UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

In the Matter of	)	
	)	
Department of Energy,	)	
Rocky Flats Field Office,	)	**Docket No. CERCLA-VIII-98-11**
	)	
	)	
Respondent	)	

INITIAL DECISION

Introduction

This case was initiated on April 29, 1998, by the filing of a complaint pursuant to section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9609. The complaint charges the United States Department of Energy, Rocky Flats Field Office ("DOE") with two counts of violating section 120 of CERCLA[1] by not adhering to the "*terms and conditions*" of the Final Rocky Flats Cleanup Agreement ("RFCA"). Complaint at 3. (emphasis added). Part 23 of the RFCA , entitled "Sampling and Data/Document Availability," requires the establishment of an Integrated

[1]42 U.S.C. § 9620. Section 120 governs the application of CERCLA to federal facilities. Specifically, Section 120(e) provides the requirements necessary for an interagency agreement.

Monitoring Plan (IMP) to provide for the effective collection and reporting of data to ensure the protection of human health and the environment and compliance with the RFCA. RFCA at 77.

Count 1 alleges that, from June 13 to July 2, 1997, DOE exceeded the standard setting the surface water limit for plutonium at 0.15 picocuries per liter ("pCi/L"), while Count 2 alleges that, from June 13 to June 24, 1997, DOE exceeded the surface water limit for americium which also is 0.15 pCi/L. The monitoring plan measurements, which were based on a 30-day moving average,[2] produced results showing that DOE's maximum 30-day moving average for plutonium during this period ostensibly was 0.465pCi/L, while the average for americium under the measurements ostensibly was 0.256pCi/L. Complainant seeks a total penalty for these alleged violations in the amount of $45,000. An evidentiary hearing was held on September 21, 1999 in Denver, Colorado.

Background

Pursuant to Section 120(e) of CERCLA, 42. U.S.C. § 9620(e) Complainant and Respondent entered into the RFCA on July 19, 1996. Joint Stipulation of Facts at 1. Attachment 5 of the RFCA[3] establishes surface water quality standards for plutonium and americium using the GS03 sampling station as the point of compliance.[4] On or about August 19,

[2]The RFCA requires a 30-day average for water quality measurements for plutonium and americium. Testimony of William Fraser, T.R. at 103. According to the testimony of Mr. Fraser, the 30-day running average was deemed to be a well-suited method for the sampling of plutonium and americium, as it most accurately reflects the actual conditions of the stream. Id.

[3]Attachment 5 of the RFCA is entitled "The Rocky Flats Environmental Technology Site Action Levels and Standards Framework for Surface Water, Ground Water, and Soils."

[4]The GSO3 sampling station is located in Walnut Creek at Indiana Street, where the stream crosses DOE's legal property boundary, and serves as a point of compliance. Joint Stipulation of Facts at 2; T.R. at 97-8. The RFCA set up three points of compliance at the Rocky Flats Site, GS11, GS08, and GSO3, to determine compliance with the 0.15pc/L standard.

1997, in accordance with the requirements of the RFCA, DOE notified Complainant that monitoring results at one of the Rocky Flats points of compliance ("POC"), GS03, demonstrated values of plutonium and americium above the surface water quality limit of 0.15 pCi/L[5]. The sample that evidenced the exceedance of the allowable levels of plutonium and americium was a "flow-paced sample," meaning that the quantity of the sample that had been obtained from the stream was proportional to the flow passing through that point of compliance. T.R. at 95, Testimony of William Fraser. The sample, identified as the "May 15, 1997 sample" due to the fact that May 15 was the first day of this monitoring period, was noteworthy in that its volume was only 800 milliliters. In contrast, the Integrated Monitoring Plan ("IMP"),[6] a RFCA document, required that samples used for analysis be four liters. It is on the basis of this 800 milliliter sample, the "short sample," a sample which was less than one-fourth of the amount called for in the RFCA, that DOE argues that Complainant's case must fail.[7] DOE asserts that

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T.R. at 97. There was no concurrent exceedence at either GS08 or GS11 at the time of the exceedence at GS03. T.R. at 99.

