

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CITY OF FRESNO,  
  
Plaintiff,  
  
v.  
  
UNITED STATES OF AMERICA, et  
al.,  
  
Defendants.

No. CV-F-06-1559-OWW-TAG  
  
MEMORANDUM DECISION RE:  
DEFENDANT'S MOTION FOR PARTIAL  
JUDGMENT ON THE PLEADINGS OR  
FOR PARTIAL SUMMARY JUDGMENT  
AS TO PLAINTIFF'S RCRA CLAIM;  
MOTION FOR PARTIAL JUDGMENT ON  
THE PLEADINGS AS TO  
PLAINTIFF'S HSAА CLAIM (Docs.  
142 & 143.)

I. INTRODUCTION.

This is a dispute over environmental remediation between Plaintiff City of Fresno (the "City") and Defendants the Boeing Company ("Boeing"), the United States Army Corps of Engineers, and the National Guard Bureau (collectively, the "United States"). The dispute concerns the environmental remediation of Old Hammer Field ("OHF") in Northeast Fresno, a site presently occupied by the Fresno-Yosemite International Airport. This site was used by the United States as an Army Air base during World War II. In 1946, the United States transferred the property to Plaintiff, which has since owned and controlled it. Boeing's predecessor, North American Aviation, was one of Plaintiff's tenants of the property in the 1950s.

1           The City of Fresno has sued the United States and Boeing in a  
2 Second Amended Complaint ("SAC") under CERCLA, RCRA, HSAA, as well  
3 as various state law theories. Plaintiff alleges that it "has  
4 shouldered, and continues to shoulder, a disproportionate share of  
5 the past, present and ongoing costs associated with the  
6 investigation and clean up of the OHF property, as well as off-site  
7 areas affected by Defendants' polluting activities." (SAC ¶ 4.)  
8 Plaintiff requests a "declaration of responsibility and payment  
9 from Defendants for their fair share of all past, present and  
10 future responses costs [sic] incurred in response to Defendants'  
11 release of hazardous substances, wastes, materials and pollutants."  
12 (Id. ¶ 6.) Plaintiff also seeks monetary and injunctive relief.<sup>1</sup>

13           Before the court for decision are two motions brought by  
14 Defendant United States: (1) for partial judgment on the pleadings  
15 or partial summary judgment as to Plaintiff's fourth claim under  
16 the RCRA; and (2) for partial judgment on the pleadings as to  
17 Plaintiff's third claim under the HSAA.

18           Defendant's RCRA motion challenges subject matter jurisdiction  
19 over this claim under § 113(h) of CERCLA. Defendant also argues  
20 that the claim is moot because the activities Plaintiff seeks to  
21 enjoin are already underway, under the doctrine of primary  
22 jurisdiction, and because there is no imminent and substantial  
23 endangerment at OHF as required under Plaintiff's RCRA claim. The  
24 HSAA claim is allegedly infirm because the United States has not

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26           <sup>1</sup> Specifically, Plaintiff seeks a "preliminary injunction and  
27 permanent injunction directing Defendants [...] to investigate and  
28 remediate completely the contamination on, under, adjacent to or  
downgradient from OHF and the surrounding areas in an expeditious  
manner." (Doc. 123-3. 36:24-36:27.)

1 unequivocally waived its sovereign immunity.

2       These motions were originally filed on April 23, 2007 and  
3 renoticed on August 20, 2009. Although the arguments in the  
4 original motions and renewed motions are largely the same, there is  
5 one important distinction: Plaintiff now alleges that 1,2,3-  
6 trichloropropane ("TCP") has leached into the City's water supply,  
7 allegedly from the federal facilities located on or near OHF. The  
8 alleged presence of TCP - and its effect on the current remediation  
9 plan - drives the current dispute.

10  
11                   II. FACTUAL/PROCEDURAL BACKGROUND.

12       This case involves the cost, scope, and progress of  
13 environmental remediation activities conducted by Plaintiff City of  
14 Fresno, Boeing, and the United States at Old Hammer Field ("OHF"),  
15 a site presently occupied by the Fresno-Yosemite International  
16 Airport. This site was used as an Army Air base during the World  
17 War II years.<sup>2</sup> Boeing's predecessor, North American Aviation  
18 ("NAA"), was one of Plaintiff's tenants of the property in the  
19 1950s.

20       The State of California, through its Department of Toxic  
21 Substances Control ("DTSC") and the Regional Water Quality Control  
22 Board ("RWQCB") ("State Agencies") has oversight over the cleanup.  
23 The parties work together as the Old Hammer Field Steering  
24 Committee and have entered into multiple agreements since 1993,  
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26       <sup>2</sup> The majority of the work at OHF focuses on a 78-acre parcel  
27 known as "Area 1." (Weston Dec., ¶ 5.) Area 1 was historically  
28 the location of the most intense industrial activity, both during  
and after World War II. (Id.)

1 including a 1993 Cost-Sharing Agreement containing an interim  
2 allocation of costs and specification of remedial tasks to be  
3 performed.<sup>3</sup> On October 4, 1994, Plaintiff, the United States, and  
4 the State Agencies entered into a Potentially Responsible Party  
5 Agreement for Old Hammer Field ("Cooperative Agreement") governing  
6 the performance of the investigation and response actions at the  
7 site. On the same date, DTSC issued an Imminent or Substantial  
8 Endangerment Order and Remedial Action Order for OHF to Rockwell  
9 International, a successor to NAA and one of Boeing's predecessors.

10 In May 2004, the State Agencies approved the Final Remedial  
11 Action Plan ("RAP") for OHF, which was a result of the Cooperative  
12 Agreement process. The RAP identified two primary contaminants of  
13 concern. First, a chlorinated volatile organic compound ("VOC")  
14 known as trichloroethene ("TCE"), which has been used as a  
15 degreaser and industrial solvent for many industrial activities.  
16 The TCE plume extends almost 12,000 feet long, up to 4,000 feet  
17 wide at points, and up to 300 feet deep at points. It is suspected  
18 to have originated from Area 1. Second, tetrachloroethene ("PCE"),  
19 another industrial solvent, is contained within the larger TCE  
20 plume. The RAP has five principal components: (1) the Water Supply  
21 Contingency Plan; (2) the operation and treatment of water from  
22 Well 70; (3) the treatment of the "source area; (4) installation of  
23 wells to prevent downgradient migration of contaminants; and (5)

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25  
26  
27 <sup>3</sup> The Steering Committee retained consultant ERM West, Inc. to  
28 perform most of the remedial work at OHF. (White Dec., Doc. 45-3,  
¶ 9.)

1 the operation and maintenance of the system.<sup>4</sup>

2 None of the parties is satisfied with the interim allocation  
3 of money each has paid over the years under the Cost-Sharing  
4 Agreement. Each believes it is entitled to reimbursement from the  
5 other parties. Nonetheless, until August 2006, the cleanup had  
6 continued without interruption with funding from the parties  
7 identified in a series of amendments to the original Cost-Sharing  
8 Agreement. In early 2006, disputes about funding arose and while  
9 alternative proposals were discussed, the parties were unable to  
10 agree on the allocation of funds. With funding exhausted, in  
11 August 2006 the parties notified the State Agencies that the  
12 remediation work at OHF would stop because of funding  
13 disagreements.

14 In September 2006, DTSC determined Plaintiff and the United  
15 States were non-compliant with the Cooperative Agreement and that  
16 Boeing was non-compliant with the DTSC's October 1994 Order. On  
17 October 20, 2006, pursuant to the California Water Code, the RWQCB  
18 issued an order to all of the parties to comply with a groundwater  
19 monitoring and discharging program. On October 31, 2006, pursuant  
20 to the California Health and Safety Code, DTSC issued an Imminent  
21 or Substantial Endangerment Determination and Order and Remedial  
22 Action Order to all the parties to conduct various response actions  
23 in accordance with a specific timeline. The DTSC Order required  
24 all parties, unilaterally, jointly, and severally, to immediately

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26 <sup>4</sup> The RAP originally included a sixth principal component, the  
27 "Pre-Design Investigation the Southeast Plume Source Area," but it  
28 was determined - based on a review of the samples - that the  
remediation systems were sufficient.

1 ensure that all required activities under the OHF RAP moved forward  
2 in accordance with the enforceable schedule. In December 2006 the  
3 parties reached an agreement to fund the activities required by the  
4 State Agencies in their October 2006 orders in the form of  
5 Amendment 8 to the Cost-Sharing Agreement.

6 On November 2, 2006, Plaintiff filed this action seeking  
7 payment for response costs it has incurred in relation to the  
8 cleanup at OHF of contaminants released by Defendants. The City  
9 sought a declaration of responsibility for past, present and future  
10 response costs incurred at OHF, as well as damages and injunctive  
11 relief to remediate the harm caused to OHF. Plaintiff originally  
12 pled twelve causes of action: a) Claims One and Two against all  
13 Defendants for equitable contribution under CERCLA section 107(a)  
14 and section 113(f) contribution, respectively, b) Claim Three  
15 against all Defendants for contribution and indemnity pursuant to  
16 HSAA, Cal. Health and Safety Code § 25363(e) and treble damages  
17 under § 25398.17, c) Claim Four against all Defendants for  
18 injunctive relief and litigation costs pursuant to RCRA § 6972, d)  
19 state law claims against Boeing, Claims Five through Eleven, for  
20 continuing nuisance, public nuisance, negligence, negligence per  
21 se, continuing trespass, waste, and equitable indemnity and  
22 contribution, and e) Claim Twelve for declaratory relief, seeking  
23 a judicial determination of the parties' respective liabilities for  
24 the OHF cleanup.

25 On April 23, 2007, Defendant United States moved for partial  
26 judgment on the pleadings or partial summary judgment on  
27 Plaintiff's RCRA claim and for partial judgment on the pleadings as  
28 to the HSAA claim. The City opposed the motion and the parties

1 appeared before the Court on December 3, 2007 for oral argument on  
2 Defendant's motions. The case was subsequently stayed pending  
3 settlement negotiations. On April 17, 2009, the stay was lifted  
4 and Plaintiff was ordered to file an amended complaint. (Doc.  
5 122.)

6 Plaintiff filed a Second Amended Complaint on May 18, 2009,  
7 advancing twelve causes of action, including claims under RCRA and  
8 HSAA. (Doc. 123-3.) Defendant United States filed a "Notice of  
9 Renewal of Pending Dispositive Motions" on August 7, 2009. The  
10 unopposed motion was granted on August 12, 2009.

