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0052326

DEC 20 1999

00-OSS-100

Ms. L. E. Ruud, Permit Specialist
Nuclear Waste Program
State of Washington
Department of Ecology
1315 West Fourth Avenue
Kennewick, Washington 99336

RECEIVED
JAN 12 2000

EDMC

Dear Ms. Ruud:

HANFORD SITE COMMENT PACKAGE ON THE PROPOSED MODIFICATIONS OF THE HANFORD FACILITY RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) PERMIT FOR THE TREATMENT, STORAGE AND DISPOSAL (TSD) OF DANGEROUS WASTE (PERMIT) FOR TRANSFERRING CORRECTIVE ACTION CONDITIONS FROM THE FEDERAL TO THE STATE PORTION OF THE PERMIT

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The U.S. Department of Energy, Richland Operations Office (RL) is submitting the "Hanford Site Comments on the Corrective Action Modification Package." The package was issued for Public Comment on October 18, 1999, for the Dangerous Waste Portion of the RCRA Permit for the TSD of Dangerous Waste, No. WA7890008967.

Incorporation of these comments into the modification, as finally adopted, will enhance efforts to meet our collective objective of ensuring the most expeditious, efficient, and comprehensive reclamation of the Hanford Facility. We request incorporation of these comments in the spirit of continuing open communication with, and responsiveness to, your organization.

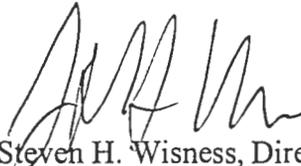
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Ms. L. E. Ruud
00-OSS-100

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Should you have any question regarding this information, please contact Ellen Mattlin, of my staff, on (509) 376-2385.

Sincerely,



Steven H. Wisness, Director
Office of Site Services

OSS:EMM

Enclosure:
Hanford Site Comment Package on the
Proposed Modifications of the Hanford
Facility RCRA Permit

cc w/encl:

Administrative Record, H6-08
HF Operating Record, H6-08
Ecology NWP Kennewick Library
Environmental Portal, LMSI
A. K. Ikenberry, PNNL
R. Jim, YN
R. J. Landon, BHI
E. McManus, Ecology
P. Sobotta, NPT
S. A. Thompson, FDH
J. R. Wilkinson, CTUIR

cc w/o encl:

M. C. Hughes, BHI
L. J. Cusack, Ecology
A. B. Stone, Ecology
J. J. Wallace, Ecology
M. A. Wilson, Ecology
D. R. Sherwood, EPA
E. S. Aromi, FDH
R. H. Gurske, FDH
W. T. Dixon, LMHC
R. D. Enge, PNNL

Hanford Site Comment Package on the Proposed Modifications of the Hanford Facility Resource Conservation and Recovery Act (RCRA) Permit for the Treatment, Storage and Disposal (TSD) of Dangerous Waste (Permit) for Transferring Corrective Action Conditions from the Federal to the State Portion of the Permit

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General Comments and Key Comments

The proposed corrective action Permit (Permit) for the Hanford Facility, replacing the corrective action provisions in the Hazardous and Solid Waste Amendments (HSWA) Permit issued in 1994 by the U.S. Environmental Protection Agency (EPA), raises significant challenges to the existing corrective action/remedial action process that was agreed to in 1989 by the Washington State Department of Ecology (Ecology), EPA, and the U.S. Department of Energy (DOE) (Tri-Parties) in the *Hanford Federal Facility Agreement and Consent Order* (termed FFACO in the draft Permit). The FFACO, in Article IV, Paragraph 20, provides as follows:

Ecology will administer the HWMA, in accordance with this Agreement, including those provisions that have not yet been authorized under RCRA Section 3006. Ecology has received authorization from EPA to implement the corrective action provisions of RCRA pursuant to Section 3006 of RCRA, and shall administer and enforce such provisions in accordance with this Agreement. Ecology may enforce the RCRA corrective action requirements of the Agreement pursuant to Article X (Enforceability), and any disputes with DOE involving such corrective action requirements shall be resolved in accordance with Article VIII (resolution of Disputes). Disputes arising under Part Two of this Agreement including provisions of the HWMA for which the State is not authorized shall be resolved in accordance with Article VIII (Resolution of Disputes). Any disputes between EPA and Ecology concerning Subtitle C RCRA requirements will be resolved in accordance with Part Four: EPA and Ecology agree that when permits are issued to DOE for hazardous waste management activities pursuant to Part Two of this Agreement, requirements relating to remedial action for hazardous waste management units under Part Three of this Agreement shall be the RCRA corrective action requirements for those units, whether that permit is administered by EPA or Ecology. EPA and Ecology shall reference and incorporate the appropriate provisions, including schedules (and the provision for extension of such schedules) of this Agreement into such permits. [Emphasis added]

EPA, which then held sole corrective action authority, and Ecology, which anticipated receiving it, agreed that the very detailed procedures and remedies negotiated in good faith between them and DOE would fully satisfy the corrective action requirements of RCRA and its authorized State programs. This was a binding commitment made by the regulatory agencies, in return for which EPA and Ecology obtained binding commitments from DOE. Ecology therefore is not free to improvise a new procedure for carrying out corrective action, but is obligated by their commitment made in 1989, and renewed as recently as December 1998, to accept the remedial action procedures of the FFACO (for both RCRA past-practice and CERCLA Past-Practice Units) as completely satisfying the corrective action requirements of any RCRA permits.

To have the current Permit's corrective action provisions incorporate by reference the lengthy and detailed provisions of the FFACO, as was done in the 1994 Permit, HSWA Portion, Part III Corrective Action, would overwhelmingly "fulfill [Permittee's] corrective action responsibilities" that "corrective action must be specified in the permit". Furthermore, examination of the corrective action provision of WAC 173-303-646 provides less than a quarter page of regulatory direction that simply require an "owner or operator of a facility" to perform corrective actions "as necessary to protect human health and the environment" [(2)(a)], to address releases off the facility [(2)(b)], and that such "corrective action must be specified in the permit" [(2)(c)]. Aside from authorization for corrective action management unit (CAMU) at 646(4), there is a reference at WAC 173-303-646(3) to "Use of the Model Toxics Control Act" as an optional requirement that Ecology might impose as a means "to fulfill his corrective action responsibilities under subsection (2)". MTCA is the Washington State counterpart to CERCLA, and is designed to address cleanup of sites not being addressed by CERCLA action. If MTCA can fully satisfy the few corrective action requirements of WAC 173-303-646, then the very detailed provisions of CERCLA, the National Contingency Plan, and the FFACO should be more than adequate to fully satisfy State corrective action requirements.

Pursuant to the FFACO, the 1994 Permit, HSWA Portion, Condition III.A. Integration with the FFACO, Section III.A.1, EPA stated: "The corrective action for the Hanford Federal Facility will be satisfied as specified in the FFACO, as amended, except as otherwise provided herein". In the Introduction to this Permit, HSWA Portion, EPA stated that "Authorization of the state of Washington for HSWA corrective action shall not change the

conditions of this permit in any substantive manner". The EPA Introduction explained that the only changes would involve changing references to Federal agencies and statutory provisions to the equivalent State counterparts within the authorized RCRA corrective action program.

Comparing the proposed Permit with that 1994 HSWA permit, Ecology's current Focus Sheet states that "[t]he corrective action conditions Ecology is proposing today are consistent with the corrective action conditions that EPA issued in 1994." DOE disagrees. The 1994 HSWA permit clearly states the primacy of the FFACO process in reaching binding decisions by DOE, EPA and Ecology on cleanup actions. The Tri-Parties agreed that decisions made through the FFACO process would presumptively satisfy the statutory and regulatory mandates given each government agency. However, the new proposed Permit appears to view the FFACO process as merely a subordinate, first step in satisfying corrective action requirements, requirements that appear to establish a series of unilateral, after-the-fact, case-by-case decisions by Ecology.

What is more, the Focus Sheet and Fact Sheet provide no explanation or justification for the differences between the 1994 corrective action Permit and the current proposal. There is no citation to any difference between the corrective action provisions of WAC 173-303-646 and 40 CFR 264.100 that requires this altered approach, or any explanation why a continuation of the language adopted by EPA in 1994, as EPA then promised, would not fully satisfy the requirements of the WAC regulation. It seems if there were significant differences between the corrective action programs of EPA and Ecology, the differences could call into question the authorization of Ecology to enforce corrective action pursuant to RCRA/HSWA.

To the extent that EPA Region 10 has concurred with changes between its 1994 corrective action Permit and the current proposed corrective action Permit, this would constitute a de facto delegation to Ecology of EPA's authority to select remedies at Federal facilities under CERCLA Section 120(e)(4). Such delegation is in direct contradiction to CERCLA Section 120(g), that states that "*no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person.*" [Emphasis added]

Subsequent to the enactment of CERCLA in 1980, HSWA was enacted in 1984 to ensure that facilities with current RCRA Permits not only prevented spills of hazardous waste through compliance with RCRA, but also remediated past spills as a condition of permitting. HSWA was not intended to displace CERCLA as the primary statutory mechanism for addressing significant releases of hazardous substances. The 1986 Superfund Amendments and Reauthorization Act (SARA), which added Section 121 to CERCLA, reaffirmed this. Section 121 established a statutory basis for the supremacy of the CERCLA process over the procedural requirements of other environmental laws. Thus, Section 121(d) states that only substantive requirements of other Federal and State laws would be applied to CERCLA response actions, via the CERCLA-managed applicable or relevant and appropriate requirements (ARARs) process. Similarly, Section 121(e)(1) exempts CERCLA response actions performed 'onsite' from all permit requirements of RCRA and other laws. The FFACO specifically recognizes that these provisions of law govern CERCLA response action on the Hanford Site at Article XVIII, Paragraph 63:

The Parties recognize that under CERCLA Secs. 121(d) and 121(e)(1), and the national contingency plan (NCP), portions of the response actions called for by this Agreement and conducted entirely on the Hanford Site are exempted from the procedural requirements to obtain Federal, State, or local permits, but must satisfy all the applicable or relevant and appropriate Federal and State standards, requirements, criteria or limitations that would have been included in any such permit.

Because CERCLA response actions conducted on the Hanford Site (that includes all of the 'facility' named as the subject of the Permit, per Article V, Paragraph 22.L. of the FFACO) are not subject to any Federal, State, or local permit, there is no basis to claim that CERCLA response actions are subject to the corrective action provisions of this Permit. In this respect, the FFACO is the implementation of legal authorities that preempt corrective action authorities.

One example of the primacy of CERCLA over RCRA requirements is *McClellan Ecological Seepage Situation [MESS] v. Perry*, 47 F.3d 325 (U.S. Court of Appeals 9th Circuit, 1995). MESS and individual plaintiffs brought suit under RCRA's citizen suit provision, seeking an injunction ordering the Air Force to obtain RCRA

permits for various contaminated sites on McClellan Air Force Base that had not operated as RCRA treatment, storage, or disposal (TSD) units, which would force the Air Force to conduct cleanup under State-administered TSD closure and corrective action procedures. While recognizing that currently operating TSD units were subject to normal RCRA permit processes, the court dismissed the suit, noting that

an injunction or declaration requiring McClellan to comply with RCRA permitting requirements [for contaminated areas being remediated under CERCLA] would also interfere with the CERCLA cleanup. As McClellan points out, the entire purpose of a permit requirement is to allow the regulating agency to impose requirements as a condition of the permit. The injunction of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup . . . would clearly interfere with the cleanup. . . . MESS, for all practical purposes, seeks to improve on the CERCLA cleanup as embodied in the Interagency Agreement.

It is indisputable that Ecology takes seriously its charter under State law, and its authorization under RCRA and HSWA, to enforce these laws to the full extent of its authority. Nevertheless, the language of the current proposed corrective action Permit does not give sufficient recognition to the FFACO as an express agreement between the Tri-Parties, which constrains the discretion and authority of the Tri-Parties, to ensure that other actions are wholly consistent with their commitments in the FFACO. As an agency of State government, Ecology is obligated to obey all Federal laws, including those that constrain its discretion as a government agency. Nowhere in the Permit or its prefatory materials does Ecology provide justification for conditions that apparently override the FFACO and expressed provisions of CERCLA.

