UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
U.S. Department of Energy	)	**Docket No. RCRA-10-99-0106**
Hanford Nuclear Reservation,	)	
	)	
Respondent	)	

Determination Regarding CERCLA and RCRA Jurisdictional Relationship

I. Introduction.

"Oh, East is East, West is West, and never the twain shall meet.."[1]

In this proceeding under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.§ 6901 et seq., Kipling's words seem appropriate, as a central issue in this case involves whether waste derived from well maintenance activities in an area described as the Hanford 200 *West* Area was properly stored at the Hanford 200 *East* Pipe Yard. EPA has alleged that the U.S. Department of Energy, at its Richland Operations Office, Richland, Washington ("DOE, Hanford")[2] violated sections of the Washington Administrative Code ("WAC") by storing drums of dangerous waste without

[1]Rudyard Kipling, The Ballad of East and West.

[2]Although the formal caption of the case, as reflected above, has been changed, the Court will refer to the Respondent as "DOE, Hanford"or "Hanford," both for ease of reference and to aid in the public recognition of the case.

complying with certain pre-permit and permit requirements. One aspect of DOE Hanford's defense[3] is that the permit requirements were not required by virtue of Section 121(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601.

Section 121(e)1, the provision in issue, provides:

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

During the prehearing conference held on September 23 and 24, 1999, this Court directed that the parties brief the issue of the relationship between RCRA and CERCLA.

II. The Arguments Presented[4]

The Position of the United States Environmental Protection Agency

EPA acknowledges that Hanford is subject to both CERCLA and RCRA, but maintains that in this case Hanford does not meet the permit exemption requirements of Section 121(e).[5] In its

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[3]This Determination addresses only Count 1 which alleges the storage, in 17 drums, of dangerous waste, without the appropriate RCRA permit. Count 2, alleging a failure to make a dangerous waste determination, is unaffected by this Determination. Count 3, alleging a failure to amend a contingency plan, was withdrawn by EPA, with prejudice, during the September 24, 1999 Prehearing Conference. Tr. 34-35. While this Determination does not explicitly address every point made and argument advanced, the entirety of the parties' briefs were considered.

[4]The synopsis under this section represents the Court's characterization and interpretation of the parties' positions. It is also noted that on January 28, 2000 the Court received, via facsimile and subsequently by mailing, a two page letter from the office of the Attorney General of Washington, Ecology Division, supporting EPA's position in this matter. The letter, which was unsolicited, played no role in the Court's evaluation of the issues involved in this Determination.

[5]In addition to not meeting Section 121's prerequisites for a permit exemption, EPA maintains that DOE Hanford had an agreement with the state of Washington Department of Ecology: The Strategy for Management of Investigation-Derived Waste ("IDW Agreement"). Although this agreement looked to the Tri-Party Agreement for the division of operable units within the Hanford Site, it provided that the exact location for centralized waste container storage within a unit was to be agreed upon. In this instance the IDW Agreement provided, in effect, that the well maintenance waste should have been stored at the Centralized Waste Container Storage

analysis, EPA parses the section at issue to support its argument that the elements required for permit exemption are not present. Noting first that the section applies only to those removal or remedial actions that are conducted *entirely onsite*, EPA observes that *onsite* is defined as:

> the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.[6]

EPA challenges Respondent's attempt to lump all of Hanford[7] or all of the 200 Area National Priorities List ("NPL") as *onsite* because these are geographical designations, not an areal extent of contamination nor within very close proximity to one nor necessary for a response action. Although conceding that the 200 Area was identified on the NPL, EPA maintains that the description was only a general identification of the area, necessitated by the fact that the precise nature and extent of contamination within the 200 Area was unknown at the time of the NPL listing.[8]

Area in the 200 West Area operable unit and the parties had selected two such storage areas in the 200 West Area. *See* EPA exhibit 16.

Even prior to the IDW Agreement, EPA and Respondent had an earlier agreement addressing the issue, a June 1993 document entitled "Control of CERCLA and other Past Practice Investigation Derived Waste." In turn, it spawned an Environmental Investigation Instruction which spelled out that such waste be located within the boundaries of the operable unit from which it was generated. Under neither of these agreements is the 200 East Pipe Yard identified as a storage location for waste derived from the 200 West units. Further, EPA observes that Respondent's own contractor recognized that, by moving the drums from their location within the boundaries of its original operable unit, the waste should have been reclassified as RCRA waste. *See* EPA exhibits 15, 21.

[6]EPA looks to the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") for the definition of "onsite." EPA Memorandum at 3.

[7]If one accepts, for purposes of the permit exemption issue before the Court, that the 200 Area NPL site must be further distinguished to identify distinct areas within it, then *a fortiori,* the notion that the entire 560 square miles that composes the Hanford site is itself within the permit exemption is rejected. Consistent with its primary argument, EPA asserts that references in the Tri Party Agreement ("TPA," and, more formally, as the Hanford Federal Facilities Agreement and Consent Order) to "Hanford" or the "Hanford Site" do not trigger the permit exemption provision because such descriptions do not involve the areal extent of contamination nor areas within very close proximity to such and necessary for a response action.