11 On August 20, 2009, the United States renoticed its motion for  
12 partial judgment on the pleadings or partial summary judgment on  
13 Plaintiff's RCRA claim:

14 This motion will be based on this Notice of Motion and  
15 Motion, the Statement of Undisputed Material Facts,  
16 the Memorandum of Points and Authorities, the  
17 Declaration of Linda J. White, the Declaration of Rick  
18 Weston, and accompanying exhibits, all of which have  
19 been previously filed [on April 23, 2007], all the  
20 papers and pleadings on file in this matter, and on  
21 such argument of counsel and additional evidence as  
22 may be considered at the hearing.

23 The previously filed Memorandum of Points and  
24 Authorities contains arguments and references relating  
25 to the First Amended Complaint. Such arguments and  
26 references are equally applicable to the Second  
27 Amended Complaint, filed June 9, 2009, which contains  
28 allegations that, in all respects material to this  
motion, are identical to the corresponding allegations  
of the First Amended Complaint.

(Doc. 142.<sup>5</sup>)

The City opposed the United States' motions on September 14,

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<sup>5</sup> The United States also incorporates its earlier filings in conjunction with its motion for partial judgment on the pleadings on Plaintiff's HSAA claim. (Doc. 143.)

1 2009.<sup>6</sup> In connection with its opposition, the City has filed a  
2 number of exhibits and declarations, including the declaration of  
3 Lisa Decker, counsel for the City.

4  
5 **III. LEGAL STANDARD**

6 Defendant moves for partial judgment on the pleadings or  
7 partial summary judgment. Judgment on the pleadings is appropriate  
8 if, assuming the truth of all material facts pled in the complaint,  
9 the moving party is nonetheless entitled to judgment as a matter of  
10 law. *Hal Roach Studios v. Richard Feiner & Co., Inc.*, 896 F.2d  
11 1542 (9th Cir. 1989). Under Rule 12(c), if "matters outside the  
12 pleadings are presented to and not excluded by the court, the  
13 motion shall be treated as one for summary judgment and disposed of  
14 as provided in Rule 56." *MetroPCS, Inc. V. City and County of San*  
15 *Francisco*, 400 F.3d 715, 720 (9th Cir. 2005). Here, the United  
16 States provides two declarations with numerous supporting documents  
17 as evidence in support of its RCRA arguments. Because Defendant  
18 relies on matters outside the pleadings, its RCRA motion cannot be  
19 resolved under Rule 12(c). Accordingly, the RCRA motion is treated  
20 as a motion for summary judgment. The United States, however, does  
21 not rely on matters outside the pleadings to support its HSAA  
22 motion, therefore it is analyzed under Rule 12(c).

23  
24 **A. Summary Judgment**

25  
26 <sup>6</sup> Similar to Defendant, the City "incorporates in their  
27 entirety the points and arguments raised in its Opposition to the  
28 United States' Motions filed [] on May 7, 2007 and raised in oral  
argument on December 3, 2007." (Doc. 150, 1:27-2:2.) The City  
also filed supplemental oppositions. (Docs. 150 & 151.)



1 Summary judgment is appropriate when "the pleadings, the  
2 discovery and disclosure materials on file, and any affidavits show  
3 that there is no genuine issue as to any material fact and that the  
4 movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
5 56(c). The movant "always bears the initial responsibility of  
6 informing the district court of the basis for its motion, and  
7 identifying those portions of the pleadings, depositions, answers  
8 to interrogatories, and admissions on file, together with the  
9 affidavits, if any, which it believes demonstrate the absence of a  
10 genuine issue of material fact." *Celotex Corp. v. Catrett*, 477  
11 U.S. 317, 323 (1986) (internal quotation marks omitted).

12 Where the movant will have the burden of proof on an issue at  
13 trial, it must "affirmatively demonstrate that no reasonable trier  
14 of fact could find other than for the moving party." *Soremekun v.*  
15 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With  
16 respect to an issue as to which the non-moving party will have the  
17 burden of proof, the movant "can prevail merely by pointing out  
18 that there is an absence of evidence to support the nonmoving  
19 party's case." *Soremekun*, 509 F.3d at 984.

20 When a motion for summary judgment is properly made and  
21 supported, the non-movant cannot defeat the motion by resting upon  
22 the allegations or denials of its own pleading, rather the  
23 "non-moving party must set forth, by affidavit or as otherwise  
24 provided in Rule 56, 'specific facts showing that there is a  
25 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting  
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "A  
27 non-movant's bald assertions or a mere scintilla of evidence in his  
28 favor are both insufficient to withstand summary judgment." *FTC v.*

1 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[A] non-movant  
2 must show a genuine issue of material fact by presenting  
3 affirmative evidence from which a jury could find in his favor."  
4 *Id.* (emphasis in original). "[S]ummary judgment will not lie if  
5 [a] dispute about a material fact is 'genuine,' that is, if the  
6 evidence is such that a reasonable jury could return a verdict for  
7 the nonmoving party." *Anderson*, 477 U.S. at 248. In determining  
8 whether a genuine dispute exists, a district court does not make  
9 credibility determinations; rather, the "evidence of the non-movant  
10 is to be believed, and all justifiable inferences are to be drawn  
11 in his favor." *Id.* at 255.

12  
13 B. Judgment on the Pleadings

14 A party may move for judgment on the pleadings after the  
15 pleadings are closed but early enough not to delay trial. Fed. R.  
16 Civ. P. 12(c). When a Rule 12(c) motion challenges the sufficiency  
17 of the pleadings, the standard for such a motion is similar to the  
18 standard for a Rule 12(b)(6) motion in that judgment on the  
19 pleadings is appropriate when, even if all the allegations in the  
20 complaint are true, the moving party is entitled to judgment as a  
21 matter of law. *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430  
22 F.3d 1036, 1042 (9th Cir. 2005). In such cases, the court assumes  
23 the allegations in the complaint are true and construes those  
24 allegations in the light most favorable to the plaintiff.  
25 *McGlinchey v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir.  
26 1988). Conclusory allegations, however, without more are  
27 insufficient to defeat a Rule 12(c) motion. *Id.*

1 IV. DISCUSSION

2 The United States seeks judgment on two of the claims  
3 contained in the SAC. First, the United States seeks summary  
4 judgment on Plaintiff's fourth claim under RCRA. Second, the  
5 United States seek judgment on the pleadings on Plaintiff's third  
6 claim under the HSAA.

7  
8 A. Preliminary Issues

9 1. Declaration of Robert Dworkin

10 To support the substance of its RCRA arguments, particularly  
11 those relating to "mootness," the City contends that at an August  
12 2009 deposition, Mr. Robert Dworkin, a FUDS Program Manager,  
13 acknowledged that the Corps had not requested funding for the OHF  
14 cleanup in its 2009-2010 budget. According to the City, "[g]iven  
15 that the point of the City's RCRA claim is to require the United  
16 States to actually fund its commitment to clean up OHF," the RCRA  
17 claim cannot be moot in light of the United States' testimony.

18 In response, the United States submitted the sworn declaration  
19 of Robert J. Dworkin, which clarified his August 2009 remarks:

20 During my deposition in this action on August 27, 2009,  
21 I testified that, at that time, the Corps had not  
22 budgeted any funds for the remediation of Old Hammer  
23 Field for Fiscal Year 2010, which extends from October  
24 1, 2009 through September 30, 2010. I testified that  
25 the budgeting process was not yet completed and that  
26 there was still an opportunity for FUDS to be budgeted  
27 for the Old Hammer Field cleanup.

28 After the deposition, and despite Plaintiffs previous  
withdrawal from settlement negotiations, it was  
requested and the Corps agreed to reprogram, from FUDS  
that had been assigned to other remediation projects,  
approximately \$300,000 that will be made available in  
increments of approximately \$100,000 per quarter for  
the first three quarters of Fiscal Year 2010. It is  
the Corps' understanding that this will cover the

1 Agency's share of expenses under the terms of the  
2 previous cost share agreement for the coming year.

3 The funding described above will be made available  
4 subject to normal restrictions on federal agency  
5 funding such as the Anti-Deficiency Act. It should  
6 also be noted that the Department of Defense and the  
7 U.S. Army Corps of Engineers are currently operating  
8 under a Continuing Resolution Act at the moment which  
9 severely constrains DOD funds until such time as the  
10 Federal Government completes the DOD appropriations  
11 process for Fiscal Year 2010.

12 (Doc. 167-2, Dworkin Dec., ¶'s 3-5.)

13 Mr. Dworkin's sworn declaration resolves many of the arguments  
14 raised in the City's motion, particularly as they relate to funding  
15 for the Corps' 2009-2010 budget.<sup>7</sup>

## 16 2. Current Status of Cleanup

17 The OHF is the subject of ongoing remediation efforts. In  
18 1994, the City, the United States, and Boeing signed a cooperative  
19 agreement outlining the investigation, cleanup, and response  
20 actions at the OHF site. In 2004, the stage agencies approved the  
21 final RAP for the OHF site. In October 2006, following a dispute  
22 among the parties, the DTSC issued an "Imminent or Substantial  
23 Endangerment Determination and Order" requiring all parties to  
24 unilaterally, jointly, and severally conduct all required  
25 activities in accordance with an enforceable schedule. In December  
26 2006 the parties reached an agreement to fund the remediation  
27 activities required by the DTSC's October 2006 order in the form of

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28 <sup>7</sup> The history of funding of the OHF cleanup is that budgeting  
and approval of the annual cleanup costs is not completed and paid  
until the end of the applicable year. The United States' share has  
been paid every year.

1 Amendment 8 to the Cost-Sharing Agreement. As best understood, the  
2 remediation efforts are continuing under Amendment 8.

3 The declaration of Lisa Decker provides an update:

4 15. Since briefing and argument on the United States'  
5 Motion in 2007, the City has continued to contribute  
6 to the clean up efforts. The City has paid a total  
7 of \$3,632,771 of \$14,576,692 in clean up costs, or  
8 25 percent of the costs thus far. The United States  
9 and Boeing have paid the remainder.

10 (Decker Dec., Doc. 152, ¶ 15.)