Ecology might disagree with the other Tri-Parties as to the fullest extent of its statutory authority, and indeed has (in FFACO Article XXVIII) reserved its rights to assert that authority. Such reservations of rights in the FFACO, alongside the countervailing reservations of rights of the other Tri-Parties, serve to outline the limits of agreement and identify subjects on which the Tri-Parties have agreed to disagree. However, the explicit placement of Ecology's assertions of authority in the proposed corrective actions Permit, without recognition of the counterbalancing assertions of the other FFACO Tri-Parties, has a very different effect than similar language in the FFACO. These Permit provisions would compel DOE as Permittee to accept Ecology's assertions in full as a precondition of receiving authority under the Permit to manage its TSD units. This is susceptible to being interpreted as a waiver by DOE, and even EPA, of legal defenses against Ecology's asserted authority.

The specific comments, beginning on page 6 of this comment package, are based on the concern over the manner in which the corrective action Permit could impose a one-sided interpretation of Federal and State law on the other FFACO Tri-Parties.

Key Comment Areas

The following key comments apply to one or more of the specific provisions of the Permit, and will be cited by title in those individual comments. When cited, the Key Comments have the meaning cited below.

- Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion):** (a) The CERCLA statute has several provisions that give CERCLA primacy over other environmental laws, including RCRA/HSWA. Among these provisions are Section 121, which establishes the ARARs process to give the CERCLA process control over the application of other laws, and specifically Section 121(e)(1) that exempts CERCLA response actions from all permit requirements. Other requirements might create similar conflicts with other specific laws. (b) The FFACO was negotiated between the Tri-Parties for the express purpose of reconciling the legal authorities of the Tri-Parties, especially CERCLA and RCRA, related to hazardous substance cleanup and hazardous waste management. The FFACO binds the Tri-Parties. (c) With issuance of the Permit in 1994, corrective action has been fulfilled in accordance with the terms of the 1994 Permit, HSWA Portion, Part III Corrective Action provisions issued by EPA. At issuance of that Permit, EPA stated in the Introduction that "Authorization of the State of Washington for HSWA corrective action shall not change the conditions of this permit in any substantive manner." This represents not just a prediction or a voluntary undertaking by EPA to constrain a future Ecology-issued Permit, but a recognition that the 1994 corrective action provisions were dictated by applicable law and the FFACO. As noted previously, the Tri-Parties to the FFACO at Article IV, Paragraph 20, specifically contemplated that Ecology would assume responsibility from EPA for the corrective action Permit, and Ecology bound itself to follow the same requirements as EPA in carrying out corrective action permitting. Ecology did not assert that the Permit, HSWA Portion, Part III Corrective Action was in conflict with the FFACO. Therefore, the Permit, HSWA Portion is an authoritative interpretation of the FFACO corrective action requirements that have been accepted by all Tri-Parties for the last 5 years.
- Exceeds regulatory authority:** Requirements that are not founded in Federal or State law and regulations, but placed into a permit, improperly subject the Permittee(s) to civil or even criminal liability to enforce arbitrary rules outside the authority of Ecology.
- Unreasonable, unfair, redundant, or unnecessary:** Washington State regulatory agencies are obligated under the U.S. and Washington State constitutions, as well as applicable statutory provisions such as the State Administrative Procedure Act, even when acting under color of specific laws or regulations, to impose only those requirements that are within the zone of reasonable discretion, and avoid actions that are arbitrary, capricious, without reasonable basis in fact or not in accordance with law, and to provide due process of law when conducting enforcement actions.
- Creates potential conflict with EPA requirements:** If a requirement levied under this Permit, even though otherwise legitimate, conflicts with requirements levied by EPA under other authority, general principles of equity and fairness in the law dictate that the Permittee would be entitled to relief from one requirement or the other.

Comments on the Corrective Action Focus Sheet and Fact Sheet

1. Focus Sheet, page 2

Focus Sheet Statement: "[t]he corrective action conditions Ecology is proposing today are consistent with the corrective action conditions that EPA issued in 1994"

Condition Impact Statement: N/A

Comment: This statement is incorrect when comparing the 1994 Permit and this proposed Permit. The statement that the conditions are consistent is misleading.

2. Focus Sheet, page 2

Focus Sheet Statement: "Like the corrective action conditions issued by EPA in 1994, the conditions proposed today are structured around continued coordination with and reliance on the investigation and cleanup requirements established under the Tri-Party Agreement. This means, generally, decisions about investigation and cleanup made under the Tri-Party Agreement will automatically serve as corrective action decisions. The major exception to this rule is in situations where a unit is a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Past Practice Operable Unit, and EPA and Ecology cannot agree on requirements under the Tri-Party Agreement. In these types of situations, after exhausting the Tri-Party Agreement Ecology/EPA dispute resolution process, Ecology may require the Permittees to take independent action, under the permit, to fulfil corrective action obligations. Other limitations on the use of the Tri-Party Agreement to satisfy corrective action requirements and reservations of Ecology's enforcement abilities are set forth in the proposed conditions."

Condition Impact Statement: N/A

Comment: This paragraph suggests that the FFACO remains the principle document that regulates CERCLA activities. However, the specific Permit conditions found in Part II.Y. do not support that statement. For example, the specific Permit conditions contained in II.Y.3. will require that all schedules related to investigations and cleanup be incorporated into the Permit. Once the schedules are included in the Permit, Ecology will become the sole regulatory authority and, in effect, will preempt the authority of the FFACO. Therefore, although the paragraph implies that Ecology will continue to work through the FFACO, it appears that once the corrective conditions are incorporated into the Permit, there is no requirement for Ecology to work through the FFACO.

3. Fact Sheet, page 2

Fact Sheet Statement: "How will corrective action requirements be applied under today's proposal? First, the corrective action requirements apply to the entire Hanford facility, that is, to all contiguous property that is owned or operated by the Permittees. This includes the portion of Hanford that is leased to US Ecology, but does not include the 1100 area that has been transferred to the Port of Benton County and which has been removed from the CERCLA National Priorities List. The 1100 area was included in the definition of 'facility' in the EPA portion of the Hanford Federal Facility Permit for purposes of corrective action, but not in the existing state portion of the permit. Today's proposal would remove the 1100 area from the definition of 'facility' for corrective action purposes, consistent with the facility definition in the remainder of the state permit. By doing so, Ecology would acknowledge acceptance of the remedial action undertaken at the 1100 area under CERCLA as satisfying the requirements of corrective action. The legal description for Hanford in Attachment 2 to the state permit would not be changed by today's proposed amendments."

Condition Impact Statement: N/A

Comment: This statement does not acknowledge that the areas of Federal land entitled the "Arid Lands Ecological Reserve" (Rattlesnake Mountain and adjacent undeveloped lands south of State Highway 240) and the "North Slope" or "Wahluke Slope" (north across the Columbia River from the main body of the

Hanford Site) have been delisted from the CERCLA National Priorities List and all pertinent remedial actions declared complete.

4. **Fact Sheet, page 3**

Fact Sheet Statement: "For CERCLA and RCRA Past Practice Units identified in the Tri-Party Agreement, the corrective action conditions proposed today are structured around continued coordination with, and reliance on, the investigation and cleanup requirements established under the Tri-Party Agreement.

"This means, generally, decisions about investigation and cleanup made under the Tri-Party Agreement will automatically serve as corrective action decisions. The major exceptions are: for CERCLA Past Practice units, in situations where EPA and Ecology cannot agree on requirements under the Tri-Party Agreement, Ecology might require the Permittee to take independent action, under the Permit, to fulfil corrective action obligations; and, for RCRA Past Practice Units, at remedy selection, remedies will be incorporated into the Permit using the permit modification procedures. Other limitations on the use of the Tri-Party Agreement to satisfy corrective action requirements and reservations of Ecology's enforcement abilities are set forth in the proposed conditions. In addition, Ecology continues to expressly reserve its rights and abilities to exercise any administrative or judicial remedy under the following circumstances: . . . "

Condition Impact Statement: N/A

Comment: This statement acknowledges that "decisions about investigation and cleanup made under the Tri-Party Agreement will automatically serve as corrective action decisions". That is a correct characterization, and it is correct because of the specific supremacy of the CERCLA response action process over other Federal and State laws. However, the Fact Sheet communicates a view that the FFACO is an agreement fully subordinate to, and carved out from, the corrective action Permit. That is not the understanding embodied in the FFACO as understood by DOE, and as required by CERCLA. DOE therefore disagrees with the assertions in the remainder of Page 3 that state corrective action authorities can override CERCLA response actions, such that Ecology might require additional action beyond that determined by CERCLA; or that requirements of the FFACO are "enforceable under the Permit independent of the Tri-Party Agreement". The provisions in the FFACO recognize DOE's obligation to comply with RCRA requirements applicable to the management of newly generated hazardous waste without confusing the application of these requirements to CERCLA response actions regarding legacy contamination.

On Page 3 of the Fact Sheet, Ecology asserts that it will 'honor' work done under FFACO provisions. However, the substance of the Permit confirms a willingness to deviate from the constraints of the FFACO. This creates a two-fold risk to the Permittee doing remedial work. First, after the completion of any work done under the requirements of the FFACO (an order signed by Ecology) it is a strong possibility that staff from Ecology might require additional work to be done before Ecology would approve completion of the work, in disregard of the fact that the work would have been done in accordance with publicly reviewed and formally approved plans. Second, by forcing DOE and its contractors to do work per Ecology's unilateral directions, if there is an unresolved dispute between Ecology and EPA, DOE and its contractors would be placed in double jeopardy: on the one hand, from an EPA enforcement action if DOE and its contractors follow Ecology's direction, and on the other hand, from an Ecology enforcement action (including civil and criminal penalties) if DOE and its contractors follow EPA's direction.

The reservations of rights recited on Page 3 of the Fact Sheet do in fact parallel such reservations in the FFACO, in Paragraphs 97 and 98. The Permit specifically omits the reservation of rights by EPA and DOE also recited in the FFACO. In fact, because the Ecology rights are reserved in the FFACO, and make explicit reference to the FFACO, it is not at all clear why these rights must be asserted again in the Permit. Recitation of such reservations is not necessary to preserve such rights in a permit issued by a regulatory agency. Such recitations are made in agreements and consent orders to make clear that concessions and waivers made in such agreements are limited in extent, but the proposed Permit does not recite such limits. Placement of these reservations into the Permit forces DOE as Permittee to accept them without the countervailing language that appears alongside such statements in the FFACO, and elsewhere throughout the

FFACO. The reservations should be omitted from the Permit.

5. **Fact Sheet, page 4**

Fact Sheet Statement: "Third, the corrective action conditions proposed today require the Permittees to report on environmental progress at the Facility by submitting the information necessary for Ecology to evaluate the Facility's status relative to EPA's two corrective action environmental indicators. EPA's two corrective action environmental indicators, published on February 2, 1999, are: 1) current human exposures under control, and 2) migration of contaminated ground water under control. EPA has committed to achieving the human exposures environmental indicator at 90% of high-priority corrective action facilities by 2005 and the ground water environmental indicator at 75% of high-priority corrective action facilities by 2005. Besides being a valuable measure of current environmental conditions at the Facility, information on environmental indicator status is necessary for Ecology to evaluate progress towards these goals."

Comment: This statement asserts a requirement for the Permittee to report on environmental progress in accordance with an EPA goal-setting process. However, this reporting is not a requirement of RCRA, or other Federal or State law, and its application to the Hanford Site and other NPL sites is even questionable. This would divert funding from cleanup to subsidize reports not required by regulation. DOE would be placed at risk of enforcement penalties for not helping EPA collect data for a self-imposed internal agency management report. This information is not gathered through Permit conditions.

Comments on the Corrective Action Proposed Modifications to Introduction

6. **Introduction, page 2, lines 12-13**

"(i.e., spill reporting, training, contingency planning, etc.). Part II includes conditions which address corrective action at solid waste management units."

Requested Action: Revise to read "Part II contains an outline of the corrective action program".

Comment Justification: Part II contains general provisions, while Part IV contains unit-specific provisions.

7. **Introduction, page 2, line 20**

"Part IV, **Unit-Specific Conditions for Corrective Action**, contains those Permit requirements which. . ."

Condition Impact Statement: Unwarranted expansion of jurisdiction

Requested Action: Introduction, page 2, line 20, Part IV, Unit-Specific Conditions for Corrective Action: Revise the information in this line to read: ". . . apply to solid waste management units that are undergoing corrective action and all known significant releases of dangerous waste and dangerous constituents".

Comment Justification: The current statement appears to assume that one-time significant release sites are solid waste management units. This is an erroneous assumption, as clearly demonstrated by Ecology's own corrective action rulemaking process, e.g., refer to Ecology's *Responsiveness Summary: Amendments to the Dangerous Waste Regulations – Chapter 173-303 WAC*, October 1993.