[5]A picocurie is one one-trillionth (0.000000000001) of a curie. A curie is a standard measurement of radioactivity. One curie of radioactive material has 37 billion radioactive decays per second. A picocurie has 2.22 disintegrations per minute. U.S. EPA TENORM Glossary (last updated July 9, 1999)<http://www.epa.gov/rpdweb00/tenorm/glossary.htm>.

[6]See infra note 9 and accompanying text. The parties agree that the IMP is part of the RFCA.

[7]Respondent has noted that "the entire testing program was designed around historic water flow patterns," and that during the period when the 800 milliliter sample was taken, there was "a significant deviation from those historic flow patterns." Respondent's Post Hearing Brief at 7. The time of year involved, June and July, typically is considered a high flow period. However, when the sample in question was taken, "the stream flow was dramatically less than what was anticipated." Consequently, "the sampler was not triggered as often as they had anticipated," which resulted in the small sample. T.R. at 109. Additionally, DOE witness Keith Motyl testified that "based on the hydrologic conditions, and the spatial and temporal variations" the May 15, 1997 sample, was "not representative of the environmental media that passed that

the agreement provides the foundation for establishing a violation and that it unambiguously requires four liter samples. DOE maintains that because the sample did not meet the volume requirement of four liters, regardless of whether it met quality control and quality assurance standards (QA/QC standards), EPA may not establish a violation. Thus the parties agree that the outcome of this case, in terms of liability, rests upon whether the short sample may be considered.

A Significant Preliminary Determination

Prior to the hearing, on July 13, 1999, Complainant filed a Motion In Limine to preclude the testimony of two probable DOE witnesses.[8] Complainant argued that the Court should reject DOE's attempt to have witnesses testify as to the negotiations that took place prior to finalizing the RFCA. EPA asserted that the parol evidence rule should be applied to assure that the plain meaning of the RFCA, and not such extrinsic evidence, governs the Court's interpretation.

On August 17, 1999, the Court, after examining Complainant's Motion, determined that it would rule on the matter after further argument at the start of the hearing. As alluded to, the Complainant sought to exclude the proposed testimony of two DOE attorneys, who were involved in the negotiation of the RFCA, as to any discussions that took place during the negotiations regarding the circumstances when penalties for exceedances of surface water quality standards would be pursued. Complainant argued that because the RFCA is an integrated

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point during the sampling." T.R. at 162. Given the basis for today's decision, the impact, if any, of this aspect, was not reached.

[8]The two prospective DOE witnesses were attorneys Mr. Richard DiSalvo and Mr. Timothy Howell.

written agreement that is clear and unambiguous, the parol evidence rule bars the admission of extrinsic evidence regarding prior agreements reached on penalties for such exceedances, and that as a consequence, any such evidence would be irrelevant and immaterial. In support of its position, Complainant maintained that the Court must look first to the plain language of the agreement and then apply the parol evidence rule, which "forbids the introduction of evidence which would add to, contradict, or vary the terms of an integrated written agreement which is clear and unambiguous." Mem. in Support of Motion in Limine (quoting A. Farnsworth, Farnsworth On Contracts, p.p. 447-461 (1981)). In emphasizing that the RFCA is *very clear and unambiguous* with respect to the terms governing when penalties would be sought for water quality standards exceedances, Complainant insisted that the "four corners" rule[9], a rule that excludes the introduction of extrinsic evidence if the contract is clear on its face, should prevail. Accordingly, Complainant argued that the Court must exclude extrinsic evidence from its determination of the case where the language of the agreement is clear, and that where the agreement's terms are clear, it is "neither necessary nor appropriate to consider the defendant's extrinsic evidence...." Mem. in Support of Motion in Limine at 5 (quoting Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1243 (7th Cir. 1997)).

