BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
CH2M Hill Plateau Remediation Company, LLC (CHPRC) A contractor of the United States Department of Energy, Hanford Nuclear Reservation, Benton County, Washington 99352	)
NPDES Permit No. WA-002591-7	)

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), CH2M Hill Plateau Remediation Company, LLC ("Petitioner" or "CHPRC"), a contractor of the United States Department of Energy ("DOE") at the Hanford Nuclear Reservation ("Hanford Site"), Benton County, Washington 99352, petitions for review of the conditions of NPDES Permit No. WA-002591-7 ("the permit"), which was re-issued to Petitioner on June 23, 2009, by the United States Environmental Protection Agency, Region 10 ("EPA Region 10") . The permit at issue in this proceeding authorizes Petitioner to discharge wastewater into the Columbia River at two outfalls on the Hanford Site. Outfall 004 discharges wastewater from the Hanford Site's 100K area, which has two closed, non-operating nuclear reactor facilities undergoing demolition and cleanup. Petitioner contends that one permit condition is based on clearly erroneous findings of fact and conclusions of law. Specifically, petitioner challenges the following permit condition, found at section I.B.2. :

> Discharges of process water such as dust suppression water and stormwater from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Cleanup actions are prohibited from Outfall 004.

The bases for this challenge, set out in more detail in the following brief, are as follows:

A. A NPDES Permit may not lawfully impose limits on a CERCLA response action.

1. CERCLA Section 121 preempts a NPDES permit.

2. The EPA NPDES regulation exempts CERCLA response actions from permitting.

3. CERCLA 113(h) bars any use of other laws to alter ongoing CERCLA response actions.

4. The permit provision violates the EPA regulation exempting AEA radionuclides.

B. A materially defective procedure was used to issue the ban on CERCLA discharges, so provision I.B.2. is clearly erroneous and improperly issued.

1. The language of provision I.B.2. appears nowhere in the Draft Permit (Exhibit A), so it did not undergo full public review and comment and is invalid.

2. The ban on CERCLA discharges improperly claims to regulate stormwater discharges.

3. The Response to Comments (Exhibit D) is fatally flawed.

C. EPA Region 10 unlawfully added a major modification to the final NPDES permit that bans all discharges based solely on the activity that produces them, rather than addressing specific pollutants in such discharges and their relationship to the specific effluent limitations or lack thereof in the remainder of the permit.

1. The ban on "CERCLA discharges"is illegal because it fails to identify any pollutant or contaminant that is being regulated.

2. The ban on CERCLA discharges violates due process of law.

3. The ban denies CHPRC the equal protection of the law, and is arbitrary, capricious, unreasonable, and without rational basis.

4. The ban on CERCLA discharges places CHPRC in a legal conflict with its Federally-enforceable contractual duty to DOE (Exhibit I) to perform CERCLA response actions that have been agreed upon by DOE and EPA.

5. The ban on CERCLA discharges unreasonably burdens CHPRC and could halt or delay response actions that EPA has agreed are reasonable and necessary to protect human health and the environment from the release or threatened release of hazardous substances.

* * *

JURISDICTION AND THRESHOLD PROCEDURAL REQUIREMENTS

The United States Environmental Protection Agency, Environmental Appeals Board ("Board") has jurisdiction to hear and decide this matter pursuant to 40 C.F.R. Part 124. This Petition is timely having been filed within thirty (30) days of the date on which Permit No. WA-002591-7 was issued.

Petitioner satisfies the threshold requirements for filing a petition for review under Part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit, as attested in the Response to Comments (Exhibit D) in the administrative record, citing comments submitted by Allan E. Cawrse, Environmental Manager for CHPRC (Exhibit K). 40 C.F.R. Section 124.19(a).

