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## MEMORANDUM

TO: ENERGY COMMUNITIES ALLIANCE MEMBERS

FROM: MR. SETH KIRSHENBERG, ESQ.  
MS. KIMBERLY STEWART

DATE: JANUARY 12, 2006

RE: Court Ruling: Federal Agencies, when Undertaking a CERCLA §120 Cleanup of a Federal Facility Must Include Local Governments in the Cleanup Decision-Making Process.

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### SUMMARY

In an important decision for local government involvement in federal facility cleanups, the United States District Court, Eastern District of Washington (the “Court”) ruled December 30, 2005 that pursuant to Section 120(f)<sup>1</sup> of the Comprehensive Environmental Response, Compensation, and Liability Act<sup>2</sup> (“CERCLA”), as amended, local officials must be allowed to participate in the planning and selection of the remedial action (including but not limited to the review of all applicable data as it becomes available and the development of studies, reports and action plans) at a federal facility site that is being cleaned up pursuant to a “remedial action.”

CERCLA §120(f) states:

“(f) State and local participation

The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 9621 of this title.”

<sup>1</sup> 42 U.S.C. §9620(f).

<sup>2</sup> 42 U.S.C. §9601 et seq.

In *City of Moses Lake v. United States of America, et al.*,<sup>3</sup> the Court granted the City of Moses Lake, Washington (the “City”) a preliminary injunction against the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Army Corps”) (the federal regulator and the United States [the “Government”] agency cleaning up the site) from formally issuing an “interim” or “proposed” cleanup plan without providing the City with:

- (1) the opportunity to review all applicable data involving the site; and
- (2) the ability to participate in the “decision-making” with regard to the site.

## **BACKGROUND**

The City is located near the former Larson Air Force Base (“Base”), which was closed in 1966 and most of the land was conveyed to the City. Subsequently, in 1967, the Government conveyed the Base’s drinking water system, a sewer system, and a waste water treatment plant was conveyed to the City. In 1988, samples taken from three of the wells tested positive for trichloroethylene (“TCE”) at concentrations above the maximum contaminant levels and the initial stages of a CERCLA investigation began. In 1990, the Army Corps, the federal entity taking the lead for the cleanup, determined Moses Lake Wellfield Contamination Site (“Site”) was eligible for funding for further environmental investigation as a Formerly Used Defense Site (“FUDS”) under the Defense Environmental Restoration Program<sup>4</sup> (“DERP”). In October 1992, EPA placed the wells on the CERCLA National Priority List (“NPL”).

The case arose in an action by the City against Lockheed Martin Corporation (“Lockheed”), Boeing Company (“Boeing”), the Government and various agencies of the Government, seeking damages, declaratory relief, and injunctive relief pursuant to CERCLA against all defendants, Washington’s Model Toxic Control Act against Boeing and Lockheed and Federal Tort Claims Act against the Government.

In addition, the City asked that the Army Corps invite the City to participate in the meetings between EPA and the Army Corps on the cleanup of the Site. The City wrote to the Army Corps, “. . . We expect the City to be extended an invitation to future Corps’ meetings with EPA regarding remedy selection.” The Army Corps denied the request by responding:

“We are working with EPA and there will be time for notice and comment. To date the City has been provided numerous opportunities to participate in public meetings and to provide comments to documents, as well as to review and comment upon anything in the Administrative Record for the NPL Site response actions. . . Please note the public repository is updated and you should periodically check it for new information.”

After attempting to work with the Government, the City moved to amend its complaint to add a claim against Army Corps and EPA for violation of CERCLA §120(f).

Based on the claim under CERCLA §120(f) the City sought a preliminary injunction enjoining Army Corps and EPA “from issuing any Proposed Plan or other document identifying or selecting a remedial action at the Site until such time as they have complied with the

<sup>3</sup> *City of Moses Lake v. United States of America, et al.*, No. CV-04-0376-AAM, (E.D. Wash. Dec. 30, 2005) (“*City of Moses Lake*”).

<sup>4</sup> 10 U.S.C. §2701.

provisions of CERCLA §120(f) by providing the City with all information required under that statute, and until they have allowed the City to participate in the planning and selection of the remedy at the Site.”<sup>5</sup>

## ANALYSIS

### **Jurisdictional Bar: Is the Cleanup a “Removal” or a “Remedial” Action**

The threshold issue for the Court was whether the cleanup is being conducted pursuant to CERCLA §120, pertaining to remedial actions at federal facilities, or CERCLA §104, pertaining to removal actions. CERCLA §113(h)<sup>6</sup> jurisdictionally bars challenges to removal or remedial action selected under CERCLA §104.

