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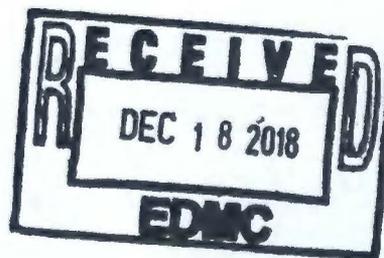
Re: **PCHB NO. 17-084**
UNITED STATES DEPARTMENT OF ENERGY and CH2M HILL PLATEAU
REMEDICATION COMPANY v. STATE OF WASHINGTON, DEPARTMENT OF
ECOLOG

Dear Parties:

Enclosed is the Pollution Control Hearings Board's Order on Summary Judgment in this matter.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. See Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 371-08-550.



A-010-04
A-010-05
A-010-06

1245864, 1246361, 1246643, 1247095, 1247337

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If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,



Kay M. Brown, Presiding

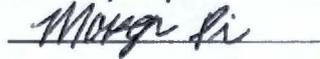
KMB/le/P17-084
Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED 6/26/18, at Tumwater, WA.



**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

1
2
3 UNITED STATES DEPARTMENT OF
ENERGY and CH2M HILL PLATEAU
REMEDIAATION COMPANY,

4 Appellants,

5 v.

6 STATE OF WASHINGTON,
7 DEPARTMENT OF ECOLOGY,

8 Respondent.

PCHB No. 17-084

ORDER ON SUMMARY JUDGMENT

9
10 Appellants United States Department of Energy (Energy) and CH2M Hill Plateau
11 Remediation Company (CHPRC)(collectively Appellants) filed an appeal with the Pollution
12 Control Hearings Board (Board) on October 5, 2017, challenging Administrative Order Docket
13 #15343 (Administrative Order) and Notice of Penalty Docket #15342 (Penalty). Both the
14 Administrative Order and the Penalty were issued by the State of Washington, Department of
15 Ecology (Ecology) on August 31, 2017, and pertain to the same sequence of events which
16 occurred at the Hanford Federal Facility in Richland, WA.

17 Ecology and the Appellants filed motions for summary judgment and Appellants also
18 filed a motion to dismiss.¹ Assistant Attorney General Koalani Kaulukukui-Barbee appeared on
19 behalf of Ecology. Attorneys R. Paul Detwiler and Benjamin J. Zelen, appeared on behalf of

20 ¹ Because the Motion to Dismiss relies on materials outside of the pleadings it will be treated as a motion for
21 summary judgment, and analyzed in the same manner as Appellants' summary judgment motion. *See Schumacher
Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 698, 850 P.2d 1361, 1364 (1993) *rev. den.* 122
Wn.2d 1013, 863 P.2d 73 (1993)(holding that a CR 12(b)(1) motion should be treated as a summary judgment
motion when court considers matters outside of the pleadings).

1 Energy. Attorneys Raymond Takashi Swenson and Eric D. Trotta appeared on behalf of
2 CHPRC. The Board hearing this matter was comprised of Presiding Member Kay M. Brown,
3 Board Member, Board Chair Joan M. Marchioro and Board Member Neil L. Wise. The Board
4 reviewed the following materials submitted by the parties:

- 5 1. Respondent Department of Ecology's Motion for Summary Judgment;
- 6 2. Declaration of Edward J. Holbrook with attached Exhibits 1-19;
- 7 3. Appellants' Response to Respondent's Motion for Summary Judgment;
- 8 4. Declaration of Simon Peter Serrano in Support of Appellants' Response to
9 Respondent's Motion for Summary Judgment with attached Exhibits A-E;
- 10 5. Respondent Department of Ecology's Reply to Appellants' Response to
11 Motion for Summary Judgment;
- 12 6. Second Declaration of Koalani L. Kaulukukui-Barbee, with attached
13 Exhibits 2-5;
- 14 7. Appellants' Motion to Dismiss and Motion for Summary Judgment-
15 Ecology Administrative Order No. 15343 and Notice of Penalty No.
16 15342, with attached Exhibits A-K;
- 17 8. Declaration of Fred A. Ruck III in Support of Appellants' Motion to
18 Dismiss and Motion for Summary Judgment-Ecology Administrative
19 Order No. 15343 and Notice of Penalty No. 15342;
- 20 9. Declaration of Eric D. Trotta in Support of Appellants' Motion to Dismiss
21 and Motion for Summary Judgment-Ecology Administrative Order No.
15343 and Notice of Penalty No. 15342;
10. Declaration of James A. Meeker in Support of Appellants' Motion to
Dismiss and Motion for Summary Judgment-Ecology Administrative
Order No. 15343 and Notice of Penalty No. 15342;
11. Respondent Department of Ecology's Response to Appellants' Motion to
Dismiss and Motion for Summary Judgment;

1 ended in the late 1980s. Appellants' motion brief, p. 1; Respondents' motion brief, p. 1; *see*
2 *generally* <https://www.energy.gov/em/hanford-site>.