At the hearing, upon the conclusion of the parties' further argument on the issue, the Court agreed with Complainant, finding the RFCA to be an integrated agreement. The Court concluded that despite not having a distinct integration clause, the RFCA nonetheless reflects the final understanding of the parties' negotiations and determinations. The Court noted that the

[9]The rule's effect is "if the language of a contract appears to admit of only one interpretation, the case is indeed over." Bourke v. Dun & Bradstreet Corp. 159 F.3rd 1032, 1036 (7th Cir. 1998)

"regulatory approach section of the [RFCA] taken with the enforceability section," clearly establishes that DOE will be subject to civil penalties for violations of in-stream concentration limits. See EPA Hearing Transcript (T.R.) at 84.[10] Given that the agreement was found to be an integrated document, containing language that is clear on its face, the Court determined, consistent with application of the parol evidence rule, as advocated by EPA, that it would be inappropriate to consider extrinsic evidence to determine the issue of when EPA may pursue a penalty. Rather, the Court accepted EPA's arguments that the terms of the agreement, where unambiguous, must control.

EPA's Inconsistent Position at Trial

Although EPA describes this case as a "straightforward enforcement matter establishing two violations of ... 'CERCLA' by the Department of Energy ... at its Rocky Flats site ... for exceeding the surface water quality standard for plutonium ... [and] for americium," a significant curve in the enforcement road precedes the "straightforward" route to establishing liability. As EPA counsel conceded at the hearing, "if the Court does decide to discard the [four] liter amount

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[10]The "Regulatory Approach" found in the RFCA provides the following:

> It is the Parties' intention to develop an integrated Water Management Plan that assures the Framework standards for radionuclides and non-radionuclides will not be exceeded at the points of compliance. Nevertheless, in-stream concentrations that exceed the Framework standards at points of compliance identified in the Framework will trigger mitigating action by DOE and penalty liability in accordance with paragraph 219.

Paragraph 219, the section covering enforceability, states that "[a]ll requirements of this Agreement shall be enforceable by any person...and any violation of such requirements of this Agreement will be subject to civil penalties under sections 109 and 310(c) of CERCLA.

and [finds] that it can't be used in the computation of a 30-day moving average, then [EPA] would have to agree that no violations have occurred." Tr. 86.

In support of its position that the less than four liter sample, the "short sample," should be included in establishing a violation, EPA argues that, as the samples produced valid, accurate monitoring results and Respondent chose not to discard but instead to analyze such a sample, EPA should be entitled to use those results.[11] Apparently EPA is urging that an estoppel theory should be applied, arguing that, while DOE could have thrown out the samples, by submitting the results, it was stuck with them. EPA also asserts that DOE's course of conduct supports this conclusion, as DOE has submitted other short samples both before and after the instance in this litigation.[12]

As an alternative theory, EPA looks to hearing testimony to support consideration of the short sample. Relying on witness testimony, EPA asserts that the origin for the four liter requirement in the RFCA was not tied to validity or accuracy, but stemmed only from concerns that an extra quantity be available should tests need to be run again or if part of the sample quantity were lost due to a laboratory mishap.

In its Reply Brief, EPA returns to the IMP for support of the use of the short sample in establishing liability. EPA maintains that the IMP clearly sets forth two criteria that must be

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[11]In EPA's view, Respondent "provided no evidence to support deleting [the] information from the data set other than it would result in no surface water quality exceedances, no violations of RFCA and no penalty." EPA Brief at 8. That assertion is hardly fair. The thrust of DOE's challenge, in terms of liability, is that the agreement itself not only supports that samples be four liters, but requires it. The evidence to support that position is the agreement itself.

[12]However, apparently this is the first time such a less than four liter sample produced results which exceeded the surface water standards. Therefore, in the Court's view, DOE's objecting to results in those other instances would have been a pointless insistence on observance of protocol.

met to reject using a low sample volume. Under this view, the first criterion Respondent must establish is that "the sample volume is inadequate for routine lab analysis." EPA Reply Brief at 3. The requirement in the IMP, according to EPA, is that the sample be inadequate, "not that the sample volume be [four] liters." EPA then points to hearing testimony which "conclusively established" that the four liter sample amount was only a laboratory accommodation. Id.