Comments on Modification E Proposed Modifications to Definitions

8. **Preamble of the definitions
page 1, lines 3 through 11**

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSAW Portion)

Draft Permit Conditions as proposed by the Department of Ecology: All definitions contained in the FFACO, May 1989, as amended, are hereby incorporated, in their entirety, by reference into this Permit, except that any of the definitions used below, (a) through (n) shall supersede any definition of the same term given in the FFACO. However, the Permit is intended to be consistent with the FFACO. All definitions contained in WAC 173-303-040 are hereby incorporated, in their entirety, by reference into

this Permit, except that any of the definitions used below, (a) through (n), shall supersede any definition of the same term given in WAC 173-303-040.

Where terms are defined in both Chapter 173-303 WAC and the FFACO, the definitions contained in Chapter 173-303 WAC shall supersede any definition of the same term given in the FFACO.

Condition Impact Statement: N/A

Requested Action: Modify the preamble of the definitions to read: "All definitions contained in the FFACO, May 1989, as amended, are hereby incorporated, in their entirety, by reference into this Permit, except that the definitions herein below shall take precedence over such FFACO definitions within this Permit. However, the Permit is intended to be interpreted as consistent with the FFACO to the maximum extent practicable... Where terms are defined in both WAC Chapter 173-303 and the FFACO, the former definitions shall take precedence within this Permit".

Comment Justification: This is to clarify that the Permit definitions supersede definitions in the FFACO only within the Permit itself. The draft language could be interpreted as superseding the FFACO definitions within the FFACO.

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9. **Term "Contractor(s)"**
page 1, lines 20 through 22

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology: The term "Contractor(s)" means, unless specifically identified otherwise in this Permit, or Attachments, Fluor Daniel Hanford, Inc. (FDH), Pacific Northwest National Laboratory (PNNL), and Bechtel Hanford, Inc. (BHI).

Condition Impact Statement: N/A

Requested Action: Modify the term "Contractor(s)" to read: "The term "Contractor(s)" means, unless specifically identified otherwise in this Permit or Attachments, Fluor Daniel Hanford, Inc. (FDH), Bechtel Hanford, Inc. (BHI), Pacific Northwest National Laboratory (PNNL), and Lockheed Martin Hanford Company (LMHC), or their successors in interest as contractors to DOE".

Comment Justification: Lockheed Martin Hanford Company is under contract to DOE.

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10. **Definition of 'Facility'**
page 2, lines 11 through 13

Key Comment: Exceeds regulatory authority

Draft Permit Conditions as proposed by the Department of Ecology: The term "Facility" for the purposes of corrective action under Condition II.Y, the term 'facility' means all contiguous property under the control of the Permittees and all property within the meaning of 'facility' at RCW 70.105D.020(3)¹ as set forth in Attachment 2 to this Permit.

Condition Impact Statement: This definition would include parcels not subject to corrective actions at this time.

Requested Action: Change the definition of 'Facility', item (j.) to read: "The term 'Facility' for the purposes of corrective action under Condition II.Y, means all contiguous property under the ownership of the DOE as set forth in Attachment 2 of this Permit, excluding the areas variously described as follows: the Arid Lands Ecology Reserve (ALE, southwest across State Highway 240 from the main body of the Hanford Site), the Wahluke Slope (north across the Columbia River from the main body of the Hanford Site), the 1100 Area (that has been transferred), the 100 acres leased for 99 years to the State of Washington (and sublet by the State to US Ecology, Inc.), and the 100-IU-1 and 100-IU-3 Operable Units based on a Final

¹ WAC 173-303-040 definition incorrectly cites the Model Toxic Control Act definition of facility as RCW 70.105D(3). The citation should be RCW 70.105D(4). Their facility has two definitions: (a) refers to types of structures and (b) refers to any site or area where hazardous substances have been placed or otherwise become located.

Record of Decision and deletion from the EPA NPL on September 30, 1996 and July 8, 1998, respectively".

Comment Justification: The ALE and the Wahluke Slope are not in fact contiguous with the Hanford Facility TSD units. The 99-year lease to the State of Washington of 100 acres for a LLW disposal site is tantamount to a transfer of title for most purposes of the law, and has effectively conveyed all indicia of ownership to the State of Washington. The Permittee did not operate or otherwise create or benefit from any Solid Waste Management Units within the leased land, and it is contrary to the intent of HSWA to hold the Permittee responsible for the activities of the State or its lessee on that property. Because the State of Washington is the landlord of US Ecology, Inc., the State should be estopped from seeking to enforce against Permittee requirements for corrective or remedial action when the State has a responsibility and opportunity to enforce such requirements directly against its own tenant, and when the only remedy available to a Permittee to enforce RCRA corrective action requirements on the leased land would be through an action by DOE as lessor directed back at the State itself as lessee, as there is no privity of contract directly between DOE and US Ecology, Inc.

11. **Definition of 'Permittees'**
page 2, lines 16 through 18

Key Comment: Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion)

Draft Permit Conditions as proposed by the Department of Ecology: The term "Permittees" means the United States Department of Energy (owner/operator), Fluor Daniel Hanford, Inc. (co-operator), Bechtel Hanford, Inc. (co-operator), and Pacific Northwest National Laboratory (co-operator).

Condition Impact Statement: N/A

Requested Action: Modify the definition of 'Permittees' to read: "The term 'Permittees' for the non-corrective action portions of this Permit means the U.S. Department of Energy (DOE, owner/operator), and as co-operators of specific TSD Units, to the extent assigned by DOE, Fluor Daniel Hanford, Inc., Bechtel Hanford, Inc., Pacific Northwest National Laboratory, and Lockheed Martin Hanford Corporation, or their successors in interest as contractors to DOE. The term 'Permittee' for the corrective action portions of this Permit means only the DOE".

Comment Justification: The DOE is fully responsible under RCRA and CERCLA for corrective and response actions on its property. The co-operators of various TSD units do not own any of the real property that is the subject of potential corrective actions, so co-operators have no 'contiguous property' that could constitute a 'facility' on which corrective action requirements might be imposed. The co-operators are not necessary parties to any corrective action requirement; other than to carry out tasks assigned by DOE, the facility owner/operator. There is no basis in law for holding co-operators responsible in any way for corrective action of SWMUs, which the co-operators did not create and do not now manage. The State's proposed definition could be interpreted to make each co-operator jointly liable for TSDs or SWMUs managed by other co-operators or by no one at all. Under the terms of their contracts with DOE, contractors are not responsible for pre-existing conditions, including in particular any legacy contamination of any portion of the DOE property that was created before their contracts. Furthermore, CERCLA §119 states that "a person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this subchapter [CERCLA] or under any other Federal law [e.g. RCRA] to any person for injuries, costs, damages, expenses, or other liability . . . which results from such release or threatened release". [Emphasis added]. Because the corrective action authority asserted by the State in this Permit is derivative of an authorization by EPA pursuant to RCRA and HSWA, the State is barred from holding response action contractors liable for SWMUs that DOE contractors did not create.

12. **Condition: Definition of SWMU**
page 2, lines 45 through 47; and
page 3, lines 1 through 2

Key Comment: Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology: The term "solid waste management unit" (SWMU) means any discernible location at the facility where solid wastes have been

places at any time, irrespective of whether the location was intended for the management of solid or dangerous waste and includes any area at the facility at which solid wastes have been routinely and systematically released (for example through spills) and includes dangerous waste treatment, storage and disposal units.

Condition Impact Statement: To the extent that Ecology includes land areas of SWMUs on the US Ecology, Inc. site, in particular, the 100 acres of land leased to the State of Washington, in the definition, DOE objects to the definition. Such an interpretation of the SWMU definition improperly would impose corrective action requirements on DOE who has no privity of contract with, lease with, or other control of the offending operator. This definition could detract from the dollars available for cleanup of the Hanford Facility for which DOE does have control and responsibility. Further, such an interpretation of the SWMU definition improperly subjects DOE to potential cleanup actions and cost actions taken wholly by an entity and/or persons controlled and regulated by the State of Washington under the State of Washington's lease to US Ecology Inc., and the Washington State Department of Health Radioactive Materials Licensing Division.

Requested Action: Clarify the definition to exclude the US Ecology, Inc. site and SWMUs. Either footnote the definition or add the following sentence: "To the extent that lease property is controlled by the State of Washington and regulated by Departments within the State of Washington responsible for radioactive materials licensing, this definition and Permit section on Corrective Action is inapplicable".

Comment Justification: While the DOE leased a 100-acre parcel to the State of Washington for 99 years. The State of Washington subsequently leased a parcel to US Ecology, Inc. Because of the broad terms of this lease, the property is not "under the control of the owner or operator". See 58 FR 8664, February 16, 1993 describing that control is a condition precedent for including corrective action provisions in a permit. DOE has no real measure of control over US Ecology, Inc. US Ecology Inc. and the State of Washington have responsibility for those activities. DOE should not be placed in a position where RCRA corrective action permit conditions are placed upon it for activities controlled under an AEA by a NRC license issued by an agreement state and for which the Department of Energy Richland Operations Office has no control. Since the State of Washington is both the landlord and regulator of US Ecology, Inc. and since the purpose of the NRC 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 Washington State and the NRC will require the site to be closed in an appropriate manner. From a policy standpoint, the DOE and federal taxpayers should not be required or requested under the RCRA permit to take corrective actions at a licensed commercial radioactive low-level waste disposal facility. While the DOE would seek to obtain compensation from the State of Washington and US Ecology Inc., this process would be inefficient to all parties; any necessary corrective actions should be taken solely under the US Ecology Inc radioactive materials licenses. In addition, it is inconsistent with the requirements of the AEA to require investigation and cleanup under RCRA when these obligations are already addressed under the US Ecology Inc. Closure Plan. The justification in Comment Number 34 also applies.

Comments on Corrective Action Proposed Modifications to Part II, General Facility Conditions

13. **Condition II.Y**

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion)

Draft Permit conditions as proposed by the Department of Ecology: 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 might be required to implement measures within the facility to address releases which have migrated beyond the facility boundary.

Condition Impact Statement: This condition is inconsistent with Article IV, Paragraph 20 of the FFACO.

Requested Action: Use the language in the 1994 Permit, HSWA Portion, Part III, Corrective Action

(except for the last sentence referring to Conditions III.B through III.J.).

Comment Justification: The implementation of this condition through WAC 173-303 and WAC 173-303-815(2)(b)(ii) is inconsistent with Article IV, Paragraph 20 of the FFACO. Article IV, Paragraph 20 states that Ecology will administer the HWMA, in accordance with the FFACO. Specifically as stated in Paragraph 20, Ecology will enforce corrective action authority pursuant to Article X of the FFACO and disputes will be resolved in accordance with Article VIII. The FFACO does not intend for Ecology to have sole ultimate authority for all decisions concerning the cleanup of the Hanford Site. The reference to 'facility' here does not recognize that the Hanford Site is a CERCLA NPL site where cleanup work is ongoing.

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14. **Condition II.Y.1. (including II.Y.1.a through II.Y.1.g)** **Key Comment:** Exceeds regulatory authority; creates potential conflict with EPA requirements

Draft Permit conditions as proposed by the Department of Ecology: 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 of Chapter 173-340 WAC:

- a. As necessary to select a cleanup action in accordance with WAC 173-340-360, WAC 173-340-350 State Remedial Investigation and Feasibility Study.
- b. WAC 173-340-360 Selection of Cleanup Actions.
- c. WAC 173-340-400 Cleanup Actions
- d. WAC 173-340-410 Compliance Monitoring Requirements.
- e. WAC 173-340-420 Periodic Site Reviews.
- f. WAC 173-340-440 Institutional Controls
- g. WAC 173-340-700 through -760 Cleanup Standards.

Condition Impact Statement: This condition attempts to force CERCLA actions to comply with Chapter 173-340 (Model Toxics Control Act).

Requested Action: Delete II.Y.1 and its subsections.

