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**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

UNITED STATES DEPARTMENT OF  
ENERGY, RICHLAND OPERATIONS  
OFFICE,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 00-050

STIPULATION AND AGREED  
ORDER OF DISMISSAL

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COMES NOW the appellant United States Department of Energy, Richland Operations Office ("Energy") by and through its attorneys, Robert M. Carosino, Deputy Chief Counsel, and Barbara D. Williamson and Dale E. Jackson, Attorneys, Office of Chief Counsel, and the respondent State of Washington, Department of Ecology ("Ecology") by and through its attorneys, Christine O. Gregoire, Attorney General, and Andrew A. Fitz, Assistant Attorney General, and agree to the entry of the following Stipulation and Agreed Order of Dismissal.

**I. RECITALS**

1.1 On or about March 28, 2000, Ecology issued the Dangerous Waste Portion of the Hanford Facility Resource Conservation and Recovery Act Permit for the Treatment, Storage, and Disposal of Dangerous Waste, Permit No. WA7890008967, Revision 6 ("the Permit"), to Energy.

1.2 On or about April 27, 2000, Energy timely appealed Conditions II.Y.1 through

1 II.Y.3.a. of the Permit to the Pollution Control Hearings Board. More specifically, Energy  
2 challenged Ecology's authority through its state program under chapters 70.105 RCW and 173-  
3 303 WAC (as authorized under the federal Resource Conservation and Recovery Act, 42 U.S.C.  
4 § 6901 et seq. (RCRA) and asserted through the conditions of the Permit) to require or  
5 potentially require corrective action at certain solid waste management units and areas of concern  
6 ("units") located within the Hanford Site. Those units are: 1) selected units located within  
7 property owned by Energy, but leased to the State of Washington and subleased by the state to  
8 US Ecology, Inc. for the operation of a commercial radioactive waste disposal facility; and 2)  
9 units currently or subsequently designated as "CERCLA past practice units (PPUs)" under the  
10 Hanford Federal Facility Agreement and Consent Order (HFFACO).

11 3 In addition, Energy has challenged whether Ecology has authority through its state  
12 program under chapters 70.105 RCW and 173-303 WAC (as authorized under the federal RCRA)  
13 to impose, through the operation of the Permit, corrective action with respect to radionuclides  
14 regulated under the provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011  
15 *et seq* (AEA).

16 1.4 The parties wish to settle Energy's appeal as set forth below in order to avoid the  
17 time, expense, legal uncertainties and possibly needless expenditure of personnel resources  
18 associated with this litigation.

## 19 II. STIPULATION

20 2.1 Energy and Ecology stipulate to changes in the language of Conditions II.Y,  
21 II.Y.1, II.Y.1.g, II.Y.2.a.iii, II.Y.3.a.ii, and II.Y.3.a.iii of the Permit as set forth (added language  
22 underlined and deleted language struck through) in Exhibit A to this Stipulation and Agreed  
23 Order of Dismissal, and incorporated herein by reference.

24 2.2 Ecology's assertion of corrective action authority over solid waste management  
25 units within the U.S. Ecology property and CERCLA PPU's is in addition to cleanups and/or  
26 closures being undertaken under other authorities. The intent of the changes to Permit Conditions

1 II. Y, II. Y.2. a.iii, II. Y.3. a.ii, and II. Y.3. a.iii, as memorialized in Exhibit A hereto, is for Ecology to  
2 assert corrective action authority over solid waste management units identified in the Permit,  
3 while deferring litigation concerning whether Ecology's assertion is lawful until such time as  
4 Ecology decides that corrective action under the conditions of the Permit is necessary. The  
5 parties are thus allowed to dismiss the instant appeal without Energy waiving its right to challenge  
6 Ecology's jurisdiction, or raise any other available legal defense. When and if Ecology determines  
7 that corrective action is necessary at solid waste management units within the U.S. Ecology  
8 property or a CERCLA PPU, Ecology will impose, in accordance with the Permit Modification  
9 Procedures of WAC 173-303-830, a requirement for Energy to conduct such corrective action.  
10 At that time, Energy can challenge Ecology's underlying authority to impose corrective action  
11 with respect to such units through a timely appeal of the permit modification action. Ecology  
12 agrees that the jurisdictional, procedural and substantive challenges raised by Energy in the instant  
13 matter have not been waived by a failure to fully litigate such challenges through the instant  
14 appeal and that such challenges can be raised again without argument of waiver in the event that  
15 Ecology decides that corrective action under the conditions of the Permit is necessary. Energy  
16 agrees that it will not argue that Ecology has failed to satisfy a cause for permit modification  
17 under WAC 173-303-830(3)(a) if Ecology decides that corrective action is necessary under the  
18 conditions of the permit.