2. The issue raised by Petitioner in this petition was not raised during the public comment period because the offending permit condition I.B.2. first appeared only in the final permit. Permit condition I.B.2. did not appear in the previously issued permit nor in the draft permit. *See* the Draft Permit attached hereto as Exhibit A, the Final Permit attached hereto as Exhibit C, and the Response to Comments attached hereto as Exhibit D. The language in permit condition I.B.2. was first communicated by EPA Region 10 to Petitioner via e-mail on March 2, 2009, only a few days before the end of the public comment period on March 6, 2009, a copy of which is attached as Exhibit E. (The e-mail also addressed a second issue, not the subject of this appeal.) Petitioner responded to EPA Region 10's proposal to add new language to the permit on March 10, 2009 (Exhibit F), pointing out that the proposed addition conflicted with two explicit provisions in the

NPDES permitting regulation at 40 C.F.R. Sections 122.2 and 122.3. There was no further written communication from EPA Region 10 until it issued the Final Permit (Exhibit C) on June 23, 2009. In the accompanying Response to Comments (Exhibit D), EPA Region 10 completely omitted any reference to Petitioner's March 10 objection or its contents, and instead claimed erroneously that "Hanford . . . agreed to an additional permit condition to prohibit all process water discharges from CERCLA cleanup action discharging from Outfall 004" (Comment 13). Petitioner's objections may now be raised for review in this appeal because permit condition I.B.2. did not appear in the draft permit. Moreover, EPA Region 10 has erroneously refused to place Petitioner's objections to the late addition of condition I.B.2. into the administrative record, while erroneously claiming that Petitioner did not object to the condition. 40 C.F.R. 124.19(a). See *In re Beeland Group, LLC, Beeland Disposal Well #1*, 14 E.A.D __, 8 (EAB 2008) (citing *In re Envotech, L.P.*, 6 E.A.D. 260, 266-267 (EAB 1996)). See also *In re Sutter Power Plant,* 8 E.A.D. 680, 686 n. 7 (EAB 1999).

* * *

FACTUAL AND STATUTORY BACKGROUND

Petitioner CHPRC commenced work on October 1, 2008, under DOE contract No. DE-AC06-08RL14788 (Exhibit I), as one of several companies engaged to execute DOE's responsibilities under CERCLA Section 120, Executive Order 12580 and the National Contingency Plan, 40 C.F.R. Part 300, to perform cleanup of hazardous substances on DOE's Hanford Site. The Hanford Site was part of the original Manhattan District nuclear weapons complex and expanded that role during the Cold War. For the last two decades, DOE's primary mission at Hanford has been to clean up the numerous facilities and waste sites created during those operations. As

designated in E.O. 12580, DOE is the Lead Agency for site response actions, and the DOE Richland Operations Site Manager is the On-scene Coordinator (40 C.F.R. Section 300.5).

In connection with the placement of the Hanford Site on the Superfund National Priorities List in 1989, DOE executed the Hanford Federal Facility Agreement and Consent Order (HFFACO, "Tri-Party Agreement", or "TPA" found at http://www.hanford.gov/?page=92&parent=90) in 1989 with EPA Region 10 and the State of Washington to coordinate the exercise by the three governmental entities of their respective responsibilities and authorities for cleanup of the Hanford Site. Remediation under CERCLA and RCRA closure of this large and complex facility has been ongoing for 20 years. A map of the Hanford Site, including the portions of the original 586 square mile facility that were included in the Hanford Reach National Monument in 2000, is found in the contract excerpt (Exhibit I). Additional detailed information about the Hanford Site can be found on the public web page at http://www.hanford.gov/, including a link to the complete CERCLA Administrative Record (http://www5.hanford.gov/arpir/), including the full text of CERCLA documents cited or excerpted here, including the 1999 Interim Action Record of Decision (ROD) for the 100 Area (http://www5.hanford.gov/arpir/?content=findpage&AKey=D199153689) and the 2006 Action Memorandum for the Removal Action for 105-KE and 105-KW Reactor Facilities (http://www2.hanford.gov/arpir/?content=findpage&AKey=DA04316914) in which DOE directed, and EPA approved, the demolition and cleanup of the 100-K East and 100-K West reactor complex (location shown on Exhibit G). This work was assigned by DOE to the CHPRC contract (Exhibit I) in 2008, and it is being executed in accordance with the 2007 Removal Action Work Plan for 105-KE and 105-KW Reactor Facilities (http://www2.hanford.gov/arpir/?content=findpage&AKey=DA04508807). A depiction of the facilities before and after demolition and cleanup is Exhibit H.