11 Although the parties are not satisfied with scope and duration  
12 of funding, particularly as to the federal budgeting process, there  
13 has not been a formal breach of the cooperative agreement.<sup>8</sup>

14 B. RCRA (Claim IV)

15 The RCRA is a comprehensive environmental statute that governs  
16 the treatment, storage, and disposal of solid and hazardous waste."  
17 *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (citing *Chicago*  
18 *v. Env'tl. Def. Fund*, 511 U.S. 328, 331-32 (1994)). Its purpose is  
19 to minimize the present and future threat to human health and the  
20 environment, not effectuate the clean-up of toxic waste sites or  
21 allocate those costs. 42 U.S.C. § 6902(b); *Meghrig*, 516 U.S. at  
22 483. The RCRA provides for citizen suits to obtain a "mandatory

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23 <sup>8</sup> At oral argument on March 22, 2010, the Court clarified:  
24 "And the Court does not understand there to be a current breach,  
25 although it is always the case that federal funding, the federal  
26 government more often than not operates under continuing  
27 resolutions. There is always -- because of the nature of the  
28 federal FIFG [sic] and the budgeting process under the law, if you  
will, delay involved in the ultimate approval authority. But  
there hasn't been one year that the funding hasn't been approved  
and paid." (Reporter's Transcript ("RT"), March 22, 2010,  
12:8-12:15.)

1 injunction, i.e., one that orders a responsible party to 'take  
2 action' by attending to the cleanup and proper disposal of toxic  
3 waste, or a prohibitory injunction, i.e., one that 'restrains' a  
4 responsible party from further violating RCRA." *Id.* at 484.

5 Specifically, citizens can sue for injunctive relief to  
6 enforce RCRA's provisions:

7 against any person, including the United States,...  
8 who has contributed or who is contributing to the past  
9 of present handling, storage, treatment,  
10 transportation, or disposal of any solid or hazardous  
11 waste which may present an imminent and substantial  
12 endangerment to health or the environment.

13 42 U.S.C. § 6972(a)(1)(B).

14 The SAC seeks an injunction compelling Defendants to "correct  
15 the violations, including, but not limited to, investigating,  
16 remediating, responding to, and removing the contamination released  
17 from OHF, and for other actions as may be necessary to remedy the  
18 violations committed by Defendants." (SAC ¶ 133.)

19 The United States contends that the City's RCRA claim fails  
20 for four reasons: (1) the court lacks subject matter jurisdiction  
21 over this claim pursuant to § 113(h) of CERCLA, (2) the claim is  
22 moot because the City is asking the court to engage in an idle act  
23 as the United States is in compliance with the remedial objectives  
24 of the DTSC pursuant to the RAP; (3) under the primary jurisdiction  
25 doctrine, the administrative forum provided by the State of  
26 California is the appropriate forum for resolution of the City's  
27 claims concerning the cleanup of the OHF; and (4) there is no  
28 imminent and substantial endangerment at OHF as required by the  
RCRA framework.

Plaintiff rejoins that a number of factual developments

1 preclude summary judgment, chief among them that "the City has now  
2 determined that [...] TCP has leached into the City's water supply  
3 from OHF." (Doc. 150, 2:7-2:10.) According to the City, because  
4 the current remediation efforts do not address TCP, each argument  
5 raised by the United States is unavailing.<sup>9</sup> Even without the TCP  
6 allegations, the City argues that summary judgment is inappropriate  
7 because the United States has failed to obtain or commit sufficient  
8 funds to continue the cleanup at OHF.

9 The United States responds that the funding of the cleanup and  
10 the alleged introduction of TCP are irrelevant to the issues raised  
11 by its motion for three reasons. One, absent a showing of  
12 "substantial and imminent danger to health or the environment,"  
13 Plaintiff's TCP allegations have no legal effect. Two, the DTSC  
14 has not ordered the parties to address TCP, therefore the United  
15 States is under no obligation to budget or spend money to remediate  
16 TCP from the OHF site. Three, the fact that small amounts of TCP  
17 were allegedly detected in some city and county well "is irrelevant  
18 to whether the Court has subject matter jurisdiction over the RCRA  
19 claim."

20  
21 1. CERCLA § 113(h)

22 The substance of the United States' motion focuses on the  
23 jurisdictional bar contained in § 113(h) of CERCLA. In 1986,  
24 Congress amended CERCLA to add § 113(h) which bars federal courts  
25

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26 <sup>9</sup> A general background of TCP, as well as its alleged  
27 existence at or near OHF, is set forth in the declaration of Lisa  
28 Decker, counsel for the City of Fresno. (Decker Dec., Doc. 152,  
¶'s 3-13.)

1 from exercising jurisdiction over "any challenges" to removal or  
2 remedial environmental response actions taken pursuant to section  
3 9604 of CERCLA, 46 U.S.C. § 104, while those response actions are  
4 ongoing. *McClellan Ecological Seepage Situation ("MESS") v. Perry*,  
5 47 F.3d 325, 330 (9th Cir. 1995). The provision reads:

6 No Federal court shall have jurisdiction under  
7 Federal law ... to review any challenges to removal  
8 or remedial action selected under [CERCLA § 104],  
of this title, or to review any order issued under  
[CERCLA § 106].

9 42 U.S.C. § 9613(h).

10 Congress passed this section in order to protect "the  
11 execution of a CERCLA plan during its pendency from lawsuits that  
12 might interfere with the expeditious cleanup effort." *McClellan*,  
13 47 F.3d at 329. Section 113(h) amounts to a "blunt withdrawal" of  
14 jurisdiction from any challenges to a CERCLA cleanup. *Id.* The  
15 Ninth Circuit has held that a lawsuit qualifies as a "challenge"  
16 under § 113(h), and is thus barred, if it is "directly related to  
17 the goals of the cleanup itself." *Id.*

18 The parties dispute whether the OHF clean up proceeds under  
19 the authority of § 104.<sup>10</sup> The United States argues that the cleanup  
20 proceeds "pursuant to the CERCLA § 104 authority granted to it by  
21 the President in Executive Order 12,580 and under the DERP  
22 statute." According to the United States, this is an easy case:  
23 the OHF cleanup is a § 104 cleanup at a formerly owned defense  
24

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25 <sup>10</sup> Section 104 of CERCLA authorizes the President, in response  
26 to a release or threatened release of a hazardous substance, to  
27 "remove [the substance] or [...] provide for remedial action [...] or take any other response measure consistent with the national contingency plan [...] to protect the public health or welfare or the environment." 42 U.S.C. § 9604(a)(1).



1 site, nothing else. Plaintiff argues that the cleanup is being  
2 undertaken pursuant to the authority of § 120 of CERCLA, 46 U.S.C.  
3 § 9620, and therefore is properly categorized as a § 120 clean up.  
4 Section 120 contains provisions applicable to cleanups on currently  
5 owned federal facilities and does not trigger § 113(h)'s  
6 jurisdictional bar.

7 Relying on *Fort Ord Toxics Project, Inc. v. California EPA*,  
8 189 F.3d 828 (9th Cir. 1999), the City contends that the  
9 remediation activities at OHF are proceeding pursuant to § 120, not  
10 § 104. The City, however, ignores *Fort Ord's* direction that § 120  
11 covers only federal facilities, not privately owned ones, and the  
12 statutory language of § 120 itself.<sup>11</sup> *Fort Ord* held that it was  
13 "unclear whether the legislators who voted for 113(h) subjectively  
14 intended to allow immediate challenges to remedial actions at  
15 federal facilities even while disallowing such challenges at  
16 private facilities." *Id.* *Fort Ord* implies that challenges to  
17 remedial actions at private facilities - supposedly cleanups  
18 pursuant to § 104 - are barred by § 113(h). Here, there is no  
19 dispute that OHF is privately owned by the City of Fresno and that  
20 the activities in question are "remedial activities."

21 The remediation work at OHF is also carried out under the  
22 Defense Environmental Restoration Program, a federal statute which  
23 authorizes the Department of Defense to conduct remediation  
24 activities on both currently owned DOD properties and formerly  
25 owned properties where the DOD was the owner, lessor, or possessor

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26  
27 <sup>11</sup> Section 120's own terms apply to properties "owned or  
28 operated" by the federal government. The title of the heading in  
the legislation for § 120 is "Federal facilities."

1 at the time of actions leading to contamination by hazardous  
2 substances. As for formerly owned DOD properties, the DERP statute  
3 authorizes the Formerly Used Defense Sites ("FUDS") program at 10  
4 U.S.C. § 2701(c) (1) (B). Both parties here acknowledge that the  
5 work at OHF is part of the FUDS program.

6 Plaintiff argues that the Defense Environmental Restoration  
7 Program statute makes activities carried out under the statute  
8 subject to § 120 of CERCLA. It cites the DERP statute at 10 U.S.C.  
9 § 2701(a) (2) that program activities "shall be carried out subject  
10 to, and in a manner consistent with, section 120 (relating to  
11 Federal facilities) of CERCLA." Plaintiff cites this section to  
12 support its argument that the FUDS program operates under CERCLA §  
13 120. Such an interpretation ignores the plain language of the  
14 section, which specifically references § 120 as relating to federal  
15 facilities in parentheses. Because the statute applies to both  
16 currently and formerly owned federal facilities, the statute  
17 directing DERP activities at federal facilities should be  
18 implemented in a manner consistent with CERCLA § 120 activities,  
19 which also apply at federal facilities. According to Plaintiff's  
20 argument, the DERP statute mandates that all its authorized  
21 activities be carried out under § 120, even those under FUDS that  
22 do not take place on federally owned properties. This makes little  
23 sense given that § 120 applies only to federal properties.

24 The United States also references the language in the  
25 cooperative agreement to support its contention that cleanup is  
26 performed pursuant to § 104. The cooperative agreement was  
27 discussed in detail by United States' counsel at oral argument on  
28 December 3, 2007:

1 What's on the screen now is a page from what's known  
2 as the cooperative agreement. This is the agreement  
3 between the plaintiff, the United States, and the  
4 State of California about how the cleanup was going to  
5 be done, basically. That's the simple version.

6 And if we look under the heading of jurisdiction on  
7 page 5 of that agreement, we see that the -- it says  
8 that the National Guard Bureau and the U.S. Army Corps  
9 of Engineers enter into this agreement pursuant to  
10 CERCLA/SARA, the NCP, that's the National Contingency  
11 Plan required by CERCLA and promulgated by the EPA,  
12 Executive Order 12580 and DERP.

13 And Your Honor, this is the same line of authority  
14 that's stemming from Section 104(a). Nothing -- no  
15 reference to Section 120. Of course, that wouldn't  
16 make sense to have a formerly used defense site  
17 cleaned up under Section 120.