19 2.3 The intent of the changes to Permit Conditions II. Y, II. Y.1, and II. Y.1.g  
20 memorialized in Exhibit A hereto, which respect radionuclides regulated under the AEA is to  
21 similarly defer and preserve Energy's right to challenge Ecology's jurisdiction, or to raise any  
22 other available legal defense, in the event that Ecology affirmatively attempts to regulate the  
23 cleanup of radionuclides regulated under the AEA through corrective action under its state  
24 program authorized under RCRA.

25 2.4 As the result of the instant appeal, the Permit has yet to take effect pursuant to  
26 WAC 173-303-845(b)(iii). Because of the changes set forth above, Ecology has chosen to reopen

1 the public comment period pursuant to WAC 173-303-840(7). Comments filed during the  
2 reopened comment period will be limited to the changes made to Conditions II.Y, II.Y.1,  
3 II.Y.1.g, II.Y.2.a.iii, II.Y.3.a.ii, and II.Y.3.a.iii as a result of this settlement agreement. Following  
4 the close of the reopened comment period, Ecology will reissue Conditions II.Y, II.Y.1, II.Y.1.g,  
5 II.Y.2.a.iii, II.Y.3.a.ii, and II.Y.3.a.iii as a final permit decision, together with a response to  
6 comments, unless Ecology determines that as a result of public comment, one or more of the  
7 changes as described in this agreement should not be issued as a final permit decision.

8           2.5    The parties stipulate that pursuant to WAC 173-303-840(8)(b), all conditions of  
9 the Permit take effect upon the effective date of this Stipulation and Agreed Order of Dismissal  
10 with the exception of the above-described changes to Conditions II.Y, II.Y.1, II.Y.1.g,  
11 II.Y.2.a.iii, II.Y.3.a.ii, and II.Y.3.a.iii of the Permit. Conditions II.Y, II.Y.1, II.Y.1.g, II.Y.2.a.iii,  
12 II.Y.3.a.ii, and II.Y.3.a.iii of the Permit, if issued as a final permit decision after the close of the  
13 reopened comment period described in paragraph 2.3 above, will take effect thirty days after  
14 service of notice of the final permit decision and response to comments. Energy and Ecology  
15 agree that prior to the time Conditions II.Y, II.Y.1, II.Y.1.g, II.Y.2.a.iii, II.Y.3.a.ii, and  
16 II.Y.3.a.iii take effect, each party will conduct itself as if the conditions were in effect, except to  
17 the extent that Ecology determines, following public comment, that one or more of the conditions  
18 as described in this agreement should not be issued as a final permit decision. Energy agrees that  
19 it will take no appeal of this Permit unless: 1) Ecology decides in accord with paragraph 2.2 of  
20 this Agreement that corrective action is necessary; or 2) a change is made to Condition II.Y,  
21 II.Y.1, II.Y.1.g, II.Y.2.a.iii, II.Y.3.a.ii, and/or II.Y.3.a.iii based upon public comment as  
22 contemplated by paragraph 2.4 of this Agreement. The previous sentence notwithstanding, both  
23 parties agree that changes to the Permit not contemplated by this Agreement may give rise to a  
24 new cause of action.

25           2.6    The parties agree that they will each bear their own costs and attorneys' fees.

26           2.7    This Stipulation and Agreed Order of Dismissal resolves issuance of the Permit

1 and defers all claims associated with this appeal.

2           2.8    The undersigned representatives of Energy and Ecology certify that they are fully  
3 authorized to enter into the terms and conditions of this Stipulation and Agreed Order of  
4 Dismissal and to legally bind each party thereto. Energy and Ecology consent to the submission  
5 of this Stipulation and Agreed Order of Dismissal to the PCHB for approval and entry.