The primary product of the Hanford Site during World War II and the Cold War was Plutonium. This was produced in the nine nuclear reactors arrayed along the river in what was designated the 100 Area, where river water was used for cooling the reactors, drinking water, decontamination, and other uses. Uranium fuel pellets fed through the reactors absorbed additional neutrons and a small portion was transmuted into Plutonium. The fuel pellets were then chemically processed in large enclosed structures within the 200 Area, the central plateau of the Hanford Site several miles away from the river, where the small traces of Plutonium were separated from Uranium and other radioisotopes. When Plutonium extraction was halted, a large amount of fuel pellets remained. They were stored in large pools at the reactors, where the water protected workers against radiation, but materials could be observed, inserted or removed easily. The last remaining pool or fuel basin is at the 100-K West Reactor. It contains some residues of nuclear fuel, which have deteriorated into a sludge. One of the major tasks assigned to CHPRC is removing the sludge from the basin, where it presents a risk to the Columbia River, and completing demolition and removal of the basin and all ancillary facilities, which became contaminated with radioactive and chemical wastes during reactor operations.

Because the water in the fuel basin gradually evaporates, the water treatment and supply system at 100K has continued to operate to maintain safety for workers until the fuel basin is cleaned out. The water treatment system has a small amount of wastewater, which is discharged at Outfall 004, which is covered by the permit and its predecessors. The 100K stormwater collection system also feeds into the same outfall. The stormwater component is covered under the national stormwater permit for construction sites (Exhibit J).

Because of historical contamination of the 100K structures, small amounts of radionuclides can be detected in the wastewater at Outfall 004. The prior NPDES permits, and the new permit, do not set limits for radionuclides because they are regulated by the DOE, as successor to the Atomic Energy Commission, under the authority of the Atomic Energy Act of 1954 ("AEA", 42 U.S.C. Section 2011 *et seq.*), such as through DOE Order 5400.5, Radiation Protection of the Public and the Environment, whose purpose is "To establish standards and requirements for operations of the Department of Energy (DOE) and DOE contractors with respect to protection of members of the public and the environment against undue risk from radiation." (http://www.directives.doe.gov/cgi-bin/explhcgi?qry1314981363;doe-328). DOE's regulation of radionuclides is acknowledged by 40 C.F.R. Section 122.2, which excludes AEA radionuclides from the definition of "pollutant":

> Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)) . . . Note: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976)." [Emphasis added]

The prior issuance of Permit WA-002591-7 had included a provision in which the permittee agreed to semi-monthly sampling of the other outfall, 001, at the Hanford 300 Area many miles downriver from the 100K facility, for gross alpha and gross beta radiation levels, while having no limit for those levels. The new permit applies this same monitoring standard, for the first time, to Outfall 004, and Petitioner agrees to this provision.

CHPRC and its predecessors have taken monthly radionuclide samples at Outfall 004 apart from any NPDES permit standard, and samples of water and biota in the Hanford Reach are regularly

taken by another DOE contractor. In about February 2009, sampling found a rise in the levels at Outfall 004, which varied from a pattern of declining or level values over the last five years. Immediate notifications were made to EPA and the Washington Departments of Health and Ecology, as well as the City of Richland. Sampling of the river immediately below the outfall showed levels still were at or near drinking water standards. During this time, CHPRC had been conducting demolition of 100-K East structures, including the K-East fuel storage basin, so the assumption was made that demolition work had mobilized contaminants in below-ground lines feeding into Outfall 004. Action was taken to plug lines, and subsequent sampling has shown a return to the previous trend.

The ongoing CERCLA remedial and removal actions directing the demolition and removal of 100-K West and East structures will include removal of nuclear fuel sludge from the 100-KW basin, draining of the basin, shutting down the water supply treatment system (thus removing a major source of process wastewater), and removal of the wastewater effluent line to Outfall 004. Depending on the removal of the fuel sludge, the removal of the wastewater effluent line could be accomplished by the end of 2010. We know from historical sampling that radionuclides in the wastewater system itself will continue to discharge to the river until the system is removed. Removal of the system will terminate those discharges. Despite the best efforts of CHPRC to control releases of radionuclides and other contaminants during execution of the cleanup, the demolition of existing contaminated facilities, including the contaminated wastewater system itself, may temporarily cause other radionuclides to enter the wastewater, during the process of shutting down Outfall 004 and removing from the riparian habitat hazardous substances that threaten air quality, soil, groundwater and the Columbia River.

