > (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated."

94/3279.2001

A "solid waste management unit" is defined in the preamble to the RCRA first codification rule as including:

> "...any unit at the facility [seeking a permit under Section 3005(c) of RCRA] 'from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes.' H.R. Rep. No.198, 98th Cong., 1st Sess.; Part 1,60 (1983)." See 50 Fed. Reg. 28702, 28712 (July 15, 1985).

EPA has further defined the term "solid waste management unit" in its proposed Subpart S regulations as:

> "any discernable unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released." See 55 Fed. Reg. 30,798, 30,874 (July 27, 1990).

9473279.2002

The Subpart S SWMU definition has been upheld by EPA's Environmental Appeals Board as being "consistent with both the statutory definition of 'solid waste management' and the legislative history concerning units intended for regulation under RCRA Section 3004(u)." See In re GMC Delco Moraine, RCRA Consolidated Appeal Nos. 90-24 and 90-25, RCRA Permit Nos. OHD 045 557 766 and OHD 060 928 561, November 6, 1992, at 5; In re: Environmental Waste Control, RCRA Appeal No. 92-39, RCRA Permit No. MID 057 002 602, May 13, 1994, at 16, n.9.

The term "hazardous waste" is defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), as being:

> "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--
>
> (A) cause, or significantly contribute to an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

The term "hazardous waste" is further defined at 40 CFR § 261.3 as follows:

> "(a) A solid waste, as defined in § 261.2, is a hazardous waste if:
>
> > (1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and
> >
> > (2) It meets any of the following criteria:..."

The criteria under 40 CFR § 261.3(a)(2) include: 1) whether the solid waste exhibits any of the characteristics of hazardous waste identified in 40 CFR Part 261, Subpart C; 2) whether the solid waste is a listed waste under 40 CFR Part 261, Subpart D; 3) whether the solid waste is a mixture of a solid and a characteristic hazardous waste and the mixture retains a characteristic of a hazardous waste; and 4) whether the solid waste is a mixture of a solid and a listed hazardous waste. Thus, under 40 CFR Part 261, hazardous wastes are a subset of the universe of solid wastes identified under Part 261.

The US Ecology RFA identified 19 SWMUs at the US Ecology portion of the Hanford Federal Facility, and it recommended that some of these SWMUs required various levels of further study (i.e., a RCRA Facility Investigation (RFI) was required). See "Hanford Site, US Ecology, Inc., Richland, Washington, RCRA Facility Assessment Report, Final Report" (hereinafter "US Ecology RFA"), dated June 22, 1992, prepared by PRC Environmental Management, Inc. The SWMU of greatest concern is SWMU #1 which is an unlined chemical disposal trench which was operated by the facility prior to 1980. The RFA indicated that this chemical trench appeared to have received, before 1980, various hazardous chemicals in boxes and drums, and some free liquids as well.

The US Ecology RFA indicated that file searches conducted by US Ecology revealed "only the disposal of solid beryllium/copper metal shavings, scintillation fluids, and phenolic waste from three generators (US Ecology, 1990). These documented wastes included hazardous constituents such as benzene and toluene. Past disposal practices for this trench may have included disposal of additional uncontainerized bulk liquid waste (AT Kearney, 1987)." See US Ecology RFA, p. 12. Also, the US Ecology RFA identified that US Ecology trenches 1 through 11A received scintillation fluids, and some discarded shielding containers and resin waste that may qualify as mixed waste due to lead and other potential metals contamination. See US Ecology RFA, p. 12. In addition, the US Ecology RFA

9412279.2003

identified the resin tanks (SWMU 17) as being an area which managed organic and metal-containing wastes. Materials such as metal shavings, scintillation fluids containing benzene and toluene, discarded lead shielding, resin waste and phenolic waste clearly fall under the definition of a "solid waste" under Section 1004(27) of RCRA and 40 CFR § 261.2, as these "materials" were "disposed of" in the US Ecology trenches. Thus, it is clear that the chemical trench and trenches 1 through 11A, and the resin tanks contain solid waste, and are also considered solid waste management units under RCRA.

In a recent RCRA permit appeal before EPA's Environmental Appeals Board, the Board ruled that the proposed SWMU definition contained in EPA's proposed Subpart S rule does not require a showing of a release of hazardous waste or constituents if the proposed SWMU is a "discernable unit at which solid wastes have been placed at any time." In re General Motors Corporation, Inland Fisher Guide Division (hereinafter "GMC"), RCRA Permit No. IND 980 700 801, RCRA Appeal No. 93-5 (July 11, 1994), at 11.

In GMC, the Permittee (GMC) sought review of a final HSWA permit decision by EPA Region V. In its petition, GMC challenged, inter alia, the Region's designation of five solid waste management units at GMC's manufacturing facility in Anderson, Indiana. The Board upheld Region V's designation of all five SWMUs, and stated that for each designated unit, the Region had identified adequate evidence in the administrative record which showed that either the SWMUs were units in which solid wastes had been placed, or that the area was one at which solid wastes had been routinely and systematically released, or both. GMC, at pp. 4-14.

In upholding Region V's designation of SWMUs at the GMC facility, the Board quoted the definition of a "solid waste management unit" from EPA's proposed Subpart S rules, and stated:

> "[t]hat definition does not, as GMC suggests, require EPA to demonstrate that a particular unit was used for storage of *hazardous* wastes before designating the unit as a SWMU. To the contrary, although the definition acknowledges the distinction between solid waste and hazardous waste ('irrespective of whether the unit was intended for the management of solid or hazardous waste') it refers only to 'solid waste' when identifying the material placed at or released from a potential SWMU. And the proposed Subpart S definition requires only the 'placement' of solid waste at a particular unit to support designation of the unit as a

9413279.2004

SWMU; the definition does not, as GMC suggests, require both the placement of waste and the occurrence of routine and systematic releases of that waste." (Emphasis in original). See GMC, at 8.

The Board goes on in GMC to state that:

> "The proposed Subpart S definition of solid waste management unit, on which GMC here seeks to rely, requires no showing of a release if the proposed SWMU is a 'discernable unit at which solid wastes have been placed at any time.' 55 Fed. Reg. at 30,874." See GMC, at 11.

Thus, it is clear that in order for a unit to be designated as a SWMU, EPA does not need to show in the administrative record that the unit had received hazardous waste or that the unit has been shown to be actively releasing. Rather, EPA must be able to show that the proposed SWMU is a "discernable unit at which solid wastes have been placed at any time." In this case, the US Ecology RFA indicated that the proposed SWMUs at the US Ecology facility had received various types of solid waste in the past, such as solid beryllium/copper metal shavings, scintillation fluids, and phenolic waste from three generators, and may have included disposal of additional uncontainerized bulk liquid waste (Chemical Trench); and metal shavings, scintillation fluids containing benzene and toluene, discarded lead shielding, resin waste and phenolic waste (Trenches 1-11A); and metals and organic wastes associated with resins in the resin tanks. This material is clearly solid waste, and the Chemical Trench and Trenches 1-11A and the resin tanks are clearly "discernable units" in that they are discreet, surveyed and/or marked out areas of the US Ecology facility. Thus, these trenches and tanks are "solid waste management units" as that term is defined in RCRA and in the proposed Subpart S rule.

In addition, SWMUs do not have to be classified as RCRA-regulated treatment, storage or disposal units in order for RCRA corrective action to apply to the SWMUs at a facility under Section 3004(u) of RCRA, 42 U.S.C. § 6924(u). Rather, the SWMUs need only be located on a treatment, storage or disposal "facility" seeking a permit under Section 3005(c) of RCRA, 42 U.S.C. § 6925(c). See Section 3004(u) of RCRA; see also S. Rep. No. 284, 98th Cong., 1st Sess., at 32 (1983) ("The requirement for corrective action [under Section 3004(u)] applies not just to releases of hazardous wastes, but also to releases of hazardous constituents, including hazardous constituents from solid waste and hazardous constituents that are reaction by-products"). In this case, the U.S. Department of Energy has applied for a

9/4/2279.2005

RCRA permit for the Hanford Federal Facility. As such, all "contiguous property under the control of the owner or operator" seeking a RCRA permit is subject to corrective action under Section 3004(u) of RCRA. A discussion of the definition of a "facility" for purposes of corrective action can be found in EPA's Response to Comment #22.4, infra.