[8]The Court notes that EPA is correct in asserting that the inclusion of the 200 Area on the NPL does not mean that the entire area is therefore "onsite" as the NPL is "primarily ... an informational and management tool ... the listing process itself is not intended to define or reflect

EPA also contests Respondent's attempt to define *onsite* as referring to the boundaries of legal ownership or as coextensive with the CERCLA definition of "facility," again because neither of these measures relate to the areal extent of contamination, or very nearby such contamination, which is the focus of permit exemption provision.

It is not enough, EPA asserts, to qualify for the exemption by merely being in the 200 Area of Hanford. EPA notes that the drums which are the subject of this action, and which were deemed hazardous by virtue of the carbon tetrachloride inside them, were stored in the 200 East Pipe Yard, which is not near the source of the carbon tetrachloride contamination in the 200 West Area. Further, it contends that the underlying groundwater plume contaminated by the carbon tetrachloride does not extend even to the border of the 200 East area, let alone to the 200 East Pipe Yard. Rather, the 200 East Pipe Yard is some five miles away from the contamination source in the 200 West Area and four miles beyond the contaminated plume it created.

EPA also maintains that the Section 121 permit exemption does not apply because there has been no showing that storage of the drums in the 200 East Pipe Yard was part of any removal or remedial action carried out in compliance with that section. To so qualify, an action must be authorized under the remedial action provisions of the Section, a process requiring a determination that it is necessary to be carried out under CERCLA Section 104 or secured under section 106, the abatement actions provision, and also in concert with Section 120, the federal facilities section. As there is no identified authorized removal or remedial action,[9] this provision does not apply. The source, EPA argues, for any such authorized actions would be found in groundwater remedial actions for the 200 West Area. Yet, it notes, the RODs for the operable units in the 200 West area make no mention of storage in the 200 East Area.

In response to the Respondent's reasoning that since Section 121's reference to "onsite" includes those areas close to the area of contamination that are *necessary* for implementation of the response action, and consequently that it is arguable that data from the wells as well as the maintenance of the wells, fall within the Section's exemption, as both aspects are also *necessary*, EPA views such contentions as irrelevant to the true issue at hand: whether storage of waste in the 200 East Pipe Yard was necessary for implementation of a response action.

EPA also argues that, apart from Respondent's failure to meet CERCLA's Section 121 permit exemption, coverage of the 17 drums at issue here makes sense under RCRA, as Respondent is a generator, a transporter, as well as an owner and operator of a facility that treats, stores and disposes

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the boundaries of such facilities or releases." 54 Fed. Reg. 41017-18 (1989).

[9]EPA notes that to qualify under this section there would have to have been a remedial investigation and feasibility study ("RI/FS") and its memorialization in a Record of Decision ("ROD").

(a "TSD facility") of hazardous waste.[10]

Complainant also points to EPA's 1989 promulgation of the CERCLA NPL Listing Policy. Under the policy, federal facilities are placed on the NPL while still being regulated under RCRA. Further, EPA notes that CERCLA Section 120(i), entitled "Obligations under Solid Waste Disposal Act," which specifically addresses federal facilities, provides:

> Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [42 U.S.C.A.§ 6901 et seq.] (including corrective action requirements).

42 U.S.C.§9620(i). EPA believes this policy reflects its intention to implement both RCRA and CERCLA at federal facilities in a manner which avoids duplication.

EPA also observes that although CERCLA Section 120 (e) requires an interagency agreement between the federal facility and the EPA to address remedial issues at the facility, and that such an agreement, referred to as the "Tri-Party Agreement,"[11] ("TPA") has been executed and amended several times, the agreement, which identifies TSD units and "past practice" units, does not speak to the 200 East Pipe Yard. Significantly, the TPA provides that it does not preclude the exercise of administrative or judicial remedies "[i]n the event or upon the discovery of a violation of, or noncompliance with, [the agreement] or *any provision of CERCLA,* [or] *RCRA ...not addressed by this Agreement.*" TPA, Complainant's Exhibit 10, at p. 72. (emphasis added).

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[10]In fact, in 1980, DOE Hanford identified itself as such and identified the storage drums at the 200 East Pipe Yard as a less than 90 day storage area. EPA exhibit 3. Once the 90 day storage period has elapsed, the entity is a designated TSD facility, and becomes subject to the permit requirements of RCRA Section 3005. Within this section there is also a provision allowing a facility to acquire interim status pending a permit issuance. While Hanford obtained such interim status for several TSD units, the 200 East Pipe Yard was never so identified and consequently no permit or interim status was ever sought for that area. EPA also notes that while Hanford received a RCRA permit in 1994, it covered, initially, only five TSD units with other units required to go through the interim status procedure. The 200 East Pipe Yard, however, has never been identified as a TSD unit under either the Part A or Part B provisions so that it could potentially be included within the Hanford RCRA permit. However, the Court observes that, consistent with its position in this case, DOE is asserting that it never took those steps because it believes the 17 drums come within the Section 121 exemption.