6           EXECUTED this 8<sup>th</sup> day of December, 2000.

7  
8 **CHRISTINE O. GREGOIRE**  
Attorney General

9  
10 

11 **ANDREW A. FITZ, WSBA #22169**  
Assistant Attorney General  
12 Attorneys for State of Washington  
13 Department of Ecology

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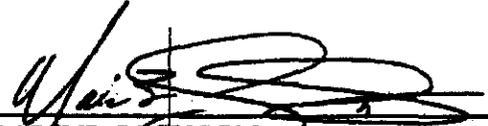
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**DALE E. JACKSON**  
Attorney, Office of Chief Counsel  
U.S. Department of Energy  
Richland Operations Office

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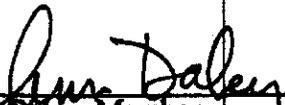
**III. AGREED ORDER OF DISMISSAL**

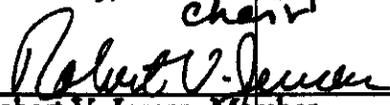
Having reviewed the foregoing Stipulation and the file and pleadings herein, and it appearing that the parties have reached an agreement;

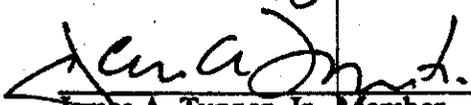
IT IS HEREBY ORDERED that the foregoing Stipulation is entered as an order of this Board and this case, United States Department of Energy, Richland Operations Office v. Ecology, PCHB 00-050 is hereby DISMISSED without prejudice and without costs or attorneys fees.

DATED this 13<sup>th</sup> day of December, 2000.

**POLLUTION CONTROL HEARINGS BOARD**

  
\_\_\_\_\_  
Ann Daley, Member  
*Chair*

  
\_\_\_\_\_  
Robert V. Jensen, Member

  
\_\_\_\_\_  
James A. Tupper, Jr., Member

Presented by:

Approved as to form; notice of presentation waived:

**CHRISTINE O. GREGOIRE**  
Attorney General



\_\_\_\_\_  
**ANDREW A. FITZ, WSBA #22169**  
Assistant Attorney General  
Attorneys for State of Washington  
Department of Ecology  
(360) 586-6752

  
\_\_\_\_\_  
**DORE E. JACKSON**  
Attorney for Appellant  
U.S. Department of Energy  
Richland Operations Office  
(509) 376-8086

**STIPULATION AND  
AGREED ORDER OF DISMISSAL  
PCHB 00-050**

**EXHIBIT A**

**PERMIT LANGUAGE MODIFICATIONS**

**II.Y CORRECTIVE ACTION**

In accordance with WAC 173-303-646 and WAC 173-303-815(2)(b)(ii), the Permittee must conduct corrective action, as necessary to protect human health and the environment, for releases of dangerous waste and dangerous constituents from solid waste management units and areas of concern at the facility, including releases that have migrated beyond the facility boundary. The Permittee may be required to implement measures within the facility to address releases which have migrated beyond the facility's boundary. As specified in Conditions II.Y.1.g, II.Y.2.a.iii and II.Y.3.a.ii., the Permittee's right to challenge Ecology's authority to impose corrective action with respect to radionuclides, CERCLA Past Practice (CPP) Units (as identified under Condition II.Y.2a) and selected solid waste management units not covered by the FFACO at property currently subleased to US Ecology, Inc. (as identified under Condition II.Y.3.a.i.), is reserved until such time as Ecology chooses to impose corrective action in accordance with the Permit Modification Procedures of WAC 173-303-830.