* * *

ISSUES PRESENTED FOR REVIEW

A. Does EPA Region 10 have legal authority to ban all discharges of wastewater and stormwater from a lawful CERCLA response action which is operating under EPA concurrence and oversight?

B. Can EPA Region 10 lawfully add a material provision to a final NPDES permit that did not appear in any form in the draft permit, while failing to acknowledge Permittee's opposition to the provision, and in fact erroneously claiming that Permittee agreed to the provision?

C. Can EPA Region 10 lawfully add a material provision to a final NPDES permit that bans all discharges based solely on the activity that produces them, rather than addressing specific pollutants in such discharges and their relationship to the specific effluent limitations or lack thereof in the remainder of the permit?

* * *

ARGUMENT

A. A NPDES Permit may not lawfully impose limits on a CERCLA response action.

1. CERCLA Section 121 preempts a NPDES permit.

Cleanup of the 100-K East and 100-K West reactor complex is lawfully authorized and mandated under direction of DOE and oversight of EPA in accordance with CERCLA Sections 104 and 120, Executive Order 12580 (which delegates CERCLA authority to the two agencies), the National

Contingency Plan (40 C.F.R. Part 300, implementing CERCLA), the Hanford Federal Facility Agreement and Consent Order (HFFACO) between DOE and EPA, and a series of Remedial Action and Removal Action decisions in the Administrative Record for the Hanford 100 Area NPL site.

CHPRC is under contract to DOE (Exhibit I) to fulfill DOE's obligation to complete cleanup of the 100K Area facilities. DOE and EPA Region 10 lawfully agreed to issue the 100 Area Remaining Sites Interim Record of Decision (cited above) and the 100-K East and West demolition removal action Action Memorandum (cited above).

The relationship between CERCLA Remedial and Removal Actions and other environmental laws is defined by CERCLA Section 121 (42 U.S.C. Section 9621). Section 121 (e)(1) specifically exempts CERCLA response actions from regulation under Federal or State permits, while Section 121(d) establishes a procedure under which the substantive standards in such regulations are incorporated into the design and execution of the CERCLA cleanup through the identification of Applicable, or Relevant and Appropriate, Requirements (ARARs). Specifically, the 100 Area Remaining Sites ROD (cited above), beginning at page 38, contains the following discussion of ARAR standards which are relevant to surface water protection (emphasis added):

> Compliance with Applicable or Relevant and Appropriate Requirements
>
> The selected remedy will comply with the federal and state ARAR's identified below. No waiver of any ARAR is being sought. The ARARs identified for the 100 Area source OUs [Operable Units] include the following:
> • **The SDWA MCLs for public drinking water supplies** are relevant and appropriate for protecting groundwater.
> • MTCA (WAC 173-340) risk-based cleanup levels are applicable for establishing cleanup levels for soil, structures and debris.
> • ***Clean Water Act,* (33 U.S.C. 1251) requirements for protection of aquatic life are relevant and appropriate for protecting the Columbia River.**

• **"Water Quality Standards for Waters of the State of Washington" WAC 173-201-035, are applicable for protecting the Columbia River.**
• "National Emission Standards for Hazardous Air Pollutants" (40 CFR 61), are applicable for radionuclide emissions from facilities owned and operated by DOE. Radionuclides are presented in the contaminated soils, structures, and debris that will be excavated, treated, transported, and disposed under this interim action. **[These require use of water for dust suppression.]**
• State of Washington "Dangerous Waste Regulations," (WAC 173-303), are applicable for the identification, treatment, storage, and land disposal of hazardous and dangerous wastes.
• RCRA Subtitle C (40 CFR 261, 264, 268) is applicable for the identification, treatment, storage, and land disposal of hazardous wastes.
. . .
• ***Water Quality Standards for Waters in the State of Washington,* (WAC 173-200) are relevant and appropriate for establishing for establishing cleanup goals that are protective of the Colombia River.**
. . .
• State of Washington, "Department of Health" (WAC 246-247) is applicable to the release of airborne radionuclides.
. . .
• *Endangered Species Act of 1973* (16 U.S.C. 1531; 50 CFR 200; 50 CFR 402) is relevant and appropriate to conserve critical habitat upon which endangered or threatened species depend. **[This includes salmon spawning grounds in the Hanford Reach]** Consultation with the Department of the Interior is required.