Comment Justification: This Permit condition seeks to use MTCA procedures and standards to govern all actions covered by the remaining corrective action provisions, whether closure, RCRA past-practice, or CERCLA past-practice. Substantive standards embodied in MTCA and many of the MTCA provisions cited generally are considered applicable requirements under the ARARs process, and therefore are incorporated into remedial action decision documents. However, the ARARs process does specifically not incorporate procedural requirements of MTCA, and CERCLA Section 121(e)(1) excludes permitting and other procedural requirements from applying to onsite response actions. The substantive provisions of MTCA are not concentrated in any one subsection of the regulation, and the distinction between substantive and procedural was not one that entered into the drafting of the MTCA regulations. Furthermore, the CERCLA decision-making processes determine what portions of MTCA are substantive and what portions are procedural or administrative. Condition II.Y.1. proposes applying MTCA regulations directly, bypassing the ARARs process required by CERCLA. That would be contrary to Federal law. Thus, it is inappropriate for Ecology and Permittee to agree prospectively and for all time, to any specific MTCA provisions as being binding on all future response actions on the Hanford Site. In addition, the phrasing makes corrective action mandatory unless it can be shown to Ecology's satisfaction that the FFACO fulfills Ecology's subjective judgment as to the need for additional corrective action. The burden of proof would be placed on the Permittee, and the default is to do additional work. This would be unfair and unreasonable.

15. **Condition II.Y.2.**

Key Comment Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology: Notwithstanding Condition II.Y.1., when agreed to by Ecology, work under other cleanup authorities or programs may be used to satisfy corrective action requirements, provided it protects human health and the environment. Ecology will evaluate work under other cleanup authorities or programs on a case-by-case basis and will incorporate its decisions about the extent to which such work satisfies corrective action requirements into this Permit using the permit modification process of WAC 173-303-830. Ecology has already made decisions about some on-going work undertaken under other authorities and programs and accepts the work as satisfying corrective action requirements to the extent provided for in Conditions II.Y.2.i and II.Y.2.ii.

Condition Impact Statement: The proposed case-by-case review introduces uncertainty and delay into the cleanup process, so that no cleanup action can be considered final. This uncertainty places an unnecessary burden on the budgeting and planning processes, and makes accountability to Congress for Federal cleanup expenditures difficult.

Requested Action: Use the general language in the 1994 Permit, HSWA Portion, Condition III.A.

Comment Justification: This condition undermines the FFAO. This condition allows Ecology through the Permit to choose between the various decisions concerning cleanup of the Hanford Facility, and allows Ecology to override any decision on cleanup Ecology so chooses. The decision whether work pursuant to the FFAO, at both CERCLA and RCRA Past-Practice Units, would satisfy the corrective action requirements of RCRA/HSWA was decided once and for all in the FFAO. This condition proposes to disregard that determination, which was negotiated and agreed to by the Tri-Parties, and to reserve to Ecology the sole authority to determine whether Ecology wants to accept any particular response action, after the fact, in lieu of original requirements from Ecology under authority of this Permit.

16. **Condition II.Y.2.i:**

Key Comment Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology: For units identified in Appendix C of the FFAOC, as amended, as CERCLA Past Practice Units, Ecology accepts work under the FFAO, as amended, and under CERCLA program as satisfying corrective action requirements to the extent provided for in Conditions II.Y.3.a.i and subject to the reservations and requirements of II.Y.3.a.ii through II.Y.3.a.v and II.Y.3.d.

Condition Impact Statement: This condition damages cleanup program by creating additional requirements without additional benefits.

Requested Action: Revise this condition to read: "For CERCLA Past-Practice Units, whether currently identified or newly identified, Ecology accepts work under the FFAO, as amended, and under the CERCLA program, as satisfying all corrective action requirements."

Comment Justification: While Ecology "accepts work under the FFAO . . . as satisfying corrective action requirements," Ecology proposes to make such acceptance conditional on a case-by-case unilateral Ecology re-examination of each CERCLA response action for satisfaction of unspecified standards. Such re-examination is contrary to the express provisions of CERCLA Section 121, which exempts CERCLA response actions from having to satisfy the procedural requirements of other regulatory programs, whether State or Federal.

17. **Condition II.Y.2.ii**

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology: For units identified in Appendix C of the FFACO, as amended, as RCRA Past Practice Units, Ecology accepts work under the FFACO, as amended, as satisfying corrective action requirements to the extent provided for in Condition II.Y.3.b.i and subject to the reservations and requirements of II.Y.3.b.ii through II.Y.3.b.iv and II.Y.3.d.

Condition Impact Statement: This condition creates uncertainty in planning and execution of cleanup.

Requested Action: Revise this condition to read: "For RCRA Past-Practice Units, whether currently identified or newly identified, Ecology accepts work under the FFACO, as amended, and under the CERCLA program, as satisfying all corrective action requirements. More detailed provisions follow at II.Y.3.b." At II.Y.3.b., adopt the language of the 1994 Permit, HSWA Portion, Corrective Action, Part III.A.2. RCRA Past-Practice Units".

Comment Justification: As noted, Condition II.Y.2. contradicts the FFACO and Ecology's intentions as described in the Fact Sheet and Focus Sheet.

18. **Condition II.Y.3**

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion); exceeds regulatory authority

Draft Permit Conditions as proposed by the Department of Ecology: Corrective action is necessary to protect human health or the environment for all units identified in Appendix B and Appendix C of the FFACO.

Condition Impact Statement: This condition conflicts with the agreed process in the FFACO.

Requested Action: Delete this Introduction. Alternatively, replace this condition with the following: "In light of the requirements in the FFACO to achieve cleanup under CERCLA, for units identified in Appendix B and C, that is protective of human health and the environment, corrective action under this Permit is unnecessary, as long as the Permittee complies with the conditions in the FFACO including modification thereto".

Comment Justification: This condition infers that both RCRA and CERCLA actions taken under the FFACO are inadequate and that only Ecology corrective actions can satisfy the overall cleanup program. The assertion that "corrective action is necessary", which is a prerequisite to the imposition of any corrective action requirements under WAC 173-303-646(2), is the equivalent of stating that the CERCLA process on the Hanford Site is inadequate to address all past contamination, whether currently known or later discovered. That assertion of inadequacy cannot be supported. The 'necessary' jurisdictional prerequisite to issuing orders under corrective action authority is simply lacking.

19. **Condition II.Y.3.a.
CERCLA Past Practice Units**

Key Comments: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion); exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Condition Impact Statement: To place CERCLA actions under the unilateral supervision and enforcement of a RCRA delegated Permit enforcement program would directly conflict with the intent of Congress embodied in CERCLA Section 121, and in particular the exemption from all permits in Section 121(e)(1).

Requested Action: Delete all conditions under II.Y.3.a., including II.Y.3.a.i. through II.Y.3.a.v. Reference to these conditions also should be removed from the *Permit Applicability Matrix (Attachment 3)*.

Comment Justification: Condition II.Y.3.a. would incorporate CERCLA past-practice unit decisions into the Permit and make such decisions subject to unilateral enforcement under the Permit. To place CERCLA actions under the unilateral supervision and enforcement of a RCRA delegated Permit enforcement program would directly conflict with the intent of Congress embodied in CERCLA Section 121, and in particular the exemption from all permits in Section 121(e)(1). The fact that CERCLA provides this exemption is basically acknowledged by the Washington State Attorney General in her communications to Congress, in her capacity as President of the National Association of Attorneys General. NAAG specifically has argued in favor of an amendment to CERCLA that would enable states to directly impose and enforce, through civil and criminal enforcement, additional requirements related to CERCLA response actions. The request for this amendment acknowledges that CERCLA as currently constituted does not allow such enforcement. This condition is also in direct conflict with the FFAO, which clearly did not intend that CERCLA Past-Practice Units be subject to the Permit. Unlike RCRA Past-Practice Units, which the FFAO states will be added to the Permit (fulfilled by the 1994 Permit, HSWA Portion, Condition III.A.2.), CERCLA Past-Practice Units are consistently classified throughout the FFAO as being totally outside the realm of RCRA permitting, for all intents and purposes. This is self-evident from even a cursory comparison of Sections 7.3 (Comprehensive Environmental Response, Compensation, and Liability Act Past-Practice Unit Process) and 7.4 (Resource Conservation and Recovery Act Past-Practice Unit Process) of the FFAO Action Plan. Specific comments on some of the subsections follow.

20. **Condition II.Y.3.a.i**

Key Comment Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology: For any unit identified in Appendix C of the FFAO as a CERCLA Past Practice (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 FFAO, as amended. The requirements and schedules related to investigation and cleanup of CPP units currently in place under the FFAO, as amended, and in the future developed and approved under the FFAOC, as amended, are incorporated into this Permit by this reference and apply under this Permit as if they were fully set forth herein.

Condition Impact Statement: This condition would create double jeopardy as to any issue related to compliance with the FFAO and its milestones.

Requested Action: Delete all conditions under II.Y.3.a.i.

Comment Justification: The schedule for investigation and cleanup of the CERCLA Past Practice's is negotiated through the FFAO. The negotiations take into consideration priorities and anticipated funding. Like all plans and schedules, changes are a given. Therefore, inclusion of schedules as Permit conditions creates an administrative burden. This condition proposes to convert any enforceable provision of the FFAO into an enforceable provision of the Permit. Yet the FFAO has its' own identified enforcement mechanisms. This would create double jeopardy as to any issue related to compliance with the FFAO and its milestones, which could be enforced through two independent procedures by two different agencies of Federal and State government. Any adjustment to the milestones or other requirements would henceforward require change not only through the procedures of the FFAO, but also through the more time consuming procedures applicable to the Permit. It is possible that an extension could be granted under the FFAO, but refused under the Permit procedure. Even worse, an extension under the FFAO could be negotiated in a package with alternative requirements. It is very possible that both the old and new requirements would be enforced against the Permittee. This is an unreasonable addition to procedure that adds no benefit in performing cleanup. This illogical result is precisely the reason that Congress exempted CERCLA response actions from RCRA and other permitting procedures through enacting Section 121(d) and (e) in the 1986 Superfund Amendments and Reauthorization Act (SARA). Condition II.Y.3.a.i. is simply contrary to law.

21. **Condition II.Y.3.a.ii:**

Key Comment Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology: If the Permittee is not in compliance with requirements of the HFFACO, as amended, that relate to investigation or cleanup of CPP unit(s), Ecology may take action to independently enforce the requirements as corrective action requirements under this Permit. Consistent with Article VII, paragraph 209, and Article XLVI, paragraph 136, of the HFFACO, as amended, and other applicable provisions of the HFFACO, as amended, such enforcement actions are not subject to dispute resolution under the HFFACO.

Condition Impact Statement: This condition would create double jeopardy for the Permittee, enforcement under both the FFAO and the Permit for the same noncompliance.

Requested Action: Delete all conditions under II.Y.3.a.ii.

Comment Justification: In this condition Ecology asserts the right to bring an enforcement action based on the Permit against any failures to satisfy Ecology that the CERCLA work, under the FFAO, is being performed adequately. As discussed previously, in connection with Condition II.Y.3.a.i., this not only would be illogical, unreasonable, and inequitable, but also contrary to the express exemption from procedural (including enforcement), administrative, and Permit requirements in CERCLA Section 121. Although Ecology cites as authority Article VII, Paragraph 29 of the FFAO, that provision is premised on DOE violating "any RCRA requirement of this Agreement", Article VII specifically is concerned with obtaining and complying with permits for TSD units. Ecology should not create its own jurisdiction over CERCLA response actions by copying these conditions from the FFAO into this Permit.

22. **Condition II.Y.3.a.iii.**

Key Comment Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology: In the case of interim RODs, a final decision about satisfaction of corrective action requirements will be made in the context of issuance of a final ROD.

Condition Impact Statement: Creates uncertainty for planning and budgeting of cleanup actions.

Requested Action: Delete all conditions under II.Y.3.a.iii.

Comment Justification: While Ecology's willingness to postpone RCRA evaluation of interim CERCLA records of decision (RODs) is appreciated, even review under RCRA enforcement authority of a final CERCLA ROD is still unreasonable and contrary to law, as discussed previously in Comment Numbers 18 through 21.

23. **Condition II.Y.3.a.iv**

Key Comment Conflicts with CERCLA, the FFAO, or the Permit (HSWA Portion); exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology: If EPA and Ecology, after exhausting the dispute resolution process under Section XXVI of the HFFACO, cannot agree on requirements related to investigation or cleanup of CPP unit(s), the Permittee must conduct corrective action in accordance with Condition II.Y.1. If Ecology and EPA cannot agree on requirements related to investigation or cleanup of CPP units(s), Ecology will notify the Permittee, in writing, of the disagreement. Within thirty days of receipt of Ecology's notice, the Permittee must submit for Ecology review and approval a plan to conduct corrective action in accordance with Condition II.Y.1 for the subject unit(s). The Permittee's plan may include a request that Ecology evaluate work under another authority or program

as provided for by Condition II.Y.2. Approved corrective action plans under this Condition will be incorporated into this Permit in accordance with the permit modification procedures of WAC 173-303-830.