[11]The Tri-Party Agreement, dated May 15, 1989, is formally identified as the "Hanford Federal Facility Agreement and Consent Order."

The Position of the United States Department of Energy

Looking at the statutory language that EPA has interpreted, as disqualifying DOE Hanford from the CERCLA Section 121(e)(1) permit exemption, Respondent interprets the same provision as demonstrating that EPA lacks jurisdiction as to Count 1 because, in its view, the language serves to preempt any RCRA permit requirement. DOE asserts that the "[v]arious exhibits accepted by the Court[12] at pre-hearing conference as relevant and material demonstrate that the storage of the seventeen drums was ... part of a removal action ...[that] was "conducted entirely onsite." DOE Brief at 3.

In support of its position, DOE Hanford first notes that RCRA is "prospective in orientation and preventive in application"[13] and consequently it was not intended to cover pre-existing contamination of environmental media by hazardous waste. RCRA, DOE maintains, "was designed to prevent spills of concentrated hazardous wastes into the environment." DOE Brief at 6. In contrast, CERCLA is aimed at the cleanup of releases of hazardous substances "that occurred historically, that is months, years, or decades in the past," not the ongoing management of hazardous waste from industry. Consistent with this thrust, CERCLA authorizes removal and remedial actions to deal with spills and to undertake cleanups. Thus, DOE argues, "CERCLA is concerned with cleaning up vast quantities of soil and groundwater that have been contaminated by spills or releases ... in the past." In addressing these problems, one aspect involves groundwater sampling wells which are installed to determine the nature and extent of the contamination.

CERCLA, DOE asserts, has priority over other environmental statutes, so that it can "intervene actively and promptly to prevent harm ...from hazardous substances that *have already been released into the environment*." DOE Brief at 6, (emphasis added). Respondent contrasts CERCLA with other environmental statutes which are designed to "prevent prospective human activities that could be harmful to the environment." These other statutes use the time consuming permit process which if applied in a CERCLA context could "interfere with prompt initiation of clean-up actions where a spill has already occurred and is spreading through the enviroment." *Id.* at 7. Thus, DOE maintains that Section 121 was enacted to ensure that "well intended regulatory processes [such as federal, state or local permits] do not in fact hinder cleanup." *Id.* In place of requirements, such as the permitting process, Section 121 envisions a review and selection process to identify the appropriate substantive requirements that should have "applicability to a given cleanup activity"and then to select those "Applicable or Relevant and Appropriate Requirements" ('ARARs'). While ARARs may adopt

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[12]DOE overstates the Court's position. Documents admitted at the Prehearing Conference were admitted preliminarily, meeting an initial hurdle for materiality and relevancy, but still subject to later challenge before final admission as exhibits. Tr. 129, and 7, 52, 99, 149. In any event, the acceptance of exhibits does not infer acceptance of the import that a party attaches to them.

[13]However, Respondent concedes that, while originally prospective, amendments to RCRA in 1984 required corrective action cleanup as a precondition to granting certain permits. Respondent's Brief at 4.

RCRA requirements, DOE argues that the RCRA provisions are not independently viable but rather have effect only when adopted through this CERCLA process. *Id.* at 8.

Section 121(e), asserts DOE, was intended to avoid the delays that are attendant to permitting, and thereby not slow down the remedial actions. In fact, DOE notes, EPA has used this section to defeat assertions by local governments who raised permit requirement claims in attempting to block EPA ordered response actions.

Although the parties have very different views of the impact of Section 121's exemption in this RCRA proceeding, they are in apparent agreement that the Section's exemption is implemented by regulation contained in the National Contingency Plan ('NCP'), which is the source for the definition of *on-site*[14]. Relying upon the implementing provision at 40 CFR § 300.400(e) that "[n]o federal, state, or local permits are required for *on-site* response actions conducted pursuant to CERCLA sections ... 121..." (emphasis added), DOE asserts that "EPA broadly applies the exemption of CERCLA response actions from RCRA permits at all Superfund sites..." and points to EPA's RCRA, Superfund & EPCRA Hotline Training Module, Introduction to: Applicable or Relevant and Appropriate Requirements, EPA 540-R-98-020, June 1998 which provides:

> EPA interprets CERCLA §121(e) broadly to cover all administrative provisions from other laws, such as recordkeeping, consultation, and reporting requirements. In other words, administrative requirements do not apply to on-site response actions ... Only the substantive elements of other laws affect on-site responses. Furthermore, where RCRA hazardous waste is stored on site for more than 90 days, and then transported and disposed of off site, EPA would not have to obtain a storage permit, but would have to adhere to all federal and state administrative standards pertaining to off-site transportation and disposal.