**II.Y. Compliance with Chapter 173-340 WAC**

In accordance with WAC 173-303-646, the Permittee must conduct corrective action "as necessary to protect human health and the environment." To ensure that corrective action will be conducted as necessary to protect human health and the environment, except as provided in Condition II.Y.2, the Permittee must conduct corrective action in a manner that complies with the following requirements provisions of Chapter 173-340 WAC:

- II.Y. .a. As necessary to select a cleanup action in accordance with WAC 173-340-360 and WAC 173-340-350 State Remedial Investigation and Feasibility Study;
- II.Y.1.b. WAC 173-340-360 Selection of Cleanup Actions;
- II.Y.1.c. WAC 173-340-400 Cleanup Actions;
- II.Y.1.d. WAC 173-340-410 Compliance Monitoring Requirements;
- II.Y.1.e. WAC 173-340-420 Periodic Site Reviews;
- II.Y.1.f. WAC 173-340-440 Institutional Controls; and
- II.Y.1.g. WAC 173-340-700 through -760 Cleanup Standards, except that to the extent that Ecology seeks to impose corrective action with respect to radionuclides regulated under the provisions of the Atomic Energy Act, as amended, 42 U.S.C. § 2011 et seq (AEA), the Permittee may challenge Ecology's authority to impose such corrective action through a timely appeal of the permit modification issued by Ecology without argument from Ecology that such right has been waived by a failure to fully litigate that issue through an appeal taken within thirty (30) days of the issuance of this permit, and without argument from the Permittee that such requirement fails to satisfy a cause for permit modification under WAC 173-303-830(3)(a).

**II.Y.2 Acceptance of Work Under Other Authorities or Programs and Integration with the FFACO**

Corrective action is necessary to protect human health and the environment for all units identified in Appendix B and Appendix C of the FFACO. Notwithstanding Condition II.Y.1, work under other cleanup authorities or programs, including work under the FFACO, may be used to satisfy corrective action requirements, provided it protects human health and the environment.

- II.Y.2 a. For units identified in Appendix C of the FFAOC, as amended, as CERCLA Past Practice (CPP) Units, Ecology accepts work under the FFACO, as amended, and under the CERCLA program, as satisfying corrective action requirements to the extent provided for in, and subject to the reservations and requirements of, Conditions II.Y.a.i through II.Y.a.iv.
  - i. For any unit identified in Appendix C of the FFACO as a CPP unit, the Permittee must comply with the requirements and schedules related to investigation and cleanup of the of CPP unit(s) developed and approved under the FFACO, as amended. The requirements and schedules related

2 to investigation and cleanup of CPP units currently in place under the FFACO, as amended, and  
3 in the future developed and approved under the FFAOC, as amended, are incorporated into this  
4 Permit by this reference and apply under this Permit as if they were fully set forth herein. If the  
5 Permittee is not in compliance with requirements of the FFACO, as amended, that relate to  
6 investigation or cleanup of CPP unit(s), Ecology may take action to independently enforce the  
7 requirements as corrective action requirements under this Permit.

- 8 ii. For any unit identified in Appendix C of the FFACO as a CPP unit, in the case of an interim  
9 ROD, a final decision about satisfaction of corrective action requirements will be made in the  
10 context of issuance of a final ROD.
- 11 iii. If EPA and Ecology, after exhausting the dispute resolution process under Section XXVI of the  
12 FFACO, cannot agree on requirements related to investigation or cleanup of CPP unit(s),  
13 Ecology will notify the Permittee, in writing, of the disagreement and impose, in accordance with  
14 the Permit Modification Procedures of WAC 173-303-830, a requirement for the Permittee to  
15 conduct corrective action for the subject unit(s) in accordance with Condition II.Y.1. The  
16 Permittee may challenge Ecology's authority to impose such corrective action requirements  
17 through a timely appeal of such permit modification, without argument from Ecology that the  
18 Permittee's right to raise such challenge has been waived by a failure to fully litigate that issue  
19 through an appeal taken within thirty (30) days of the issuance of this permit, and without  
20 argument from the Permittee that such requirement fails to satisfy a cause for permit  
21 modification under WAC 173-303-830(3)(a). Within sixty (60) days of receipt of Ecology's  
22 notice the above permit modification, or within some other reasonable period of time agreed to  
23 by Ecology and the Permittee, the Permittee must submit for Ecology review and approval, a plan  
24 to conduct corrective action in accordance with Condition II.Y.1. for the subject unit(s). The  
25 Permittee's plan may include a request that Ecology evaluate work under another authority or  
26 program. Approved corrective action plans under this condition will be incorporated into this  
27 Permit in accordance with the Permit Modification Procedures of WAC 173-303-830.
- 28 iv. The Permittee must maintain information on corrective action for CPP units covered by the  
29 FFACO in accordance with Sections 9.0 and 10.0 of the FFACO Action Plan. In addition, the  
30 Permittee must maintain all reports and other information developed in whole, or in part, to  
31 implement the requirements of Condition II.Y.2.a, including reports of investigations and all raw  
32 data, in the Facility Operating Record in accordance with Condition II.I. Information that is  
33 maintained in the Hanford Site Administrative Record may be incorporated by reference into the  
34 Facility Operating Record.