Condition Impact Statement: Proposed Permit condition II.Y.3.a.iv. would emasculate the CERCLA Past-Practice Units dispute resolution process in the FFACO by establishing Ecology as the unilateral decision-maker in the event of a dispute.

Requested Action: Delete all conditions under II.Y.3.a.iv. Alternatively add the following: "If, at the completion of dispute resolution procedures between EPA and Ecology as required by the FFACO, the Administrator of EPA has rendered a decision with which Ecology disagrees, Ecology shall not require any additional or modified remedial or corrective action since such action would not be authorized by CERCLA Section 120(e), and would be an inconsistent response action prohibited by CERCLA Section 122(e)(6)."

Comment Justification: This condition purports to give Ecology unilateral power or authority over cleanup. If for any reason Ecology disagreed with the decisions made under the FFACO procedures, Ecology would preempt all decisions made jointly by DOE with EPA and Ecology. This condition conflicts with the agreement made by Ecology in the FFACO. It also happens to be contrary to CERCLA Section 121 and 122 and the delegations of authority made by the President to DOE and EPA under Executive Order 12580.

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| 24. Condition II.Y.3.a.v. | Key Comment Conflicts with CERCLA, the FFACO, or the Permit (HSPA Portion); exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements |
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Draft Permit Conditions as proposed by the Department of Ecology: The Permittee must maintain information on corrective action for CERCLA Past Practice Units covered by the FFACO 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.3.a., including reports of investigations and all raw data, in the Facility Operating Record in accordance with Condition II.I.

Condition Impact Statement: This condition creates double jeopardy for FFACO noncompliances.

Requested Action: Delete all conditions under II.Y.3.a.v.

Comment Justification: This condition seeks to convert FFACO record keeping requirements into duties enforceable under the Permit. This condition also seeks to require additional records to be kept to facilitate enforcement under the Permit of the additional requirements levied by Condition II.Y.3.a., creating a new potential noncompliance enforceable under the Permit. Requirements in the FFACO are enforceable under the FFACO. This condition would allow Ecology to bypass the prerequisites to enforcement stated in the FFACO. Recordkeeping requirements under RCRA and other laws are not applicable to CERCLA activities, because these are procedural and administrative requirements rather than substantive ones. In particular, because these requirements emanate directly from a Permit, these requirements are not enforceable because of CERCLA Section 121(e)(1). This is the policy of EPA at all CERCLA sites.

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| 25. Condition II.Y.3.b. RCRA Past Practice Units (including II.Y.3.b.i through II.Y.3.b.v.) | Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSPA Portion) |
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Draft Permit Conditions as proposed by the Department of Ecology:

- II.Y.3.b.i. For any unit identified in Appendix C of the FFACO, as amended, as a RCRA Past Practice (RPP) unit, until a permit modification is complete under II.Y.3.b.iv, the Permittee must comply with the requirements and schedules related to investigation and cleanup of RPP units developed and approved under the FFACO, as amended. The requirements and

schedules related to investigation and cleanup of RPP units currently in place under the FFAO, as amended, and in the future developed and approved under the FFAO, as amended, are incorporated into this Permit by this reference and apply under this Permit as if they were fully set forth herein.

- II.Y.3.b.ii. Until a permit modification is complete under II.Y.3.b.iv, if the Permittee is not in compliance with requirements and schedules related to investigation and cleanup of RPP units developed and approved under the HFFACO, as amended, Ecology may take action to independently enforce the requirements as corrective action requirements under this Permit. Consistent with Article VII, paragraph 29, and Article XLVI, paragraph 136, of the HFFACO, as amended, and other applicable provisions of the HFFACO, such enforcement actions are not subject to dispute resolution under the HFFACO.
- II.Y.3.b.iii. When the Permittee submits a corrective measures study for an individual RPP unit or a group of RPP units, the Permittee must, at the same time, recommend a remedy for the unit(s) and request a modification to this Permit to incorporate the recommended remedy. The remedy recommendation must contain all the elements of a draft cleanup action plan under WAC 173-340-360(10). The permit modification request must follow the procedures of WAC 173-303-830(3)(c), class 3 modifications.
- II.Y.3.b.iv. After considering the Permittee's corrective measures study and remedy recommendation, and public comments received during the public comment period required by WAC 173-303-830(3)(c), Ecology will make a final determination as to what is necessary to satisfy corrective action requirements and will publish that decision as a draft permit under WAC 173-303-840(10).
- II.Y.3.b.v. The Permittee must maintain information on corrective action for RPP units covered by the FFAO, as amended, in accordance with Sections 9.0 and 10.0 of the FFAO 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.3.b, including reports of investigations and all raw data, in the Facility Operating Record in accordance with Condition II.I.

Condition Impact Statement: These conditions contradict the commitment made by Ecology when Ecology executed the FFAO as a State consent order.

Requested Action: Replace these conditions with the conditions set out in the 1994 Permit, HSWA Portion, Condition III.A.2. RCRA Past-Practice Units.

Comment Justification: Given the division of responsibility between EPA and Ecology as to which agency would oversee cleanup action at which locations, a threshold issue for imposing requirements on RCRA past-practice cleanup actions is whether these are in fact CERCLA actions that are being overseen by Ecology via its agreement with EPA. If that is so, for some or all of these actions, the arguments cited previously regarding CERCLA past-practice actions would apply to the corresponding RCRA past-practice actions as well. It might be argued that an actual examination of this issue in each instance is a prerequisite to the assertion by Ecology of enforcement jurisdiction. However, assuming that the RCRA Past-Practice Units are classified properly as such, there are still substantial reasons to reject the proposed Permit conditions on RCRA past-practice unit cleanup. RCRA Past-Practice Unit cleanup under the FFAO completely fulfills the RCRA/HSWA requirements for corrective action. The addition of review and enforcement processes, despite the extensive FFAO processes already being pursued to accomplish cleanup of these units, contradicts the commitment made by Ecology when Ecology executed the FFAO as a State consent order. These conditions unilaterally would replace the negotiated provisions of the FFAO. Consent orders are just as binding on the State as the orders are for the other Tri-Parties.

26. **Condition II.Y.3.b.ii.**

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion)

Draft Permit Conditions as proposed by the Department of Ecology: Until a permit modification is complete under II.Y.3.b.iv, if the Permittee is not in compliance with requirements and schedules related to investigation and cleanup of RPP units developed and approved under the HFFACO, as amended, Ecology may take action to independently enforce the requirements as corrective action requirements under this Permit. Consistent with Article VII, paragraph 29, and Article XLVI, paragraph 136, of the HFFACO, as amended, and other applicable provisions of the HFFACO, such enforcement actions are not subject to dispute resolution under the HFFACO.

Condition Impact Statement: This condition denies DOE the rights afforded under the FFACO.

Requested Action: Delete last sentence of the condition.

Comment Justification: Article VII, Paragraph 29 of the FFACO allows all dispute except for the specific issue of failure to give adequate notice at least 7 days before a 'formal enforcement action'.

27. **Condition II.Y.3.c. Dangerous Waste Treatment, Storage and Disposal Units (including II.Y.3.c.i through II.Y.3.c.ii)**

Key Comment: Exceeds regulatory authority; unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology:

- II.Y.3.c.i. 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, the Permittee must, at the same time, request to modify this Permit to either:
 - II.Y.3.c.i.A. reflect that the work completed under closure and/or post-closure satisfies the requirement for corrective action; or
 - II.Y.3.c.i.B. if the work completed under closure and/or post-closure care does not satisfy corrective action requirements, to incorporate unit-specific corrective action requirements.
- II.Y.3.c.ii. On completion of the public comment period initiated by the Permittee's request under II.Y.3.c.i, Ecology will make a final decision 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 process of WAC 173-303-830.

Condition Impact Statement: These conditions would impose an inefficient permitting methodology and result in additional costs to Permittee without corresponding benefit to human health and the environment.

Requested Action: Delete these conditions in their entirety. Alternately, see subsequent comments and proposed revisions to these conditions in II.Y.3.c.

Comment Justification: Pursuant to the FFACO, the 1994 Permit, HSWA Portion, Condition III.A. Integration with the FFACO, Section III.A.1, EPA stated: "The corrective action for the Hanford Federal Facility will be satisfied as specified in the FFACO, as amended, except as otherwise provided herein". In the Introduction to this Permit, HSWA Portion, EPA stated that "Authorization of the state of Washington for HSWA corrective action shall not change the conditions of this permit in any substantive manner". The Introduction explained that the only changes would involve changing references to Federal agencies and statutory provisions to the equivalent State counterparts within the authorized RCRA corrective action program. The statement in Ecology's current Focus Sheet (Transferring Corrective Action Conditions from Federal to State Portion of Hanford Facility-Wide RCRA Permit) that "[t]he corrective action conditions Ecology is proposing today are consistent with the corrective action conditions that EPA issued in 1994" is misleading. What is more, the Focus Sheet and Fact Sheet provide no explanation or justification for the

differences between the 1994 corrective action Permit and the current proposal. There is no citation to any difference between the corrective action provisions of WAC 173-303-646 and 40 CFR 264.100 that requires this radically altered approach, or any explanation why a continuation of the language adopted by EPA in 1994, as EPA then promised, would not fully satisfy the very limited requirements of the WAC regulation. In fact, if there were significant differences between the corrective action programs of EPA and Ecology the differences would call into question the authorization of Ecology to enforce corrective action pursuant to RCRA/HSWA.

28. **Condition II.Y.3.c.i.** **Key Comment:** Unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology:

II.Y.3.c.i. 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, the Permittee must, at the same time, request to modify this Permit to either:

Condition Impact Statement: This condition would impose an inefficient permitting methodology and result in additional costs to Permittee without corresponding benefit to human health and the environment.

Requested Action: Delete this condition in accordance with Comment Number 27. Alternately, revise draft Permit conditions to read: "The Permittee shall identify the corrective action status of a TSD unit at the appropriate time. The appropriate time will be determined on a case-by-case basis for each TSD unit. In general, the appropriate time to identify the corrective action status of a TSD unit contained in Part III of the Permit or being incorporated into Part III of the Permit pursuant to Condition I.A.1 will occur at the time the Permittee submits a certification of closure or a certification of completion of post-closure care. In general, the appropriate time to identify the corrective action status of a TSD unit contained in Part V or VI of the Permit will have occurred at the same time the TSD unit was incorporated into the Permit. In general, the appropriate time to identify the corrective action status for a TSD unit being incorporated into Part V, or VI of the Permit pursuant to Condition I.A.1 will be at the time the TSD unit is incorporated into the Permit. Based on a case-by-case evaluation by the Permittee of the circumstances for a given TSD unit or group of units at the request of the Department, the Permittee shall select from one of the following three circumstances:"

Comment Justification: Ecology has proposed Permit conditions that do not account for the unique circumstances that may present themselves for any given Hanford Facility TSD unit. Ecology needs to draft conditions flexible enough to allow for future circumstances that can not be predicted at this time. The Permittee has proposed text to allow Ecology and the Permittee to determine the most cost effective approach to address corrective action requirements.

Ecology should not be issuing conditions that will increase the cleanup costs at Hanford. This draft condition will increase costs by limiting corrective action option selection at the time a certification of closure or a certification of completion of post-closure care is submitted. The Permittee read the condition to address only some of the circumstances that might arise for TSD units already incorporated in Parts III, V, or VI of the Permit. The Permittee is submitting the revised condition language in order to account for circumstances related to TSD units already incorporated in Parts III, V, or VI of the Permit and for circumstances related to TSD units that will be incorporated into the Permit. Other circumstances might arise when partial closure activities at a TSD unit are completed. For partial closures of a TSD unit, the circumstances might lead to a conclusion that the corrective action status of the TSD unit should be decided at the time closure for the entire TSD unit occurs and not after partial closure activities are completed.

For TSD units being incorporated into the Permit, the completion of closure activities may occur before TSD unit incorporation or after TSD unit incorporation. There are many factors in closing a Hanford Facility TSD unit that will effect the time closure activities are completed. Management of the Permit over the last five years has shown TSD unit closures are unique in many cases. The operating history for a TSD unit can be excellent as in container storage areas such as the 2401-W Storage Building within the Central Waste Complex TSD unit. On the other hand, the operational history can be poor when historical

operations occurred before effective dates under the RCRA or the HWMA. For TSD units with poor operational histories, closure activities may be limited to a subset of activities now, with the rest of the closure activities taking place at a later time in coordination with FFACO Operable Unit activities.