Permit Change:

No permit change is required in response to this comment.

Comment #22.2:

US Ecology commented that "even if there are any SWMUs at the US Ecology site (which there are not) there is no information that a release of hazardous substances or constituents has occurred from any of the alleged SWMUs at the site."

Response #22.2:

EPA disagrees in part with this comment. The RCRA Facility Assessment (RFA) completed in June 22, 1992 identified 19 SWMUs on the US Ecology facility. The HSWA Portion of the RCRA Permit identifies that some of these SWMUs require further corrective action; i.e., a RCRA Facility Investigation is required for those SWMUs. See EPA's Response to Comment #22.1, supra. EPA agrees that the US Ecology RFA does not conclude that a release has in fact occurred at the US Ecology SWMUs. However, as explained below, proof that a release has occurred is not required in order to allow EPA to include corrective action conditions in HSWA permits. In fact, EPA may impose corrective action requirements in order to obtain precisely those data which may confirm or refute the possibility that a SWMU may have released hazardous constituents.

EPA has the authority to require corrective action at SWMUs for releases of hazardous waste or hazardous constituents under Section 3004(u) of RCRA. EPA has interpreted the term "release" for purposes of RCRA corrective action in a manner consistent with the definition of "release" under Section 101(22) of CERCLA, 42 U.S.C. § 9601(22). See 50 Fed. Reg. 28,702, 28,713 (July 15, 1985). Section 101(22) of CERCLA defines "release" as including any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." EPA, under its proposed corrective action rule, the draft Subpart S rule (which EPA uses as guidance pending action on a final rule), proposed including in the definition of a release such items as abandoned or discarded

9413279.2006

containers and other closed receptacles containing hazardous waste or hazardous constituents. See 55 Fed. Reg. 30,798, 30,808 (July 27, 1990).

Existing regulations explicitly contemplate situations where insufficient data are available to confirm releases from solid waste management units. For example, 40 CFR § 170.14(d)(3) states the following with respect to solid waste management units and permit applications:

> "The owner/operator must conduct and provide the results of sampling and analysis of groundwater, landsurface and subsurface strata, surface water, or air, which may include the installation of wells, where the Director ascertains it is necessary to complete a RCRA Facility Assessment that will determine if a more complete investigation is necessary."

40 CFR § 264.101(b), in part, states:

> "Corrective action will be specified in the permit in accordance with this section and subpart S of this part. The permit will contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit)..."

Thus, regulatory authority exists for permit conditions that require investigations to fill data gaps in the RCRA Facility Assessment. While the HSWA Permit requires the Permittee to investigate US Ecology SWMUs as a RCRA Facility Investigation (RFI), data to be gathered are precisely those that, if available at the time of the RFA, would support a conclusion of either no further action, or that a full RFI was required.

The EPA Administrator has ruled affirmatively on this issue. In the case entitled In re Shell Oil Company, RCRA Appeal No. 88-48, the Administrator states:

> "To require an owner/operator to conduct further investigation of a SWMU, the Region need not have conclusive evidence of a release, but instead only evidence of a likely or suspected release.

See In re Shell Oil Company, RCRA Permit No. WAD 009 275 082, RCRA Appeal No. 88-48 (March 12, 1990), p. 7.

In a similar case, the Administrator stated that:

> "...RCRA § 3004(u) does not mandate that the Region show conclusive proof of a release before requiring the

9413279.2007

permittee to conduct various preliminary site investigations. Although the section mandates corrective action for 'releases,' it recognizes that gaps in available information may require a phased approach and the inclusion of schedules of compliance. In my view, the authority in RCRA § 3004(u) to require corrective action for a release includes the authority to require an applicant or permittee to determine whether a suspected release has actually occurred.

See In re Marathon Petroleum Company, Robinson, Illinois, RCRA Permit No. ILD 005 476 882, RCRA Appeal No. 88-24 (November 16, 1990), p. 5.

The EPA Administrator has also ruled that Section 3004(u) of RCRA can be used to require monitoring of future releases at SWMUs even where there is no evidence of existing releases. See In re Envirosafe Services of Idaho, Inc., RCRA Permit Appeal No. 88-41 (April 3, 1990). See also In re General Motors Corporation, Inland Fisher Guide Division, RCRA Permit No. IND 980 700 801, RCRA Appeal No. 93-5 (July 11, 1994), at 11; EPA's Response to Comment #22.1, supra.

94 4279 2008

The US Ecology RFA cited a report prepared by AT Kearney in September 1987 entitled "Closure and Perpetual Care and Maintenance of the Commercial Low-Level Radioactive Waste Disposal Facility on the Hanford Reservation, Phase One Report" (hereinafter "AT Kearney Report"). The US Ecology RFA, citing the AT Kearney Report, stated the following:

> "It is likely that there have been environmental releases from SWMU 1 (chemical trench). Chemicals were disposed of in this unlined trench in drums and cardboard boxes. A former US Ecology employee alleged that past US Ecology practices included dumping uncontained liquid wastes directly into the chemical trench (AT Kearney, 1987). Also, it is likely that waste disposal containers buried in this unit 20 years ago have begun deteriorating and releasing their contents into the soil. However, no evidence of release was observed during the [visual site inspection]." See US Ecology RFA, p. 18.

In addition, the US Ecology RFA indicated there may have been releases from SWMUs 2 through 13 (trenches 1 through 11A) at the US Ecology Site:

> "Environmental releases could have occurred from SWMUs 2 through 13 (Trenches 1 through 11A). These trenches are unlined and have been used for disposal of undetermined amounts of mixed waste and low-level radioactive wastes in drums and boxes. As with SWMU 1,

the containers have probably begun deteriorating and releasing their contents into the soil."

Finally, the RFA identified that releases did or were likely to have occurred from SWMU 14, the former resin tank. See EPA's Response to Comment #20.1, supra.

Therefore, EPA does have information indicating that further investigation in the HSWA Permit of SWMUs 1 through 14 at US Ecology is warranted. The US Ecology RFA has determined that it is likely that releases of hazardous constituents into the environment from these SWMUs has occurred. Further investigation, and possible remediation, of these SWMUs is indicated.

9413279.2009

Permit Change:

No permit change is required in response to this comment.

Comment #22.3:

US Ecology commented that there is, likewise, no evidence that RCRA constituents have migrated beyond the Hanford Federal Facility's boundaries to the US Ecology's site and, as a result, no corrective action authority exists under RCRA § 3004(v).

Response #22.3:

EPA disagrees with this comment. Under the terms of the draft HSWA permit, EPA is not requiring corrective action for the SWMUs at US Ecology under the authority of Section 3004(v) of RCRA. Rather, EPA is requiring corrective action for the US Ecology SWMUs under the authority of Section 3004(u) of RCRA, as the US Ecology SWMUs are part of the Hanford Federal Facility for purposes of corrective action. See EPA's Response to Comment #22.4, infra, for further discussion of the definition of a "facility" for purposes of corrective action.

Permit Change:

No permit change is required in response to this comment.

Comment #22.4:

US Ecology commented that the US Ecology site is not part of Energy's "facility." US Ecology stated that "[b]y EPA's own admission, the definition of 'facility' for purposes of RCRA corrective action is limited in scope when applied to

federal facilities such as the Hanford Federal Facility. Only property within the control of DOE can be included in the 'facility' for purposes of RCRA corrective action. EPA has admitted that the US Ecology site is not under the control of DOE, and therefore the US Ecology site is not part of the permitted 'facility.'"