35 II.Y. 2.b. For units identified in Appendix C of the FFACO, as amended, as RPP units, Ecology accepts work  
36 under the FFACO, as amended, as satisfying corrective action requirements to the extent provided  
37 for, and subject to the reservations and requirements of, Conditions II.Y.2.b.i. through II.Y.2.b.iv.

- 38 i. For any unit identified in Appendix C of the FFACO, as amended, as RPP unit, until a permit  
39 modification is complete under II.Y.b.iii., the Permittee must comply with the requirements and  
40 schedules related to investigation and cleanup of RPP units developed and approved under the  
41 FFACO, as amended. The requirements and schedules related to investigation and cleanup of  
42 RPP units currently in place under the FFACO, as amended, and in the future developed and  
43 approved under the FFACO, as amended, are incorporated into this Permit by this reference and  
44 apply under this Permit as if they were fully set forth herein. Until a permit modification is  
45 complete under II.Y.b.iii., if the Permittee is not in compliance with requirements and schedules  
46 related to investigation and cleanup of RPP units developed and approved under the FFACO, as  
47 amended, Ecology may take action to independently enforce the requirements as corrective  
48 action requirements under this Permit.
- 49 ii. When the Permittee submits a corrective measures study for an individual RPP unit or a group of  
50 RPP units, the Permittee must, at the same time, recommend a remedy for the unit(s). The

remedy recommendation must contain all the elements of a draft cleanup action plan under WAC 173-340-360(10).

- iii. After considering the Permittees' corrective measures study and remedy recommendation, Ecology will make a tentative remedy selection decision and publish the decision for public review and comment. Public review and comment may be accomplished by publishing the tentative decision as a draft Permit under WAC 173-303-840(10), or by a method that provides an equivalent opportunity for public review and participation. Following public review and comment, Ecology will make a final remedy selection decision. Final remedy decisions will be incorporated into the Permit using the Permit Modification Procedures of WAC 173-303-830.
- iv. The Permittee must maintain information on corrective action for RPP units covered by the FFACO, as amended, in accordance with Sections 9.0 and 10.0 of the FFACO Action Plan. In addition, the Permittee must maintain all reports and other information developed in whole, or in part, to implement the requirements of Condition II.Y.2.b., including reports of investigations and all raw data, in the Facility Operating Record in accordance with Condition II.I. Information that is maintained in the Hanford Site Administrative Record may be incorporated into the Facility Operating Record by reference.

II.Y.2.c. For each TSD unit or group of units, when the Permittee submits a certification of closure or a certification of completion of post-closure care, or at an earlier time agreed to by Ecology and the Permittee, the Permittee must, at the same time, either:

- i. document that the activities completed under closure and/or post-closure satisfy the requirements for corrective action; or
- ii. if the activities completed under closure and/or post-closure care do not satisfy corrective action requirements, identify the remaining corrective action requirements and the schedule under which they will be satisfied, if remaining corrective action requirements will be satisfied by work developed and carried out under the FFACO provisions for RPP units or CPP units, a reference to the appropriate RPP or CPP process and schedule will suffice.
- iii. Ecology will make final decisions as to whether the work completed under closure and/or post-closure care satisfies corrective action, specify any unit-specific corrective action requirements, and incorporate the decision into this Permit in accordance with the Permit Modification Procedures of WAC 173-303-830.