For TSD units incorporated into Part V and VI of the Permit under post-closure care, the FFACO Action Plan Section 6.3.2 addresses how corrective action will be addressed. The FFACO, Action Plan Section 6.3.2 states: "The postclosure permit will cover maintenance and inspection activities, groundwater monitoring requirements, and corrective action, if necessary, that will occur during the postclosure period". It is inappropriate for Ecology to alter the activities being carried out in a postclosure permit when corrective action considerations must be addressed at the time the post-closure Permit is incorporated into Part V or VI of the Permit.

The Permit condition also assumes that the Permittee will always initiate the Permit modification. This text needs to be removed from this condition since the Ecology may also initiate a Permit modification based on WAC 173-303-830.

Refer to Comment Number 27 regarding the overall comment to draft conditions contained in II.Y.3.c.

Refer to Comment Number 31 that suggests Ecology add a new condition as II.Y.3.c.i.C.

29. **Condition II.Y.3.c.i.A.** **Key Comment:** N/A

Draft Permit Conditions as proposed by the Department of Ecology:

II.Y.3.c.i.A. reflect that the work completed under closure and/or post-closure satisfies the requirement for corrective action; or

Condition Impact Statement: N/A

Requested Action: Delete this condition in accordance with Comment Number 26. Alternately, revise this condition to read: "The activities completed under closure and/or post-closure satisfies the requirement for corrective action;"

Comment Justification: This is an editorial change to address the new condition proposed as II.Y.3.c.i.C and the revised language for Condition II.Y.3.c.i.

Refer to Comment Number 27 regarding the overall comment to conditions contained in II.Y.3.c.

30. **Condition II.Y.3.c.i.B.** **Key Comment:** N/A

Draft Permit Conditions as proposed by the Department of Ecology:

II.Y.3.c.i.B. if the work completed under closure and/or post-closure care does not satisfy corrective action requirements, to incorporate unit-specific corrective action requirements

Condition Impact Statement: N/A

Requested Action: Delete this condition in accordance with Comment Number 26. Alternately, revise this condition to read: "The activities completed under closure and/or post-closure care does not satisfy corrective action requirements; or"

Comment Justification: This is an editorial change to address the new condition proposed as II.Y.3.c.i.C and the revised language for condition II.Y.3.c.i.

Refer to Comment Number 27 regarding the overall comment to the conditions contained in II.Y.3.c.

31. **Condition II.Y.3.c.i.C.**
(new condition)

Key Comment: N/A

Condition Impact Statement: These conditions found as II.Y.3.c.i.A and II.Y.3.C.i.B would not provide the necessary options to ensure cost effective clean up of the Hanford Facility.

Requested Action: None if Comment Number 27 is accepted. Alternately, the Permittee requests that Ecology add a new condition to address the option that allows deferral of the correction action decision. The Permit condition should read: "The activities completed under closure and/or post-closure care will be evaluated at the time the Operable Unit containing the TSD unit is addressed under the FFACO".

Comment Justification: The Permittee has suggested this condition because conditions II.Y.3.c.i.A and II.Y.3.C.i.B would not provide the necessary options to ensure cost effective clean up of the Hanford Facility. Adding this option will ensure the appropriate options are available for TSD unit closure and/or post-closure activities when the activities will be deferred to the operable unit activities.

Refer to Comment Number 27 regarding the overall comment to conditions contained in II.Y.3.c.

32. **Condition II.Y.3.c.ii.**

Key Comment: Unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology:

II.Y.3.c.ii. On completion of the public comment period initiated by the Permittee's request under II.Y.3.c.i, Ecology will make a final decision 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 process of WAC 173-303-830.

Condition Impact Statement: This condition would impose an inefficient permitting methodology and result in additional costs to the Permittee without benefit to human health and the environment.

Requested Action: Delete this condition in accordance with Comment Number 27. Alternately, revise this condition to read: "At the appropriate time agreed to by the Permittee, the Department will determine whether closure and/or post-closure care activities performed in accordance with Part III, V, or VI of this Permit satisfy corrective action and whether the Department will specify any unit-specific corrective action requirements. If the Department determines that the activities completed under closure and/or post-closure care satisfies corrective action, the Department will incorporate the determination into this Permit in accordance with the permit modification process of WAC 173-303-830".

Comment Justification: The revised text will provide the most efficient way to document corrective action decisions for TSD units in the Permit. The language provides the necessary flexibility to address the unique circumstances that can arise in closing Hanford Facility TSD units.

This condition also assumes that the Permittee will always initiate the Permit modification. This text needs to be removed from this condition since Ecology may also initiate a Permit modification based on WAC 173-303-830.

Refer to Comment Number 27 regarding the overall comment to these conditions contained in II.Y.3.c.

33. **Condition II.Y.3.d.**
(including II.Y.3.d.i. through
II.Y.3.d.iii.)

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HWSA Portion)

Draft Permit Conditions as proposed by the Department of Ecology:

II.Y.3.d. Notwithstanding any other condition in this Permit, Ecology may directly exercise any administrative or judicial remedy under the following circumstances:

II.Y.3.d.i. Any discharge or release of dangerous waste or dangerous constituents which is not addressed by the FFACO, as amended;

- II.Y.3.d.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,
- II.Y.3.d.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.

Condition Impact Statement: DOE would have to accept the authority asserted in these 'reservations' to the denigration of any authority, rights and privileges that DOE might otherwise assert.

Requested Action: Delete these conditions.

Comment Justification: These conditions assert a number of 'reservations of rights' by Ecology. In various conversations with Ecology employees, the employees asserted that these reservations are equivalent to reservations in the FFACO. While the conditions might mirror provisions in the FFACO, these reservations are not identical in import or scope. Reservations in the FFACO are asserted to ensure that concessions and waivers that are explicit or implied in other provisions of that agreement are not understood to go beyond defined boundaries. Those boundaries limit the zone of agreement among the Tri-Parties. However, in the Permit these define the positive scope of Ecology's asserted sole authority, covering all matters within the Permit and going beyond it. These reservations do not acknowledge counterpart reservations of rights and authorities of DOE or EPA. Most important, by accepting this Permit, DOE would have to accept the authority asserted in these 'reservations' to the denigration of any authority, rights and privileges that DOE might otherwise assert.

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| 34. | Condition: II.Y.4.a. U.S. Ecology (including Conditions II.Y.4.a.i. through II.Y.4.a.ii.) | Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary; creates potential conflict with EPA requirements |
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Draft Permit Conditions as proposed by the Department of Ecology:

- II.Y.4.a.i. The following solid waste management units are not covered by the FFACO, as amended, and require investigation to determine whether releases of dangerous waste or dangerous constituents that warrant corrective action have occurred or are occurring.
 - II.Y.4.a.i.A US Ecology, Inc., SWMU 1 Chemical Trench.
 - II.Y.4.a.i.B US Ecology, Inc., SWMU 2-13: Low-level radioactive waste trenches 1 through 11A.
 - II.4.Y.a.i.C US Ecology, Inc., Underground resin tank.
 - II.4.Y.a.ii Selected solid waste management units identified in Condition II.Y.4.a.i are currently being investigated by US Ecology in accordance with the Comprehensive Investigation US Ecology – Hanford Operations Workplan. US Ecology will submit to Ecology a written report on the findings of the investigation. The report will help Ecology determine whether, based on site specific conditions, additional work is needed to investigate or clean up the solid waste management units identified in Condition II.Y.4.a.i.
 - II.Y.4.a.iii Following receipt of the written report, or within one year of the effective date of the Permit Condition, whichever is earlier, Ecology will make a tentative decision as to whether additional investigation or cleanup is necessary to protect human health or the environment for the solid waste management units identified in WAC 173-303-840(10). Following the associated public comment 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:
 - II.Y.4.a.iii.A a decision that corrective action is not necessary to protect human health or the environment;
 - II.Y.4.a.iii.B an extension to the schedule established under III.Y.a.iii; or,

- II.Y.4.a.iii.C a decision that corrective action is necessary to protect human health or the environment.
- II.Y.4.a.iv If Ecology decides under Condition II.Y.a.iii that corrective action is necessary to protect human health or the environment, within one hundred eighty (180) day of the effective date of this decision, the Permittee must submit, for Ecology review and approval, a plan to conduct corrective action in accordance with Condition II.Y.4.a.1. Approved corrective action plans will be incorporated into this Permit in accordance with the permit modification procedures of WAC 173-303-830.

Condition Impact Statements: This section improperly imposes potential cleanup actions and cost on the Federal government for actions taken wholly by an entity and/or persons controlled and regulated by the State of Washington under the State of Washington's lease to US Ecology and the Washington State Department of Health Radioactive Materials Licensing Division.

Requested Action: Delete these conditions. Alternatively, include within the definition of SWMU, a footnote or statement stating: "To the extent that lease property is controlled by the State of Washington and regulated by Departments within the State of Washington responsible for radioactive materials licensing, this definition and Permit section on Corrective Action does not apply".

Comment Justification: The State of Washington leased a 100 acre parcel of land from the DOE to establish a commercial radioactive waste disposal site for 99 years. The State subsequently leased the property to US Ecology, Inc. and is the controlling landlord of US Ecology, Inc. Before leasing to the State, the land was pristine with no known contamination. In addition, US Ecology, Inc. maintains a license with the State of Washington Radioactive Materials Licensing Division that includes provisions for closure of their site in accordance with a Facility Closure and Stabilization Plan ('Closure Plan'). The US Ecology, Inc. Closure Plan is independent of any closure plan or responsibility of DOE for the Hanford Facility. The site-specific permitting and closure processes specified in the US Ecology, Inc., radioactive materials licenses (licenses created pursuant to the AEA) should take precedence over an investigation of corrective action SWMUs undertaken in accordance with RCRA Section 3004(u). Any cleanup requirements related to SWMUs on the US Ecology, Inc., site should be incorporated into the US Ecology, Inc., Closure Plan through the radioactive materials licensing processes performed by the State of Washington or through Washington State's MTCA.

Despite these facts, Ecology, following EPA's lead, included the 100-acre parcel as part of the 'facility' merely because of the DOE's ownership of the bare legal title. This position is contrary to the definition of 'facility' in 40 CFR 260.10 and WAC 173-303-040 and EPA's/Ecology's before interpretation of that definition.

When EPA included the 100-acre parcel as part of the 'facility' in the 1994 Permit, HSWA Portion, DOE appealed the condition. The parties stayed the condition until Washington State received authority to administer the RCRA Corrective Action program from EPA. Authority has been delegated. Presently, Ecology is attempting to reserve RCRA corrective action authority over certain land units on the US Ecology, Inc. site based on Washington State investigating the US Ecology, Inc., SWMUs pursuant to an action independent of DOE. Then as now the application of the definition of 'facility' under 40 CFR 260.10 and WAC 173-303-040 to Federal lands that are subject to a lease is an important policy consideration, that EPA has recognized since at least 1985, but which EPA has never resolved. Neither is there clear guidance from Ecology on the issue.

The definition of facility for corrective action purposes requires more than mere ownership. US Ecology, Inc., should be included in the Permit only if it is part of the same 'facility'. The Federal and State hazardous waste management definitions for facility are the same. Like the Federal definition, under WAC 173-303-040 'facility' has two definitions. For permitting, there is a narrower definition that includes all contiguous land, and structures, appurtenances, and improvements on the land used for recycling, reusing, reclaiming, transferring, storing, treating, or disposing of dangerous waste. For the purposes of implementing corrective action imposed pursuant to WAC 173-303-646(2) or (3), the term facility has the meaning that follows. "All contiguous property *under the control* of an owner or operator seeking or

required to have a permit under the provisions of 70.105 RCW or chapter 173-303 WAC, including the definition of RCW 70.105D.020(3)²" (Emphasis added).

In creating the regulations, Ecology could have referred to all contiguous property "owned by the owner or operator", but did not do so. Instead, it used the term "under the control" of the permit seeker. The same term appears in the EPA definition of 'facility' for the purposes of corrective actions. Under 40 CFR 260.10, 'facility' also has two definitions. For permitting there is a narrower definition that includes all contiguous property used for TSD of hazardous waste. But, for the purposes of implementing corrective action, 'facility' means "all contiguous property under the control of the owner or operator seeking a permit".