DOE Brief at 9-10 ("1998 RCRA Training Module") (Respondent's emphasis of words in quoted portion deleted.) Furthermore, DOE contends, CERCLA Section 113(h) bars federal court challenges to removal or remedial actions.

Beyond these arguments, DOE claims that the remedial action decision process is the equal of the permit process. This process starts with a Remedial Investigation and is followed by a Feasibility Study and finally by the proposed remedy, as identified in the ARARs. In DOE's view this alternative regime provided by CERCLA is "better oriented toward accomplishing an expeditious

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[14]DOE refers to the regulation contained in the NCP at 40 CFR § 300.400 (e), which employs the same definition of *on-site* (i.e. 'the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action') that EPA relies upon in its argument to demonstrate that the permit exemption does not apply in this instance.

environmental cleanup." Further, the lengthy permit process works against a rapid removal reaction to environmental threats. Investigation Derived Wastes (IDW), an unavoidable byproduct of a CERCLA response action, are similarly within the exemption of Section 121.

DOE also looks to the National Priorities List ("NPL") which, as an attachment to the NCP regulations, is used as a starting point in identifying CERCLA boundary sites. The task of boundaries identification is vested with DOE as the lead CERCLA agency at Hanford.[15] In this regard it points to the Hanford 200 Area NPL Site Narrative description of that area. It is this broad description of the site, DOE asserts, that forms the basis for determining the permit exemption's reference to "onsite" encompasses the 200 East Pipe Yard within that term. *Id.* at 14-15.

DOE concedes that, with the 1986 SARA amendments, and the consequent addition of Section 120 to CERCLA under those amendments, it is EPA that approves the final selection of a remedial action at federal facilities that are on the NPL. For each facility the provision is implemented through a Federal Facility Agreement ('FFA'). In Hanford's case, the FFA is the Hanford Federal Facility Agreement and Consent Order ('HFFACO'), more popularly known as the 'Tri-Party Agreement.' However, Respondent notes that under the Tri-Party Agreement, DOE retains the authority to conduct removal actions. EPA's regulations implementing CERCLA, as reflected in the National Contingency Plan ('NCP'), also make clear that DOE is the lead agency implementing CERCLA at its facilities through its selection of the Remedial Project Manager ("RPM"). Respondent emphasizes that under the NCP, the RPM, as the lead agency's representative, with the authorities of CERCLA § 104, conducts remedial or other response actions. In this regard, Respondent refers to 40 CFR § 300.120(f) which provides that the RPM is the "prime contact for remedial or other response actions ... at sites..." *Id.* at 15-16.

On this basis, Respondent contends that "[c]learly, the precise delineation of what is "on-site" at a given CERCLA release is a determination that is made by the RPM as part of the RPM's duty to determine what [constitutes] the 'areal extent of contamination'...[as well as] what is suitable and necessary for implementation of the response action." It is on this foundation that Respondent asserts that DOE's determination, (as agreed to by EPA and memorialized in the HFFACO), that the entire Hanford reservation is a single unitary site for purposes of Section 121(e) is controlling.[16]

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[15]DOE, citing to State of Ohio v. USEPA, 997 F.2d 1520 (D.C.Cir. 1993), maintains that whoever has the designation of CERCLA lead agency holds the authority to define the CERCLA site in order to achieve the maximum response action benefit under Section 121(e). Although the D.C. Circuit wrestled with the NCP's definition of "onsite," the case does not stand for the proposition that the "designated CERCLA lead agency" has broad discretion to define each CERCLA site, if that phrase is intended to apply to an agency other than EPA.

[16]As an example of Hanford's site-wide exemption from RCRA permits, Respondent points to the fact that it has excavated over a million tons of contaminated soil from the site and deposited them in the Environmental Restoration Disposal Facility ('ERDF') within the Hanford 200 Area without ever being required to obtain a RCRA permit for that disposal. Respondent's

Respondent also points out that, while no permits are required for CERCLA response actions, it still has the responsibility to comply with its "facility-wide RCRA permit," which speaks to the storage, treatment and disposal of wastes not addressed by such response actions. *Id.* at 18-19.

Respondent also refers to the IDW Strategy,[17] stating that it applies to site characterization and environmental investigations that include drilling and well maintenance activities. Under it, long term storage of IDW is permitted until the response action is taken. DOE maintains that under the IDW studies and investigations under CERCLA § 104 are removal actions which, when dealt with on-site, do not require adherence to administrative requirements such as obtaining permits.[18]

Last, DOE asserts that EPA has confused the term "site" with "operable unit." DOE contends that EPA's argument that a CERCLA permit exemption is limited to response actions within a single operable unit, misconstrues the term "operable unit," as defined at 40 CFR § 300.5, because an operable unit is "a grouping of logically related response activities," not a geographic designation. *Id.* at 21. As an example, DOE contends that a single unit for soil cleanup could include a number of separate spills of similar hazardous substances though separated by miles. Thus DOE asserts that a CERCLA site encompasses all like operable unit activities within the site and that operable unit plans can not alter the lead agency's determination of a what constitutes a "site.[19]"

As an secondary position, DOE also contends that, even if its interpretation of Section 121 is rejected, CERCLA Section 113 bars federal courts from hearing challenges to CERCLA response

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brief at 18.