The second criterion in the IMP for not using a short sample is, according to EPA, that the sample be reported as "Not Sufficient Quantity" ("NSQ"). As DOE did not report the short sample as "NSQ" and instead proceeded to analyze it and report the results, then "even though Respondent had the option under the IMP to discard the sample" in EPA's view it is both "reasonable and appropriate" that the results be used.

Arguing for the principle that the plain meaning of the agreement should govern the analysis of a sample in this instance, Respondent counters that "the [four] liter requirement is as valid a requirement as the 0.15 picocurie limit set in [the] RFCA and is as binding on the [p]arties as that...limit." Respondent's Reply to Complainant's Post Hearing Argument at 1. Respondent alternatively argues that there is no definitive testimony as to why the parties decided on the four liter requirement; that testimony from Complainant's witness, Mr. Fraser, that four liters was chosen to accommodate the laboratories in the event of water loss or for reanalysis, is "far from absolute." Id. at 2. In support of this argument, Respondent points out that Mr. Fraser did testify that "as your sample gets smaller, your error goes up, and eventually you reach the point where the sample is unacceptable from a quality assurance standpoint," implying that it is possible that this was considered by the parties in determining the proper sample volume requirement. Id.

Discussion

As EPA recognized, at least during the motion phase of this proceeding, the "parol evidence rule" operates to preclude the admission of extrinsic evidence outside the four corners of a contract whenever the contract is 'complete, unambiguous, and valid and there is no fraud, accident or mistake, or claim or allegation thereof, with respect to the instrument.'" United States v. Wallace & Wallace Fuel Oil Co., Inc., 540 F. Supp. 419 (S.D. NY) (1982) (quoting 32 A C.J.S. Evidence s 851 at 214-215). The "rule was 'developed to safeguard the sanctity of integrated writings from future attempts at contradiction.'" Id. (quoting 3A. Corbin, Contracts, s 5726, 1960 & 1980 Supp.) Thus, where the "...parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." Nicholson v. United States 29 Fed. Cl. 180, *193 (1993) (quoting Corbin, Contracts, §573 at 357). In determining the intention of the parties to a contract, the intention is to be derived, first, from the language of the contract itself. Looking to the contract's terms, the rule provides that the "express terms may not be changed or nullified by parol testimony, nor may such parol testimony antecedent to the reduction of the agreement to writing be considered where the language of the agreement is clear, unquestioned and unambiguous." Id. at *194 (quoting Williston on Contracts § 603, at 341. Although some contracts formally include a clause announcing that the agreement is complete, through the inclusion of an "integration clause," there is no talismanic requirement for such a clause. Rather, the inquiry is whether the agreement is "intended to be the final, complete, and exclusive manifestation of the terms..."

California Sand and Gravel, Inc. v. United States 22 Cl. Ct. 19, (1990), quoting David Nassif Assocs. v. United States, 557 F.2d 249, at 256. Critical to the case at hand is the admonition that "if the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning'" and "[a] court may not resort to extrinsic evidence to interpret them." McAbee Construction, Inc. v. United States 97 F.3d 1431,*1434 (Fed. Cir. 1996) (quoting Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed.Cir. 1993) and Interwest Construction 29 F.3d 611, 615 (Fed.Cir.1994).

In stark contrast to the position it took in its Motion in Limine, EPA had a very different perspective on the admission of extrinsic evidence in the context of establishing a violation. Even though the Integrated Monitoring Plan[13] specifically requires that samples be four liters for routine analysis, EPA contended that this requirement need not be followed in making a determination as to whether DOE has violated water quality assurance standards. In the face of the plain language of the IMP and despite the explicit requirement in the RFCA calling for samples of not less than four liters, at hearing Complainant relied on extrinsic evidence to attempt to establish a violation by showing that the sample still satisfied the underlying QA/QC standards and, as a secondary basis, because DOE failed to designate the sample as Not Sufficient Quantity (NSQ) when reporting the sample.