3 The Plutonium Uranium Extraction Plant (PUREX) is one of the five former plutonium
4 processing plants. It contains the main building, Building 202-A, two annex structures and
5 ancillary support structures. Holbrook Decl., ¶ 4. PUREX is described on the Hanford website
6 as follows:

7 The Plutonium Uranium Extraction Plant is massive. It is longer than three
8 football fields, stands 64 feet above the ground, and extends another 40 feet below
9 ground. Concrete walls up to six feet thick were used in the plant to shield
workers from the radiation of the building. PUREX also contains more than
thirty-three miles of piping.

10 Built in the early 1950's, the facility went into operation in 1956. From 1956 to
11 1972, and again from 1983 until 1988, PUREX processed about 75% of the
12 plutonium produced at Hanford. Some scientists believe that more plutonium was
processed at PUREX than any other building on the planet, as it processed more
than 70,000 tons of uranium fuel rods during its operations.

13 Appellants' motion brief, p. 2; *See generally* <https://www.hanford.gov/page.cfm/PUREX>.

14 In 1989, the Hanford Federal Facility Agreement and Consent Order (referred to as the
15 Tri-Party Agreement or TPA) was reached between Energy, the U.S. Environmental Protection
16 Agency (EPA), and Ecology.³ Takashi Decl., ¶ 4. One of the general purposes of the TPA was
17 to ensure that the environmental impacts associated with past and present activities at the
18 Hanford Site were appropriately addressed to protect the public health, welfare and the
19 environment. Holbrook Decl., Ex. 1, p. 6 (TPA, Article 3, ¶ 14 A, p. 6).

20 _____
21 ³Both parties cite to the TPA and provide excerpts from the document as exhibits in the record. *See i.e.* Holbrook
Decl., Ex. 1; Serrano Decl., Ex. B. The entire document is available on the Hanford website at
<https://www.hanford.gov/files.cfm/HFFACO.pdf>.

1 The TPA establishes a framework for determining the lead regulatory agency (either
2 Ecology or EPA) for the clean-up of certain areas of Hanford. The TPA addresses whether the
3 areas will be cleaned up pursuant to the Comprehensive Environmental Response,
4 Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, the Resource
5 Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, or a combination of both.
6 *See generally*, TPA, Part 4, Articles XXIII and XXIV, pp 43, 44. In Washington, in lieu of
7 RCRA, Ecology is authorized by EPA to implement the state Hazardous Waste Management Act
8 (HWMA), RCW 70.105, and its implementing dangerous waste regulations, WAC 173-303. *See*
9 59 Fed. Reg. 55,322 (Nov. 4, 1994).

10 Attachment 2 to the TPA is a detailed Action Plan for implementation of the TPA.
11 Section 8 of the Action Plan, entitled “Facility Disposition Process”, “defines the approach by
12 which [Energy], with involvement of the lead regulatory agencies, will take a facility from
13 operational status to its end state condition (final disposition) at Hanford.” Holbrook Decl., Ex.
14 1, pp. 25-26 (TPA, Attachment 2, § 8.1, p. 8-1). This is accomplished by the completion of
15 “facility transition, surveillance and maintenance (S&M) and disposition phase activities.” *Id.*

16 Section 8 establishes a process to coordinate the “requirements of [Energy’s]
17 decommissioning processes with the requirements of environmental regulations, such as RCRA
18 and CERCLA, as they relate to disposition of facilities.” *Id.* It defines “key facilities” as those
19 that “present sufficient potential environmental concern that coordination of the
20 decommissioning process with cleanup activities under the Tri-Party Agreement was deemed
21 necessary.” *Id.* PUREX is identified as a key facility and is subject to Section 8. *Id.*, § 8.1.2, p.

1 8-2. The final disposition phase of PUREX will be addressed using CERCLA remedial action
2 coordinated with RCRA. *Id.*, § Table 8-1, p. 8-2. Ecology is the lead agency for disposition of
3 PUREX. Holbrook Decl., Ex. 1, pp. 35, 38, 39 (TPA, Attachment 2, Appendix J, pp. J-1, J-3, J-
4 4.)