18 I'd like to direct your attention to another reference  
19 in this agreement, Your Honor, on page 10, what's been  
20 marked as paragraph (A) (I) [...] [t]his definition of  
21 the term USACE means the U.S. Army Corps of Engineers  
22 and also notes that it relates to the formerly used  
23 defense site, FUDS component of DERP, the Defense  
24 Environmental Restoration Program.

25 It's apparent that this cleanup was going to involve  
26 a FUDS/DERP cleanup, and that again relates to Section  
27 104(a) and Executive Order 12580 and not Section 120  
28 [...]

One final reference to the cooperative agreement, page  
31. Under the heading of "Removal Action," I'm not  
going to read this, but on paragraph B, basically it's  
the same legal authority [discussed preciously] and  
subsection (c) even contains a reference to Section  
104.

Now this confirms what we've already seen in the other  
provisions of the agreement, and if this was a Section  
120 cleanup, they would have been written much  
differently, and certainly the Section 104 reference  
wouldn't even be there.

(Reporter's Transcript, December 3, 2007, 11:18-12:19, 13:23-14:6).

In rebuttal, the City emphasizes that the Court should give  
great weight to recent factual developments "relating to activities  
and operations conducted on currently owned federal facilities

1 causing the contamination at issue that is triggering remediation  
2 activities." This argument incorporates the United States' current  
3 operations at AVCRAD and CANG, which are on/near the OHF. However,  
4 neither AVCRAD nor CANG is involved in any aspect of the OHF  
5 cleanup:

6 Counsel: Now, when this agreement was signed, the  
7 National Guard had agreed to cleanup certain of  
8 its own currently owned federal property. Now  
9 that was pursuant to Section 120, that there  
10 were two federal areas that the guard was  
11 cleaning up.

12 Court: Not the Old Hammer Field.

13 Counsel: In the area of Old Hammer Field [...] [however]  
14 the current cleanup doesn't involve these  
15 properties at all. That's the -- the currently  
16 owned federal property is not involved in the  
17 cleanup.

18 But it shows -- if we take that paragraph 6.3  
19 on page 11 [of the cooperative agreement], it  
20 shows that the parties knew how to reference  
21 Section 120 when 120 was appropriate. It says  
22 that the National Guard are federal facilities  
23 under jurisdiction of the Secretary of Defense  
24 within the meaning of CERCLA Section 120 and  
25 SARA Section 211.

26 In contrast, the formerly owned, not the  
27 currently federal facility property, but the  
28 former federal facility property is set out in  
Section 6.6 [of the cooperative agreement].  
Old Hammer Field is a formerly used defense  
site, FUDS, and is subject to the Defense  
Environmental Restoration program.

Now, this case only involves Old Hammer Field.  
There is no cleanup that the state has ordered  
on federal property. The National Guard has  
done that on its own property. It's not part  
of the case. And it's clear that the property  
at issue here was and is being cleaned up  
pursuant to DERPS and FUDS, and the authority  
for that comes from Section 104(a) as delegated  
through Executive Order 12580.

(RT, December 3, 2007, 12:20-13:22.)

1 Here, the City's arguments that "[t]here is no proof that the  
2 investigation and remediation activities at OHF are proceeding  
3 under the direction of the Department of Defense pursuant to  
4 Section 104 of CERCLA," are contradicted by the record. All  
5 remediation efforts are taking place on City-owned property; the  
6 cleanup is proceeding under E.O. 12580 and the DERP statute,  
7 implicating § 104, not § 120. Moreover, while the United States  
8 adequately explains the "consistent with § 120" issue, the City  
9 does not explain why the cooperative agreement cites E.O. 12580 and  
10 the DERP statute. In particular, the City does not address this  
11 question: why would the cooperative agreement cite E.O. 12580 and  
12 the DERP statute if the cleanup was to proceed pursuant to § 120?

13 At oral argument on March 22, 2010, the City again stressed  
14 the importance of the United States' admissions concerning its  
15 operation of the AVCRAD and CANG facilities at or near the OHF.  
16 According to Plaintiff, these admissions clearly demonstrate the  
17 cleanup is proceeding pursuant to § 120, not § 104:

18 [The United States] admit[s] in their briefs, on this  
19 very issue, that those [properties] are subject to  
20 CERCLA section 120. If you look at the United States'  
21 initial motion [...] if you look at the cooperative  
22 agreement, section 5.1(k) [...] it all discusses  
23 section 120 authority applying to the currently  
24 operated federal facilities [...]

25 And the critical issue, again, is that the United  
26 States admits that they are a federally - that they  
27 are operating pursuant to section 120, that they are  
28 a currently owned federal facility. Same with AVCRAD.  
And there's no dispute about that in the papers.

(Reporter's Transcript, March 22, 2010, 18:22-19:7, 21:11-21:16.)

Plaintiff's arguments are unpersuasive. First, the undisputed  
record points to a § 104 cleanup, not § 120. Second, Plaintiff

1 overstates the United States' admissions concerning its AVCRAD and  
2 CANG operations. In the documents cited by Plaintiff, the United  
3 States stated: "The Cooperative Agreement noted that there are only  
4 two areas that are currently under the jurisdiction, control, or  
5 custody of the U.S. Department of Defense: [CANG and AVCRAD].  
6 These are the only portions subject to CERCLA Section 120. None of  
7 the RAP-required cleanup activities will occur on these areas. All  
8 of the remedial work will take place on property that is not owned  
9 or operated by the federal government." (Doc. 45-2, pg. 14 at fn.  
10 9.) Contrary to Plaintiff's assertions, the government's  
11 admissions do not support its position. If anything, the  
12 statements weaken it.<sup>12</sup>

13 The case law is also contrary to the City's position. *Pollack*  
14 *v. U.S. Dep't of Defense*, 507 F.3d 522 (7th Cir. 2007) is most  
15 applicable. There, the Seventh Circuit held that § 113(h) barred  
16 a lawsuit arising out of ongoing efforts to remediate an Illinois  
17 landfill located on property that used to be a U.S. Army base.  
18 *Pollack* reconciled Presidential authority under CERCLA, § 120, the  
19 National Priorities List, and the *Fort Ord* decision:

20 Critically, § 120 does not provide a separate grant of  
21 authority for the President to initiate cleanups of  
22 federal sites or force private parties to do so.  
23 Hence a cleanup of a federally owned contaminated site  
24 must be initiated under §§ 104 or 106, just like the  
25 cleanup of a privately owned site.

26 There is a wrinkle. Section 120 may create authority  
27 to clean up a certain type of federally owned property  
28 that does not include the landfill that is the subject  
of this lawsuit. As noted above, the nastiest sites

---

27 <sup>12</sup> The language used to incorporate § 120 - for the AVCRAD and  
28 CANG cleanup - differs from the language used in the OHF-RAP and  
Cooperative Agreement to remediate the OHF.

1 in the country are listed on the National Priorities  
2 List and are to be cleaned up first thing. Section  
3 120(e) requires the administrators of federal agencies  
4 that own property on this list to perform a  
5 remediation study and then to undertake any necessary  
6 remediation. Cleanup efforts of federal NPL Superfund  
7 sites therefore arguably are initiated under § 120,  
8 rather than §§ 104 or 106. But there is no dispute  
9 that the landfill on the former Fort Sheridan is not  
10 on the National Priorities List, so § 120 does not  
11 provide any authority for initiating a cleanup of it.  
12 Such authority comes solely from §§ 104 and 106, and  
13 so this challenge to the Fort Sheridan cleanup remains  
14 subject to the bar set out in § 113(h).

15 This explains the Ninth Circuit's decision in Fort Ord  
16 Toxics Project, Inc. v. California EPA, on which  
17 Pollack relies. [Fort Ord] held that a cleanup of a  
18 federally owned site was indeed initiated under § 120.  
19 Since § 113(h) only blocks challenges to cleanups  
20 initiated under §§ 104 or 106, the court ruled that  
21 the plaintiff's challenge was not subject to § 113(h)  
22 and could proceed. But the court noted that the  
23 property was listed on the NPL, and cited to §  
24 120(e)'s grant of authority for cleaning such parcels.  
25 No other circuit has cited Fort Ord, but a district  
26 court confronting the same argument in the context of  
27 a non-NPL federal property - like Fort Sheridan in  
28 this case - concluded, correctly, we believe, that the  
cleanup was authorized by §§ 104 or 106 rather than §  
120, and was therefore subject to § 113(h). The Ninth  
Circuit conceded that its Fort Ord decision was  
'intuitively unappealing' and 'troubling.' We need  
not agree or disagree with that court's conclusion  
that cleanups to federally owned sites on the NPL are  
initiated under § 120 and hence not subject to the bar  
of § 113(h) because this case does not concern an NPL  
property.

21 *Id.* at 526 (citations omitted).

22 *Shea Homes Ltd. P'ship v. United States*, 397 F. Supp. 2d 1194  
23 (N.D. Cal. 2005) is also instructive. In dismissing Plaintiff's  
24 RCRA claim for lack of subject matter jurisdiction, *Shea Homes*  
25 focused on whether the cleanup site was listed on the National  
26 Priorities List and whether there was EPA involvement:

27 Importantly, it was undisputed in Fort Ord that the  
28 clean up at issue was a remedial action being  
conducted by the EPA pursuant to the grant of

1 authority created by § 120. The site at Ford Ord was  
2 placed by the EPA on the National Priorities List and  
3 the clean up was conducted pursuant to EPA's delegated  
4 authority through an interagency agreement between the  
5 EPA, the Army, and California state Agencies [...]

6 In this case, however, the site at issue is not  
7 included on the National Priorities List and the EPA  
8 is not involved. As a result, authority to undertake  
9 the clean up has been delegated to the Secretary of  
10 Defense [pursuant to E.O. 12580 which delegates  
11 authority under § 104 to the Department of Defense]  
12 [...]

13 As such [...] the response actions in this case were  
14 authorized by § 104 and thus are governed by § 113(h).

15 *Id.* at 1203 (citations omitted).

