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STATE OF WASHINGTON

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DEPARTMENT OF ECOLOGY

Mail Stop PV-11 • Olympia, Washington 98504-8711 • (206) 459-6000

January 11, 1994

Mr. James Bauer  
U.S. Department of Energy  
Richland Operations Office  
P.O. Box 550  
Richland, WA 99352



Dear Mr. Bauer:

By letter dated October 5, 1992, you presented to Mr. Fred Olson, then Acting Director for the Department of Ecology (Ecology), the U.S. Department of Energy's (USDOE's) concerns regarding our assertion of preemptive authority at the Hanford facility.

Since the issuance of your letter, we were involved in a number of discussions with members of your staff regarding the specific issues that you identified in the letter. As a result of an Ecology/USDOE meeting that was held in Ecology's Lacey offices on November 24, 1992, USDOE agreed to help identify the "universe" of regulatory activity at Hanford that might be subject to Ecology's preemptive authority as authorized under Revised Code of Washington (RCW) 70.105.240.

In a subsequent letter dated May 17, 1993, Mr. James E. Rasmussen submitted a document entitled State Regulatory Permits Potentially Affected By State of Washington Department of Ecology Exercise of Preemption Authority at the U.S. Department of Energy - Hanford Site. I appreciate the extensive time and effort spent by the Richland Operations Office (DOE-RL) and supporting contractor staff to develop this document. Because of it, we were able to more fully assess and understand the broad and complex scope of Hanford regulatory activity that might be affected by the application of preemption.

To address these concerns, we conducted numerous internal discussions on this topic at different levels of management and with our supporting Assistant Attorney General. The cross program impacts of the preemption statute also required coordination and discussion with other Ecology programs. These discussions resulted in a set of general internal guidelines for staff when making decisions regarding preemption. I would like to address these guidelines in response to the following specific issues that were presented in your October 5th letter.

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1. *"Ecology must design its preemption program carefully and in a manner which recognizes and accommodates existing regulatory and management systems."*

We agree that Ecology must exercise preemptive authority prudently. At federally owned RCRA facilities, Ecology can only exercise preemptive authority where there has already been a waiver of sovereign immunity.

In determining whether or not to exercise preemption at Hanford, Ecology will consider the following:

- a) Is the local or state government authority staffed and prepared to exercise regulatory authority and/or to issue necessary permits at a RCRA facility?
- b) Is the local or state government authority unwilling to exercise regulatory authority and/or to issue necessary permits at a RCRA preempted facility?
- c) If the local government is willing and able to exercise regulatory authority and/or to issue a permit, will the regulatory or permit action in any way contradict or undermine Ecology's authority to implement the Hazardous Waste Management Act or the Tri-Party Agreement at a RCRA facility?

2. *"It is not clear that Hanford taken as a whole site fits the categories of "facilities" that are intended to be regulated under this statute."*

While there is no clear evidence that Hanford, as an entire site, was specifically considered by the legislature when the preemption statute was enacted, we do not believe that this lack of specificity would legally preclude an interpretation that the Hanford Site could not be considered a "facility" for purposes of applying preemption. Preemptive authority was granted by the legislature to aid in the siting, permitting, and regulating of hazardous waste facilities.

Guided by the spirit and intent of the legislature, Ecology will evaluate the need for preemptive authority as permitting and regulatory decisions are made at regulated units on the Hanford Site. Ecology will then determine the extent of preemptive authority that will be exercised in accordance with our response to DOE-RL issue "1" above.

3. *"Ecology should promulgate specific rules under RCW 70.105.240 regarding the exercise of preemptive authority".*

Ecology is not required to promulgate rules under RCW 70.105.240 regarding the exercise of preemptive authority. This would entail a very lengthy process which may or



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may not address Hanford specific issues. We will, as required, pursue separate MOU's with involved preempted local government and state agencies. In any case, we intend to communicate openly with USDOE on all aspects of preemption implementation.

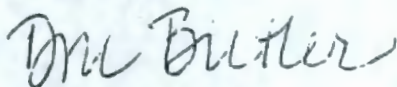
4. *"Ecology should clarify in its rulemaking whether the intended scope of RCW 70.105.240 includes only environmental permit related actions or will include all other actions such as health codes or safety".*

Ecology is authorized to apply preemptive authority only in areas where Congress has clearly waived the federal government's sovereign immunity. This would apply to environmental regulatory/permitting activities necessary to operate RCRA regulated units. Ecology could conceivably preempt local government or other state agencies in regulating their environmental laws at the Hanford reservation. However, the scope of RCW 70.105.240 is broad and includes regulatory activities that go beyond those considered as purely environmental in scope. While these activities might be subject to preemptive authority, Ecology would be constrained from exercising the full range of such authority at Hanford if the federal government's sovereign immunity in these areas has not been waived.

We will do everything necessary to communicate with DOE-RL regarding the details of our preemption plans. If you have any questions regarding this matter, your staff may contact Dan Josue, our program focal point on preemption matters. He can be reached at 206-407-7111.