Response #22.4:

EPA disagrees with this comment. In its February 9, 1994 Response to Comments, EPA stated that Section 3004(u) of RCRA requires that each permit for a hazardous waste treatment, storage, or disposal facility, issued after November 8, 1984, contain provisions requiring corrective action for releases of hazardous waste or hazardous constituents from any solid waste management units (SWMUs) at a facility seeking a permit for treatment, storage or disposal of hazardous waste, regardless of the time at which waste was placed in such units. Energy, at the Hanford Federal Facility, submitted Part A and Part B applications and is seeking a RCRA permit for facility operations under EPA/Ecology ID #WA7 89000 8967. At this time, EPA does not consider US Ecology to be operating a RCRA treatment, storage or disposal facility subject to RCRA permitting or interim status regulations codified at 40 CFR Parts 264 or 265. See EPA's Response to Comment #4.1, supra. However, RCRA requires facility-wide corrective action for the Hanford Federal Facility, which includes the SWMUs within US Ecology's sublease, since the subleased area is owned by the Department of Energy and is therefore considered to be part of the Hanford "facility" for purposes of RCRA corrective action.

This response will continue with a discussion of the "facility" definition as specified in RCRA regulations and EPA guidance and policy. The discussion will then focus on the consistency of the permit definition with the regulatory definitions.

The definition of "facility" for corrective action purposes is consistent with the recently promulgated corrective action management unit rule definition of "facility" (58 Fed. Reg. 8658, 8664), codified at 40 CFR § 260.10, which defines the term "facility" for purposes of corrective action under RCRA:

> "Facility means:
>
> .... (2) For the purposes of implementing corrective action under § 264.101, all contiguous property under the control of the

9413279.2010

owner or operator seeking a permit under Subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h)."

This definition of facility is the same definition that was upheld in a decision of the U.S. Court of Appeals. See United Technologies v. U.S. EPA, 821 F.2d 714 (D.C. Cir. 1987). EPA therefore interprets "facility" for purposes of corrective action to include all contiguous property under the owner or operator's control. This interpretation is consistent with the definition of facility in the HSWA Portion of the RCRA Permit.

EPA has implemented the RCRA Section 3004(u) statutory requirement through rules codified at 40 CFR § 264.101 (July 15, 1985, 50 Fed. Reg. 28702). In the preamble to that rulemaking, EPA raised the issue of whether it was appropriate to use the same definition of "facility" for federal facilities as private facilities (i.e., all contiguous property under the owner or operator's control, see 50 Fed. Reg. at 28712). On March 5, 1986 (51 Fed. Reg. 7722), EPA published a "Notice of Policy and Interpretation" which stated in part:

> "...EPA has concluded that Section 3004(u) subjects federal facilities to corrective action requirements to the same extent as any facility owned or operated by private parties. Furthermore, EPA has determined that the statute requires federal agencies to operate under the same property-wide definition of 'facility.'" 51 Fed. Reg. at 7722.

However, in that 1986 "Notice of Policy and Interpretation," EPA also stated that:

> "[u]nder EPA's interpretation of the definition of 'facility' for section 3004(u), contiguous tracts of federal lands owned by the United States but administered by different federal agencies could be considered a single 'facility' for corrective action purposes. A permit for a hazardous waste unit located anywhere on this collective federal 'facility' would trigger corrective action requirements for every solid waste management unit found within its boundaries. In the western half of the United States, contiguous federal lands cover large portions of several states. Moreover, the agency that operates a hazardous waste unit might not have authority to require or manage cleanup of solid waste units on lands administered by

9443279.2011

other agencies. The size of the facility and the administrative limitations could make corrective action very difficult."

"EPA believes that Congress did not intend section 3004(u) to require such wide-ranging cleanups on federal lands. Congress has consistently expected individual federal departments and agencies to obtain RCRA permits and manage hazardous waste. For example, section 6001 of RCRA specifically requires 'departments, agencies and instrumentalities of the Federal government' to comply with RCRA requirements....Consequently, EPA is today interpreting the concept of ownership for the purposes of section 3004(u) as referring to individual federal departments, agencies, and instrumentalities." Id. at 7722.

9413279.2012

EPA, on the same day (March 5, 1986; 51 Fed. Reg. 7723), issued a "Notice of Intent to Propose Rules" in which EPA stated it intended to address three issues through rulemaking regarding EPA's interpretation of the definition of a "facility" for corrective action purposes as it affects "federal compliance with section 3004(u)." 51 Fed. Reg. at 7723. EPA also stated that "[t]his notice is not a proposal and EPA is not yet requesting comments on these issues." Id.

EPA, in this "Notice of Intent to Propose Rules," goes on to state the following:

"The Department of the Interior has expressed concern that federal agencies might be considered "owners" of hazardous waste facilities on federal lands operated by private parties with partial property interests such as leases or mineral extraction rights. The Department urges that the federal government should not be held responsible for releases from such operations. Furthermore, it believes that the federal agency should not have to clean up releases on contiguous federal land when such a private party applies for a RCRA permit for its hazardous waste facility."

"EPA intends to propose a rule that limits Federal agency responsibility for facilities operated by private parties with legal ownership interests by identifying a 'principal owner' for the purpose of defining the 'facility' boundary under section 3004(u). The 'principal owner' probably would be the person most directly associated with operation of the hazardous waste facility. Only property within the scope of the 'principal owner's' legal interest would be considered the 'facility' for corrective action purposes. The

> federal agency that administers the same land would not be responsible for complying with section 3004(u) within the principal owner's 'facility.' To determine whether a private party on federal lands should be treated as a 'principal owner', EPA might consider factors such as the degree of control the federal agency exercises over the private party's actions, or the amount of benefit the agency derives from the private party's waste management operation. EPA will also need to consider the impact of this concept on private lands where one private party has granted legal ownership interests to a second private party that operates a hazardous waste 'facility.'" Id.

However, EPA subsequently issued a policy directive (OSWER Policy Directive No. 9502.00-2; April 18, 1986, hereinafter "OSWER Policy") in which EPA stated the following in reference to the March 5, 1986, Notice of Intent to Propose Rules:

> "While negotiation of corrective action schedules of compliance may be handled on a case-by-case basis until the final rule is promulgated, there is one area discussed in the Federal Register notice which we cannot address without a regulation. The [March 5, 1986] notice states that in some situations where a private party has partial property interests such as leases or mineral extraction rights, it may be appropriate to define the facility boundary in terms of the private party's property interest rather than the Federal agency's property interest. In these limited situations the private party would be responsible for taking corrective action rather than the Federal government. In all such cases prior to issuance of the final rule, the Federal agency will be considered the owner of such property and will be held responsible for releases from such operations and for releases on its contiguous Federal lands." (Emphasis added). See OSWER Policy, at 2.

The situation referred to in the OSWER Policy addresses the case where a private property lessee/operator is the permittee seeking a RCRA permit for an operation on federally-owned land. In that case, EPA, in the 1986 Notice of Intent to Propose Rules, indicated that it was considering limiting the definition of "facility" to the private property lessee's interest, as the private property lessee was going to be the permittee. The situation at the Hanford Federal Facility is just the opposite. The actual property owner, Energy, is the permittee under RCRA. In this case, EPA must in the RCRA permit include all SWMUs

9413279.2013

owned by the federal agency owner/permittee, under the terms of the OSWER Policy listed above, as well as 40 CFR § 260.10 (defining a corrective action "facility" as being comprised of "all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA"). Thus, EPA has made it clear that until and unless EPA issues a rulemaking regarding the issue of private party property interests on Federal land with respect to corrective actions under Section 3004(u) of RCRA, EPA will consider the Federal agency to be the owner of such privately-leased property and will hold the Federal agency landowner responsible for releases from its contiguous Federal lands.