In arguing that the clear words of the agreement are not controlling, Complainant seeks to apply the parol evidence rule selectively. In so doing, Complainant contradicts its earlier argument that the RFCA is an integrated agreement, representing the entire understanding of the

[13]As mentioned, the Integrated Monitoring Plan is a RFCA document. It is the operative sampling protocol under the RFCA. Answer to Complaint at 1.

parties, and its position that the parol evidence rule should apply to prevent the use of such extrinsic evidence. The RFCA's Integrated Monitoring Plan provides the following with respect to samples taken for monitoring purposes:

> (1) Termination for Cause: Completion of a flow-proportional composite sample is determined by several factors that are evaluated by the sampling team. These include, but are not limited to, the required sample volume analysis (normally [greater than or equal to] four liters), weather conditions, work schedules, sample preservation, potential loss of data, regulatory reporting schedules, and other concerns.[14]
>
> (2) Not Sufficient Quantity (NSQ): If sample accumulation is terminated for cause, and sample volume is inadequate for routine lab analyses, then no analyses are required, and **the sample will not be used in the computation of a 30-day moving average**. **For example, routine lab analysis for Pu, Am and tritium *requires* four liters**. Therefore, samples less than four liters may be discarded and not used in the computation and evaluation of compliance parameters, but must be reported. This requirement may be referred to as the NSQ requirement regarding insufficient quantity of sample. (emphasis added)

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[14]DOE maintains that the 800 milliliter sample was terminated for cause and points out that at the hearing, Complainant agreed that it was "proper [for DOE] to discontinue the sampling." Respondent's Post-Hearing Brief at 3. DOE removed the sample because of an impending pond discharge. Id. In its Post-Hearing Brief, DOE points to testimony by Complainant's witness, with respect to the termination of the sampling:

> Q. Do you agree that removing the bottle and replacing it with a new bottle for sampling when pond discharge is about to occur is proper?
> A. Yes, I believe that's the normal procedure in order that the base flow in this pond discharge flow would not be mixed, so that we could have a measure of one as opposed to the other.
> Q. So it was quite proper for DOE to stop sampling at that point in time and place another bottle in the stream?
> A. Yes...

T.R. at 133, Testimony of Fraser. Given the basis for this decision, this aspect, as with that mentioned in footnote 7, while noted, is unnecessary to resolve.

In asserting that the IMP requires a showing that the sample volume be inadequate for routine lab analysis, EPA's engages in a selective reading of the that plan. While the IMP does speak to the situation when a sample accumulation is terminated for cause and the sample volume is inadequate for routine lab analysis, the plan goes on to give a specific and unqualified example of the adequacy required for routine lab analysis. In fact in the example the IMP specifically addresses the very substances involved in this complaint, plutonium (Pu) and americium (Am), by succinctly stating "...routine lab analysis for Pu, Am and tritium requires four liters." Nevertheless, while four liters is the described *required* amount for lab analyses, the IMP goes on to provide that although such short samples, samples which are specifically identified as those that are less than four liters, may be discarded and *not used* in the computation of compliance parameters, they still must be reported. It is apparent from this portion of the IMP that samples must be four liters for routine lab analysis. It is also noteworthy that plutonium (Pu) and americium (Am) are specifically identified in the RFCA.

EPA's second criterion for not using a short sample is both procedural and equitable in nature. Under this view, DOE's failure to designate the sample as "NSQ," followed by its act of analyzing and reporting the results, bars it from objecting to its use in the computation of the compliance parameters. EPA takes this position despite admitting that DOE had the option under the IMP to discard the sample.