16 Applying *Pollack*, § 120 "merely supplements the existing  
17 CERCLA regime by bringing federal property owners up to the same  
18 standards as private owners; it does not create a separate system  
19 for the feds." *Id.* at 525. Under *Pollack*, § 120 does not provide  
20 a separate grant of authority beyond the facts of *Fort Ord*.<sup>13</sup>  
21 Assuming, *arguendo*, that AVCRAD and/or CANG changes the OHF to a  
22 "currently operated federal facility," the OHF would still be  
23 characterized as a "non-NPL federal property," not being remediated  
24 by the EPA, similar to *Pollack* and *Shea Homes* (two § 104 cases).  
25 This line of authority does not support the City's position. Here,  
26 the OHF is properly classified as a "non-NPL non-federal property,"  
27 which on the spectrum of 113(h) cases is one degree from *Pollack*  
28 and *Shea Homes* (non-NPL federal property) and two degrees from *Fort*

---

<sup>13</sup> Whether § 120 provides a separate grant of authority for the President to initiate cleanups of federal sites beyond the facts of *Fort Ord* need not be resolved here. It is enough to note the Seventh Circuit's analysis in *Pollack*, distinguish the facts of *Fort Ord*, and discuss the case law applying § 104 and § 120.



1 *Ord* (NPL federal property).<sup>14</sup>

2 The City relies on *City of Moses Lake v. United States*, 416 F.  
3 Supp. 2d 1015 (E.D. Wash. 2005), for the proposition that the  
4 "physical 'location' of the remediation activities is immaterial to  
5 the analysis of whether contamination from a federal facility is  
6 driving the remediation." This is the City's best argument. *Moses*  
7 *Lake* held that the proposed plan was not a § 104 "removal" action,  
8 but a § 120 "remedial action," therefore Plaintiff was not  
9 jurisdictionally barred from seeking a preliminary injunction. *Id.*  
10 However, *Moses Lake* is distinguishable on a number of grounds,  
11 namely that it was decided on a motion for preliminary injunction,  
12 involved a "plan for proposed remediation" not ongoing remediation,  
13 a prior agreement specifically referenced § 120's authority, the  
14 cleanup site was listed on the NPL, and there was EPA involvement:

15 In October 1992, the EPA placed the former LAFB on the  
16 National Priorities List. And in 1999, the Department  
17 of the Army entered into an interagency agreement with  
18 the EPA concerning the preparation and performance of  
19 the RI/FS (Remedial Investigation/Feasibility Study)  
20 for the Moses Lake Wellfield Contamination Site. The  
21 IAG specifically states that the EPA and the Army  
22 enter into "this Agreement pursuant to their  
23 respective authorities contained in Sections 101, 104,  
24 107, 120 and 122" of CERCLA [...]

25 The EPA and the USACE are hereby PRELIMINARILY  
26 ENJOINED from formally issuing the proposed plan  
27 pending further order of this court. Within ten (10)  
28 days of the date of this order, EPA and the USACE  
shall make the proposed plan available to counsel for  
Moses Lake and all "relevant" Moses Lake officials  
involved in decision-making with regard to the Moses  
Lake Wellfield Contamination Site [...]

*Id.* at 1021, 1027.

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14 Like *Shea Homes*, the OHF is not listed on the NPL and the  
EPA is not involved with the current cleanup.

1           **The City fails to reconcile the relevant case law, including**  
2 ***Pollack, Shea Homes, Moses Lake, and OSI, Inc. v. United States,***  
3 **525 F.3d 1294 (11th Cir. 2008).<sup>15</sup> They involved materially**  
4 **different issues from the one in this case. *Pollack, Shea Homes***  
5 ***and OSI, Inc.* dealt with whether 113(h)'s jurisdictional bar**  
6

---

7           <sup>15</sup> *OSI, Inc. v. United States*, 525 F.3d 1294 (11th Cir. 2008)  
8 is also instructive:

9           While [§ 120's] discussion of federal facilities is  
10 extensive, we have searched the language of the section  
11 in vain for a general authorization for the federal  
12 government to engage in remedial actions on federal  
13 facilities. The only language approaching such a grant  
14 of authority is in [§ 120(e)], which, as stated above,  
15 says a department "shall" engage in remedial  
16 investigation and action, but only after the site has  
17 been included on the NPL. Section [§ 120] contains no  
18 language authorizing any remedial activity if the site is  
19 not listed on the NPL. It is undisputed that the OU-1  
20 site has not been placed on the NPL. The only language  
21 authorizing remedial actions on such sites is found in [§  
22 104], the language of which is broad enough to be read as  
23 an authorization for all remedial actions, regardless of  
24 the land upon which the action takes place. Therefore,  
25 we hold the Air Force's remedial action for OU-1, a  
26 federal facility not listed on the NPL, was "selected  
27 under"[§ 104] and is subject to the jurisdictional bar of  
28 [§ 113(h)] [...]

Our view of [§ 113(h)] for federal facilities not listed  
on the NPL comports with the view of the Seventh Circuit.  
The only other Circuit to address the jurisdictional bar  
for federal facilities and the source of authority for  
remedial actions is the Ninth Circuit in Fort Ord [...] which held challenges to federal site cleanups were not  
subject to [§ 113(h)'s] jurisdictional bar. As the court  
in *Pollack* noted, however, Fort Ord is distinguishable  
because there the federal facility was listed on the NPL.  
Where a federal facility is not listed on the NPL, the  
only language authorizing remedial or removal actions is  
found in § 104.

(*Id.* at 1298-99.)

1 applied to federal facilities that were not listed on the NPL  
2 and/or did not involve the EPA. Conversely, *Fort Ord* and *Moses*  
3 *Lake* dealt with a federal facility that was listed on the NPL and  
4 involved the EPA. The OHF is a non-NPL non-federal property with  
5 no EPA involvement.<sup>16</sup>

6 The same reasoning applies to the City's most recent argument  
7 concerning TCP contamination. The City argues that because the  
8 "current State-approved remedial action plan for OHF does not yet  
9 address TCP, [thus] there can be no challenge to it that would  
10 implicate Section 113(h)." Applying the City's reasoning, anytime  
11 a new contaminant is *alleged* to be released on or near a current  
12 cleanup site - even if that site is privately owned and cleanup is  
13 proceeding under E.O. 12580 and/or DERP - § 113's jurisdictional  
14 bar is inapplicable.<sup>17</sup> This not only would lead to an illogical  
15 result, but also conflicts with the stated purpose of § 113(h).

16 The City's arguments raise questions concerning how the  
17 ongoing remediation of a formerly owned federal property is  
18 impacted by the alleged discovery of a new contaminant. The City,  
19 however, does not bring its TCP allegations and AVCRAD/CANG  
20 arguments within the authority of § 120. The argument is weakened  
21

---

22 <sup>16</sup> *Fort Ord* is factually distinguishable as the lawsuit  
23 concerned contamination on federally owned property - an Army base  
24 - and "[i]n February 1990, Fort Ord was placed on the Environmental  
Protection Agency's National Priorities List."

25 <sup>17</sup> The City offers no legal support for its theory. In  
26 addition, on these facts, introduction and remediation of a new  
27 contaminant at the OHF site would necessarily involve the DTSC and  
28 RWQCB, as well as a "substantial and imminent" danger finding under  
the RCRA framework. The City does not develop these arguments as  
they relate to § 113(h)'s jurisdictional bar.

1 by the City's request to "solely enforce the existing orders from  
2 DTSC and RWQCB," that do not discuss TCP or concern AVCRAD/CANG.  
3 The relevant case law, including *Fort Ord*, *Pollack*, *Shea Homes*,  
4 *Moses Lake*, and *OSI, Inc.*, distinguishes the City's argument.

5 Here, all the evidence points to the applicability of § 104:  
6 the language of the cooperative agreement; OHF is privately owned  
7 by the City of Fresno; OHF is not listed on the NPL; the EPA is not  
8 involved in the cleanup of OHF; and neither AVCRAD nor CANG is  
9 involved in any aspect of the OHF cleanup. Nor does the City  
10 explain the specific inclusion of E.O. 12580 and DERP in the  
11 cooperative agreement (as opposed to the language re: the authority  
12 of § 120 to cleanup AVCRAD and KANG). The City's evidence is  
13 insufficient to create a genuine dispute of material fact that  
14 CERCLA § 120 applies to the OHF cleanup and not § 104.

15  
16 a. *Is There a Challenge under § 113(h)?*

17 The City contends that even if the cleanup efforts at the OHF  
18 site are proceeding under § 104, the complaint is not a "challenge"  
19 to a cleanup plan that removes jurisdiction. The United States  
20 responds that the City's RCRA cause of action constitutes such a  
21 challenge while the City contends that it does not. The City  
22 claims that it is not attempting to challenge the cleanup because  
23 of "the presence of TCP in the groundwater." The proposed order  
24 and SAC, however, show that the City requests compliance with RCRA  
25 as well as to enforce the terms of the cooperative agreements and  
26 DTSC orders.

27 The City's arguments have been rejected by the Ninth Circuit  
28 in *McClellan Ecological Seepage Situation ("MESS") v. Perry*, 47

1 F.3d 325 and *Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995).  
2 In *MESS v. Perry*, the Ninth Circuit took a broad view of the scope  
3 of § 113(h). There, the plaintiffs made an argument similar to  
4 that advanced here: that their RCRA claim was not a "challenge"  
5 under § 113(h) because it was not attempting to delay or modify the  
6 remedy, but rather only sought to compel the defendant's compliance  
7 with RCRA's requirements. *Id.* at 330-31. The Court held that  
8 while tangentially related claims, such as those to enforce minimum  
9 wage requirements, do not constitute a challenge under § 113(h),  
10 the plaintiffs' claim was "far more directly related to the goals  
11 of the cleanup itself." *Id.* at 330. The Court also concluded that  
12 for "all practical purposes" the plaintiffs were effectively  
13 seeking to "improve" the clean up. *Id.* As such, it found that the  
14 plaintiff's claim was a "challenge" barred by § 113(h). *Id.*

15 *Shea Homes Ltd. P'ship v. United States*, 397 F. Supp. 2d  
16 1194, is also instructive. Citing *McClellan*, *Shea Homes* held that  
17 the plaintiff's RCRA claim was related to the cleanup's goals and  
18 would interfere with the ongoing cleanup efforts:

19 Here, [Plaintiff] also argues that it is merely  
20 seeking to enforce Defendant's compliance with  
21 applicable state laws and requirements. It is  
22 apparent, however, that it has a different view of  
23 what state law requires than does Defendant; otherwise  
24 it would have no purpose in seeking injunctive relief.  
25 Indeed, Plaintiff alleges that the Corps' response has  
26 not adequately contained or controlled the migration  
27 of landfill gas and that it should be 'enjoined to  
28 abate the migration.' Plaintiff also contends, as  
noted above, that the Corps has made improper choices  
with respect to the timing of certain elements of the  
remedy. As such, the Court concludes that Plaintiff  
effectively seeks injunctive relief to "improve" the  
on-going clean up. As such, Plaintiff's RCRA claim is  
plainly related to the goals of the clean up-and would  
likely require some interference with on-going clean  
up plans. Accordingly, the RCRA claim constitutes a  
"challenge" for purposes of § 113(h), and must

1           therefore be dismissed for lack of jurisdiction.