Other Criteria, Advisories, or Guidance to be Considered for this Remedial Action (TBC's)
. . .

59 FR 66414, " Radiation Protection Guidance for Exposure to the General Public," contains EPA protection guidance recommending (non-medical) that radiation doses to the public from all sources and pathways not exceed 100 mrem/yr [milliREM per year] above background [typical background radiation received from natural and non-DOE sources is about 300 mrem/yr]. It also recommends that lower dose limits be applied to individual sources and pathways: One such individual source is residual environmental radiation contamination after the cleanup of a site. Lower doses limits and individual pathways are referred to as secondary limits.

Because effects of the 100K Area cleanup on surface water are addressed under CERCLA and its implementing decision documents, whose execution is overseen by EPA Region 10, and compliance with which is enforced through the stipulated penalties provisions of the HFFACO (cited above), CERCLA Section 121 has preempted regulation of these actions through a NPDES permit.

2. The EPA NPDES regulation exempts CERCLA response actions from permitting.

40 C.F.R. Section 122.3 states, as one of the exclusions from NPDES permitting:

> (d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan ["NCP"]) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

This regulatory exclusion is necessary to maintain consistency with the statutory preemption of NPDES permitting by CERCLA Section 121. As noted above, pursuant to 40 C.F.R. Section 300.5, DOE is the CERCLA Lead Agency for DOE's Hanford Site, and the DOE Richland Operations Office Site Manager is the On-Scene Coordinator for execution of the agency's duties under the NCP. CHPRC's 2008 contract with DOE (Exhibit I) constitutes "the instructions of the On-Scene Coordinator", executing the decisions made by DOE and EPA Region 10 in the 100 Area Remaining Sites Interim ROD (1999), the 100-K West and East Removal Action (2006), and the Removal Action Work Plan (2007). Section I.B.2. of the permit is therefore in direct contravention of the regulation and is without legal authority.

3. CERCLA 113(h) bars any use of other laws to alter ongoing CERCLA response actions.

CERCLA 113(h) states that:

> No Federal court shall have jurisdiction under Federal law . . . or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title . . . .

This provision has been held specifically to bar enforcement of the Clean Water Act that could alter the planned cleanup of a CERCLA site (*Wason Ranch Corp. v. Hecla Mining Co. et al,* 2008 U.S. Dist. LEXIS 2542 (D.C. CO. 2008)). Section 113(h) has been specifically applied to the Hanford Site (*Hanford Downwinders Coalition v. Dowdle*, 71 F.3d 1469; 1995 U.S. App. LEXIS

34229; 41 ERC (BNA) 1925 (US Court of Appeals Ninth Circuit 1995)). Therefore, any attempt to enforce provision I.B.2. directly or through a citizen suit would be legally barred. This is another justification for the 40 C.F.R. Section 122.3 exemption of CERCLA activities from regulation through NPDES permits.

4. The permit provision violates the EPA regulation exempting AEA radionuclides.

As noted above, 40 C.F.R. Section 122.2 exempts from the definition of "pollutant" any "radioactive materials . . . regulated under the Atomic Energy Act of 1954." The previous NPDES permits for Outfall 004 have followed this limitation by not setting standards for levels of radiation in effluent, and even the new permit declines to set specific radiation limits. Yet the March 2 communication from EPA Region 10 which proposed adding provision I.B.2. to the permit made clear that the reason for the ban of all discharges from CERCLA actions was a desire to regulate "radioactive materials." Thus, Exhibit E says (emphasis added):

> 2. These are the reasons reported from Hanford for the recent increase in **radionuclide discharges** through Outfall 004.
>
> > One immediate action has been to uncover and expose a pipe that may have carried contaminated suppression water from substructure demolition efforts to the outfall where the **AEA radionuclides** have been found.
> >
> > CH2M HILL restricted all 100K East Basin Deactivation and Decommissioning activities that required an extensive use of water (e.g., water for dust control during demolition) in case those activities are contributing to the discharge.
> >
> > CH2M HILL has also increased the frequency of discharge monitoring. **While the contaminants are at very low levels and are not expected to have an impact on the Columbia River**, as a precaution, water samples will be taken from the river upstream and downstream of the outfall pipe this week.
> >
> > Leading candidates for the **radionuclide source** are the KE Basin floor

drain lines that were previously plugged with grout that may have been disturbed or broken during KE Basin substructure demolition. These floor drains all flow into a collection box (a cement septic tank like cube) which is located about 25 feet below grade (to the NW of KE Basin) and then into a line leading to the outfall. CH2M HILL is investigating plugging the KE collection box to seal this pathway.