5 PUREX is currently in the surveillance and maintenance phase of its disposition process.
6 Holbrook Decl., ¶ 8, Ex. 1, p. 26 (TPA, Attachment 2, § 8.1.2, p. 8-2). During the surveillance
7 and maintenance phase, a Surveillance and Maintenance Plan (S&M Plan) is applicable, and
8 Energy must perform surveillance and maintenance activities in accordance with the S&M Plan.
9 Holbrook Decl., ¶¶ 8, 9, and Ex. 1 p. 26 (TPA, Attachment 2, § 8.1.2, p. 8-2).

10 In April 2016, Ecology initiated an inspection of the 2015 surveillance and maintenance
11 activities conducted by Appellants by reviewing their documents.⁴ Holbrook Decl., ¶ 11. These
12 documents revealed the presence of white powder in three different areas of the PUREX facility,
13 and included photographs of the white powder. *Id.*, ¶ 12; Ex. 5, pp. 7, 25-26, 29, 35-36, Ex. 6,
14 pp. 15-17.

15 Between July and September, 2016, Ecology asked Appellants what actions they took
16 after discovery of the white powder documented in their surveillance and maintenance reports.
17 Holbrook Decl. ¶ 13-14. In August 2016, Appellants responded that “Additional
18 investigation/data may be needed to determine if the white powder poses a hazard that requires
19 additional action.” Holbrook Decl., ¶ 13, Ex. 6, pp. 5-6. In October, 2016, Appellants responded
20 that hazardous materials left in PUREX were identified in Appendix A of the PUREX S&M

21 ⁴ Ecology personnel do not go into the PUREX facilities for inspections because of the specialized training required to do so. Appellants' motion brief, Ex. B, pp. 32-33, Ex. C, p. 9.

1 Plan; that there is no indication that the white powder, if determined to be a solid waste, would
2 designate as dangerous waste; that the powder is safe within the PUREX facility, and does not
3 constitute a threat to human health or the environment; and that in accordance with the TPA,
4 disposition of the white powder will be addressed under CERCLA. Holbrook Decl., ¶ 14, Ex. 7,
5 pp. 2-3.

6 On November 26, 2016, Ecology issued a compliance report to Appellants, identifying
7 Appellants' failure to determine whether the white powder designated as dangerous waste under
8 WAC 173-303-070 as an area of non-compliance. Holbrook Decl., ¶¶ 15, 16, Ex. 8, pp. 19-22.
9 Ecology required Appellants to submit a plan within 60 days to determine if the white powder
10 designates as a dangerous waste. *Id.* p. 20.

11 On February 2, 2017, Appellants responded to Ecology's finding of non-compliance,
12 stating that they had reviewed the finding of non-compliance; that the white powder is not within
13 a Treatment, Storage or Disposal Unit (TSD) boundary; that it is in a safe and stable condition
14 within the confines of PUREX and has not been released to the environment; and that it does not
15 constitute a threat to human health and the environment. Energy went on to state that it "intends
16 to leave the white powder in place until remediation of PUREX during the [CERCLA] remedial
17 action planned for the facility." Holbrook Decl., ¶ 17, Ex. 9, p.1.

18 On April 19, 2017, Ecology responded to Appellants' letter, requesting again that they
19 determine whether or not the white powder designates as a dangerous waste, and warning that
20 failure to do so could result in the issuance of an enforcement order and/or penalty. Holbrook
21 Decl., ¶ 18, Ex. 10.

1 On April 25, 2017, Ecology initiated its inspection of Appellants' 2016 PUREX
2 surveillance and maintenance activities by reviewing its documents. Holbrook Decl., ¶ 19.
3 Ecology noted the documentation of the continued existence of the white powder at the same
4 three locations. Holbrook Decl., ¶¶ 19-21, Exs. 11, 12.

5 Ecology also noted that Appellants had documented water intrusions or leaks with
6 notations or photographs during its 2015 and 2016 PUREX annual surveillance within the
7 PUREX canyon. Holbrook Decl., ¶ 21. Ecology concluded from this evidence that there is a
8 possibility of water intrusion that could lead to the migration of the uncontained white powder.
9 *Id.*

10 On August 31, 2017, Ecology issued a compliance report to Appellants, again citing as an
11 area of non-compliance Appellants' failure to determine whether the white powder designated as
12 dangerous waste in accordance with WAC 173-303-070. Holbrook Decl., ¶¶ 22-23, Ex. 12.