[17]Respondent's Exhibit, R-130 and Complainant's Exhibit, C-EX 16.

[18]DOE takes issue with EPA's interpretation of the IDW Strategy and its reference to an "area of contamination being defined as an operable unit" because the phrase does not define what is meant by "on-site." Rather it views the area of contamination as a concept which allows contaminated soil and water to be removed and placed within the boundaries of the same area of contamination without adhering to the RCRA Land Disposal Restrictions and which is unrelated to the CERCLA § 121 permit exemption. In this respect DOE views the Land Disposal Requirements as substantive requirements which still apply even though exempt from a permit under Section 121. Areas of Contamination do not define a CERCLA site because the operable unit response actions do not define the CERCLA site. The IDW Strategy, DOE notes, no longer discusses AOCs and operable units, a fact which DOE interprets to mean that the terms are no longer essential to the management of IDWs at Hanford.

[19]DOE also refers to another federal facility agreement under CERCLA § 120 to establish that its interpretation of "onsite" is consistent with those here. DOE points to the Idaho National Engineering and Environmental Laboratory (Idaho Site) federal facility agreement, in support of its position the boundaries of that site, for purposes of the CERCLA permit exemption, encompass the entire site.

actions.[20] Respondent refers to Heart of America Northwest v. Westinghouse Hanford Company[21], 820 F.Supp. 1265 (E.D. Wash. 1993), a citizen suit seeking to enforce certain RCRA provisions against CERCLA activities at Hanford. After determining that the Hanford Federal Facility Agreement and Consent Order was an integrated CERCLA response action encompassing remedial actions, the Court applied Section 113(h), determining that the section required dismissal for lack of jurisdiction.

Reply Briefs[22]

EPA's Reply

EPA contends that Respondent continues to make general assertions regarding well maintenance activities in the 200 West Area without any showing that storage of the drums in the 200 East Pipe Yard or that the waste in those drums was part of any CERCLA response action. EPA notes that there are many wells at Hanford some of which are associated with other regulatory programs, such as RCRA and the Atomic Energy Act. Thus, preliminarily, to come within Section 121(e)(1), EPA contends that DOE must demonstrate that the wells and the well maintenance were part of a particular CERCLA response action.

Second, even if DOE is able to tie the waste to a particular CERCLA response action, there has been no showing that *storage* of it in the 200 East Pipe Yard was authorized under any IDW strategy. The fundamental issue, EPA contends, is whether the *storage* was part of any CERCLA response action; that is, the storage must be shown to be part of a CERCLA removal or remedial action. Yet Respondent is unable to point to any Record of Decision or other authority such as identification of any ARARs pertaining to storage of waste in the 200 East Pipe Yard. This is of particular significance, EPA notes, because where the permit exemption does apply, the substantive requirements of such permits still exist through the ARARs. In fact, the Hanford TPA provides that in such instances there be identification of each permit that would otherwise be required together with

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[20] Section 113(h) provides: "No Federal Court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) 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 or to review any order issued under section 9606(a) of this title, in any action except one of the following....[exceptions not listed as none pertain Section 9621].

[21]Respondent also refers to McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325 (9th Cir. 1995), for the principle that an injunction requiring compliance with RCRA permitting requirements would interfere with CERCLA cleanup.

[22]Although the Court's summary of the Reply Briefs summarizes new points only, all arguments were considered.

other information demonstrating equivalent satisfaction of the permit requirements.[23] See Hanford TPA at page 42, Complainant's Exhibit 10.

Addressing DOE's claim that the Hanford TPA supports the assertion that all of Hanford is onsite, EPA notes that the claim rests upon the TPA's definition of "Hanford" and "site" along with the Agreement's recognition that Section 121's permit exemption applies to the Hanford Site. EPA points out that the TPA does not spell out what is considered *onsite* for purposes of Section 121 and could not, because the determination of onsite is not a generic determination but rather it is a "response action-specific analysis."[24]

Similarly, EPA contests Respondent's analogy to the ERDF's[25] lack of a requirement for a RCRA waste disposal permit. Unlike the situation for the 200 East Pipe Yard, the ERDF was specifically created as part of a CERCLA remedial action for the disposal of waste generated during CERCLA actions, and was documented by a ROD.[26]

Further, EPA contends that other Hanford CERCLA waste management practices also refute DOE's contention that all of Hanford is "onsite" for purposes of the permit exemption. As in the case of the ERDF, waste generated from a CERCLA response action is not automatically exempted from

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[23]As another example in support of EPA's argument that documentation must back up permit exemption claims, EPA notes that the NCP also requires such information to support any CERCLA response action. EPA Reply at 5.