These sources are process wastewater from CERCLA Cleanup actions.

This language will be added to the final permit as agreed during our conference call. [NOTE: There was no such agreement.]

> **Discharges of process water such as dust suppression water and stormwater from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Cleanup actions are prohibited from Outfall 004.**

This allows the discharge from areas within the cleanup footprint **that have not yet begun cleanup**.

Also, Ecology will ask for additional monitoring for **radionuclides discharged from Outfall 004**.

Thus EPA Region 10 stated that the purpose and intent of provision I.B.2., the ban on all CERCLA action discharges, was to regulate AEA radionuclides. But this purpose is flatly prohibited under 40 C.F.R. 122.2, for the precise reason that, as held by the U.S. Supreme Court in the *Train* decision in 1976, the case cited in the regulation, Congress intended when enacting the Clean Water Act that AEA radionuclides would be regulated only under authority of the AEA. The preemption by the AEA over State laws was also reaffirmed recently in the Ninth Circuit Court of Appeals ruling in *U.S. v. Manning*, 527 F.3d 828; 2008 U.S. App. LEXIS 10795; 66 ERC (BNA) 1673; 38 ELR 20119 (2008).

B. A materially defective procedure was used to issue the ban on CERCLA discharges, so provision I.B.2. is clearly erroneous and improperly issued.

1. The language of provision I.B.2. appears nowhere in the Draft Permit (Exhibit A), so it did not undergo full public review and comment and is invalid.

The addition of the ban on CERCLA discharges does not fit any of the categories for a "minor modification" of a permit (40 C.F.R. Section 122.63). Furthermore, because there was no "consent of the permittee," the minor modification procedure may not be used. (Ibid.) The claim by EPA Region 10 in its Response to Comments (Exhibit D) that "Hanford" agreed to provision I.B.2. is false, as demonstrated by Petitioner's transmission of its specific legal objections to the proposed language (Exhibit F). Because the provision was not in the Draft Permit, CHPRC was unable to comment on it in its formal comments (Exhibit K). Since provision I.B.2. is not a "minor modification", it "must be made for cause and with part 124 draft permit and public notice as required in Section 122.62." Petitioner asserts that, to the best of its knowledge and belief, none of the enumerated circumstances exist which could constitute "cause" for a modification as stated in 40 C.F.R. Section 122.62. Furthermore, EPA Region 10 failed at the time of proposing the language banning all CERCLA discharges (Exhibit E), as well as at the time of issuing the Final Permit (Exhibit C), to articulate any cause for the addition of the ban on CERCLA discharges, let alone any cause which is explicitly recognized by Section 122.62.

2. The ban on CERCLA discharges improperly claims to regulate stormwater discharges.

Neither the application for the NPDES permit (submitted in 2003 by CHPRC's predecessor contractor which had been assigned the 100K area cleanup) nor Draft Permit (Exhibit A) purport to address stormwater discharges. Instead, stormwater discharges at Outfall 004 are addressed by application to the outfall of the general permit for construction site stormwater discharges (Exhibit J). The claim by provision I.B.2. to ban all CERCLA discharges of stormwater improperly

exceeds the scope of the NPDES permit and directly conflicts with CHPRC's stormwater construction general permit.

3. The Response to Comments (Exhibit D) is fatally flawed.

The Response to Comments materially misrepresents (at Response 13) the comments and statements of permittee CHPRC. First of all, the only basis EPA Region 10 offers to justify the addition of provision I.B.2. banning all CERCLA discharges is that "Hanford agreed". But "Hanford" is not the permittee. The Final Permit (Exhibit C) uses the term "Hanford" only two times, both on the title page, to describe the Hanford Site. However, the permit does not identify the permittee as "Hanford". The permittee is CHPRC, which is only one of several companies conducting CERCLA and RCRA cleanup activities within the Hanford Site under DOE contract. Thus, consent by "Hanford" does not bind CHPRC.