13 On that same day, Ecology issued the Administrative Order and Penalty to Appellants for
14 their continuing violation of WAC 173-303-070 for failure to designate the white powder.
15 Holbrook Decl. ¶ 24, Exs. 13, 14. The Penalty was issued in the amount of \$16,000 for failure to
16 designate the white powder. *Id.* Ex. 14. The Administrative Order required designation of the
17 white powder identified in the 2015 and 2016 CHPRC inspections of the PUREX Plant by
18 October 31, 2017 (Corrective Action 1); submission of a plan by November 15, 2017, to recover
19 and manage any solid waste that may be designated as dangerous waste in accordance with
20 WAC 173-303 (Corrective Action 2); and if the white powder designates as a dangerous waste in
21 accordance with WAC 173-303, recover and manage the dangerous waste in accordance with

1 WAC 173-303 within 60 days of the designation (Corrective Action 3). Holbrook Decl., ¶¶ 24-
2 26, Ex. 13, p. 9.

3 On October 5, 2017, Energy and CHPRC filed an appeal of both the Penalty and the
4 Administrative Order.

5 Subsequent to filing the appeal, the white powder was tested and designated. Holbrook
6 Decl., ¶¶ 28, 29, Exs. 17, 18. The white powder is primarily sodium carbonate and sodium
7 bicarbonate along with the presence of pipe corrosion material. Cadmium, chromium, lead and
8 nitrate were also detected in the sample. Holbrook Decl., Ex. 17. Appellants have
9 acknowledged that the white powder is dangerous waste. Holbrook Decl., Ex. 18.

10 By letter, Ecology confirmed that Corrective Action 1 required by the Administrative
11 Order was satisfied as of December 6, 2017. Holbrook Decl., Ex. 19.

12 ANALYSIS

13 Through prehearing conference procedures, the parties submitted and agreed to the
14 following legal issues for this case:

- 15 1. Whether the terms of the Hanford Federal Facility Agreement and Consent Order of
16 1989, as amended, prevent Ecology from imposing the terms of Administrative Order
Docket No. 15343 and Notice of Penalty Docket No. 15342?
- 17 2. Whether Appellants violated WAC chapter 173-303 (Washington's Dangerous Waste
18 Regulations) as stated in Ecology's Administrative Order Docket No. 15343 and
Notice of Penalty Incurred and Due Docket No. 15342?
- 19 3. Whether the penalty assessed against Appellants under Ecology's Notice of Penalty
20 Incurred and Due Docket No. 15342 is reasonable under the facts and circumstances
of the case?

1 Ecology moved for summary judgment on Issues 1-3. The Appellants moved to dismiss
2 contending the statute of limitations precluded Ecology's enforcement action. The Appellants
3 also moved for summary judgment on Issues 1 through 3.

4 A. Summary Judgment Standard

5 Summary judgment is a procedure available to avoid unnecessary trials where there is no
6 genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

7 The summary judgment procedure is designed to eliminate trial if only questions of law remain
8 for resolution, and neither party contests the facts relevant to a legal determination. *Rainier*
9 *Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*,
10 117 Wn.2d 1004 (1991).

11 The party moving for summary judgment must show there are no genuine issues of
12 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
13 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
14 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
15 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
16 then the non-moving party must present evidence demonstrating that material facts are in
17 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
18 *reconsideration denied* (1991). In a summary judgment proceeding, all facts and reasonable
19 inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146
20 Wn.2d 291, 300, 45 P.3d 1068 (2002).

1 B. Statute of Limitations

2 Appellants contend that Ecology's enforcement actions (the Administrative Order and
3 Penalty) should be dismissed because they violate RCW 4.16.100, which is the two year statute
4 of limitations for "a forfeiture or penalty to the state." The Board does not reach the merits of
5 this issue because Ecology argues, and the Board agrees, that the issue was not properly raised.

6 The Board's rules outline the process for conducting appeals at the Board. The Board
7 routinely conducts a prehearing conference with the parties, at which time issues are identified
8 and incorporated into a prehearing order. WAC 371-08-435 (1), (2). The applicable rule
9 provides:

10 The issues which the prehearing order identifies for the hearing shall control the
11 subsequent course of the appeal, and shall be the only issues to be tried at the
12 hearing, unless modified for good cause by subsequent order of the board or the
13 presiding officer.

14 WA 371-08-435 (2).

15 This was the process followed in this appeal. A prehearing conference was conducted,
16 issues were identified, the parties worked on consolidating their issues, and the agreed issues list
17 was incorporated into the prehearing order. The issues in this case do not include a challenge
18 based on the statute of limitations.