US Ecology raises the issue of whether Federal ownership alone of the land upon which the US Ecology SWMUs are located ought to make the US Ecology SWMUs part of the Hanford Federal Facility. US Ecology argues that the Federal agency must also exercise "control" over the private property interests:

> "By its own terms, the OSWER Policy does not alter the agency's published discussion that the federal agency must also exercise control over the private entity to include it in the federal agency's permit; ownership alone is not enough. EPA has yet to publish the long-promised rule addressing this issue." See US Ecology's May 9, 1994 Comments, p. 13.

EPA, in its preamble to the July 15, 1985, codification rulemaking, stated the following in regards to the definition of "facility" and the term "control":

> "Accordingly, for purposes of section 3004(a), the term 'facility' is not limited to those portions of the owner's property at which units for the management of solid or hazardous waste are located, but rather extends to all contiguous property under the owner or operator's control."
>
> "The extent to which the above interpretation applies to federal facilities raises legal and policy issues that the agency has not yet resolved. To address these issues, it is necessary to examine the objectives of Section 3004(u), the purposes of HSWA, and the relationship of RCRA to other Federal laws." See 50 Fed. Reg. at 28,712.

Thus, the question of whether Energy, as "owner" of the "contiguous" US Ecology leased land upon which the US Ecology SWMUs are located, exercises "control" over those SWMUs such that they must be included in the HSWA Permit,

can be answered by examining the factual situation at the Hanford Reservation "in light of the objectives of Section 3004(u), the purposes of HSWA, and the relationship of RCRA to other Federal laws."

During Congress' enactment of Section 3004(u) as part of the HSWA amendments to RCRA, Congress was concerned about the future burdens to the Superfund program caused by unaddressed releases from SWMUs at permitted facilities:

> "Unless all hazardous constituents releases from solid waste management units at permitted facilities are addressed and cleaned up the Committee is deeply concerned that many more sites will be added to the future burdens of the Superfund program with little prospect for control or cleanup. The responsibility to control such releases lies with the facility owner and operator and should not be shifted to the Superfund program, particularly when a final permit has been requested by the facility." (Emphasis added). See H.R. Rep. No. 198, 98th Cong., 1st Sess., pt. 1, at 61 (1983).

It is clear that Congress intended that both owners and operators of a facility have the responsibility to address releases of hazardous waste or hazardous constituents from a facility seeking a permit under Section 3005 of RCRA. At the Hanford Federal Facility, Energy is the owner of the entire Hanford Federal Facility, including the land upon which US Ecology conducts its operations. As such, Energy as the owner of the SWMUs at the US Ecology facility is required to address any releases from those SWMUs under Section 3004(u) of RCRA.

As suggested by Congress in the highlighted language given above, the owner of a SWMU at a facility has the ability, by definition of the term "own," to "control" releases occurring on its own land. Energy, at the Hanford Federal Facility, has leased approximately 100 acres of land it owns to the state of Washington, who in turn has subleased that 100 acres to US Ecology. Under the terms of the prime lease between Energy's predecessor (the U.S. Atomic Energy Commission) and the state of Washington, Energy has the ability to perform the following actions with respect to the leasehold estate:

> "2. Description of Leasehold ... (b)(3) To the extent deemed necessary for the protection of the health and safety of the employees or personnel of the Commission, its Contractors, the State, its Sublessees, or the public, the Commission may, but shall not be obligated to, close all routes of ingress and egress to and from

9413279.2015

the Leased Premises, or cause the Leased Premises to be evacuated, or both; provided, that the Commission shall give such advance notice of the closure or evacuation as circumstances permit."

"6. Access to Leased Premises by Commission: The Commission, or any person authorized by it, shall at all times have access to the Leased Premises for all reasonable purposes, including without limitation, the following:"

"(a) For the protection of the health and safety of the employees or other personnel of the Commission, its Contractors, the State, its Sublessees, or the public;"

In addition, under the terms of Article VI of the February 26, 1976, extension of the original sublease (dated July 29, 1965) between the state of Washington and California Nuclear, Inc., a predecessor in interest to US Ecology, the state of Washington has the ability to perform the following actions:

"ARTICLE VI: Access Rights of State: The State, or any person authorized by it, shall at all times have access to the subleased premises for all reasonable purposes, including, without limitation, the following:"

"1. For the protection of the health and safety of the public or of the employees, other personnel, or contractors of the State;"

Thus, it is clear that Energy has access rights to the leased premises through the terms of its lease with the state of Washington in order to conduct actions necessary for the protection of the public health and safety. The state of Washington also has access rights for the same purposes under the terms of its sublease with US Ecology. EPA believes that the ability of Energy to obtain access to the US Ecology facility in order to protect the public health and safety is one type of "control" over a facility that was envisioned by Congress when it stated that both owners and operators are subject to the corrective action requirements of Section 3004(u) of RCRA. EPA believes that property ownership alone, in the context of corrective action for contiguous property at a federal facility, is the requisite degree of "control" required to assert RCRA Section 3004(u) corrective action authority. However, in this case the Permittee, Energy, also has the ability under the terms of its lease with the state of Washington to obtain access to the US Ecology facility in order to conduct actions necessary to protect public health and safety. Investigation and, if necessary, remediation of releases or

9112279.2016

potential releases of hazardous constituents certainly are actions "necessary to protect public health and safety" from the dangers posed by these RCRA hazardous constituents.

EPA, in the February 1994 Fact Sheet accompanying the draft HSWA Permit, stated that Energy does not assert "direct operational control" over US Ecology's operations on its leased lands. However, EPA believes that day-to-day "operational control" is not the only type of "control" which can justify inclusion of privately-leased land in the definition of a federal "facility" for corrective action purposes. At the Hanford Federal Facility, EPA believes that the additional factors of Energy's access rights and Energy's ability to "close down" the ingress and egress to the US Ecology leased premises in order to protect public health and safety justifies inclusion of the US Ecology SWMUs in the HSWA Permit based on this type of Energy's "control" over the US Ecology leased premises. See also In re: National Cement Company of California, Inc., and Systech Environmental Corporation, RCRA Permit No. CAD 982 444 887, RCRA Permit Appeal Nos. 94-5, 94-6 (July 22, 1994), pp. 8-9.[2]

At the Hanford Federal Facility, it is clear from the language of both the Energy-State lease and the State-US Ecology lease that the parties to these leases understood that there may be occasions where the lessor may have to exercise control over the leased premises in order to protect the public health and safety. Congress, when it enacted HSWA, stated the following:

---

[2]In that case, the EPA Environmental Appeals Board stated (in interpreting the definition of "facility" and "owner" under 40 CFR §§ 260.10 and 270.10 in the context of a RCRA boiler and industrial furnace permit) that the owner of a facility, who leased its property under the terms of a 99-year lease to a cement kiln operator seeking a RCRA permit, nevertheless was responsible for signing the RCRA permit application. The EAB stated that "Tejon [the owner] is an owner of the real property on which the facility is located. The real property on which the facility is located is considered part of the facility. An owner of part of a facility is deemed under the rules to be an owner of the facility. Owners of facilities are required to have permits. This is true even for 'absentee owners,' like Tejon, who have nothing to do with the operation of the facility." National Cement, at pp. 8-9. At the Hanford Federal Facility, even though Energy may have "nothing to do with the operation" of US Ecology, Energy is the owner of the contiguous land upon which the US Ecology SWMUs are located and thus Energy is responsible for corrective action for the US Ecology SWMUs under the HSWA Permit.

9413279.2017

"In conclusion, the Committee believes that the RCRA regulatory and enforcement program must be conducted in a manner that controls and prevents present and potential endangerment to public health and the environment. In the absence of that, little more will be done than to contribute to future burdens on the "Superfund" program...." See H.R. Rep. No. 198, 98th Cong., 1st Sess., pt. 1, at 20 (1983).