EPA recognized early on this definition created particular issues for Federal facilities, especially where the Federal agency does not hold unencumbered title to all contiguous property. In the July 15, 1985 preamble to EPA's Final Codification Rule, EPA stated that the "extent to which the previously interpretation applies to Federal facilities raises legal and policy issues that the agency has not yet resolved". 50 Fed. Reg. 28,712. EPA pledged in 1985 to use its best efforts to resolve these issues "in the next 60 days". These are still unresolved over 14 years later.

On March 5, 1986, EPA published a Notice of Policy, 51 Fed. Reg. 7722, and Notice of Intent to Propose Rules, 51 Fed. Reg. 7723, concerning the application of the definition of 'facility' to Federal facilities. The latter Notice discussed the issue of Federal lands in which other parties held leases or other rights. Federal agencies had questioned whether Federal lands would be considered the owners of all adjacent property, including such leased parcels, and thus be subject to broad corrective action requirements. EPA stated that it intended to propose a rule to recognize different 'principal owners' for purposes of defining the facility boundary. EPA stated:

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.

51 Fed. Reg. 7723. Until a final rule was adopted, EPA stated that it would address this issue on a case-by-case basis. 51 Fed. Reg. 7724. But EPA did not propose a rule on this issue. In the 1994 Permit, HSWA Portion, EPA completely reversed its position. In its Response to Comments EPA stated:

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.

The EPA Response to Comments, (August 29, 1994) assertion is incorrect for several reasons:

It is contrary to the language of the regulation. If property ownership alone equals 'control', the regulation could have simply used the concept of 'ownership' to define the facility, as it does in the definition of 'onsite'. 40 CFR 260.10. EPA's 1994 response interpretation robs 'under the control' of its normal meaning and alters the meaning of the regulation.

If EPA's 1994 response interpretation is correct, the published Notice of Intent is meaningless. A Federal agency that owns bare legal title to property, always would have to include it as part of the facility for corrective action. It would not matter if the land were leased, nor what 'degree of control' the Federal government actually exercised.

Clearly bare legal title cannot automatically convey 'control'. The terms of a long-term lease might greatly limit what the owner can do on the leased property. In fact, at law a tenant is entitled to quiet enjoyment of

² WAC 173-303-040 definition incorrectly cites the Model Toxic Control Act definition of facility as RCW 70.105D(3). The citation should be RCW 70.105D(4). Their facility has two definitions: (a) refers to types of structures and (b) refers to any site or area where hazardous substances have been placed or otherwise become located.

property as against the landlord. See 49 Am. Jur. 2d Landlord and Tenant 280, 336.

EPA's unpublished guidance, OSWER No. 9502.00-2 (April 18, 1986), does not address the issue of control of leased land. It focuses only on title. EPA cannot have intended this unpublished directive to reverse the position it had taken in its published Notice of Intent just the month before. Likewise, such a blanket approach contradicts the case-by-case review it had just publicly stated it would undertake in the Notice of Intent. The application of the definition of 'facility' to Federal lands subject to lease is thus a important policy consideration that EPA has recognized since the HSWA rules were promulgated, but which have been 'on hold' since 1986.

Regulating agencies should examine actual control exercised by DOE over leased lands.

Like EPA, Ecology also included the 100-acre parcel as part of the facility on the grounds that it is 'under the control' of DOE. This was a clearly erroneous finding of fact, because the phrase 'under the control' has been interpreted to require actual exercise of control; but DOE exercises no actual control over the parcel.

EPA previously has asserted in its Response to Comments on page 55-57 that DOE had sufficient rights under the terms of the lease to US Ecology, Inc. to exercise control. This conclusion is based mainly on the provisions that reserve to DOE the right of access to the site for all reasonable Amendments to the Sublease. Actually, the structure of the agreement contemplates that the State or its sublessee will care for and maintain the property, and that the DOE acting under its reserved rights will not carry out such activities.

EPA has faced when the issue of determining when contractual rights give a party 'control' in another context. In the CERCLA Lender Liability Rule, EPA was defining the level of 'participation in management' necessary to establish ownership by a security interest holder. EPA there determined that participation in management "does not include the mere capacity to influence, or ability to influence, or unexercised right to control facility operations" 40 CFR 300.1100(c)(1). EPA there reasoned that unexercised contractual rights do not constitute control. While that rule was later vacated as beyond EPA's delegated powers under CERCLA, its rationale was sound and should apply here.

EPA also ignored another factor cited in its 1986 Notice of Intent, the "amount of benefit the agency derives" from the activity on the leased premises. Here DOE derives no benefit at all from the US Ecology, Inc. activities. The original lease with the State of Washington commenced in 1964 and fixed rent at \$600 per year for 99 years. The sublease to US Ecology, Inc.'s predecessor was not executed until 1976, and all rent and other payments under it flow to the State. Applying this factor, it would be inequitable to treat DOE as controlling the US Ecology, Inc. site and thereby be required to include it in the Permit for the purposes of corrective action.

Under the terms of Condition II.Y.4.a.iv, the Permittee, DOE, would be required to take corrective actions for SWMUs for which it is not responsible and has no privity of contract, lease, license or right to control other than by mere land ownership. US Ecology, Inc., lessee and licensee to the State of Washington, has no privity of contract with the DOE. The control of US Ecology, Inc. is at the hand of the State of Washington through a lease, radioactive materials license, and environmental regulations, such as, the MTCA. There is no contractual mechanism by which DOE can force participation of US Ecology, Inc., in any corrective action. DOE would have to persuade the State of Washington to take action against the State's lessee, licensee.

As a policy matter, it is inappropriate to require DOE to take responsibility for, or come onto a site that has been independently regulated for the purpose of protection of public health, safety and the environment by a license issued pursuant to the AEA, as amended, in an agreement by the Washington State Department of Health. Imposition of corrective action responsibilities for such a licensed facility on the DOE, who is not a party to the licensed activity and does not control the activity, is inappropriate from both legal and policy standpoints. EPA and Ecology could not expect any corrective action imposed could take place in a timely and effective way.

EPA and Ecology should recognize that US Ecology, Inc., is not 'under the control' of the Hanford Facility for which DOE is responsible and should exclude it from the Permit conditions for purposes of corrective action. In the alternative, if Ecology is looking for a responsible party, it should look to the State of Washington whereby, the State of Washington becomes a permittee to the Corrective Action Portion of the Permit responsible for any required future corrective actions at the US Ecology, Inc., site. To the extent there is any issue of contamination at the US Ecology, Inc.; facility; EPA and Ecology have ample authority under CERCLA and MTCA, as well as under the US Ecology, Inc. Radioactive Materials License to require cleanup by the State of Washington lessee. EPA and Ecology should not force this property into an inappropriate RCRA corrective action pigeonhole. Refer to Comment Justification for Comment Number 12, the definition of SWMU also applies.

35. **Condition II.Y.4.b.
Newly Identified Solid Waste
Management Units and Newly
Identified Releases of Dangerous
Waste or Dangerous Constituents**

Key Comment: Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion); unreasonable, unfair, redundant, or unnecessary

Draft Permit Conditions as proposed by the Department of Ecology: The Permittee must notify Ecology of all newly-identified solid waste management units and all newly-identified significant releases of dangerous wastes or dangerous constituents at the Facility. For purposes of this Condition, a "newly-identified" solid waste management unit and a "newly-identified" significant release of dangerous waste or dangerous constituents is a unit or significant release not identified in the FFACO, as amended, on the effective date of this Permit and not identified by Condition II.Y.4.a. Notification to Ecology must be in writing and must occur no more than thirty calendar days after the date of discovery. At a minimum, notification must include the information listed in WAC 173-303-806(4)(a)(xxiii) and WAC 173-303-806(4)(a)(xxiv).

Condition Impact Statement: This condition would create a redundant notification requirement inconsistent with provisions agreed to in the FFACO.

Requested Action: Revise the Permit condition to read: "The Permittee must notify Ecology of all newly-identified solid waste management units and all newly-identified significant releases of dangerous wastes or dangerous constituents at the Facility. For purposes of this Condition, a 'newly-identified' solid waste management unit or a 'newly-identified' significant release of dangerous waste or dangerous constituents is a unit or significant release not identified in the FFACO, as amended, on the effective date of this Permit and not identified by Condition II.Y.4.a. Notification to Ecology shall be accomplished by entry of the unit or release into the Waste Information Data System required by the FFACO".

Comment Justification: Section 3.5 of the FFACO Action Plan establishes the Waste Information Data System (WIDS) as the database for maintaining information on waste management units (including unplanned release sites). Ecology personnel have been directly involved in the development of procedures, pursuant to the FFACO, for entering new sites into the WIDS. Ecology already has electronic access to the entire WIDS database. The draft Permit condition represents a redundant reporting requirement that would be costly and administratively burdensome with no attendant benefit.

36. **Condition II.Y.5**

Key Comment Conflicts with CERCLA, the FFACO, or the Permit (HSWA Portion), exceeds regulatory authority, unreasonable, unfair, redundant, or unnecessary, creates potential conflict with EPA requirements

Draft Permit Conditions as proposed by the Department of Ecology: Within one hundred and eighty (180) days after the effective date of this Permit Condition, the Permittee must submit to Ecology for review and approval, completed "documentation of environmental indicator determination" forms in accordance with the February 5, 1999 environmental indicator guidance issued by the U.S. Environmental Protection Agency and, as requested by Ecology, any additional information or analysis necessary to

support environmental indicator determinations. Following review of the Permittee's submittal, Ecology will make the final environmental indicator determination for the Facility and will notify the Permittee, in writing, of the determination and record the determination in the RCRA Information System (RCRIS) Database. Following Ecology's environmental indicator determination, the Permittee must notify Ecology, in writing, any time he / she believes the environmental indicator determination for the facility has changed (e.g., changed from an IN, insufficient information, to a YES, environmental indicator achieved) and must update the "documentation of environmental indicator determination" forms to reflect new information and cleanup progress at least once every two years.

Condition Impact Statement: This condition will require additional reporting not currently budgeted for planned cleanup.

Requested Action: Delete this condition.

Comment Justification: This condition tasks DOE as a Permittee to provide information sought by EPA (as opposed to Ecology), information whose sole purpose is to measure EPA's corrective action program against national goals set internally by EPA. This program, while in fulfillment of a mandate from Congress to show measurable progress, is a mandate levied on EPA, not on any permit holder, and certainly not on CERCLA facility owners such as DOE. There is no law or regulation that places on DOE or its contractors a duty to gather and format information in the manner being sought by EPA. This condition places enforceable requirements on DOE and the contractors without a regulatory basis.

Comments on proposed Corrective Action Applicability Matrix, Permit Applicability Matrix

37. **Each Page: Part I through Part VI Footnotes**

Key Comment: N/A

Draft Permit conditions as proposed by the Department of Ecology: The Department of Ecology omitted footnotes from all pages of the Permit Applicability Matrix. The Department of Ecology also added a superscript to Part II.A through VI.

Condition Impact Statement: Removing the footnotes provides the public with incomplete information on the categories that the Permit applies. Adding the superscript to Part II.A through VI incorrectly represents the Permit Applicability Matrix because the superscript 'footnotes' only apply to Part I Permit Conditions.

Requested Action: Remove superscripts from Part II.A through Part VI, and restore the footnotes to each page as in previous revisions for the Permit as follows:

Part I requires footnote:

CATEGORIES ARE DEFINED AS FOLLOWS:

- | | |
|---|--|
| A. Leased Land | E. TSD Unit Closures (in Part V) |
| B. North Slope and ALE | F. TSD Operating Units (in Part III) |
| C. Interim Status TSD Units | G. TSD Units in Post closure/Modified Closure (in Part VI) |
| D. Areas Between TSDs (excluding A and B) | |

* Condition applies to this category, as modified by applicable footnotes and qualifiers

¹ – For Category B, Part I Conditions only apply if future TSD activities are begun on the North Slope or ALE.

² – For Category C, all Part I Conditions apply to activities subject to Conditions II.U. and II.V.

³ – For Category D, Part I Conditions only apply to activities subject to Conditions II.A., II.C., II.D.4., II.G., II.I., II.L.3., II.O., II.Q., II.S., II.T., and II.X.

Part II through VI footnote:

CATEGORIES ARE DEFINED AS FOLLOWS:

- A. Leased Land
- B. North Slope and ALE
- C. Interim Status TSD Units
- D. Areas Between TSDs (excluding A and B)
- E. TSD Unit Closures (in Part V)
- F. TSD Operating Units (in Part III)
- G. TSD Units in Post closure/Modified Closure (in Part VI)

* Condition applies to this category, as modified by applicable footnotes and qualifiers

Comment Justification: The superscripts and footnotes were omitted in error. The superscripts only apply to Part I; and do not apply to Parts II through VI. The footnote information on the Categories is needed to define applicability of the Permit to Hanford Facility activities.