More importantly, CHPRC objected unequivocally to the addition of the proposed language banning CERCLA discharges (Exhibit F). The assertion in the Response to Comments that the permittee consented to the additional language is absolutely false. Even more seriously, the Response to Comments fails to even acknowledge CHPRC's objection, and fails to respond to it. EPA Region 10 cannot claim that the permittee's objection was untimely, and may be ignored, since the new language banning CERCLA discharges was not part of the Draft Permit (Exhibit A). Instead, the new language is a major modification to the permit, which must undergo a new, full 30-day public comment period before it could properly be incorporated in a permit. 40 C.F.R. 122.62. The language was therefore improperly included in the Final Permit (Exhibit C).

C. EPA Region 10 unlawfully added a major modification to the final NPDES permit that bans all discharges based solely on the activity that produces them, rather than addressing specific pollutants in such discharges and their relationship to the specific effluent limitations or lack thereof in the remainder of the permit.

1. The ban on "CERCLA discharges" is illegal because it fails to identify any pollutant or contaminant that is being regulated.

"CERCLA discharges" per se are not included in the definition of "pollutant or contaminant" regulated under NPDES permits so there is no lawful basis to totally ban them. The remainder of the Final Permit recognizes that AEA radionuclides cannot be regulated under a NPDES permit, and does not set limits on them, while it sets specific effluent limits for other identified pollutants, based on analysis of what pollutants are present and what levels are appropriate, based on both the need to maintain water quality in the receiving river, and the reasonably available technology to control those pollutants. There is no rational basis for allowing the named pollutants to be discharged at the specified levels, but banning discharge of the same pollutants if they happen to originate from CERCLA cleanup actions. Since AEA radionuclides cannot be banned in the 004 Outfall generally, there is no rational basis to ban radionuclides just because they originate from a CERCLA cleanup action.

2. The ban on CERCLA discharges violates due process of law.

To the extent that the ban prohibits discharge of specific pollutants which are neither radionuclides nor listed specifically in the Final Permit, the ban denies Petitioner its right to due process of law under the Fifth Amendment to the U.S. Constitution, because (a) the language of the ban is overly

broad and ambiguous and fails to give CHPRC notice as to the justification for banning those pollutants rather than allowing them to be discharged at levels determined to not harm human health or the environment, and (b) it fails to give CHPRC notice as to which pollutants or contaminants it is must monitor or control or how to contest reasonableness of the ban on those specific components of the CERCLA discharge. Additionally, due process of law was denied to CHPRC since there is no evidence that the components of the CERCLA discharges ever were evaluated in accordance with the water quality procedure of Section 401 of the Clean Water Act.

3. The ban denies CHPRC the equal protection of the law, and is arbitrary, capricious, unreasonable, and without rational basis.

EPA does not regulate EPA-lead CERCLA remedial actions under NPDES permits, nor does it permit States delegated NPDES permitting authority to issue or deny NPDES permits to companies under contract to EPA to perform EPA-lead CERCLA response actions. EPA's response action contractors are not placed under threat of civil and criminal penalties through NPDES permits. Yet EPA Region 10 is placing burdens on CHPRC, a remedial action contractor for DOE, which it never would place or allow to be placed upon EPA's own remedial action contractors.

4. The ban on CERCLA discharges places CHPRC in a legal conflict with its Federally-enforceable contractual duty to DOE (Exhibit I) to perform CERCLA response actions that have been agreed upon by DOE and EPA.