As a preliminary observation, it appears to the Court that EPA's second criterion conflicts with its own first criterion. While EPA's first criterion requires a showing of inadequate volume for lab analysis, the second criterion seems to ignore that requirement, by allowing a volume that is adequate for lab analysis to still be deleted where a respondent simply

exercises the option to discard the sample. Thus, while asserting that the substantive test of adequacy for lab analysis should control the outcome, EPA concedes that the substantive basis may be defeated at least when a respondent exercises the proper procedural steps.

Apart from this conflict in EPA's analysis, the IMP does not express any such procedural default as EPA reads into the document. Nor does the document identify "reasonableness" or "appropriateness" as the touchstones for consideration of short samples. Rather, the IMP declares, without exception or qualification that routine lab analysis for Pu, Am and tritium *requires* four liters. It would not have been a difficult drafting task for the IMP to have expressed that samples of less than four liters would be perfectly acceptable for evaluation of compliance parameters as long as the samples were of a quantity sufficient to perform the laboratory analyses. The document does not express such an intention.

Because the RFCA is an integrated agreement representing the final intentions of the parties, there is no reason to assume, as Complainant does, that samples less than four liters are acceptable samples to be used to measure compliance with the surface water quality standards. There is nothing in the agreement that would alert DOE that Complainant could deem valid a sample less than four liters and base the determination of a violation on such a sample.

Complainant argues that *hearing testimony* establishes that the four liter requirement was "an accommodation for the laboratory, not a scientific or analytical requirement."[15] Complainant's Reply to Respondent's Post Hearing Brief at 3. However, Complainant misses the point. The IMP, which, as part of the RFCA, serves as an expression of the parties' final

[15]Complainant's expert witness, Mr. William Fraser, an environmental engineer, testified that the IMP requires a sample to be four liters in total, and not for each substance individually. See T.R. at 140.

intentions, does not leave room for such an interpretation. The agreement unambiguously requires a four liter sample. Complainant's testimony that the parties decided on the four liter requirement because it "leaves enough water left over after the initial analysis for a reanalysis to be done, should there be problems..." can no more be admitted to contradict the plain terms of the RFCA than the testimony to which EPA objected when Respondent was attempting to violate the parol evidence rule in the face of terms it found unfavorable in the same document. T.R. at 140, Testimony of Fraser.[16] Regardless of whether the Complainant or Respondent is the source of testimony seeking to alter the terms of the agreement, neither can change the plain wording of the agreement. The IMP unambiguously requires samples of four liters for analysis and does not provide any exceptions or alternatives. Accordingly, the plain meaning of the agreement governs, regardless of why the parties decided on four liters as the requirement, as it represents the final expression between the parties.[17] Thus, determinations of compliance with

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[16]It is interesting to note that a reanalysis was conducted for all of the samples factored in in the composite, *except* for the May 15, 1997, 800 milliliter sample. T.R. at 140.

[17]Nor is this conclusion impacted by the parties stipulations as to the accuracy of the monitoring results. In large measure, the arguments on this aspect echo those already advanced. Both parties agreed that the sample "met the Rocky Flats' quality assurance and quality control (QA/QC) requirement for such samples, set forth in [the] RFCA, and therefore are valid, accurate monitoring results for this sample." Joint Stipulation of Facts at 3. This sample, although only 800 milliliters, passed the QA/QC, meaning that the "error was within acceptable limits for that sample." T.R. at 142. Given that DOE reported the sample to EPA as a valid result, as opposed to identifying the sample as a NSQ, Complainant used the sample in calculating the 30-day moving average. T.R. at 113. From this Complainant argues that because DOE agreed that the monitoring results were valid and accurate, and DOE reported the results, there was no reason to exclude the results of the 800 milliliter sample in determining whether there was an exceedance of the surface water quality standards.

DOE, on the other hand, maintains that despite the fact that the analysis of the sample in question produced valid results, *the plain meaning of the agreement dictates that the sample must be four liters*. In support of this argument, DOE adds that "no reference is made to QA/QC in ...[the NSQ] of the IMP," asserting that because no such reference was made, the parties did not contemplate that having a sample that met QA/QC standards would negate the

the surface water quality standards may not be based on evaluations of samples less than four liters.