38. **Page 9, Part II.Y.**

Key Comment: exceeds regulatory authority

Draft Permit conditions as proposed by the Department of Ecology: A (*) denoting that this Condition and its sub-conditions apply to interim status TSD units has been added to the table.

Condition Impact Statement: This change would assign applicability of final status corrective actions to interim status TSD units.

Requested Action: Remove designation (*) for category "C".

Comment Justification: Final status standards are not applicable to interim status TSD units in accordance with WAC 173-303-400. Corrective Action considerations will be addressed for these TSD units in Parts III, V, or VI.

39. **Page 9, Part II.Y.4.a**

Key Comment: exceeds regulatory authority

Draft Permit conditions as proposed by the Department of Ecology: A (*) denoting that this Condition and its sub-conditions apply to interim status TSD units, areas between units, final status units, closure units, and post-closure units has been added to the table.

Condition Impact Statement: This change would assign applicability of actions to be taken at the disposal site leased to the Department of Ecology to interim status TSD units, areas between units, and other Hanford Site units.

Requested Action: Delete this condition and associated line item in the applicability matrix. If the comment to delete is not accepted, remove designation (*) for category "C", "D", "E", "F", and "G".

Comment Justification: The Department of Energy disagrees with the inclusion of the US Ecology, Inc. disposal site in the Permit (refer to comment on proposed Condition II.Y.4.a. elsewhere in this comment package.) Final status standards are not applicable to interim status TSD units, in accordance with WAC 173-303-400. It is clear from the language in Condition II.Y.4.a. and its sub-conditions that the actions to be taken pertain only to the US Ecology site leased to the State of Washington. Corrective Action considerations, if any are required, would be addressed in Part IV as described in the draft modification to the Introduction and elsewhere in the proposed modification. Any resulting effects on other parts of the Hanford Site would be expressed as a part of that set of conditions, and not as part of Part II Conditions.

40. **Page 10, Part III.8.A**

Key Comment: N/A

Draft Permit conditions as proposed by the Department of Ecology: Central Waste Complex (CWC) Facility Compliance with Approved Permit Application.

Condition Impact Statement: An incorrect TSD unit title will lead to confusion regarding applicability of the Permit.

Requested Action: Change title of TSD unit to "Central Waste Complex".

Comment Justification: The Department of Ecology has added a line item to the table with a title for the Central Waste Complex TSD unit inconsistent with Part III and Attachment 27.

41. Page 12, Part IV

Key Comment: exceeds regulatory authority

Draft Permit conditions as proposed by the Department of Ecology: Asterisks (*) denoting that this Condition applies to leased land, ALE and the North Slope, interim status TSD units, areas between units, final status operational units, units undergoing closure, and units in post-closure have been added to the table.

Condition Impact Statement: This change would appear to assign blanket applicability of final status corrective actions specified in Part IV to interim status TSD units and Facility-wide.

Requested Action: Remove designation (*) for all categories.

Comment Justification: Final status standards are not applicable to interim status TSD units in accordance with WAC 173-303-400. Corrective Action considerations will be addressed for these TSD units in Parts III, V, or VI. It is confusing to imply that all corrective actions named in Part IV conditions apply site-wide. This row should be left blank, and applicability noted for each individual set of corrective action units. This would be consistent with the way applicability is described for units incorporated in Parts III, V, and VI of the Permit and would reduce confusion.

42. Page 12, Part IV.1 and .2

Key Comment: N/A

Draft Permit conditions as proposed by the Department of Ecology: Asterisks (*) denoting that these Conditions apply to areas between units have been added to the table.

Condition Impact Statement: This change would appear to assign blanket applicability of final status corrective actions specified in Part IV to all areas between units Facility-wide.

Requested Action: Add qualifier text in the right column to indicate that the applicability of each unit's conditions to areas between units is limited to those areas described in the approved Corrective Measures Study.

Comment Justification: It is confusing to imply that all corrective actions named in these units' Part IV conditions apply Facility-wide to areas between units. Qualification would reduce confusion.

43. Page 11, Part V.21

Key Comment: N/A

Draft Permit conditions as proposed by the Department of Ecology: 2401-W Waste Storage Building Compliance with Approved Modified Closure Plan

Condition Impact Statement: This condition would establish confusion regarding the type of closure plan contained in the Permit.

Requested Action: Delete line item Part V.21 in Applicability Matrix based on Comment Number 1 in Comments on the Proposed Modifications to Part V, Chapter 21, 2401-W Waste Storage Building (previously submitted) regarding the inappropriate incorporation of this closure plan into Part V of the Permit.

Comment Justification: Based on Comment Number 1 in Comments on the Proposed Modifications to Part V, Chapter 21, 2401-W Waste Storage Building (submitted on 12/6/99), it is inappropriate to locate the 2401-W Waste Storage Building Closure Plan in Part V of the Permit.

In addition, the 2401-W Waste Storage Building is not a Modified Closure Plan. A Modified Closure Plan is a plan developed to meet modified closure provisions in Permit Condition II.K, Dangerous Waste Portion. The 2401-W Waste Storage Building Closure Plan indicates clean closure of the 2401-W Waste Storage Building. It is inaccurate to reference this closure plan as a Modified Closure Plan.

**NAMP EM Consolidated Audit Program (EMCAP)
Conference Call Minutes
December 15, 1999**

The conference call convened at 1200 hrs EST with a general roll call. The following individuals were present:

Name	Affiliation/Location
Carden, Dave*	DOE-OR
Dechant, Gary	Grand Junction, CO
Ideker, Virgene*	Kaiser-Hill/RFETS
Khalil, Mo*	Westinghouse/Savannah River
Marcus, Mark*	Waste Management/Hanford
McIntyre, Todd*	SAIC/Gaithersburg, MD
Minteer, Mark*	Agra Earth and Environmental/Albuquerque, NM
Morton, Stan*	DOE-ID
Reece, Chuck*	DynCorp/Gaithersburg, MD
Sassoon, Richard*	SAIC/Gaithersburg, MD
Watkins, Cliff*	Bechtel BWXT/Idaho
Whitney, Gail	DOE-SR
<i>Working group members not present:</i>	
Boada-Clista, Lydia*	DOE-OH

* Denotes Working Group Member

Stan Morton stated that there was poor response to the action item to submit subtasks and associated due dates to Todd McIntyre by December 10. Mark Minteer did, however, submit a general outline and basis for the auditor training program. This document will be transmitted for review by the working group with the minutes from this conference call.

Stan Morton thanked Virgene Ideker for providing comments to Todd McIntyre on the draft audit plate Module 1 this week. He stated that the early submittal of comments will facilitate the comment response process and will help increase the number of comments that can be addressed

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before the deadline.

Minutes from the conference call held on December 1, 1999 were reviewed. Mark Minteer clarified the item regarding associating lines of inquiry with method or regulatory requirements. He stated that the minutes should have reflected that there are many analytical procedures used by DOE for which there are neither published methods nor regulatory requirements. Therefore, we need to address how we will audit items that are not tied to existing standards. He stated that DOE may need to adopt minimum basic standards for certain procedures. Dave Carden stated that standards should be developed before lines of inquiry.

Todd McIntyre asked if the current format of the minutes is helpful. A positive response was received from the working group.

Stan Morton gave a brief summary of events from the NELAC 5th Interim meeting held in Washington, DC. He stated that plenary speaker Henry Longest (USEPA) announced that EPA has developed an "exit policy" for NELAC. Essentially, this means that NELAC plans to privatize the program in the future.

The list of "Major Responsibilities" was discussed, with the intent of soliciting a status report for each of the eight items on the list.

- **Overall Management:** No deliverables were due since the last conference call.
- **Baseline Assessment:** Chuck Reece stated that the first of three sets of data requested via his e-mail was due on December 14. As of today, he has received data from Rocky Flats, Albuquerque, Richland, Oakland, Savannah River, and Oak Ridge. No data have been received yet from Nevada, Ohio or Idaho. Cliff Watkins stated that the Idaho data would be sent this week. Chuck Reece summarized the data received so far: 30 auditors listed, with a combined total of 879 audits completed. The average years of experience per auditor is seven. He concluded by stating that he has already received all three data sets from three DOE sites.
- **Development of Procedures:** Dave Carden stated that he is approximately half way through comments received from Idaho on the draft procedure. He mentioned that the comments were quite helpful, and that he had also received good comments from Albuquerque. Based on these comments, he feels that the procedure will be greatly improved over the first version. To date, he has completed addressing the comments received from Chuck Reece and Albuquerque. A revised draft will be issued by the end of this week. A major element of the changes made is in the roles and responsibilities of audit personnel. Dave Carden concluded by requesting that comments on the revised draft be provided to him by January 14, 2000.
- **Development of Audit Plates:** On December 13, Todd McIntyre e-mailed the set of six draft audit plate modules with comment guidance and a form to record comments. He

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- stated that the purpose of the electronic comment form is to make it easier to compile, compare and address comments on the audit plates. He thanked Virgene Ideker for providing comments on Module 1, and she stated that the electronic comment form was helpful and easy to use. The next major milestone is January 14, 2000 when all comments are due to Todd McIntyre. He stated that submitting comments prior to the deadline (if possible) would be very helpful.
- **Audit Coordination:** Virgene Ideker stated that the Oak Ridge audit schedule is helpful, and covers all the ICPT labs. A current challenge is how to coordinate the audits including how to select auditors and how to select labs for consolidated audits. Virgene Ideker stated that in order to cover all the ICPT labs, we will have to conduct an average of three to four audits per month throughout the fiscal year.
- **Development of Auditor Training Program:** Mark Minter has developed some preliminary general training guidelines that were e-mailed to Stan Morton and Todd McIntyre on December 13. These will be e-mailed to the working group members with the minutes from this conference call. Mark Minter stated that Jim Merrigan is working on waste management auditor qualifications. Mark Minter said that the group should consider using auditor qualification guidelines from other organizations such as NELAC, NQA1 and ASQ. He asked if we want to consider developing a series of seminars for auditor training to educate auditors on the philosophy and basic facts of the audit program. Members of the working group responded that this would be a good idea, and offered the following potential benefits: establish knowledge on analytical nuances, measurement systems and method modifications, would help ensure a consistent approach to auditing. Mo Khalil stated that we already have enough competent auditors in the complex and thought it would be better to bring junior personnel along on audits as "on the job training" (OTJT). Mark Minter replied that his proposed program does include OTJT. Mark Markus stated that the seminars would also serve to enhance the defensibility of the audit program as a whole. Jim Merrigan stated that his office has a training module for waste management auditors. Dave Carden asked how we will efficiently train everyone who needs to be trained. Richard Sassoon stated that training could be held in conjunction with NAMP conference and/or Sample Management Workshops in order to minimize travel costs.
- **Pilot Audit:** Virgene Ideker stated that GEL will be the subject of the pilot audit. GEL is a full service laboratory and is used by the majority of the DOE complex. All analyses are performed at one location. The POC at GEL is Molly Green. Virgene Ideker stated that the audit team will consist of one DOE lead, one contractor lead, and one auditor for each of the major analytical areas (organic, inorganic/wet chem, rad, QA and materials management). The duration of the audit should be no more than three days. Target start date is February 14. There was discussion concerning the idea of "two leads" and concerns were expressed with regard to lines of authority. Stan Morton suggested that NAMP should consider development of a policy (straw man) on how to designate audits leads, DOE vs. contractor, etc.

- **Development of Database:** Cliff Watkins sent an e-mail to the working group asking for suggested end user requirements for the database. He stated that there is no need to “re-invent the wheel”, and that to the extent practicable, we should work with systems that have already been developed by Argonne East.

Action Items:

- Individuals who have taken the lead for “Major Responsibilities” (see attached list to be transmitted with these minutes) shall develop a list of subtasks for their item along with due dates. This information should be sent to Todd McIntyre (mcintyret@saic.com) by December 17, 1999.
- NAMP will begin development of a white paper suggesting options for the audit program including designation of lead auditors.
- The working group shall provide Cliff Watkins feedback database requirements.

The next audit working group conference call will be held Wednesday, January 5, 1999 at 12:00 Noon EST. Call in number to be announced.

The conference call was adjourned at approximately 1315 hrs. EST.