In determining whether the cleanup was proceeding pursuant to CERCLA §104 or §120 the Court relies on *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*.<sup>7</sup> In *Fort Ord*, the court reasoned:

“If §120 creates a grant of authority separate from §104, then the plain language of §113(h) would exempt §120 cleanups from its jurisdictional bar. Determining which provision governs a particular cleanup requires a close look at the different type of CERCLA cleanups and at the specific grants of authority in §120. CERCLA distinguishes between two types of cleanups: removal actions and remedial actions. *See* 42 U.S.C. §§9601(23)<sup>8</sup> and (24)<sup>9</sup>. In short, removal actions are temporary measures

<sup>5</sup> *City of Moses Lake*. The City filed the action against the Government pursuant to the citizen suit provision of CERCLA, 42 U.S.C. §9659(a) “for failure to perform their mandatory duties and comply with certain statutory requirements, as set forth in 42 U.S.C. §9620(f).”

<sup>6</sup> 42 U.S.C. §9613(h) states in relevant part: “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 (related 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...[listed exceptions].”

<sup>7</sup> *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, 189 F.3d 828 (9<sup>th</sup> Cir. 1999) (“*Fort Ord*”).

<sup>8</sup> A “removal” is defined in 42 U.S.C. §9601(23) as: The terms “remove” or “removal” means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals not otherwise provided for...

<sup>9</sup> A remedial action is defined in 42 U.S.C. §9601(24): The terms “remedy” or “remedial action” means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment...

taken to protect against the threat of an immediate release of hazardous substances into the environment, whereas remedial actions are intended as permanent solutions. Under §120(e)(2), the Administrator of the EPA is granted authority to conduct remedial actions on federal property. *See* 42 U.S.C. §9620(e)(2). There is no analogous authority under §120 for the commencement of removal actions. Thus, removal actions on federal property must fall under the general provisions of §104. *See* 42 U.S.C. §9604(a).

The text of §113(h), then, would preclude challenges to a CERCLA *removal* action on federal property, because such actions are conducted under §104's grant of authority. But §113(h) would not preclude challenges to a CERCLA *remedial* action because such actions are conducted under §120's grant of authority."<sup>10</sup> [Emphasis in original.]

The Court in *City of Moses Lake* notes the difficulty in distinguishing between a "removal" and "remedial action" under CERCLA. Citing *United States v. W.R. Grace & Co.*,<sup>11</sup> the court observed that "[t]he tangled language of CERCLA hardly lends itself to clear cut distinctions between the two types of actions."<sup>12</sup> The consistent thread in deciding between the two actions is the immediacy in which the action should be taken. Removal actions are generally immediate and/or interim responses, whereas a remedial action is generally considered permanent.

The Court concluded that the proposed plan is a remedial action intended to affect a comprehensive resolution to the contamination problem. The Court identified several issues for its decision including: the period of time the cleanup action has been ongoing, the fact that the site is an NPL site, the lack of urgency of the actions of the parties, and references to CERCLA §120 by the Government in its determination related to the Site. "The proposed plan is a response to a 'non-urgent' threat which is not 'time sensitive,' at least as perceived by EPA."<sup>13</sup> The Court ruled that "(s)ince the proposed plan is not a §104 'removal' action but a §120 'remedial action,' Moses Lake is not jurisdictionally bared from seeking relief."<sup>14</sup>

### **CERCLA §120(f) is Not Discretionary**

In order to enforce the right to be part of the decision-making process by participating in the planning and selection of the remedial action at federal facilities the City brought suit under the citizen suit provision of CERCLA.<sup>15</sup> CERCLA §310(a)(1)<sup>16</sup> authorizes suits against the head of an administrative agency based on the administration of CERCLA. The Government argued that a citizen suit pursuant to CERCLA §310(a)(1) is not possible since CERCLA §120(f)

<sup>10</sup> As cited in *City of Moses Lake*.

<sup>11</sup> *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1240 (9<sup>th</sup> Cir. 2005).

<sup>12</sup> *Id.* at 1232.

<sup>13</sup> *City of Moses Lake* at 13.

<sup>14</sup> *Id.* An initial question that the Court determined is that the Site is a former federal facility site. The Court identified that at certain former federal facility sites are cleaned up pursuant a delegated authority to the Secretary of Defense pursuant to CERCLA §104 and thus would be governed by CERCLA §113(h). *See City of Moses Lake* discussion of *Shea Homes Limited Partnership v. United States of America*, 397 F. Supp. 2d 1194 (N.D. Cal. 2005).

<sup>15</sup> 42 U.S.C. §9659(a).