[24]Referring to Paragraph 63 of the TPA, EPA notes that only *portions* of the response actions which are conducted entirely on the Hanford Site are exempted from the permit requirement. EPA Exhibit 10. EPA also notes that the same Paragraph's reflection that the parties "recognize" that portions of the response actions are exempt from the permit requirements is a far cry from concluding the entire site is exempted. The effect of such a construction, in EPA's view, would negate the authority for existing RCRA permitted units that manage waste generated from CERCLA response actions as well as the Hanford RCRA Permit. In addition if all of Hanford were deemed to be onsite it would lead to untenable results as wildlife refuges and recreation sites also would be eligible for unpermitted waste storage.

[25]"ERDF," as noted at footnote 16, refers to the Environmental Restoration Disposal Facility.

[26]The "ERDF ROD" was issued in 1995 and provided for the construction of two landfill cells in the 200 Area of Hanford. Under the ROD investigation derived waste from the 100, 200 and 300 areas could be disposed at the ERDF. However, the ERDF ROD did not grant carte blanche authority to accept waste anywhere from Hanford. Further, the ERDF ROD addresses the otherwise applicable permitting requirements. EPA Reply at 7-8.

RCRA permit requirements without the receiving site also being created by a response action.[27]

Regarding DOE's reference to the Idaho Site[28], another location on the NPL, and to the interagency agreement for that site, EPA takes the position that Idaho issues are not dispositive of those at Hanford. Although EPA acknowledges that a letter regarding the site from DOE to its contractor asserts that the off-site rule does not apply, it maintains that such assertions do not change the fact that it is still EPA's responsibility to decide whether other waste receiving units, within the boundaries of a federal facility, are acceptable. Further, EPA maintains Paragraph 7.8 of the Idaho interagency agreement recognizes that on-going waste management activities (including obtaining permits) which are beyond the scope of the agreement still remain in effect and that, in fact, the Idaho site has been charged with storing waste without a permit. *Id.* at 11-12.

Finally, responding to DOE's alternative assertion that Section 113(h)'s provisions bar Federal court review of challenges to CERCLA Section 104 removal or remedial actions, EPA maintains that DOE has failed to show that the 200 East Pipe Yard was part of any CERCLA response action, nor addressed in any ROD and, at least in the Tenth Circuit, enforcement of a state's RCRA-delegated authority does not constitute a challenge to a CERCLA response action.[29] In sum, EPA asserts that the presence of a CERCLA response action is the *sine qua non* for either the Section 121 permit exemption or the Section 113(h) jurisdictional bar to apply. One does not reach Section 113 issues if the Section 121(e) defense fails.

The Department of Energy's Reply

As a preliminary matter, DOE maintains that EPA has taken the position that "the burden of persuasion, **both on the facts and the law**, as to the application of the CERCLA [section 121(e)] exemption" rests with the Respondent. DOE Reply at 2 (emphasis in original). In this respect, DOE correctly observes that "[i]ssues concerning the applicability of law are left to the courts for determination. The court makes its own determination as to what the law says...." *Id.* at 2-3. Further, *if* EPA in fact was suggesting otherwise, the Court agrees with DOE that the Complainant has the burden of presentation and persuasion as to all factual matters related to the alleged violation. However, as DOE has asserted that the activity in question comes within Section 121's permit exemption, it has the initial burden of production to show that the exemption applies. The Court notes that regardless of determining who goes first, both parties have spoken at length to this issue and that it is in a position to make a determination.

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[27]EPA cites as an example, the 200 UP-1 Operable Unit ROD which addresses contaminated ground water in that Unit. The contaminated water ends up in RCRA permitted unit in the 200 East Area. EPA Reply at 10.

[28]See footnote 15.

[29]EPA also contends that this administrative court is not a "Federal court" within the meaning of CERCLA Section 113(h).

Turning to the particulars, DOE at first maintains that it is not attempting to equate "onsite" with either all of Hanford or the entire 200 Area CERCLA NPL, but that DOE's decision in 1989 represents the definitive definition of the term for Hanford. Yet, having denied that it was so equating "onsite" with either broad area, DOE asserts that, as reflected in the HFFACO, the principals agreed that "all of the Hanford Site is "on-site." *Id.* at 6. Subsequently, DOE reiterates this position that "the best definition of "onsite" ...encompass[es] the entire Hanford Reservation. *Id.* at 12. Thus, in DOE's view, the HFFACO is controlling and the parties are therefore bound by its terms, terms which include an agreement that the permit exemption would be given broad application throughout the Hanford Site. This makes sense, in DOE's view, because curtailing the use of the permit process serves the "interest of expediting and simplifying the cleanup of hundreds of contaminated areas on the Hanford Site." *Id.* at 7.[30] As DOE sees it, EPA is simply attempting to create a new definition for "onsite" to suit its needs in this instance.[31]