2           Id. at 1204 (citations omitted).

3           The City argues that it is "solely seeking to enforce the  
4 existing orders from DTSC and RWQCB, not to second-guess or change  
5 them." The City further argues that a genuine dispute of fact  
6 exists because "the current State-approved remedial action plan for  
7 OHF does not yet address TCP." It is unclear, however, how TCP is  
8 related to the proposed injunction relief - the proposed order does  
9 not address TCP contamination. Here, the City's request to enforce  
10 the existing DTSC and RWQCB orders - and their provisions to divide  
11 the remediation into discrete tasks - constitutes a "challenge"  
12 under *McClellan* and *Shea Homes*, as well as other Ninth Circuit  
13 authority. See, e.g., *Hanford Downwinders Coalition, Inc. v.*  
14 *Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995) ("We held in *Razore v.*  
15 *Tulalip Tribes*, that '[a]n action constitutes a challenge if it is  
16 related to the goals of the cleanup.'").

17           The City's fourth claim under RCRA is DISMISSED WITH PREJUDICE  
18 for lack of subject matter jurisdiction pursuant to § 113(h) of  
19 CERCLA.

20  
21           2.    *Imminent and Substantial Finding, Mootness, Primary JX*

22           Because Defendant's summary judgment motion is barred by §  
23 113(h) of CERCLA, it is unnecessary to resolve the issues  
24 concerning mootness, the primary jurisdiction doctrine, and whether  
25 the City has satisfied RCRA's "imminent and substantial  
26

1 **endangerment" requirement.**<sup>18</sup>

2 **Assuming, *arguendo*, that § 113(h) does not bar the City's RCRA**  
3 **claim, it is unclear how the City demonstrates "credible evidence"**  
4 **to suggest that the current levels of TCP contamination create an**  
5 **imminent or substantial endangerment to health or the environment**  
6 **exists at or near the OHF.**<sup>19</sup> **Moreover, the State of California,**

---

8 <sup>18</sup> Under the doctrine of primary jurisdiction, when certain  
9 issues or forms of requested relief require the resolution of  
10 matters that fall "beyond the conventional experience of judges" or  
11 are "within the realm of [...] an administrative agency with more  
12 specialized experience, expertise, and insight [than the  
13 judiciary]," a court may either stay the action until the agency  
14 has considered the issue, or may dismiss the claims altogether.  
15 *United States v. Gabelli*, 345 F. Supp. 2d 340, 350-51 (S.D.N.Y.  
16 2004). This judicially created doctrine serves two primary  
17 interests. First, it allows the resolution of "technical questions  
18 of fact through an agency's specialized expertise prior to judicial  
19 consideration of the legal claims." Second, such deference ensures  
20 "consistency and uniformity in the regulation of an area" entrusted  
21 to an agency by the legislature through a regulatory scheme. *Id.*

17 <sup>19</sup> RCRA provides for citizen suits "against any person ... who  
18 has contributed or who is contributing to the past or present  
19 handling, storage, treatment, transportation, or disposal of any  
20 solid or hazardous waste which may present an imminent and  
21 substantial endangerment to health or the environment." 42 U.S.C.  
22 § 6972(a)(1)(B). Under this section, "[a]n endangerment can only  
23 be 'imminent' if it 'threatens to occur immediately.'" *Meghrig v.*  
24 *KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (quoting Webster's New  
25 International Dictionary of English Language 1245 (2d ed.1934)).  
26 "[T]his language 'implies that there must be a threat which is  
27 present now, although the impact of the threat may not be felt  
28 until later.'" *Id.* (quoting *Price v. United States Navy*, 39 F.3d  
1011, 1019 (9th Cir. 1994)). To show an "imminent and substantial"  
threat, the plaintiff must do more than establish the presence of  
solid or hazardous wastes at a site. *Foster v. United States*, 922  
F.Supp. 642, 661 (D.D.C. 1996). Instead, "endangerment must [be  
shown to] be substantial or serious, and there must be some  
necessity for the action." *Price*, 39 F.3d at 1019. The fact that  
remedial activity in accordance with CERCLA has commenced at a site  
greatly reduces the likelihood that a threat to health or the  
environment is imminent. *Christie-Spencer Corp. v. Hausman Realty*

1 through the DTSC and RWQCB, has oversight over the remediation and  
2 has the scientific understanding and resources necessary to  
3 investigate and remediate alleged hazards. Conversely, the  
4 district court has neither the resources nor expertise necessary to  
5 properly address the scientific issues presented by an alleged  
6 imminent and substantial endangerment to health or the environment.

7 These concerns are shared by a number of district courts  
8 throughout the United States. See *West Coast Home Builders, Inc.*  
9 *v. Aventis Cropscience USA Inc*, No. 04-2225-SI, 2009 WL 2612380  
10 (N.D. Cal. 2009) ("There are two fundamental problems with  
11 plaintiff's RCRA claim [...] [f]irst, the Consent Order already  
12 requires GBF/TRC to clean up the groundwater contamination, and  
13 that remediation has been underway for years [] Plaintiff seeks  
14 relief that it is already obtaining outside of this lawsuit.");  
15 see also *River Vill. W. LLC v. Peoples Gas Light and Coke Co.*, 618  
16 F. Supp. 2d 847, 854-55 (N.D. Ill. 2008) ("Unlike the district  
17 court, the [agency] has been specifically charged with the  
18 responsibility to develop and enforce regulations to implement the  
19 environmental laws passed by Congress [...] the district court's  
20 handling of this matter would be delayed by years if research and  
21 discovery which would be necessary to develop a basic understanding  
22 of the [contamination area and hazards presented]."); *OSI, Inc. v.*  
23 *United States*, 510 F. Supp. 2d 531 (M.D. Ala. 2007) ("OSI has  
24 presented no [] evidence to suggest that an imminent or substantial  
25 endangerment to health or the environment exists on OSI or  
26 Government property. Furthermore, the Government is conducting a

27 \_\_\_\_\_  
28 *Co., Inc.*, 118 F. Supp. 2d 408, 419-23 (S.D.N.Y. 2000).



1 remediation program in conjunction with ADEM to repair any  
2 contamination and resulting dangers that do exist [...] [t]hese two  
3 factors together lead the Court to conclude that the Government is  
4 entitled to summary judgment."); *Davis Bros., Inc. v. Thornton Oil*  
5 *Co.*, 12 F. Supp. 2d 1333, 1338 (M.D. Ga. 1998) ("[P]laintiff has  
6 presented no credible evidence supporting a finding of imminent and  
7 substantial endangerment to health or the environment [...] [m]oreover,  
8 the proposed remedy of injunctive relief is moot  
9 because Conoco has already agreed to remediate the site and pay for  
10 any costs associated with the cleanup, and the state is overseeing  
11 the cleanup more effectively than the court ever could. Thus, the  
12 RCRA claim fails on the merits, and is also moot."). This language  
13 applies with equal force to this case.

14  
15 C. HSAA CLAIM

16 The United States argues that the Court lacks subject matter  
17 jurisdiction to hear the HSAA claim because the United States has  
18 not waived sovereign immunity. The City disagrees.

19 In enacting CERCLA, Congress "envisioned a partnership between  
20 various levels of government in addressing the complex and costly  
21 problems associated with hazardous waste remediation." *Fireman's*  
22 *Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 940 (9th Cir.  
23 2002). CERCLA specifically anticipates states enacting legislation  
24 addressing environmental remediation. *Id.* at 942. In California,  
25 the Carpenter-Presley-Tanner Hazardous Substance Account Act  
26 ("HSAA"), Cal. Health & Safety Code § 25300 *et seq.*, grants the  
27 DTSC authority to require the cleanup of sites within the state  
28 where chemical contamination represents a threat to human health or

1 the environment. *Id.* at 934. HSAA is the state law counterpart to  
2 CERCLA. *Foster-Gardner, Inc. v. National Union Fire Ins. Co. of*  
3 *Pittsburgh, PA*, 18 Cal.4th 857, 865 (1998); *City of Lodi v.*  
4 *Randtron*, 118 Cal. App. 4th 337, 351 (2004). Under HSAA, DTSC  
5 oversees the cleanup of hazardous waste sites by issuing remedial  
6 orders and by entering into agreements with potentially responsible  
7 parties ("PRPs") to facilitate remediation efforts. *Fireman's*  
8 *Fund*, 302 F.3d at 934. Both the federal and state statutes are  
9 designed to: (1) achieve the complete and cost-effective cleanup of  
10 contaminated sites; and (2) provide a way to assign those costs to  
11 the parties responsible for the contamination. *Id.* at 945-46.

12 Under CERCLA, departments and agencies of the United States  
13 are subject to liability to the same extent as any non-governmental  
14 entity. *United States v. Shell Oil Co.*, 294 F.3d 1045, 1052-53  
15 (9th Cir. 2002). Section 120(a)(1) explicitly waives the sovereign  
16 immunity of the United States with respect to CERCLA actions. *Id.*  
17 Regarding state laws governing hazardous waste response, §  
18 120(a)(4) of the CERCLA statute addresses their application to the  
19 federal government:

20 State laws concerning removal and remedial action,  
21 including State laws regarding enforcement, shall  
22 apply to removal and remedial action at facilities  
23 owned or operated by a department, agency, or  
24 instrumentality of the United States ... when such  
25 facilities are not included on the National  
26 Priorities List. The preceding sentence shall not  
27 apply to the extent a State law would apply any  
28 standard or requirement to such facilities which is  
more stringent than the standards and requirements  
applicable to facilities which are not owned or  
operated by any such department, agency, or  
instrumentality.