Thus, EPA believes that inclusion of the US Ecology SWMUs as part of the Hanford "facility" is justified, based upon Congressional intent in enacting the HSWA amendments to RCRA, the fact that the US Ecology SWMUs are located on land owned by Energy, and the fact that Energy has the ability to "control" these lands under the terms of its lease with the state of Washington, who in turn has the ability to "control" these lands vis-a-vis its sublease with US Ecology.

US Ecology also commented that EPA was being inconsistent with its inclusion of the US Ecology SWMUs in the HSWA Permit, as EPA had excluded the BPA Midway area, the Washington Public Power Supply System ("WPPSS") area, the North Slope lands, the Central Waste Landfill, the Hanford Site Waste Units, and the BPA lands governed by "use permits", from inclusion in HSWA Permit.

The BPA Midway area is located on land owned by the Bonneville Power Administration, a major subdivision of Energy. Consistent with its March 5, 1986 "Notice of Policy and Interpretation," EPA has excluded the BPA Midway SWMUs from the HSWA Permit as these SWMUs are "owned" by BPA, and as such EPA interprets "the concept of ownership for the purposes of section 3004(u) as referring to individual federal departments, agencies, and instrumentalities." 51 Fed. Reg. 7722 (March 5, 1986).

The WPPSS area is on land leased to WPPSS. Following the discussion above in this comment, EPA considers the WPPSS are to be part of the contiguous property under the control of the Department of Energy. The WPPSS area is therefore considered part of the Hanford Federal Facility for purposes of corrective action. However, WPPSS has its own RCRA identification number (WAD 98073 8488) and WPPSS has applied for its own RCRA operating permit. As part of that permit, EPA and the state of Washington will require corrective action, where warranted, for the SWMUs located on the WPPSS leased lands. As such, there is no need to include the WPPSS SWMUs in the HSWA Permit at this time. If, for any reason, corrective action at the WPPSS SWMUs are not addressed in either a RCRA permit issued to WPPSS, a RCRA Order (such as an order issued under Section 3008(h) of

9413279.2018

RCRA), or a MTCA Order, then corrective action for the WPPSS SWMUs shall be addressed under the terms of the HSWA Permit through the permit modification process. At such time that a RCRA permit is issued to WPPSS, this area will be considered a separate area for purposes of corrective action, and it will be removed through the permit modification process from the Hanford Federal Facility.

The North Slope lands, the Central Waste Landfill, and the Hanford Site Waste Units are areas owned by Energy. These areas are thus considered part of the Hanford Federal Facility for purposes of corrective action. Corrective actions that occur at these areas, however, will occur under the terms and schedules contained in the FFACO, or Tri-Party Agreement, between Energy, EPA, and the state of Washington. The FFACO is the document which, among other things, governs the cleanup of RCRA and CERCLA past practice units at the Hanford Federal Facility. The North Slope, Central Waste Landfill, and the Hanford Site Waste Units have been designated as RCRA past practice units under the FFACO and will be investigated and, if necessary, remediated under the terms and schedules in the FFACO as provided in HSWA Permit Condition III.A.1. SWMUs at these areas, therefore, are not expressly included in the HSWA Permit.

The areas of the Hanford Federal Facility being used by BPA under "use permits" with Energy are also included in the definition of facility for purposes of corrective action, on the basis that these areas are contiguous lands owned by, and under the control of, the Department of Energy. SWMUs at these areas, however, are not addressed by the HSWA Permit, as the "use permits" are not the same as a lease. The use permits are more similar to a contract than a lease in that the use permit can be terminated at will by Energy. Since the FFACO only excludes "leased lands," the BPA lands governed by these use permits are not excluded from jurisdiction under the FFACO. As such, and in addition to the fact that these lands are owned by Energy, corrective action at these lands is more properly addressed under the terms and schedules specified under the FFACO.

Permit Change:

No permit change is required in response to this comment.

Comment #22.5:

US Ecology also commented by stating the following: "Moreover, even if the US Ecology site were a RCRA 'facility' (which it is not) EPA is without authority to require corrective action at the US Ecology site because the

9412279.2019

materials at the site and the activities conducted there are subject to the AEA, and the application of RCRA to the US Ecology site is inconsistent with those regulations."

Response #22.5:

EPA disagrees with this comment in part. EPA under RCRA regulates only the hazardous component of "mixed wastes" under RCRA. "Mixed wastes" under RCRA are solid wastes which have both a hazardous and a radioactive component. The NRC, under the AEA, regulates the radioactive component of mixed waste. Thus, on its face, EPA's regulation of only the hazardous component of mixed waste is not "duplicative" with NRC's regulation of the radioactive component. Section 1006 of RCRA states that where application of or regulation under RCRA of a substance is inconsistent with regulation of that substance under the AEA, RCRA regulation of that substance will yield to the regulation of the substance under the AEA.

The U.S. Court of Appeals for the D.C. Circuit recently rejected a petitioner's contention that EPA's interpretation of RCRA's applicability to mixed wastes was inconsistent with the provisions of the AEA. In that case, the Court found that the petitioners had failed to point out any direct conflict between EPA's position regarding Section 3004(j) of RCRA and any specific provision of the AEA. See Edison Electric Institute v. U.S. EPA, 996 F.2d 326, 337 (D.C. Cir. 1993). Thus, any inconsistency between RCRA and the AEA ought to be measured as the two statutes are applied at a particular site or facility. EPA, in light of the terms of Section 1006 of RCRA, 42 U.S.C. § 6905, will not impose RCRA corrective action requirements which will be inconsistent with any AEA requirements governing the same waste or material at the US Ecology facility.

In HSWA Permit Condition III.H., EPA has provided a mechanism by which the Permittee can submit information which demonstrates that compliance with a remedy selected would be impracticable. For example, this condition would allow the Permittee to show that implementation of a RCRA requirement would be technically impracticable or impossible given AEA regulation over a hazardous substance. In addition, in Attachment A to the HSWA Permit, the Permittee is allowed under the RFI Work Plan to submit existing information on contamination at the facility as part of the RFI. These permit conditions show that EPA is willing to be flexible regarding potential duplication of effort during the investigation of SWMUs under the terms of the permit.

9417279.2020

Permit Change:

No permit change is required in response to this comment.

Comment #22.6:

US Ecology commented by stating the following: "In fact, the purpose of the RCRA corrective action requirements, namely the protection of human health and the environment, is more than adequately met at the US Ecology site under the AEA. The application of RCRA to the US Ecology site will result in duplicative requirements and increased costs."

Response #22.6:

EPA disagrees with this comment. EPA recognizes that the US Ecology Site is operated pursuant to AEA under the Radioactive Materials License issued by the Washington State Department of Health. However, EPA is required to include corrective action permit conditions for all SWMUs at the US Ecology facility. See EPA's Response to Comment #22.4. EPA has included in HSWA Permit Condition III.B.2 a provision which specifies that corrective action requirements could be deferred under HSWA Permit Condition III.B.2.(c)(2) to an amendment to US Ecology's Radioactive Materials License or an enforceable, filed Department of Health Order.

As stated in EPA's Response to Comment #22.5, infra, EPA recognizes that there may be situations where regulation of a substance under RCRA and the AEA might result in some duplicative regulation. As a result, EPA allowed for flexibility in the HSWA Permit in order to accommodate such potential duplication of effort. However, there has been no demonstration made in the administrative record for the HSWA Permit that there is an enforceable mechanism under the AEA that addresses RCRA corrective action concerns which would substantiate the commenter's claim that corrective action under the HSWA Permit would "result in duplicative requirements" for the US Ecology SWMUs.