DOE also asserts that EPA has attempted to selectively redefine the CERCLA "site" according to the extent of the carbon tetrachloride plume[32] and that such a redefinition conflicts with its earlier position that a "site" is defined by the geographical boundaries of individual operable units. In this regard it notes that two operable units, Unit 200-UP-1 and 200-ZP-1, address cleanup of carbon tetrachloride, with the former unit containing other contaminants.[33]

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[30]The Court notes that DOE's assertion and specific reference to paragraph 63 of the HFFACO overstates the extent of the claimed permit ban. The paragraph acknowledges that the permit exemption only applies to *portions* of the response actions. Further, Article XVIII, the permit section which includes paragraph 63, goes on to provide that, in instances where it is proposed that a response action be conducted entirely onsite, DOE must identify the standards, requirements, criteria, or limitations which would have been required under a permit and an explanation of how those requirements will still be met. Thus, it appears that the permit exemption is an exemption from the time consuming formality of obtaining a permit but not from the substantive requirements that would be attendant to it.

[31]The Court takes note that the HFFACO, in Article V, Defintions, does not, in fact, define "onsite" but rather generically lumps together and defines, as a distinct term, "Hanford," "Hanford Site," and "Site"generally. Definition "L." Further, the definition specifically notes it "is not intended to limit CERCLA or RCRA authority regarding hazardous wastes, substances, pollutants or contaminants which have migrated off the Hanford Site."

[32]DOE further asserts that EPA employs this same "selective redefinition" basis in attempting to attribute Fluor Daniel Hanford's statement that the storage of the 17 drums was subject to RCRA permitting as an admission of liability by DOE. In this respect, the Court does agree that Fluor Daniel's expression does not determine the resolution of the issue.

[33]In the view of the Court, DOE's characterization overstates EPA's position which is simply that the 200 East Pipe Yard is not *onsite* because it is not within the areal extent of the

DOE also contests EPA's position that a "site" is limited to various operable units within Hanford as the NCP definition of "operable unit" is not tied to a geographical designation. While conceding that from 1995 to 1999 DOE and EPA established a management practice of storing investigation derived waste within operable units, it states that this practice has been abandoned and maintains this investigation derived waste practice went beyond any CERCLA requirements. *Id.* at 15.

DOE also takes exception to what it characterizes as EPA's position that "all management of hazardous substances must be specified in detail in a Record of Decision (ROD)."[34] *Id.* at 17 Yet, in referring to the 200-UP-1-ROD for the proposition that RODS generally do not provide detail about where hazardous waste is stored, DOE's quote from that particular ROD seems to indicate otherwise by its statement that "This waste will be disposed of in the ERDF or other approved facility after meeting RCRA ARARS and other waste acceptance criteria." *Id.* Provisions such as these would seem to meet the requirements of HFFACO, Article XVIII pertaining to the permit exemption.

Last, DOE argues that the 200 East Pipe Yard was suitable for CERCLA storage as a natural and efficient repository for the well maintenance crews to leave the waste generated from their well maintenance activities. It adds that the storage area was fenced, and inspected weekly for container integrity and spill prevention.[35] *Id.* at 20

III. The Determination of the Court

The preliminary question regarding the relationship between RCRA's permitting requirements and the CERCLA permit exemption is easily resolved, as CERCLA Section 121(e)(1) does provide for the exemption of permits in certain limited circumstances. However the more difficult question presented is whether, in this case, the qualifying conditions for exemption are present.

Upon consideration, the Court concludes that the Department of Energy's arguments concerning

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carbon tetrachloride contamination in the 200 West Area nor in very close proximity to it.

[34]DOE, in the view of the Court, overstates EPA's position on RODS. Instead, EPA asserted only that "Respondent has presented no ROD *or any other appropriate decision document* that identifies the storage of hazardous waste generally at the 200 East Pipe Yard, or the 17 drums specifically, as a part of any CERCLA response action." EPA Brief at 5 (emphasis added).

[35]Given the Court's ruling on the issue, the significance of DOE's points as to the precautions it took at the Pipe Yard have potential significance only on the issue of an appropriate penalty.