Thank you for your help in this matter.

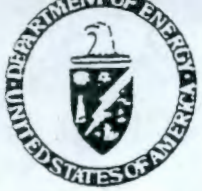
Sincerely,



Dru Butler  
Program Manager  
Nuclear & Mixed Waste Management

DB:md





Department of Energy

Richland Field Office

P.O. Box 550

Richland, Washington 99352

92-RPA-275

OCT 06 1992

Mr. Fred Olson  
Acting Director  
State of Washington  
Department of Ecology  
P.O. Box 47600  
Olympia, WA 98504-7600

Dear Mr. Olson:

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY'S (ECOLOGY) ASSERTION OF PREEMPTIVE AUTHORITY AT THE HANFORD FACILITY

With this letter the U.S. Department of Energy, Richland Field Office (RL) is providing a response to the June 15, 1992, letter from Mr. Chuck Clark to Mr. Ronald D. Izatt, regarding Ecology's assertion of preemptive authority at the Hanford Site under Revised Code of Washington (RCW) 70.105.240. We have a number of comments, described below, regarding the manner in which preemptive authority may be applied at Hanford. We plan to meet with members of your staff to discuss these issues.

RL does not object to Ecology's exercise of preemptive authority to the Hanford Site when applied on a unit specific basis. In our August 28, 1992, letter from R.D. Izatt to J. R. Dawson and David Jansen, RL agreed to deal solely and directly with Ecology on all matters pertaining to the permitting of the Hanford Site Solid Waste Landfill. The Benton Count Department of Health will no longer be involved in the permitting of this facility. We stand ready to support Ecology's lead to assure rapid processing of the permit application.

Specific issues regarding Ecology's application of preemptive authority to the Hanford Site overall are as follow:

1. Ecology must design its preemption program carefully and in a manner which recognizes and accommodates existing regulatory and management systems.

RL recognizes that the assertion of preemptive authority by Ecology for the purpose of centralizing regulatory and permitting activities at the Hanford Site could result in certain benefits (e.g., a streamlined and uniform approach to permitting activities). However, we believe that it is important for Ecology to recognize that RL has established significant long term working relationships with several regulatory agencies that are affected directly by Ecology's assertion. Existing statutes define, in large part, the formal



nature, duties, authorities and responsibilities and obligations our respective agencies must fulfill. We believe that if Ecology is to assert the preemptive authority effectively, it must demonstrate and assure RL and the affected regulatory bodies that implementation of preemptive authority will not result in detract from any benefits derived from the systems we have put in place to address the multitude of regulatory requirements.

2. It is not clear that Hanford taken as a whole site fits the categories of "facilities" that are intended to be regulated under this statute.

We have researched the subject of preemptive authority carefully. Although it appears that Ecology has been granted preemptive authority which could be used to regulate various activities in the State of Washington, it does not appear that this preemptive authority was originally intended to be directed towards the entire 560 square mile Hanford Site or may be properly applied to Hanford in that manner (see Attachment A).

3. Ecology should promulgate specific rules under RCW 70.105.240 regarding the exercise of preemptive authority.

As a result of the lack of promulgated rules, there are no clear and ascertainable standards by which we can determine the nature of the requirements which will be imposed upon or other preempted activities as a result of Ecology's assertion of preemptive authority. It is our position that promulgation of clear and ascertainable standards through formal rulemaking is required. The rulemaking should specifically address the manner in which Ecology intends to implement its asserted preemptive authority.

4. Ecology should clarify in its rulemaking whether the intended scope of RCW 70.105.240 includes only environment permit related actions or will include all other actions such as health codes or safety.

We believe this issue must be clarified Ecology chooses to exercise preemptive Site unit, we will maintain the existing relationships we have with Ecology and agencies. We will continue to submit for regulated Hanford Site activities, such as the Tri-County Air Pollution Control Game, and State Department of Health regulatory requirements.

Ecology. Until such time as authority to another specific Hanford statutorily defined interagency other affected state government its and seek appropriate approvals from the relevant government agencies, Pollution Authority, Department of Fish and Game, and other statutory authorities and

Mr. Fred Olson  
92-RPA-275

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We request that Ecology communicate with us regarding its plans and intentions, maintain an open dialogue, and involve us in any agency deliberations, discussions, or meetings that may be taking place regarding how to implement preemptive authority.

Please contact me or Mr. Paul J. Krupin on (509) 372-1112 if you have any questions or wish to discuss this matter further.

Sincerely,

ORIGINAL SIGNED BY  
JAMES D. BAUER

James D. Bauer, Acting Program Manager  
Office of Environmental Assurance,  
Permits, and Policy

EAP:PJK

Attachment

cc: Dan Josue, Ecology  
D. Stancik, Attorney  
T. Barnett, WA AG Office



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Addressee

Correspondence No.

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J. D. Bauer, RL

Incoming 9401999

Subject: STATE OF WASHINGTON DEPARTMENT OF ECOLOGY'S PREEMPTIVE AUTHORITY

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