EPA encourages US Ecology to continue to work with Health to revise US Ecology's site stabilization and closure plan under US Ecology's Radioactive Materials License to address RCRA corrective action concerns. However, until such a revised license condition is in place and fully enforceable by Health and/or Ecology and is shown to EPA's and Ecology's satisfaction to address the required corrective actions under RCRA, EPA cannot abrogate its statutory obligations under Section 3004(u) of RCRA to ensure that releases which endanger the public health, safety and the environment are addressed in the HSWA Permit being issued to Energy. In addition, until such a revised site stabilization and

9413279.2021

closure plan has been reviewed by EPA and the state, it is impossible to tell if what is being required under the HSWA Permit is duplicative or inconsistent with what is being required under the terms of US Ecology's license.

Permit Change:

No permit change is required in response to this comment.

Comment #22.7:

US Ecology commented by stating the following: "Similarly, US Ecology is currently monitoring the site pursuant to its Washington Department of Health license and NRC regulations, rendering moot EPA's inclusion of alleged SWMUs at the US Ecology site for additional investigative activity."

Response #22.7:

EPA disagrees with this comment. See EPA's Response to Comment #22.1 and #22.6. In addition, the administrative record for the HSWA Permit does not demonstrate that the ongoing monitoring at the US Ecology facility meets the technical or performance objectives of RCRA. As a matter of policy, EPA Region 10 accepts data gathered under other regulatory or monitoring programs, provided the data can be validated (technically sound, representative sampling, proper quality assurance/quality control, etc.) for its intended purpose.

HSWA Permit Condition III.B.2 provides for several options for deferral of corrective action obligations at the US Ecology SWMUs which include, among other options, comparison of residual concentrations of contaminants to established standards for purposes of determining whether no further action is needed. These data may impact and/or include information from site monitoring pursuant to US Ecology's Radioactive Materials License. US Ecology may also choose to modify its license to address the corrective actions necessary at the US Ecology SWMUs.

Paragraph 6(B)(1)(b)(iii) of Attachment A to the HSWA Permit implicitly anticipates that existing monitoring wells, such as those in existence at the US Ecology facility, can be incorporated into the monitoring required under the HSWA Permit. Paragraph 6(B)(2)(d) also allows for existing soil contamination data to be submitted as part of the RFI investigation under the HSWA Permit. Paragraph C of Attachment B to the HSWA Permit also explicitly anticipates that data obtained from activities other than permit-required actions may be considered towards fulfilling actions required under the HSWA Permit.

9W4279.2022

Permit Change:

No permit change is required in response to this comment.

Comment #22.8:

US Ecology commented by stating the following: "Notwithstanding EPA's suggestions to the contrary, the fact that US Ecology is not a party to the FFACO does not give EPA authority to require corrective action at the US Ecology site under RCRA. The FFACO cannot and does not give EPA authority that it does not have under RCRA."

Response #22.8:

EPA disagrees with this comment, in part. EPA has addressed the integration of the HSWA Portion of the RCRA permit with the FFACO under HSWA Permit Condition III.A.1 by stating the following:

> "The corrective action for the Hanford Federal Facility will be satisfied as specified in the FFACO, as amended, except as otherwise provided herein. For those solid waste management units not covered by the FFACO, RCRA corrective action requirements will be addressed by HSWA Permit Conditions III.B through III.J."

EPA agrees that the US Ecology is not a party to the FFACO. EPA is issuing the HSWA Portion of the RCRA Permit to the United States Department of Energy. See EPA's Response to Comment #4.1, supra. By including the US Ecology SWMUs in the HSWA Permit, EPA is not relying on language contained in the FFACO. Rather, EPA is relying on the terms of Section 3004(u) of RCRA, 42 U.S.C. § 6924(u). In addition, EPA is relying on 40 CFR § 264.101(a), which states that:

> "The owner or operator of a facility seeking a permit for the treatment, storage, or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit."

9413279.2023

In addition, EPA has authority to include corrective action requirements for solid waste management units under 40 CFR § 264.101(b), which states in relevant part that:

> "Corrective action must be specified in the permit. The permit will contain schedules of compliance for such corrective action...."

Permit Change:

No permit change is required in response to this comment.

Comment #22.9:

US Ecology commented by stating as follows: "EPA wrongly suggests that the Hanford Permit will decrease bureaucracy. In truth, it will create excessive and unnecessary bureaucracy and increase costs by giving EPA oversight authority over the potential amendment of US Ecology's license. EPA cannot obtain this authority in a RCRA Permit. The requirement that RCRA corrective action goals be met by applying the Washington MTCA is another example of EPA overreaching its authority."

Response #22.9:

EPA disagrees with this comment. EPA is not seeking authority over US Ecology's Radioactive Materials License under the HSWA Permit. EPA agrees that it lacks the statutory authority under the AEA to enforce AEA or NRC regulations at the US Ecology facility. However, EPA under the terms of the HSWA Permit was and remains willing to defer imposition of HSWA corrective action requirements on the US Ecology SWMUs, pending a successful investigation of the US Ecology SWMUs under the terms of an amended Radioactive Materials License as one deferral option. Such a deferral would result in less confusion and would allow fulfillment of Energy's RCRA corrective action responsibilities without having to seek access to the US Ecology facility under the terms of Energy's lease with the state and the state's sublease with US Ecology. However, to date US Ecology has not yet been given approval for its amended site stabilization and closure plan under the terms of its license, nor has the license been amended to ensure such "corrective actions" occur at the US Ecology SWMUs. Until and unless this occurs and is documented in the administrative record, there is no alternative mechanism by which EPA could be assured that the US Ecology SWMUs would be investigated and, if necessary, remediated.

9413279.2024

Permit Change:

No permit change is required in response to this comment.

Comment #22.10:

US Ecology also commented as follows: "Inclusion of the US Ecology site in the Hanford Permit is also violative of US Ecology's substantive and procedural due process rights under the United States Constitution because the Permit applies to DOE as the permittee yet interferes with US Ecology's property rights without providing due process, because the Hanford Permit subjects US Ecology to duplicative regulatory schemes (i.e., the AEA and RCRA), and because inclusion of the US Ecology site in the Hanford Permit is contrary to EPA's own guidelines and is arbitrary and capricious."

Response #22.10:

EPA disagrees with this comment. US Ecology is not being asked to perform or pay for the required corrective action under the terms of the HSWA Permit. Energy, as the owner of the property upon which the US Ecology SWMUs are located, is the only entity upon which EPA can enforce corrective action under Section 3004(u) and the terms of the HSWA Permit. In addition, EPA does not believe that US Ecology's property rights are being interfered with under the terms of the HSWA Permit. Under the terms of the lease between Energy and the state, as well as under the terms of the sublease between the state and US Ecology, Energy has the ability to enter the US Ecology facility in order to conduct actions Energy deems to be necessary in order to protect public health and safety. EPA, in the US Ecology RFA, has documented the need to conduct further investigatory work at the US Ecology SWMUs in order to determine if potential releases of hazardous constituents from these SWMUs pose a risk to human health or the environment. Therefore, Energy (not US Ecology) under the terms of the HSWA Permit is being asked to conduct all necessary corrective actions at the US Ecology SWMUs. If necessary, Energy can obtain access to the US Ecology site by enforcing the terms of the lease and sublease.

In addition, US Ecology has been made aware of this potential corrective action, as evidenced by US Ecology's participation in public meetings held by EPA and Ecology as part of the issuance of the HSWA Permit and by the numerous and voluminous comments submitted by US Ecology during the public comment period regarding the HSWA permit.