CERCLA Section 121(e)(1)'s permit exemption must fail on several accounts. First, on its face, Section 121(e)(1) applies only to those removal or remedial actions conducted *entirely onsite*. The term "*onsite*" is not boundless; rather it is limited to the areal extent of contamination and suitable areas in very close proximity to such contamination. DOE has not challenged EPA's assertion that the 200 East Pipe Yard is some five miles away from the 200 West Area carbon tetrachloride contamination nor the contention that there is an approximate four mile separation between the 200 West contaminated plume and the 200 East Pipe Yard. Given this construction of "onsite," the Court rejects the contentions that the boundaries of legal ownership (i.e. all of Hanford) or the CERCLA definition of "facility" should be the measure of Section 121's applicability.[36] Nor does DOE's reference to the 1998 RCRA Training Module serve to answer the question regarding the scope of Section 121's permit exemption. Rather, it only begs the question, as it is dependent upon the interpretation of "onsite." Similarly, the Court rejects, as unwarranted, the expansive breadth DOE gives to the word "necessary" as it appears within the definition of "onsite." Further DOE's contention that the Remedial Project Manager has the last word in determining what is onsite has overtones of the fox guarding the coop and is contrary to its concession that Section 120 gives final selection of the remedial action at NPL facilities to EPA.[37]

Second, Section 121(e)(1) contemplates the presence of a qualifying action. With its applicability to "removal or remedial action[s] conducted entirely onsite," it is further limited by its restriction to that *portion* of any removal or remedial action. Here, EPA rightly points out that there is no showing that the *storage* of the 17 drums in the 200 East Pipe Yard was part of any such CERCLA removal or remedial action. Showing that the wells provided data regarding contamination, which data was used in selecting and planning CERCLA response actions, as well as showing that the waste was derived from well maintenance activities, does not, per se, speak to the propriety of the *storage* of that waste in the 200 East Pipe Yard. As the drum waste emanated from the 200 West Area, one would need to consult that area's groundwater remedial actions and the RODS associated with it or ARAR's relating to storage of waste in the 200 East Pipe Yard. It is also noteworthy that, while

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[36]For the reasons already stated, Respondent's reliance on the IDW strategy must fail, as it ultimately rests on an erroneous interpretation of "onsite." Similarly, DOE's reference to the apparently broad interpretation given to "onsite" at the Idaho National Engineering and Environmental Laboratory is not persuasive. That matter is not being litigated here and, as explained in this determination, the notion that the entire Hanford Site falls within the permit exception is without merit.

[37]Respondent, while maintaining that it is exempt from any permit requirement in this instance concedes that "it still has responsibility to comply with its 'facility-wide RCRA permit' [where such wastes are] not addressed by ... response actions." To the extent that DOE can show that it took action prior to the cited activity that was no different from, or equivalent to, the action that would have been required under the RCRA permit process, such a showing could potentially form a basis for reduction in the proposed penalty, as the substantive concerns over gravity would fade, leaving a procedural error and its attendant harm to the regulatory program. In this regard, DOE represented at the prehearing conference that it intends to show that many of the substantive RCRA requirements were met. Tr. 70-71.

Section 120(e) requires an interagency agreement addressing remedial issues, nowhere does the Tri-Party Agreement ("TPA"), as the reflection of this requirement, refer to the 200 East Pipe Yard as a waste repository.

Although the Court does not take issue with many of the broad assertions made by DOE regarding CERCLA and RCRA, such as its observation that CERCLA has priority over other statutes to avoid their potential interference with the "prompt initiation of clean-up actions where a spill has already occurred and is spreading throughout the environment," and to ensure that well intended processes, such as permits, "do not in fact hinder cleanup," such assertions are not applicable to the situation at hand, involving as it does, wastes which have been captured, and which then found their way, allegedly, to a non-designated repository. Thus, at least here, there has been no showing that the permitting process had the effect of slowing down or otherwise interfering with remedial actions.

It is important to bear in mind that Section 121's permit exemption only relieves a party from the permitting process, and not from the substantive requirements or their equivalence that would otherwise obtain. Indeed, DOE appears to recognize this by asserting that the remedial action decision process is the equivalent of the permit process and that the process is ultimately reflected in the ARAR. Accordingly, where a CERCLA 121(e)(1) permit exemption is claimed, the TPA provides for the creation of a paper trail to document the exemption and to ensure that, substantively, the same protection will obtain. Yet, DOE has not pointed the Court to any such documentation from this process which is directed to the designation of the17 drums to the 200 East Pipe Yard.

Finally, with respect to the issue of Section 113(h)'s applicability, the Court agrees with EPA that this section is engaged only after there has been a showing of a response action pertaining to the challenged activity. Here, as noted, it is a central aspect of EPA's case that there is no CERCLA removal or remedial action pertaining to the 200 East Pipe Yard.

In light of this Determination, the parties are directed to reevaluate their estimate of the time needed to present their respective sides at the hearing, presently scheduled to commence May 2, 2000, and to so advise the Court, via facsimile, by February 25, 2000. **No further motions will be entertained after February 24, 2000**. Motions are to be sent to the Court via facsimile as well as by regular mail.

William B. Moran
United States Administrative Law Judge

Dated: February 9, 2000

In the Matter of U.S. Department of Energy, Hanford Nuclear Reservation, Respondent
Docket No. RCRA-10-99-0106

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Determination Regarding CERCLA and RCRA Jurisdictional Relationship**, dated February 9, 2000, was sent this day in the following manner to the addressees listed below:

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