19 Appellants argue that under Superior Court Civil Rule 8(c) and general case law
20 regarding the waiver of the statute of limitations affirmative defense, they have not waived the
21 defense because they have not been dilatory in raising it. The Superior Court rules apply to
Board proceedings, where relevant, and to the extent they do not conflict with the Board's

1 procedural rules. WAC 371-08-300(1), (2). Here, however, the Board’s rules expressly require
2 all issues to be included in the prehearing order. If a party wishes to add issues, it must move to
3 modify the prehearing order. *Id.* If CR 8 would allow a statute of limitations argument to be
4 brought at this stage in the proceedings,⁵ without having been identified as an issue in the
5 prehearing order, it is in conflict with WAC 371-08-435(1) and (2), and therefore is not
6 applicable.

7 The Board denies Appellants motion to dismiss based on the statute of limitations as
8 being beyond the scope of the issues identified in the prehearing order.

9 C. WAC 173-303 (Issue 2)

10 Under the HWMA and the dangerous waste regulations, Ecology implements “cradle to
11 grave” regulation of hazardous and dangerous waste to ensure they are managed in a manner
12 than protects human health and the environment. *WHW, Inc. v. Dept. of Ecology*, PCHB No. 05-
13 142, p. 6 (Order on Summary Judgment, March 30, 2006)(citing RCW 70.105.007). To achieve
14 this end, Ecology regulates generators of solid and dangerous waste as well as owners and
15 operators of permitted TSD facilities that manage dangerous waste. WAC 173-303-070, 300.
16 Energy has acknowledged in the TPA that it is a “generator, transporter, and owner and operator
17 of a TSD Facility.” Holbrook Decl., Ex. 1, p. 15 (TPA, Article VI, §23.B, p. 15).

18
19
20 ⁵ The Courts have held that the affirmative defense of the statute of limitations is waived if the party asserting it is
21 dilatory. Here, the Appellants could have raised this defense in their notice of appeal, when they filed proposed
issues before the prehearing conference, or when the parties worked together to identify a proposed list of issues for
inclusion into the prehearing order. The Appellants could also have moved at any time for a modification of the
prehearing order, which they did not do. *See generally*, Board file for PCHB No. 17-084.

1 “‘Generator’ means any person, by site, whose act or process produces dangerous waste
2 or whose act first causes a dangerous waste to become subject to regulation.” WAC 173-303-
3 040. Generators of solid waste are required to designate the solid waste they generate. *See*
4 WAC 171-303-070. A “solid waste” is defined as “any discarded material” not otherwise
5 excluded from the regulations. WAC 173-303-016(3)(a). A material is “discarded” if it is
6 abandoned by being disposed of. WAC 173-303-016(3)(b)(i); WAC 173-303-016(4)(a).
7 Discarded material includes material that is being accumulated or stored before or in lieu of
8 being abandoned by disposal. WAC 173-303-016(3)(b)(i); WAC 173-303-016(4)(a), (c); *WHW,*
9 *Inc.*, PCHB No. 05-142, p. 7. Designation of solid waste must be accomplished pursuant to
10 WAC 173-303-070 by either testing the waste in accordance with WAC 173-303-070(3)(c)(i) or
11 relying on documented knowledge of the materials and or processes that created the waste in
12 accordance with WAC 173-303-070(3)(c)(ii).

13 Pursuant to these regulations, Ecology requested that Appellants designate the white
14 powder, which Ecology contends is a solid waste generated by Appellants. Ecology contends
15 that Appellants should have designated the white powder when Appellants became aware of the
16 existence of the powder on the floors and equipment within PUREX during the 2015 annual
17 surveillance. When Appellants did not act within a reasonable time, Ecology issued its
18 administrative order requiring the designation.

19 Appellants assert that they did not generate the white powder because they “performed no
20 act and conducted no process to create the white powder in PUREX facility during 2015;
21 therefore WAC 173-303-070 does not apply.” Appellants’ motion brief, p. 5. However, as

1 pointed out by Ecology, both Appellants' briefing and Fred Ruck's Declaration describe the
2 process by which Appellants generated the white powder. Appellants explain that the white
3 powder is the result of the chemical breakdown of sodium hydroxide, which was used in a water
4 flush applied by Energy's contractors during the deactivation process in the 1990s. Some
5 flushing solution remained in the pipes, the water in the solution evaporated over time, and
6 sodium hydroxide was left behind and fell to the floor under the chemical process lines.
7 Appellants' Motion pp. 5, 6, Ruck Decl., p. 2. The Board concludes that based on Appellants'
8 own representations of what occurred to create the white powder, the Appellants generated the
9 white powder.