If it is technically impossible to completely prevent even de minimis discharges from mandated CERCLA cleanup at the 100K Area, CHPRC would be faced with either violating its contract with DOE by halting all further cleanup work that might affect Outfall 004, or with being subjected to

civil and criminal penalties for even de minimis discharges from the CERCLA cleanup work it performs under contract to DOE. If it is technically possible to materially alter the Removal Action Work Plan (cited above) to prevent even de minimis discharges from CERCLA cleanup, CHPRC would need to file a Request for Equitable Adjustment under its contract with DOE, to address the added costs, including for the time involved in developing and installing a system to comply with the ban on discharges, even though the system would only operate until Outfall 004 is removed around the end of 2010. These added costs for the DOE CERCLA cleanup of the Hanford Site would deprive other vital response actions of needed funds. As other projects lose funding, the current enforceable deadlines for one or more important remedial actions may need to be pushed back, delaying needed cleanup past the dates which EPA determined were appropriate. EPA could respond by proposing to assess stipulated penalties against DOE. DOE would need to assert that the delays are justified under the HFFACO and that EPA should be estopped from opposing the changes to enforceable deadlines since it is EPA's own action which would be causing the need for the delays.

5. The ban on CERCLA discharges unreasonably burdens CHPRC and could halt or delay response actions that EPA has agreed are reasonable and necessary to protect human health and the environment from the release or threatened release of hazardous substances.

If the ban on CERCLA discharges is upheld, it would serve as a precedent for similar interference with vital CERCLA cleanup throughout the nation, and is therefore arbitrary, capricious, and without rational basis in fact or law. In particular, in most states, the NPDES permitting authority has been delegated to state agencies. State regulators could use the precedent of this permit to arbitrarily issue similar bans on EPA-lead CERCLA cleanup actions, interfering with EPA's mission under CERCLA to protect human health and the environment. Additionally, the precedent

could allow states which have permitting programs for discharge to groundwater to assert that EPA-lead CERCLA remediation is required to obtain permits for any discharge to groundwater, such as reinjection of treated groundwater as part of a groundwater cleanup remedy.

* * *

CONCLUSION

Petitioner CHPRC requests that provision I.B.2. be removed from NPDES Permit WA-002591-7 and the Response to Comments be amended to reflect the objections of CHPRC to the language.

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Date: July 21, 2009

LIST OF EXHIBITS

A. Draft Permit WA-002591-7

B. Fact Sheet, Permit WA-002591-7

C. Final Permit WA-002591-7

D. Response to Comments, Permit WA-002591-7

E. March 2, 2009 EPA Region 10 email to Petitioner

F. March 10, 2009 Petitioner reply to EPA Region 10

G. Map of Hanford Site, showing location of 100K East and West reactor facility

H. Diagrams of 100K East and West reactor facility (before and after cleanup)

I. CHPRC Contract with DOE, Statement of Work for 100K Reactors cleanup (Excerpt)

J. Stormwater permit documents

K. CHPRC written comments on draft permit, March 5, 2009

INTERNET DOCUMENTS CITED

A. Hanford Federal Facility Agreement and Consent Order, "Tri-Party Agreement" (http://www.hanford.gov/?page=92&parent=90)

B. Hanford Site CERCLA Administrative Record (http://www5.hanford.gov/arpir/)

C. 1999 Interim Action Record of Decision (ROD) for the 100 Area (http://www5.hanford.gov/arpir/?content=findpage&AKey=D199153689)

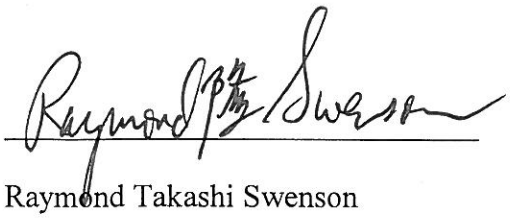
D. 2006 Action Memorandum for the Removal Action for 105-KE and 105-KW Reactor Facilities (http://www2.hanford.gov/arpir/?content=findpage&AKey=DA04316914)

E. 2007 Removal Action Work Plan for 105-KE and 105-KW Reactor Facilities (http://www2.hanford.gov/arpir/?content=findpage&AKey=DA04508807)

F. DOE Order 5400.5, Radiation protection of the Public and the Environment (http://www.directives.doe.gov/cgi-bin/explhcgi?qry1314981363;doe-328)

CERTIFICATE OF SERVICE

I hereby certify under penalty of law that this Petition for Review was also served by overnight delivery dispatched on Tuesday, July 21, 2009, to the EPA Region 10 Office of Regional Counsel, Attention: Keith Cohon, ORC-158, 1200 6th Ave., Suite 900, Seattle, Washington 98101.



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