Conclusion[18]

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four liter requirement. Respondent's Reply to Complainant's Post Hearing Argument at 2. As the parties agreed to the four liter requirement, and nothing in the IMP permits QA/QC standards to override this prerequisite, DOE concludes that the agreement should control.

Mr. Fraser also opined during his testimony that DOE should have reported the sample as NSQ if it did not want to be penalized for the exceedance, given that the sample was less than four liters. He noted that in the past, DOE had used the NSQ designation for particular samples, both prior to taking the 800 milliliter sample, and after reporting the 800 milliliter sample. T.R. at 113. Nonetheless, the inference that Mr. Fraser hopes the Court will draw from this testimony, that because DOE at other times had reported samples as NSQ, DOE must have decided that this 800 milliliter sample be included in analyzing for exceedences, does not vitiate the IMP's unambiguous requirement of four liter samples. As the agreement is clear on its face, the Court finds that the stipulations do not provide a basis for deviating from the terms of the RFCA.

[18]Although it is unnecessary to reach the issue, the Court also expresses its view that, had the violations been established, on this record only a nominal penalty would be in order. The reasons for this conclusion in the alternative are persuasively set forth in the Complaint itself. In that document the EPA acknowledges that "[t]he circumstances which led to this release are complex, and still not well understood ... [c]omplainant recognizes that this situation is not wholly within Respondent's control." Complaint at 5. In its post-hearing brief, EPA admitted that "no action or failure to act by Respondent was directly responsible for this particular release." EPA Brief at 6. EPA also conceded that " ... the data report[ing] [the exceedances] may be indeterminate regarding the time period over which concentrations in the stream actually exceeded the numeric standards ... [and that Respondent undertook] an aggressive and prompt response ... to investigate the violation and that [those] studies are ongoing." Complaint at 5. In addition, by joint stipulation, the parties agreed that while the reported concentrations created the potential for exposure of environmental and/or human receptors in downstream areas, "no measurable adverse effects are anticipated." Joint stipulation 13. The Complaint additionally concedes that the Respondent gained no economic benefit or savings in connection with the alleged violations and that its response actions "should contribute to minimizing future violations. Id. Further, at the hearing, EPA, while attempting to posit that there were measures the Respondent could take to prevent future exceedances, conceded that such measures "were not practical for the event that caused the water quality violation in 1997..." Tr. 122. In fact, under the parties joint stipulations, EPA agreed that no "discrete source of the plutonium and americium" could be identified and "there was no practical mitigation measures that could be taken." Joint stipulation 12. Beyond these considerations, it is noted that EPA has no penalty policy for CERCLA violations. EPA offered no testimony of the relative hazards of the

Based on the foregoing, Respondent is found not liable for either of the two alleged violations of section 120 of CERCLA, 42 U.S.C. 9620. Accordingly, the Complaint is dismissed.

So Ordered

Original signed by undersigned

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William B. Moran
United States Administrative Law Judge

Dated: June 28, 2000
Washington, D.C.

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substances involved; instead it arrived at an identical sum for both americium and plutonium. This is perplexing given that the number of days for both alleged violations was very different; the plutonium violation lasted nearly twice as long as that for americium. Further, while the exceedance for plutonium was allegedly 0.465pCi/L, and the americium measurement, at 0.256p/Ci/L, was slightly more than half that amount, no testimony explained the relative hazards presented by these different concentrations. Yet EPA, without explanation, arrived at an identical proposed penalty of $22,500. for each violation. Further, less than four pages of the hearing transcript deal with EPA's explanation for the penalty it advocated. Were it necessary for the Court to have formally reached the penalty issue, having duly considered the nature, circumstances, extent and gravity of the violations, as well as the ability to pay, prior history, degree of culpability, economic benefit or savings, and the other factors, as justice required, the penalty imposed would have been $1,000.00 (One Thousand Dollars) for the plutonium violation and $750.00 for the americium exceedance.