9413279.2025

EPA likewise disagrees with the commenter when it states that the HSWA Permit subjects US Ecology to "duplicative regulatory schemes." See EPA's Responses to Comments ##4.1, 22.5, 22.6 and 22.7, supra. As stated above, EPA is issuing the HSWA Permit to Energy, not to US Ecology. As such, Energy is the Permittee subject to the corrective action requirements of the HSWA Permit. EPA was made aware of US Ecology's submittal of a revised site stabilization and closure plan under the terms of US Ecology's Radioactive Materials License. EPA, after meeting with US Ecology, was led to believe that one possible way to handle the required investigations of the US Ecology SWMUs would be to defer imposition of corrective action requirements upon Energy pending an investigation of the US Ecology SWMUs under the terms of a revised site stabilization and closure plan under US Ecology's license. If the site stabilization and closure plan should be revised to include an investigation of the US Ecology SWMUs, such an investigation would occur under the terms of US Ecology's amended license and would be overseen by Health, not EPA under the HSWA Permit. EPA would instead be deferring the imposition of corrective action requirements under the HSWA Permit pending the results of the investigation under US Ecology's amended license. As such, EPA is not "imposing duplicative regulatory schemes" upon US Ecology; rather, an investigation by US Ecology under the terms of an amended license would be conducted by mutual agreement between US Ecology and the Department of Health. US Ecology may choose not to agree to an amended license which would investigate the US Ecology SWMUs. However, EPA would then be forced to activate the deferred HSWA Permit corrective action permit conditions, and Energy would have to perform the necessary corrective actions. Thus, US Ecology under the terms of the HSWA Permit is not being subjected to "duplicative regulatory schemes."

In addition, EPA believes that it is not acting arbitrarily or capriciously by including the US Ecology SWMUs in the HSWA Permit. EPA believes that it is following the statutory requirement of Section 3004(u) by including the US Ecology SWMUs in the permit. EPA also believes that inclusion of the US Ecology SWMUs in the HSWA Permit is consistent with current EPA rules, guidance and policy regarding the definition of "facility" for purposes of corrective action and how EPA is interpreting the "facility" definition at federal facilities with private property interests. See EPA Responses #22.2, #22.4 and #22.6, infra.

Permit Change:

No permit change is required in response to this comment.

9W 3279 2026

Comment #22.11:

US Ecology commented that "[f]inally, EPA has failed to respond adequately to US Ecology's March 1992 comments in violation of 40 CFR § 127.17."

Response #22.11:

EPA disagrees with this comment. EPA provided its response to US Ecology's comments which were submitted in March 1992 during the public comment period in January - March 1992. The comments submitted by Perkins-Coie (representing US Ecology) and EPA's response to these comments are part of the administrative record for the Draft HSWA Portion of the Hanford Permit. The original comments and EPA's responses dated February 9, 1994, are provided below for ease of understanding and readability. The original numbering has been retained to ensure traceability.

In addition, EPA's refusal to amend the language of a permit based upon comments received does not ipso facto mean that EPA has "failed to consider" the comments. To the contrary, in this and prior responses to comments, EPA believes that it has fully and carefully considered all comments received.

Permit Change:

No permit change is required in response to this comment.

9413279.2027

Note: The following comments and responses have already been sent out as part of the draft HSWA Permit which went out for public comment from February 9, 1994 to May 11, 1994. Since these comments by US Ecology are similar to the US Ecology comments responded to above, the following comments and responses are being reprinted for the ease of the reader.

COMMENTS BY- PERKINS COIE (REPRESENTING US ECOLOGY) AND EPA RESPONSES FEBRUARY 9, 1994

Comment # 1: Permit Page 3., Lines 14-17; Fact Sheet p.1., Fourth Paragraph.

US Ecology is not a Permittee under the permit and has not filed an application to become one. And yet the permit purports to impose obligations on US Ecology pursuant to its terms as if it had filed and application and would be a Permittee.

Response #1:

EPA agrees that US Ecology is not a Permittee. Property leased by US Ecology is, however, part of the Hanford facility as that term is defined under the Resource Conservation and Recovery Act as amended (RCRA) and does contain solid waste management units subject to RCRA corrective action requirements.

Section 3004(u) of RCRA requires that each permit for a hazardous waste treatment, storage, or disposal facility, issued after November 8, 1984, contain provisions requiring corrective action for releases of hazardous waste or hazardous constituents from any solid waste management units (SWMUs) at a facility seeking a permit for treatment, storage or disposal of hazardous waste, regardless of the time at which waste was placed in such units. The Hanford Federal Facility submitted Part A and Part B applications and is seeking a permit for facility operations under EPA/Ecology ID #WA7 89000 8967. At this time EPA does not consider US Ecology to be operating a RCRA treatment, storage or disposal facility subject to RCRA permitting or interim status regulations codified at 40 CFR Parts 264 or 265. However, RCRA requires facility-wide corrective action for the Hanford facility which includes the SWMUs within US Ecology's sublease, since the subleased area is owned by the Department of Energy and is therefore considered to be part of the Hanford "facility" for purposes of RCRA corrective action.

EPA has implemented this statutory requirement through rules codified at 40 CFR § 264.101 (July 15, 1985, 50 Fed. Reg.

9413279.2028

28702). In the preamble to that rulemaking, EPA raised the issue of whether it was appropriate to use the same definition of "facility" for federal facilities as private facilities (i.e., all contiguous property under the owner or operator's control, 50 Fed. Reg. 28712). On March 5, 1986 (51 Fed. Reg. 7722), EPA published a Notice of policy and interpretation which stated in part:

> ...EPA has concluded that Section 3004(u) subjects federal facilities to corrective action requirements to the same extent as any facility owned or operated by private parties. Furthermore, EPA has determined that the statute requires federal agencies to operate under the same property-wide definition of "facility"."

9413279.2029

Permit Change:

EPA agrees that the wording of the January 1992 draft permit, which designated the entire US Ecology Site as a SWMU, was inaccurate and confusing. The revised draft permit includes specific SWMUs at the US Ecology Site which have been identified as areas of potential release of hazardous constituents warranting further investigation. The US Ecology solid waste management units are specified at draft permit condition III.B.1.(a).

Comment #2: Permit Page 4., lines 21-23 and Page 5; Fact Sheet page 2.

The Permit is to ensure proper implementation of the Hanford Federal Facility Agreement and Consent Order ("FFACO") and "(e)enforcement of all conditions of this permit, including Part IV, will be primarily through the procedures identified in the FFACO."

Part IV of the Permit includes US Ecology, and yet it was not a party to the negotiations creating the FFACO and the FFACO is not binding upon US Ecology. This agreement is binding and enforceable only against the parties to the agreement. Although the agreement contemplates agents, contractors and/or consultants of the Department of Energy, and requires them to comply with the terms of the agreement, no mention is made of US Ecology, or parties similar to US Ecology. US Ecology is not an agent, contractor and/or consultant of the Department of Energy, and thus is not bound by the agreement.

To include US Ecology in this Permit and thereby attempt to enforce the FFACO against it is an injustice to US Ecology when it was not even a party to the FFACO negotiations. By

this Permit alone the agencies attempt to impose an additional and inappropriate regulatory scheme upon US Ecology merely because it is geographically located within the boundaries of a facility that is the subject of the FFACO and this permit.

Response #2:

EPA agrees that US Ecology is not a party to the Federal Facility Agreement and Consent Order ("FFACO") which was entered into by the DOE, Ecology and EPA. US Ecology is not named as a Permittee and neither the permit requirements nor the terms of the FFACO will be enforced against US Ecology. Although the FFACO specifically excludes from the jurisdiction of the FFACO lands which are owned by DOE, but leased to other parties including US Ecology, EPA interprets the term "facility," as defined for the purposes of RCRA corrective action, to include all contiguous property under the control of the owner/operator seeking a permit under Subtitle C of RCRA. Since the US Ecology site is located on property owned by DOE which is within the definition of the term "facility " as it applies to the Hanford site, SWMUs on the US Ecology site are included in the permit, and are subject to RCRA corrective action under Section 3004(u) of RCRA.

Permit Change:

EPA has explicitly delineated the relationship between the FFACO and the RCRA permit in revised draft permit condition III.A.1.

Comment #3: Permit I.A.1.b; Fact Sheet re I.A.1.b; and Fact Sheet pp. 33-4.