<sup>16</sup> 42 U.S.C. §9659(a)(1) (Section 310(a)(1)) authorizes suits:

Against any person (including the United States and any other governmental instrumentality, or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter.

pertains to the “administration” of CERCLA. Instead, the City proceeded under CERCLA §310(a)(2)<sup>17</sup> which authorizes suits:

“Against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged failure of the President or of such other officer to perform any act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.”

The Court explained that the duty to afford local officials the opportunity to participate in the planning and selection of the remedial action was not discretionary. The Court ruled that although CERCLA §120(f) does not state specifically the EPA must share a proposed plan with local officials before issuing it to the public, it does “specifically and plainly state that relevant local officials *shall* be afforded (emphasis added) the opportunity ‘to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans.’”<sup>18</sup>

The Court concluded that “a proposed cleanup plan constitutes ‘planning’ and/or an ‘action plan’” and “once the proposed plan is issued to the public at large, the ‘planning’ stage is over and the remedy selection phase begins.”<sup>19</sup> The City argued that it already had the rights afforded under CERCLA §117(a)<sup>20</sup> for public involvement, along with the rest of the public. The Court agreed that the:

“ . . . plain terms of §120(f) require something more than the rights already afforded by §117(a) and that something more has to include review of the proposed plan. Without reviewing the proposed plan and its alternative remedies (including EPA’s preferred remedy), there is simply no way for the City of Moses Lake to meaningfully and intelligently ‘participate in the planning and selection of the remedial action . . . and the development of the remedy.’”<sup>21</sup>

Hence, for local governments to be part of the planning and selection of the remedial action pursuant to CERCLA §120(f), they must be afforded the opportunity to review the proposed plan and its alternative remedies prior to issuance to the general public.

### **The Government is Not Harmed by Involving Local Governments**

In determining whether injunctive relief should be granted to the City the Court addresses the balance of harm between the City and the Government by sharing the proposed plan with the City, and the public interest served by enforcing the City’s CERCLA §120(f) rights. The Court determined that if “EPA were to issue its proposed plan immediately without allowing review by Moses Lake, Moses Lake’s §120(f) rights would be violated and the city would be irreparably harmed.”<sup>22</sup> Since these are rights that belong to the “public” the court finds that “the ‘public interest’ is served by enforcement of §120(f) rights.”<sup>23</sup> The Court also “fails to see how the

<sup>17</sup> 42 U.S.C. §9659(a)(2).

<sup>18</sup> *City of Moses Lake* at 15.

<sup>19</sup> *Id.*

<sup>20</sup> 42 U.S.C. §9659(a)(2).

<sup>21</sup> *City of Moses Lake* at 15.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

United States is harmed by divulging the proposed plan” to the City prior to the formal issuance.<sup>24</sup>

### **Courts Conclusions**

The Court granted the City’s Motion for a Preliminary Injunction and enjoined EPA and Army Corps from formally issuing the proposed cleanup plan pending further order from the Court and further ordered EPA and Army Corps to make the proposed cleanup plan available to “relevant” City officials. The Court states that the City may request any additional information the City believes is necessary to satisfy its §120(f) rights, but it is neither the federal agency nor the relevant local officials who determine unilaterally whether the obligation has been satisfied, and the Court may resolve any disputes on the matter as they arise. The Court further clarified “that it is the United States who ultimately selects the remedy, subject of course to the ROD being challenged on the appropriate legal grounds.”<sup>25</sup>

### **Conclusion**

The Court in *City of Moses Lake* clarified that EPA and the lead federal agency that is remediating a site pursuant to a CERCLA §120 remedial action must involve local governments in the planning and selection of the remedial action (including but not limited to the review of all applicable data as it becomes available and the development of studies, reports and action plans). This ruling is a departure from the current process where most local governments are relegated to participating in an environmental cleanup at a federal facility site pursuant to the public involvement process.

The Court did not specify the process for involvement in the remedial action decision making. Instead, the Court set a minimum standard and recognized that both the local government and the Government will need to work together to develop a process. In this case, the Court recognized that it would need to adjudicate any dispute related to what the language of CERCLA §120(f) “participate in the planning and selection of the remedial action” means.

Local governments should work with their DOE site and EPA to discuss this important case. Where local governments want to be more involved in the cleanup decision-making at the DOE site, local governments should begin to work with EPA and DOE to develop the formal role for the local governments in the decision making process. ECA will be contacting DOE at headquarters to recommend developing a policy of local governments and DOE working together on these important issues.

Please contact Seth Kirshenberg directly with any questions directly at (202) 828-2494 or [sethk@energyca.org](mailto:sethk@energyca.org)

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 16.