II.Y.2.d. Notwithstanding any other condition in this Permit, Ecology may directly exercise any administrative or judicial remedy under the following circumstances:

- i. Any discharge or release of dangerous waste, or dangerous constituents, which are not addressed by the FFACO, as amended;
- ii. Discovery of new information regarding dangerous constituents or dangerous waste management, including but not limited to, information about releases of dangerous waste or dangerous constituents which are not addressed under the FFACO, as amended; or
- iii. A determination that action beyond the terms of the FFACO, as amended, is necessary to abate an imminent and substantial endangerment to the public health, or welfare, or to the environment.

II.Y.3. Releases of Dangerous Waste or Dangerous Constituents Not Covered By the FFACO

II.Y.3.a. US Ecology

- i. The following solid waste management units are not covered by the FFACO:
  - A. US Ecology, Inc., SWMU 1: Chemical Trench;
  - B. US Ecology, Inc., SWMU 2-13: Low-level radioactive waste trenches 1 through 11A; and
  - C. US Ecology, Inc., SWMU 17: Underground resin tank.

1 ii. Selected solid waste management units identified in Condition II.Y.3.a.i are currently being  
2 investigated by US Ecology in accordance with the *Comprehensive Investigation US Ecology –*  
3 *Hanford Operations Workplan*. Following completion of this investigation and any closure  
4 required of such solid waste management unit under the authority of the Washington State  
5 Department of Health, or within one (1) year of the effective date of this Permit Condition,  
6 whichever is earlier, Ecology will make a tentative decision as to whether additional  
7 investigation or cleanup is necessary to protect human health or the environment for the solid  
8 waste management units identified in Condition II.Y.3.a.i, and publish that decision as a draft  
9 permit in accordance with WAC 173-303-840(10). Following the associated public comment  
10 period, and consideration of any public comments received during the public comment period,  
Ecology will publish as final permit conditions under WAC 173-303-840(8) either:

- 12 A. a decision that corrective action is not necessary to protect human health or the environment;  
13 B. an extension to the schedule established under IIIY.3.a.ii; or  
14 C. a decision that corrective action in accordance with Condition II.Y.1 is necessary to protect  
15 human health or the environment.

16 iii. If Ecology decides under Condition II.Y.3.a.ii that corrective action is necessary to protect  
17 human health or the environment, the Permittee may challenge Ecology's authority to impose  
18 such corrective action requirements through a timely appeal of such permit modification, without  
19 argument from Ecology that the right to raise such challenge has been waived by a failure to fully  
20 litigate that issue through an appeal taken within thirty (30) days of the issuance of this permit,  
21 and without argument from the Permittee that such requirement fails to satisfy a cause for permit  
22 modification under WAC 173-303-830(3)(a), ~~within one hundred and eighty (180) days of the~~  
23 effective date of this decision receipt of the above permit modification, the Permittee must  
24 submit, for Ecology review and approval, a plan to conduct corrective action in accordance with  
25 Condition II.Y.1. Approved corrective action plans under this condition will be incorporated into  
26 this Permit in accordance with the Permit Modification Procedures of WAC 173-303-830.

27 II.Y.3.b. Newly Identified Solid Waste Management Units and Newly Identified Releases of Dangerous  
28 Waste or Dangerous Constituents

29 The Permittee must notify Ecology of all newly-identified solid waste management units and all  
30 newly-identified areas of concern at the Facility. For purposes of this condition, a 'newly-  
31 identified' solid waste management unit or a 'newly-identified' area of concern is a unit or area not  
32 identified in the FFACO, as amended, on the effective date of this condition and not identified by  
33 Condition II.Y.3.a. Notification to Ecology must be in writing and must include, for each newly-  
34 identified unit or area, the information required by WAC 173-303-806(4)(a)(xxiii) and WAC 173-  
35 303-806(4)(a)(xxiv). Notification to Ecology must occur at least once every calendar year, no later  
36 than December 31, and must include all units and areas newly identified since the last notification,  
37 except that if a newly identified unit or area may present an imminent and substantial endangerment  
38 to human health or the environment, notification must occur within five (5) days of identification of  
39 the unit or area. If information required by WAC 173-303-806(4)(a)(xxiii) or WAC 173-303-  
40 806(4)(a)(xxiv) is already included in the Waste Information Data System, it may be incorporated  
41 by reference into the required notification.  
42