In spite of the fact that DOE did not and does not control the activities of US Ecology, and in spite of the fact that the State of Washington is US Ecology's landlord, the permit suggests that only the landowner (DOE), as the Permittee, is being required to perform remediation. The State of Washington cannot avoid liability for the US Ecology facility merely because it is the principal author of the permit.

Response #3:

RCRA regulations at 40 CFR § 264.101, require owners and operators of facilities seeking permits to institute corrective action as necessary. EPA assigns responsibility for SWMUs to facility owners, unless the operator of the TSD seeking a RCRA permit is also responsible for the SWMUs.

0047979 2030

For the purposes of 40 CFR § 264.101 and this permit, US Ecology and the Washington State Department of Ecology are neither owners nor operators, and therefore are not Permittees. While the permit assigns responsibility for corrective action to the owner (DOE), the permit assigns no property rights (permit condition I.B.) and has no effect on other legal arrangements. EPA holds the Permittees responsible for any necessary investigations or remedial measures pursuant to 40 CFR § 264.101; however, DOE, the State of Washington and US Ecology are free to assign responsibilities in accordance with pre-existing legal arrangements.

Permit Change:

No specific permit change required.

9413279.2031

Comment #4: Draft Permit and Fact Sheet re I.A.1.b., IV.A.2.,IV.P.4., and IV.P.4.a.

The documents are totally unclear regarding who is responsible for any activities under Permit at the US Ecology Site. The documents are internally inconsistent regarding whether the agencies have determined that the US Ecology site is to be included at this time for purposes of investigation or remediation.

Response #4:

EPA agrees that the draft permit and fact sheet do not make clear the intent of the Agency in applying 40 CFR § 264.101 requirements at the US Ecology site. EPA has completed a RCRA Facility Assessment (RFA) at the US Ecology Site which identifies specific solid waste management units (SWMUs) which were found to have a significant potential for release. These SWMUs are specifically listed in revised draft permit condition III.B.1. It is the initial intent of EPA that these SWMUs should be investigated to determine whether releases of hazardous constituents are occurring and to what extent they have affected subsurface conditions.

However, EPA is proposing to defer federal RCRA corrective action requirements for the US Ecology SWMUs. The US Ecology SWMUs could instead be investigated and, if necessary, remediated under State of Washington Radioactive Materials License issued pursuant to the Nuclear Energy and Radiation Control Act, Chapter 70.98 Revised Code of Washington, and the Radiation Control Regulations, Chapters 246-220 through 246-255 Washington State Administrative Code. Similarly, the US Ecology SWMUs could be investigated under a State of Washington, Department of Health order.

US Ecology SWMUs could be investigated pursuant to the Washington State Model Toxics Control Act (MTCA), Chapter 70.105D Revised Code of Washington, and MTCA Regulations, Chapter 173.340 Washington Administrative Code. EPA proposes to revisit the investigation progress under whichever state regulatory device is imposed, to determine whether to allow oversight to continue under state authorities, or whether to activate the revised draft permit conditions III.C. through III.I. Changes in the draft permit will allow US Ecology to directly perform the required activities in a manner that is coordinated with activities required under the US Ecology Radioactive Materials License.

Permit Change:

The revised draft permit introduction and corrective action conditions, as well as the fact sheet, have been rewritten to accurately describe the regulatory scheme described in the response to this comment. In particular, revised draft permit condition III.B.2. describes proposed procedures for deferral of RCRA permit conditions, pending the results of investigatory and corrective actions carried out under state authorities other than RCRA.

9413279.2032

Comment #5: Permit Introduction; Permit and Fact Sheet re IV.A.2.,IV.A.1.b., and IV.P.4.a.

The US Ecology site is the only site in the draft permit singled out to have RCRA corrective action carried out under the State of Washington Model Toxics Control Act (MTCA). Inclusion of US Ecology to solely achieve this unlikely eventuality is misuse by the agencies of the purpose and authority of the draft permit.

This is a tortured misapplication of the draft permit at best. If MTCA cleanup at the US Ecology site is possible and appropriate, Ecology can choose and attempt to apply such authority directly outside this Permit. This is especially appropriate as the draft permit specifically exempts CERCLA Past Practice (CPP) units from inclusion. If this is true for the application of CERCLA, why should it also not be the case for the ostensible application of MTCA to the US Ecology facility? US Ecology should be exempt from inclusion in the draft permit by the same reasoning.

Response #5:

EPA disagrees that allowing investigation of the US Ecology SWMUs to proceed under MTCA is a misapplication of the regulations. On July 27, 1990 (55 Fed. Reg. 30,798), EPA

proposed rules for implementing Section 3004(u) of RCRA, which would expand and clarify the July 15, 1985, codification rule. In the preamble to the proposed rule EPA discussed the relationship between EPA's corrective action authorities and existing corrective action authorities in states which are not yet authorized to implement RCRA corrective action in lieu of EPA. In this discussion (55 Fed. Reg. 30860) EPA stated:

> "Of course, States with existing standards may continue to administer and enforce their tandards as a matter of State law. In implementing the Federal program, EPA will work with States under cooperative agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in their efforts to implement their programs, rather than take separate actions under Federal authority."

While the US Ecology site was the only site singled out in the draft permit for this arrangement, it is not the only site in the State of Washington where, by prearranged agreement, corrective action authorities are being overseen by EPA, but implemented by Ecology under MTCA authorities.

While EPA agrees with the comment that Ecology could attempt to apply MTCA authority directly, outside the draft permit, Section 3004(u) of RCRA and 40 CFR § 264.101 require EPA to establish schedules and requirements for corrective action at the time of permit issuance for all RCRA permits issued after November 8, 1984. EPA's responsibilities are properly exercised by including oversight of the US Ecology investigation and remediation activities in the draft permit and allowing such activities to progress under existing state authorities.

The US Ecology site is located on land owned by the Department of Energy, and leased to the Washington Department of Ecology, who in turn subleases the 100 acres to US Ecology. This complex legal relationship is what led EPA to propose allowing the US Ecology to be investigated and remediated, if necessary, by US Ecology under MTCA. EPA had hoped that allowing the US Ecology SWMUs to be addressed under MTCA or under US Ecology's Radioactive Materials License would eliminate the complex, bureaucratic and increased costs steps of enforcing corrective action requirements through Energy via the HSWA Permit. Whether Energy, Ecology or US Ecology is ultimately responsible for the costs of conducting the required corrective actions under RCRA at the US Ecology SWMUs is a legal determination to be made between Energy, Ecology and US Ecology. However, under the RCRA regulatory scheme for corrective active action, which will be implemented by Part III of the HSWA

9413279.2033

permit, the "facility" owner, the Department of Energy will ultimately be accountable for permit compliance should the deferral option fail to result in satisfactory corrective action results.

EPA does not agree with the comment that the US Ecology site should excluded from the draft permit on the same basis as the CERCLA Past Practice (CPP) units. CPP units are excluded because they are specifically addressed under the FFACO with the understanding that remediation would progress under CERCLA rather than RCRA.

Permit Change:

EPA has specified in Draft Permit Condition III.A.1 that the corrective action for the facility will be satisfied by the FFACO except for those units not covered by the FFACO as set out in draft permit conditions III.B.1.a.(i) through III.B.1.a.(ii). The US Ecology SWMUs are not subject to the FFACO. Revised draft permit condition III.B.2. describes the deferral process and options to be allowed under the permit. Revised draft permit conditions III.C through III.J describe the requirements that will be imposed if corrective action needs are not satisfactorily addressed under the deferral options.

9413279.2034

Response #22.11

EPA provided response to comments provided by US Ecology in March 1992 which were received during the public comment period in January - March 1992. The response to comments are part of the administrative record for the Draft HSWA Portion of the Hanford Permit.

Permit Change:

No permit change is required in response to this comment since the HSWA Portion of the RCRA permit was revised and issued by EPA for public comment on February 9, 1994.