10 Appellants also assert that the white powder is not solid waste. The Board disagrees.
11 The white powder is a solid waste because it is discarded material that was abandoned by being
12 accumulated or stored before or in lieu of being abandoned by disposal. Furthermore, the
13 Appellants concede that the white powder designates as a dangerous waste. Appellants'
14 response, p. 6. A dangerous waste is by definition a solid waste. WAC 173-303-040
15 (“‘Dangerous wastes’ means those *solid wastes* designated in WAC 173-303-070 through 173-
16 303-100 as dangerous, or extremely hazardous or mixed waste.”)(Emphasis added). Appellants
17 cannot now claim that the dangerous waste is not waste at all. *K.P. McNamara Nw. Inc. v. State,*
18 *Washington Dep't of Ecology*, 173 Wn. App. 104, 129, 292 P.3d 812, 824 (2013), *rev. denied.*
19 117 Wn.2d 1023 (2013)(“[O]nce a waste is determined to be dangerous waste, the burden is on
20 the generator of the waste to prove otherwise.”).

1 The Board concludes, based on undisputed facts, that the white powder is solid waste
2 generated by the Appellants, and Appellants violated the dangerous regulations by not
3 designating it as required by WAC 173-303-070. The fact that Appellants did designate the
4 white powder *after* issuance of the Administrative Order and Penalty does not change the fact
5 that they violated WAC 173-303-030 in the first place. Appellants' actions to address the
6 violation months later do not moot the existence of the underlying violation. Ecology has met its
7 burden on summary judgment to establish based on undisputed facts that Appellants violated
8 WAC 173-303-070.

9 D. Effect of TPA and S&M Plan on Ecology's enforcement authority (Issue 1)

10 The parties agree on the following basic points. 1) The TPA is the controlling document.
11 2) Under the TPA, the final disposition of the PUREX facility will be addressed under CERCLA.
12 3) The PUREX facility has not yet reached the final disposition phase, and is currently in the
13 surveillance and maintenance phase. 4) The TPA specifies that the surveillance and maintenance
14 phase is controlled by the S&M Plan. The dispute focuses on the application of the dangerous
15 waste regulations during the surveillance and maintenance phase to the PUREX facility.

16 Although Appellants acknowledge that the PUREX facility has not reached the final
17 disposition phase, and that the TPA and S&M Plan are the controlling documents at this time,⁶
18 Appellants argue that Section 121 of CERCLA specifically preempts the application of
19 Ecology's permitting regulations and all related WAC requirements to CERCLA Operable Units.
20 Appellants cite TPA, paragraph 63 for the proposition that CERCLA activities on the Hanford

21 _____
⁶ See Appellants' reply brief, p. 9.

1 Site are protected by Section 121 of CERCLA from direct regulation under WAC 173-303. This
2 argument misapplies Section 121.

3 CERCLA Section 121 exempts Appellants from permit requirements, but not all related
4 WAC requirements. Section 121 states:

5 No Federal, State, or local permit shall be required for the portion of any removal
6 or remedial action conducted entirely onsite, where such remedial action is
selected and carried out in compliance with this section.

7 42 U.S.C. § 9621(e)(1) (emphasis added). WAC 173-303-070, the requirement at issue here, is
8 not a permitting requirement. *See also* Serrano Decl., Ex. B, p. 4 ((TPA, Article XVIII, ¶ 63, pp.
9 35-36) (“The Parties recognize that under CERCLA Secs. 121(d) and 121(e)(1), and the NCP,
10 portions of the response actions called for by this Agreement and conducted entirely on the
11 Hanford Site are exempted from the procedural requirement to obtain federal, state, or local,
12 permits, but must satisfy all the applicable or relevant and appropriate federal and state
13 standards, requirements, criteria or limitations which would have been included in any such
14 permit.”).

15 Furthermore, the Section 121 permit waiver applies only during CERCLA remedial
16 actions. Appellants agree that there is no CERCLA remedial action underway at PUREX
17 currently. Appellants’ response brief, p. 6 (“Under the TPA, Ecology, DOE, and EPA agreed
18 that the white powder and the other substances in the PUREX facility would be remediated under
19 CERCLA after Ecology and public approval of the CERCLA remediation plan, which will be
20 submitted to Ecology in 2020.”). The Board concludes that Section 121 does not preempt WAC
21 173-303-070.

1 Energy next argues that Ecology's authority to apply its dangerous waste regulations to
2 the white powder at the PUREX facility during the surveillance and maintenance phase is limited
3 to powder found in TSD units. This argument is not supported by the language of the S&M Plan
4 or the TPA.

5 The S&M Plan provides that:

6 Dangerous waste generation and disposal are not expected during [surveillance
7 and maintenance]. However, waste generated will be handled in compliance with
8 the applicable regulatory, environmental, and waste management requirements.
9 Compliance with the RCRA requirements found in WAC 173-303 and with the
10 PUREX Complex Part A Permit Application during the S&M phase are addressed
11 in Table 6-1.