42 U.S.C. § 9620(a)(4) (emphasis added).

The law regarding waivers of the sovereign immunity of the

1 United States is straightforward. Absent an express waiver, "the  
2 activities of the federal government are free from regulation by  
3 any state." *United States v. State of Wash.*, 872 F.2d 874, 877  
4 (9th Cir. 1989) (quoting *Mayo v. United States*, 319 U.S. 441, 445  
5 (1943)). Any waiver of United States sovereign immunity must be  
6 unequivocal; it cannot be implied. *United States Dep't of Energy*  
7 *v. Ohio*, 503 U.S. 607, 615 (1992); *State of Wash.*, 872 F.2d at 877.  
8 Such a waiver "must be construed strictly in favor of the sovereign  
9 and not enlarged beyond what the language requires." *Ohio*, 503  
10 U.S. at 615 (citations and quotations omitted). Furthermore, only  
11 Congress can waive the sovereign immunity of the United States.  
12 *Cal. v. NRG Energy Inc.*, 391 F.3d 1011, 1023-24 (9th Cir. 2004);  
13 *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 644 (9th  
14 Cir. 1998). It must do so explicitly in statutory text. *United*  
15 *States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) ("[t]he  
16 'unequivocal expression' of elimination of sovereign immunity that  
17 we insist upon is an expression in statutory text.").

18 To determine whether the United States waived its sovereign  
19 immunity under § 120(a)(4), it is necessary to harmonize the  
20 arguments advanced by the parties in the original briefing with  
21 those raised in the renewed motion. In 2007, the City argued  
22 CERCLA § 120(a)(4) includes both facilities currently owned or  
23 operated by the United States, as well as those that were formerly  
24 owned or operated, such as OHF. According to the City, because OHF  
25 was a "formerly operated facility," § 120(a)(4)'s waiver of  
26 sovereign immunity applies to OHF and the City's HSAA claim against  
27 the United States survives. The City relied exclusively on *Tenaya*  
28 *Assoc. Ltd. P'ship v. United States Forest Serv.*, No. CV-F-92-5375

1 REC, 1995 WL 433290 (E.D. Cal. May 19, 1993) as the "law of this  
2 district."

3 In *Tenaya*, the court found that the § 120(a)(4) waiver  
4 included a waste site in Fish Camp, California that the United  
5 States had formerly operated and owned. *Tenaya* stated § 120(a)(4)  
6 is "meant to include all actions brought against the United States  
7 for harms which occur during a time when the United States owns or  
8 operates a facility." *Id.* at \*2. The court observed that this  
9 interpretation preserved the present tense wording of the section  
10 and provided a clear limit on the waiver of sovereign immunity in  
11 that immunity was maintained for past harms that occurred before  
12 the government owned or operated the facility. *Id.* Citing  
13 surrounding CERCLA provisions in support of its conclusion, the  
14 *Tenaya* court explained that § 120(a)(4) should be read in  
15 conjunction with sections 120(a)(1) and section 107(a)(2), which  
16 subject federal facilities to the full extent of CERCLA liability  
17 and define who is liable, respectively. *Id.* at \*2-3. This reading  
18 avoided what the *Tenaya* court termed an illogical outcome, namely,  
19 that if formerly owned or operated facilities were not included  
20 then (1) the United States would be liable for all past harms as  
21 long as it currently owned or operated a facility, regardless of  
22 whether it created those harms, and (2) the government could avoid  
23 liability by simply selling land that it contaminated before a  
24 lawsuit was initiated. *Id.* at \*3.

25 *Tenaya* is not binding authority on another District court.  
26 Nor is it accurate to say it is "the law of this district."  
27 District court opinions are relevant for their persuasive authority  
28 but they do not bind other district courts within the same

1 district. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th  
2 Cir. 2001). Second, the *Tenaya* opinion is not persuasive. Every  
3 district court decision on this issue since has held that §  
4 120(a)(4) only waives sovereign immunity for state law claims  
5 related to facilities currently owned or operated by the United  
6 States. See *Steadfast Ins. Co. v. United States*, No. CV 06-4686-  
7 AHM-RZX (C.D. Cal. Feb. 6, 2007); *Gen. Motors Corp. v. Hirschfield*  
8 *Steel Serv. Ctr., Inc.*, 402 F. Supp. 2d 800, 804 (E.D. Mich. 2005);  
9 *Miami-Dade County v. United States*, 345 F. Supp. 2d 1319, 1354  
10 (S.D. Fla. 2004); *Crowley Marine Servs., Inc. v. Fednav Ltd.*, 915  
11 F.Supp. 218, 222 (E.D. Wash. 1995); *Rospatch Jessco Corp. v.*  
12 *Chrysler Corp.*, 829 F. Supp. 224, 227 (W.D. Mich. 1993). In so  
13 holding these courts have emphasized that a waiver must be  
14 unequivocal and cannot be implied. The facts and ruling in *Tenaya*  
15 are not helpful or persuasive in this case.

16 The arguments raised in the renewed motion are addressed in  
17 light of the majority view interpreting § 120(a)(4), i.e., *Tenaya's*  
18 inapplicability. Here, the substance of the United States' renewed  
19 motion mirrors that of its original motion: that none of the  
20 remediation is taking place on a federally owned facility,  
21 therefore § 120(a)'s waiver provisions do not apply. The City, in  
22 contrast, now argues that the United States waived its sovereign  
23 immunity by operating AVCRAD and CANG facilities at OHF - making it  
24 a "current operator" -, a position developed during an exchange  
25 between the Court and the City's counsel on December 3, 2007:

26 Court: So by the presence of the Air Guard, you say  
27 that this is a current federal facility that's  
in operation.

28 Counsel: That is correct. There are parts of it that are

1 currently in operation, and the National Guard  
2 Bureau is named in our complaint, it comes to  
3 all of the Old Hammer Field steering committee  
4 meetings. There are issues relating to their  
5 use of the site.

6 The United States said that it pertains to a  
7 completely different issue. He said that the  
8 currently owned federal properties are not  
9 involved in the cleanup. That is absolutely not  
10 the case. There is PCE that has been released  
11 from the KANG parcels that is part of this.  
12 Some of the releases from the KANG parcels have  
13 commingled with the plume that emanates from  
14 Area 1, which create issues in terms of what  
15 needs to be done to clean up.

16 And therefore, because you have a commingled  
17 waste plume, you can't necessarily say, you  
18 know, you can't really distinguish whose fault  
19 it is, and what cleanup is necessary because of  
20 what actions.

21 And, again, those are issues that will obviously  
22 develop for the Court as we move forward, but at  
23 this point there are issues of divisability  
24 [sic] and issues of who is responsible for what  
25 that aren't ripe for decision...

26 Court: Are those facts in the complaint?

27 Counsel: The facts that the Guard is currently operating?

28 Court: Yes, and on-site?

Counsel: I believe that those are in the complaint, and  
if it's not, that would be a simple matter to  
amend.

(Reporter's Transcript ("RT"), December 3, 2007, 53:2-54:12.)

On June 9, 2009,<sup>20</sup> the City filed the operative second amended  
complaint, which included new/modified allegations that the United  
States is a "current operator" at OHF pursuant to its AVCRAD and  
KANG operations:

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<sup>20</sup> The City's motion for leave to file the second amendment  
complaint was filed on May 23, 2009. (Doc. 123.) Leave was  
granted on June 9, 2009. (Doc. 127.)

- 1 25. The United States is both a part and current  
2 operator of OHF, and has operated at OHF from 1941  
3 to the present [...]
- 4 32. The California Army National Guard ("CANG") units,  
5 through the Transportation Aircraft Repair Shop  
6 ("TARS") and the Aviation Classification Repair  
7 Activity Depot ("AVCRAD"), whose interests are  
8 represented by the USACE, performed, among other  
9 activities, cleaning, stripping, repair, overhaul,  
10 maintenance, refurbishing and construction of  
11 helicopters and aircraft and associated parts at OHF  
12 on land and property leased from the City. As such,  
13 this Complaint hereafter refers to all activities  
14 conducted by CARNG, TARS, AVCRAD as though conducted  
15 by defendant USACE. USACE leased certain portions of  
16 the property and land on OHF at which it conducted  
17 its operations from the City between 1961 and at  
18 least 1987. USACE continued, since 1987 to the  
19 present, to lease certain portions of property and  
20 land at OHF at which it continued and continues to  
21 conduct its operations.
- 22 33. During the time it leased property from the City,  
23 USACE, among other activities, modified aircraft and  
24 remanufactured aircraft parts for the United States  
25 in connection with the Korean war as well as other  
26 ongoing and general defense support activities.
- 27 34. USACE leased various buildings and land from the  
28 City at OHF, conducting its primary operations in  
three locations at OHF, including in and around  
Hangar T-282 and Hangar P-3, the East Air Terminal  
Drive facility and the Airways Avenue locations, as  
well as surrounding buildings, and elsewhere on the  
leased land.
35. In the course of its activities and operations, upon  
information and belief USACE has used, stored and  
released numerous chemicals, hazardous substances,  
wastes, materials, pollutants, and contaminants,  
including but not limited to PCE, TCE, and TCP at,  
under, adjacent to and downgradient of OHF that have  
negatively impacted the land, soil and ground water  
at, under, adjacent to and downgradient of OHF.
36. In the course of its activities and operations at  
OHF, USACE has released and continues to release  
hazardous substances, wastes, materials, pollutants  
and contaminants into the ground water, soil and  
environment at OHF, including, but not limited to  
dumping and pouring waste TCE directly into the  
sewer system, which releases and continued  
threatened releases have caused the City to incur  
necessary response costs associated with OHF

1 consistent with the NCP in excess of the City's fair  
2 share of any such costs, as well as other damages.

3 37. The California Air National Guard ("CANG"), whose  
4 interests are represented by the NGB, has conducted  
5 and now conducts its operations and activities on  
6 land and property leased from the City. As such,  
7 this Complaint hereafter refers to all activities  
8 conducted by CANG as though conducted by defendant  
9 NGB. NGB leased the property and land on OHF at  
10 which it conducted and conducts its operations from  
11 the City between at least 1954 and the present.

12 39. In the course of its operations and activities at  
13 OHF, upon information and belief NGB has used,  
14 stored and released numerous chemicals, hazardous  
15 substances, wastes, materials, pollutants and  
16 contaminants, including but not limited to PCE, TCE  
17 and TCP, at, under, adjacent to and downgradient of  
18 OHF that have negatively impacted the land, soil and  
19 ground water at, under, adjacent to and downgradient  
20 of OHF.

21 40. NGB is a current owner of a federal facility at OHF.