12 Holbrook Decl., Ex. 4, p. 22. The S&M Plan further clarifies that the "enforceable requirements
13 in this document are found in Table 6-1, other dialogue and descriptions are for informational
14 purposes only." *Id.* p. 8. Table 6-1 lists WAC 173-303-010 to -110 as dangerous waste
15 regulations applicable to PUREX during the surveillance and maintenance phase. *Id.* p. 24. In
16 the preceding section of this opinion, the Board has concluded that the Appellants are generators
17 of the white powder and therefore pursuant to WAC 171-303-070 must designate the white
18 powder. Pursuant to the Table 6-1 of the S&M Plan, WAC 173-303-070 is applicable in full to
19 PUREX during the surveillance and maintenance phase.

20 Appellants also argue that the comment in Column 2 of Table 6-1 of the S&M Plan, that
21 "waste generated will be designated in compliance with the S&M contractor's waste
management procedures," overrides the requirement that the dangerous waste designation rules
apply to newly generated waste. According to this argument, if Energy's own contractors do not

1 include waste designation in their own waste management procedures, the Appellants do not
2 have to comply with WAC 173-303-070. The S&M Plan clarifies, however, that the enforceable
3 requirements in the document are found in Table 6-1, and that other dialogue and descriptions
4 are for informational purposes only. *Id.* p. 8. The S&M Plan also states that “waste generated
5 will be handled in compliance with the applicable regulatory, environmental, and waste
6 management requirements.” *Id.* p. 22. The Board is not persuaded that these clear directives in
7 the S&M Plan regarding compliance with the dangerous waste regulations could be overridden
8 simply by a contractors own waste management procedures.

9 Appellants rely on language in the TPA Purpose Section for their proposition that
10 Ecology’s authority to apply WAC 173-303-070 is limited to materials found in TSD units. The
11 language states that one of the purposes of the TPA is to ensure compliance with RCRA and the
12 HWMA “for TSD units.” Holbrook Decl., Ex. 1, p. 6 (TPA, Article III, ¶ 14 C, p. 6).
13 Appellants conclude from this statement that Ecology’s authority to apply WAC 173-303-070
14 under the TPA is limited to TSD units.

15 The Board does not find this argument persuasive, in light of the express directive in the
16 S&M Plan that WAC 173-303-070 is applicable to the PUREX facility during this phase.
17 Nothing in the S&M Plan differentiates between areas designated as TSD units and the rest of
18 PUREX. Merely because one purpose of the TPA is to ensure compliance with the HWMA and
19 RCRA in TSD units does not mean that Ecology’s authority outside of TSD units under
20 applicable regulations is limited. Under WAC 173-303-070, Appellants duties as a generator
21 apply whether they generate solid waste within or outside of a TSD unit. *See e.g. K.P.*

1 *McNamara NW*, 173 Wn. App at 110-11 (Jan. 23, 2013)(Upholding a failure to designate
2 violation even though the generator “did not possess a permit to operate as a TSD Facility.”).

3 Appellants next contention is that the dangerous waste regulations do not apply to the
4 white powder in the PUREX facility because its presence has been known for nearly 20 years.
5 Appellants’ Response, p 6. Appellants contend that the white powder was part of the hazardous
6 material remaining at the PUREX Facility at the time Ecology accepted the S&M Plan in 1998.
7 2nd Kaulukukui-Barbee Decl., Ex. 4 at 1. Under the S&M Plan, this existing material was to be
8 listed in Appendix A of the S&M Plan and remediated under CERCLA.

9 The problem with this argument, as Appellants admit, is that the white powder is not
10 listed in Appendix A, as required by the S&M Plan. Appellants’ response brief, p. 8. Therefore,
11 under the plain language of the S&M Plan, it cannot be treated as already existing material.
12 While Appellants point to a single passage contained in another document that refers to “dried
13 salts” to support their position that the white powder was preexisting, the document was prepared
14 by Energy after Ecology had accepted the S&M Plan and its list of dangerous wastes remaining
15 in PUREX in 1998. *Compare*, Serrano Decl., Ex. E and 2nd Kaulukukui-Barbee, Decl. Ex. 4.
16 The Board concludes that the white powder is not exempt from operation of the dangerous waste
17 regulations as a hazardous substance identified in Appendix A.

18 In summary, Ecology’s choice to exercise enforcement authority under the HWMA and
19 dangerous waste regulations in this situation is not precluded by the TPA and S&M Plan.
20
21

1 E. Reasonableness of the Penalty (Issue 3)

2 Ecology may impose a penalty of up to \$10,000 per day for every violation of the
3 HWMA or its implementing regulations. RCW 70.105.080(1).⁷ Each and every violation is a
4 separate and distinct offense. *Id.*

5 The Board considers three primary factors when it evaluates the reasonableness of a
6 penalty: (1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial
7 actions taken by the penalized party. *Pacific Topsoils Inc. v. Ecology*, PCHB No. 07-046 & 07-
8 047, CL 17 (2008). The Board has also considered some corollary principles in evaluating the
9 reasonable amount of a penalty in a given case, such as “whether the agency considered the
10 circumstances and made an attempt to elect the level of sanction appropriate to change behavior
11 and secure compliance and whether it imposed a lesser penalty that allowed by law.” *Shine*
12 *Quarry, Inc. v. Ecology*, PCHB No. 14-072, at 16 (Jan. 27, 2016). “The Board independently
13 assesses the reasonableness of a penalty and considers the agency’s penalty calculation as
14 guidance only and is not bound by it.” *Id.* at 16-17.

15 In support of its penalty calculation, Ecology offers its penalty order, the penalty
16 worksheet which shows the basis for its penalty amount calculation, and several pages of
17 briefing explaining how the penalty amount is justified based on the Board’s own criteria.
18 Energy’s sole argument that the penalty is not reasonable is that “Ecology has failed to show any

19 ⁷ Appellants argue that Ecology’s authority to penalize under the TPA is limited to stipulated penalties, and that
20 Ecology must follow the dispute resolution process outlined in that document. Appellants’ Response, p. 10. In
21 issuing the Penalty, however, Ecology is not relying on its authority under the TPA, but instead on its general
enforcement authority. This authority is not limited by the TPA. See 1st Holbrook Decl., Ex. 1, at 18 par. 30 (TPA,
Article VIII, ¶ 30, p. 18) (The Tri-Party Agreement dispute resolution process does not “apply to enforcement
actions which are otherwise subject to administrative or judicial appeal . . .”).

1 facts supporting its alleged violation. Therefore, any penalty would be unreasonable.”

2 Appellants’ Reply, p 13.

3 The Board concludes that the failure to designate the white powder, in the face of
4 Ecology’s repeated requests to do so, is a serious violation. Furthermore, the Board knows from
5 at least two past cases that the Appellants have a history of violations of the dangerous waste
6 regulations. *See CH2M Hill Plateau Remediation Co. v. Ecology*, PCHB No. 16-107 (Order on
7 Motions for Summary Judgment, May 22, 2107); *CH2M Hill Hanford Group v. Ecology*, PCHB
8 Nos. 04-137 04-138 (Order on Summary Judgment, June 30, 2006). The Board notes that
9 Ecology exercised enforcement discretion, and assessed a penalty which was much less than it
10 could have charged. Holbrook Decl., Ex. 15, p. 9. The Board concludes that the \$16,000
11 penalty is reasonable.

12 F. Validity of corrective actions

13 In their Motion, Appellants challenge the validity of the three corrective action orders set
14 out in the administrative order. The Board has already addressed Appellants contention that
15 Corrective Action 1 is moot under its discussion of Issue 2. Appellants’ challenges to the
16 validity of Corrective Actions 2 and 3 are well beyond the scope of the issues identified in this
17 appeal. As explained in the section of this decision addressing Appellants’ statute of limitations
18 argument, the issues identified in the prehearing order are controlling. WAC 371-08-435(1), (2).

1 Because these challenges were not identified in the issues for hearing, the Board declines to
2 consider Appellants arguments.⁸

3 **ORDER**

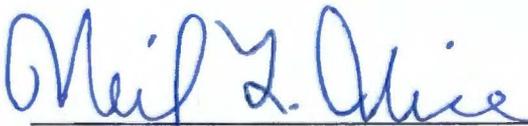
4 In accordance with the analysis above, Washington State Department of Ecology's
5 motion for summary judgment is GRANTED and Administrative Order Docket #15343 and
6 Notice of Penalty Docket #15342 is AFFIRMED; the United States Department of Energy and
7 CH2M Hill Plateau Remediation Companies' Motions to Dismiss and for Summary Judgment
8 are DENIED; and this appeal is DISMISSED.

9 SO ORDERED this 26^m day of June, 2018.

10 **POLLUTION CONTROL HEARINGS BOARD**

11
12 
13 KAY M. BROWN, Presiding

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15 
16 JOAN M. MARCHIORO, Chair

17 
18 NEIL L. WISE, Member

19
20
21 ⁸ Appellants attempt to link a challenge to the corrective actions to a challenge to the Penalty lacks merit because the Penalty was issued at the same time as the Administrative Order and was not based on violations of the corrective actions.