22 41. In the course of its activities and operations at  
23 OHF, NGB has and continues to release hazardous  
24 substances, wastes, materials, pollutants and  
25 contaminants into the ground water, soil and  
26 environment at OHF, which releases and continued  
27 threatened releases have caused the City to incur  
28 necessary response costs associated with OHF  
consistent with the NCP in excess of the City's fair  
share of any such costs, as well as other damages  
[...]

52. Upon information and belief, other hazardous  
substances, wastes, contaminants, pollutants, and  
materials, including TCP, have also been identified  
as present in the soil and ground water at, under,  
adjacent to and downgradient of OHF [...]

124. The City has incurred, and will continue to incur,  
response costs, including costs of investigation,  
removal and/or remedial actions, in the  
investigation, clean up and abatement of the  
releases and threatened releases of hazardous  
substances from all of the Defendants' operations  
and activities at OHF, including but not limited to  
the continuing cost of implementing the OHF RAP, all  
pursuant to HSAA and CERCLA and therefore is  
entitled to contribution and indemnity from  
defendants, together with interest, under HSAA,  
Health and Safety Code § 25363(e).



1 (SAC, ¶'s 25, 32-37, 39-41, 52, 124.)

2 The City's new allegations raise the question of what effect  
3 the United States' operation of AVCRAD and CANG have on the issue  
4 of waiver under § 120(a)(4). The United States argues that the  
5 operation has no effect because the actual remediation is taking  
6 place on land owned by the City, not federal property. The United  
7 States also maintains that the property leased by the federal  
8 government - AVCRAD and CANG - was remediated, therefore the City  
9 did not incur any response costs on federal property. The City  
10 responds that it satisfies *Iqbal* because it "alleged in its SAC  
11 that the response costs were incurred at property that is currently  
12 owned or operated by the United States."

13 The United States is correct. The City's primary argument  
14 fails on the specific facts of this case, as the OHF remediation is  
15 taking place on property owned by the City, not the federal  
16 government. (See SAC, Doc. 123-3, ¶ 5 ("The City, which is  
17 involved solely because it owns the property the Defendants  
18 contaminated [....]" ; Doc. 123-3 at ¶ 38 ("[The United States]  
19 continues to lease property from the City [....]"); Doc. 123-3 at  
20 ¶ 55 ("The City was identified by the State as a PRP solely because  
21 of its ownership of the OHF property [....]")). Moreover, the  
22 exhibits/maps attached to the SAC demonstrate that the remediation  
23 site is separate and distinct from AVCRAD and CANG, i.e., the  
24 alleged "current federal operations."<sup>21</sup> (See Docs. 123-4 through

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25  
26 <sup>21</sup> Generally, to avoid converting a motion for judgment on the  
27 pleadings into a motion for summary judgment, the Court may only  
28 consider the face of the complaint. See Fed. R. Civ. P. 12(c); *Van  
Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.  
2002). However, the incorporation by reference doctrine allows the

1 123-6; Doc. 123-3, ¶ 34.) The mere presence of the AVCRAD and CANG  
2 facilities - on the OHF airfield generally - does not transmute the  
3 entire cleanup into a remedial action at a "federally owned or  
4 controlled" facility; such unaffiliated federal facilities are  
5 outside the scope of § 120(a)(4).<sup>22</sup> The City does not sufficiently  
6 allege that there is a remedial action at a "facility" owned or  
7 operated by the federal government.<sup>23</sup> See *Iqbal*, 129 S.Ct. at 1950

8  
9 Court to consider any exhibits attached to the complaint as well as  
10 any documents "whose contents are alleged in a complaint and whose  
11 authenticity no party questions, but which are not physically  
12 attached." *Knivel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).  
13 The Court may also "take judicial notice of matters of public  
14 record" and consider them without converting the motion into one  
15 for summary judgment. *United States v. 14.02 Acres*, 547 F.3d 943,  
16 955 (9th Cir. 2008).

17  
18 <sup>22</sup> Specifically, the City alleges that "[t]he United States is  
19 both a past and current operator of OHF, and has operated at OHF  
20 from 1941 to the present." (Doc. 123-3, ¶ 25.) However, the City  
21 conflates two distinct definitions/operations: (1) federal  
22 operations/facilities, generally; and (2) removal or remedial  
23 actions at "facilities owned or operated by a department, agency,  
24 or instrumentality of the United States." 42 U.S.C. § 9620(a)(4)  
25 (emphasis added). Here, the City acknowledges that the United  
26 States does not own - or conduct operations - at the remediation  
27 site. Instead, it alleges that the United States' adjacent  
28 operations - on the larger OHF airfield - constitute applicable  
"facilities" under § 9620(a)(4).

29  
30 <sup>23</sup> *Robinson v. U.S. Cold Storage, Inc.*, No. 01-697-GMS, 2002  
31 WL 187511 (D. Del. Feb. 5, 2002) is instructive:

32  
33 The waiver language in CERCLA is not sufficient to  
34 permit an exercise of jurisdiction over the U.S. Air  
35 Force under the facts in this case. USCS's claim  
36 hinges on the fact that the U.S. Air Force crashed a  
37 plane on the site in 1954. CERCLA, however, only  
38 waives immunity as to "facilities" owned by the United  
States. The United States did not own the site in  
question. Further, the court cannot conclude that the  
common meaning of facility encompasses an airplane  
that passed over the site and accidentally crashed

1 ("[O]nly a complaint that states a plausible claim for relief  
2 survives a motion to dismiss [...] where the well-pleaded facts do  
3 not permit the court to infer more than the mere possibility of  
4 misconduct, the complaint has alleged - but it has not 'shown'-  
5 that the pleader is entitled to relief.").

6 At oral argument on March 22, 2010, the City argued that the  
7 United States waived its sovereign immunity by signing the 1994  
8 cooperative agreement. The relevant portion of the Agreement  
9 provides:

10 Potentially Responsible Party Agreement Under  
11 CERCLA/SARA, the NCP, California Health and Safety  
Code §§ 25355.5, 25353 and 25347.6.

12 (Doc. 45-6, pg. 7.)

13 The City relies on *Kaffenberger v. United States*, 314 F.3d 944  
14 (8th Cir. 2003) for the proposition that the United States waived  
15 its sovereign immunity because the cooperative agreement  
16 incorporated the HSAA.

17 The City's argument is a nonstarter. First, *Kaffenberger* is  
18 based on a tax law nuance: Congress, as the only branch able to  
19 waive the United States' sovereign immunity, provided a "mechanism  
20 that allows the IRS and taxpayer to extend the period for bringing  
21 suit to recover a refund beyond the normal two-year statutory

---

22  
23 there. Moreover, since the plane no longer exists,  
24 the court refuses to find that it is a facility [...]

25 Since the plane is neither a facility [...] the court  
26 finds that USCS has failed to allege facts that prove  
27 the U.S. Air Force has engaged in an activity that  
would cause the court to conclude that it has waived  
its sovereign immunity under CERCLA.

28 *Id.* at \*3.

1 period." *Id.* at 952. *Kaffenberger* is distinguishable; there is no  
2 such congressional action in this case. Second, the City's  
3 reasoning conflicts with the general rule that "only an express  
4 statute may waive the sovereign immunity of the United States."  
5 *Lion Raisins, Inc. v. United States*, 58 Fed. Cl. 391, 396 (Fed.Cl.  
6 2003) (citation omitted). These two factors together lead to the  
7 conclusion that the United States did not waive its sovereign  
8 immunity when it signed the cooperative agreement.

9 The City has failed to state facts sufficient to state a claim  
10 under the HSAA. A claim is plausible only "when the plaintiff  
11 pleads factual content that allows the court to draw the reasonable  
12 inference that the defendant is liable for the misconduct alleged."  
13 *Iqbal*, 129 S.Ct. 1937, 1949 (quoting *Bell Atlantic Corp. v.*  
14 *Twombly*, 550 U.S. 544, 570.). The SAC's third cause of action  
15 under the HSAA does not meet this standard. See *In re Syntex Corp.*  
16 *Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996) ("Conclusory  
17 allegations and unwarranted inferences are insufficient to defeat  
18 a motion for judgment on the pleadings."). The United States'  
19 motion is GRANTED.

20 The City's HSAA claim is based on the conclusory allegation  
21 that the AVCRAD and CANG operations are "currently owned or  
22 operated federal facilities," as defined by 42 U.S.C. § 9620(a)(4).  
23 However, there are no facts alleged in the SAC which support such  
24 a conclusion. First, the remediation "facility" or "site" is owned  
25 by the City of Fresno, not the federal government. It is clear  
26 from the SAC - and attached exhibits - that the remediation site is  
27 only a portion of the larger OHF and is not located on the property  
28 leased by the federal government (for its AVCRAD or CANG

1 operations). Second, it is/was impossible for the City to incur  
2 response costs at either AVCRAD or CANG because the Corps  
3 remediated both sites many years ago.<sup>24</sup> For these reasons, the HSAA  
4 claim is DISMISSED WITH PREJUDICE.<sup>25</sup>

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17  
18 <sup>24</sup> The City alleges that it incurred response costs stemming  
19 from the "implement[ation] [of] the OHF RAP" and "in excess of the  
20 City's fair share of any such costs." As explained *supra*, however,  
21 the OHF cleanup involves City-owned property, not federally owned  
22 or controlled facilities. The government also notes that it is/was  
impossible for the City to incur response costs at either AVCRAD or  
CANG because the Corps remediated both sites many years ago.

23 <sup>25</sup> For these reasons, any amendment to Plaintiff's HSAA claims  
24 would be futile. See generally *Steckman v. Hart Brewing, Inc.*, 143  
25 F.3d 1293, 1298 (9th Cir. 1998) ("Although there is a general rule  
26 that parties are allowed to amend their pleadings, it does not  
27 extend to cases in which any amendment would be an exercise in  
28 futility, or where the amended complaint would also be subject to  
dismissal ...." (citations omitted)). Moreover, the City did not  
request leave to amend in either its original or renewed  
opposition. However, if the City now contends it can sustain a  
HSAA claim, it may file a motion under Rule 15(a) of the Federal  
Rules of Civil Procedure.

1 V. CONCLUSION

2 For the reasons stated:

3 (1) The United States' motion for partial summary judgment on  
4 the City's RCRA claim is GRANTED; and

5 (2) The United States' motion for partial judgment on the  
6 pleadings on the City's HSAA claim is GRANTED.

7  
8 The United States shall submit a form of order consistent  
9 with, and within five (5) days following electronic service of,  
10 this memorandum decision.

11  
12 IT IS SO ORDERED.

13 Dated: April 22, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE