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Mr. Steven C. Silverman
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RE: ***Washington v. Chu***
U.S.D.C. Eastern No. 08-5085-FVS
Response to Department of Energy's March 31, 2014, Proposal to Amend Consent Decree

Dear Mr. Kaplan and Mr. Silverman:

Pursuant to Section VII.A.3 of the Consent Decree in *Washington v. Chu*, No. 08-5085-FVS (Consent Decree), this letter constitutes the State of Washington's response to the March 31, 2014, *Proposal by the U.S. Department of Energy to the State of Washington to Amend the Consent Decree* (Energy's proposal). Energy's proposal is not acceptable to Washington.

Summary of Reasons for Disagreement

Washington disagrees with Energy's proposed amendment approach for two overarching reasons. First, while Washington agrees there should be a phased implementation of WTP facilities, [1] the manner in which Energy has proposed to amend the Consent Decree to implement such a phased approach lacks sufficient specificity, accountability, and enforceability. Second, Energy's proposal does not go far enough. Specifically, Energy's proposal fails to mitigate the impact that delays in achieving operations of the entire WTP, and any associated extension necessary to accommodate such delays under the Consent Decree, will have. Unless mitigated,

[1] Given the likely delay with the various facilities that comprise the WTP, Washington believes it is appropriate to move forward with construction and operational actions to implement Direct Feed Low Activity Waste (DFLAW), while simultaneously proceeding to resolve technical issues with the High Level Waste (HLW) and Pretreatment (PT) facilities, followed by resuming the design, construction, and operations of those facilities (including developing a Tank Waste Characterization and Staging (TWCS) capability).

cross ref- 1223859 & 1223614

these WTP delays will further postpone retrieving waste from Hanford's single-shell tanks (SSTs) and completing the treatment of Hanford's tank waste, including providing for supplemental treatment.

Energy's proposal lacks sufficient specificity, accountability, and enforceability

Energy proposes to indefinitely extend most of the Consent Decree's WTP deadlines by trading current hard deadlines and specific tasks for future unspecified milestones to be set on an open-ended, rolling basis. In the process, Energy's proposal eliminates express deadlines for completing such matters as specified construction tasks, starting and completing cold and hot commissioning of individual WTP facilities, and achieving initial plant operations for the WTP as a whole.

The main triggers for setting additional milestones would be left almost entirely to Energy's exclusive control, with little accountability to Washington or the Court. In most instances, Energy would not propose new task milestones until it: (1) either issues an approval through its own internal Critical Decision process (subject to no timelines) or approves a new, internal performance baseline (premised on Energy's own internal "approved funding profile"); and (2) has already entered into contracts to carry out the tasks.

Washington disagrees with this rolling milestone approach because it removes nearly all enforceable deadlines for completing Consent Decree tasks and because it effectively shifts control over the substance and pace of such tasks to Energy's internal decision-making. This is not appropriate in a court order intended to remedy Energy's non-compliance with applicable law. It turns the premise of the Consent Decree on its head. Rather than the Consent Decree dictating Energy's actions to come into compliance with the law, Energy's proposal would have Energy determining how, when, and at what cost it will undertake actions under the Consent Decree, thereby resulting in additional delays at the expense of the people of the State of Washington.

The sum effect of Energy's proposal is to take the Consent Decree a significant step back in specificity, accountability, and enforceability. This is a step in the wrong direction.

Energy's proposal fails to mitigate for WTP schedule extensions

At the same time Energy proposes relaxing Consent Decree specificity, accountability, and enforceability, Energy proposes no mitigation for current and future unspecified and indefinite WTP delays. The balance struck in the parties' 2010 settlement of *Washington v. Chu* was to place requirements in the Consent Decree specifying that the WTP would be operational by 2022, with 19 SSTs retrieved by the same date. The remaining tank waste mission tasks—which include retrieving waste from all remaining SSTs and completing the treatment of all tank waste—were committed to the Hanford Tri-Party Agreement (TPA). The TPA milestones for

these tasks, however, were based on the key premise that Energy would comply with the Consent Decree. In particular, having the WTP achieve "initial operations" status by 2022 was a key basis for completing all SST retrievals by no later than December 31, 2040, and completing all tank waste treatment by no later than December 31, 2047.

Although Energy's proposal would still have 19 SSTs retrieved by 2022, the current and future delay in achieving full WTP operations is likely to set back the rest of the SST retrieval and tank waste treatment missions. Energy itself recognizes that revising Consent Decree milestones related to WTP construction and startup "will likely affect the end date for single shell tank retrievals and the overall tank waste mission." *See* Energy's proposal at 10. Despite this recognition, Energy's proposal fails to mitigate these likely impacts. Energy's proposal thus also takes the Consent Decree a step back in substance, since it would no longer support achieving the retrieval and treatment "end dates" established as part of the 2010 settlement.

This net loss in Consent Decree effectiveness is unacceptable to Washington. Completing the SST retrieval mission on the current compliance schedule is essential, given the already compromised leak integrity of the SST system. Timely completing the tank waste treatment mission is essential to completing the retrieval mission; necessary to convert Hanford's tank waste to a safer form; and necessary to maximize the use of existing infrastructure before it too needs to be replaced.

Despite recognizing likely schedule impacts to the retrieval and treatment missions, Energy hails its new approach as expediting the overall missions. *See, e.g.*, Energy's Proposal at 2, fourth bullet ("Enables the completion of the tank waste treatment mission sooner than would be possible with the current approach, which requires waste to be processed through the Pretreatment Facility."). While Washington is willing to move forward with the Direct Feed Low Activity Waste (DFLAW) approach, Energy has offered no support for the assertion that its approach will shorten the mission. Energy should offer analysis comparing the overall treatment schedule under the DFLAW approach with the treatment schedule under the existing Consent Decree and TPA requirements. Energy should also offer analysis comparing the overall tank retrieval schedule under the DFLAW approach with the retrieval schedule under the existing Consent Decree and TPA requirements.

Despite Energy's inability to demonstrate good cause (described in more detail in the next section), Washington recognizes that the Consent Decree must nonetheless be amended in light of the current state of WTP delay. Rather than taking steps back, however, a Consent Decree amendment should instead be taking steps forward in terms of specificity, accountability, enforceability, and substance. Based on this, Washington fundamentally disagrees with Energy's proposal.

Energy's proposal is not based on good cause and Energy has failed to exercise reasonable diligence

Energy asserts there is "good cause" for its proposed amendments under Section VII.D.1 of the Consent Decree. *See* Energy's proposal at 9–10. With regard to WTP requirements and schedule, Energy references "numerous circumstances and events, including unknown technical obstacles, unforeseen safety concerns, and labor shortages." Energy's proposal at 9. Energy asserts that such circumstances and events "either were not anticipated in developing the Appendix A schedule or have had a greater impact on the schedule than was anticipated at the time the schedule was developed." Energy's proposal at 9. With regard to SST retrieval requirements and schedule, Energy asserts it has encountered circumstances and events that "either were not anticipated in developing the Appendix B schedule or have had a greater impact on the schedule than was anticipated at the time the schedule was developed." Energy's proposal at 10. In all cases, Energy asserts it has exercised reasonable diligence "in spite of these obstacles." Energy's proposal at 9–10.

Energy describes having provided notice to Washington of Consent Decree schedule risks in November 2011, June 2013, and October 2013 and asserts that its amendment request is timely. *See* Energy's proposal at 9. Energy does not explain, however, how offering a proposed Consent Decree amendment some 28 months after providing its first schedule risk notice is timely.

Washington does not agree that good cause supports Energy's proposed amendment. The Consent Decree provides that good cause "does not exist if DOE can nonetheless meet the existing schedule by responding with reasonable diligence to . . . circumstances and events" and "[e]fficient management practices are an appropriate consideration in determining whether reasonable diligence has been exercised." Consent Decree § VII.D.1. Since giving Washington notice of a schedule risk in November 2011, Energy took a number of actions that appear to be inconsistent with Consent Decree requirements (*e.g.*, unilaterally suspending construction actions, seeking new contractor baselines that assume schedule delay, and not asking contractors what it would take to meet, or come as close as possible to meeting, the current schedule). Such actions do not constitute reasonable diligence. They are its opposite.

With regard to Pretreatment (PT) and High Level Waste (HLW) Milestones, Energy identifies the following technical issues as circumstances and events that apparently were either not anticipated at the time Appendix A was developed or have had a greater impact on the schedule than anticipated at the time Appendix A was developed: hydrogen gas events in pulse jet mixed vessels and piping; criticality in Pretreatment Facility vessels; pulse jet mixer control; erosion and localized corrosion in WTP vessels and piping; and ventilation balancing. Energy's proposal at 6–7. All of these issues, except for ventilation balancing, have been known since early in the WTP design process. This was well before Appendix A was developed and finalized (2010). The extent of Energy's knowledge prior to 2010 is documented in numerous places, including in records from the External Flow Sheet Teams (2006). With regard to the newly identified

ventilation balancing issue, robust engineering design should have identified this issue much sooner. Energy failed to exercise reasonable diligence when it failed to develop a robust engineering design and failed to provide proper oversight of its contractor to ensure a robust engineering design. In summary, none of these technical issues provides a good cause justification for a schedule change.

With regard to the Low Activity Waste (LAW) Facility Milestones, Energy identifies budget (FYs 2013 and 2014) as the primary reason the schedule is at risk. Energy's proposal at 7. Energy also identifies a vendor challenge. Energy's proposal at 8. Washington disputes that the budget issues described by Energy provide good cause for a schedule change. Energy does not describe its efforts to secure sufficient funding (through appropriation requests and through reprogramming funds) in order to continue to proceed on schedule for the LAW facility. In addition, Energy does not describe why it was unable to continue efforts on the LAW facility after having stopped construction on the other two major WTP facilities.

With regard to tank waste retrievals, Energy states that the schedule risk is attributable to budget, personnel, and a "new" sludge height technical issue. Energy's proposal at 8–9. Washington disputes that any of these grounds constitute good cause to modify the tank waste retrieval requirements. Specifically as to tanks C-102 and C-105, Washington disagrees with Energy's suggestion that good cause exists to justify a year's extension from the current deadline. Energy has been aware of the sludge height issue since at least April 2010. Energy promised analysis of this issue to Washington by the end of April 2014. Energy cannot justify how an issue it has known about for at least four years now provides good cause for extension of the current schedule.

Energy refers to "unforeseen safety concerns" as among the "circumstances and events" triggering a schedule risk. The Consent Decree specifically addresses Safety Concerns at Section VII.F. Where safety concerns are identified, Energy is required to "immediately" notify Washington. No more than 45 days from such notification, Energy is required to provide a Safety Issue Resolution Plan (SIRP) describing the safety issue, identifying impacts of the issue on schedule, identifying issues that must be resolved for work to continue, identifying a schedule to resolve the issue in order to resume work, identifying the management process to be used to resolve the issue, providing other pertinent information, and to request a schedule amendment or provide an estimate of schedule impact and a date by which a schedule amendment will be requested. Consent Decree § VII.F.2.

Energy provided notice to Washington of schedule risks in November 2011, June 2013, and October 2013. Yet at no time did Energy expressly cite safety reasons as a reason for delay, nor did Energy submit a SIRP, which would have been due no later than 45 days from identifying the safety issue. If any of the schedule risk notices were based on a safety issue, SIRPs would have been due 45 days after November 2011, June 2013, and October 2013. No such SIRPs were received.

Based on the information summarized above, Washington does not agree that good cause exists to support Energy's proposed amendment.

Despite Energy's inability to demonstrate good cause, Washington recognizes that the Consent Decree must nonetheless be amended in light of the current state of WTP delay. On March 31, 2014, Washington provided its own proposal to amend the Consent Decree. Washington believes its proposal encompasses an appropriate path forward to address the current situation.

Specific Reasons for Disagreement with Energy's Proposal

The following section recites Energy's specific amendments as proposed on March 31, 2014, followed by Washington's specific reason or reasons for disagreeing with the proposed amendment in italics:

Specific Amendments

- The milestone dates in Consent Decree Section IV-A and Appendix A that have not passed are vacated and are superseded by the new milestones in Appendix D and additional milestones that will be established pursuant to Paragraphs 3 and 4 of Appendix D, as set forth below.

Washington disagrees with this proposed amendment because it results in a net loss of enforceable, substantive milestones from the current Consent Decree; e.g., current milestone A-1, which requires Energy to achieve initial plant operations for the full WTP by a date certain.

- The following provisions are added to the Consent Decree as new "Appendix D: WTP Consent Decree Modified Milestones, Schedule, Assumptions":

  1. Definitions

     a. "Performance Baseline" as established in the Project Execution Plan, defines the Total Project Cost, CD-4 completion date, performance and scope commitment to which DOE must execute a project and is based on an approved funding profile. The Performance Baseline includes the entire project budget (total cost of the project that includes contingency).

Washington disagrees with inclusion of this definition as a new term of the Consent Decree. The inclusion of this definition in the Consent Decree is premised on Energy's proposal that an internal Energy process govern Energy's legal obligations. As described above, Washington disagrees with tying the enforceability of Consent Decree obligations to Energy's internal decision-making processes, including Energy's "approved funding profile."

b. "Critical Decision" or "CD" stages refer to the five decision points through which a capital acquisition project proceeds under DOE Order 413.3B. Each CD (CD-0, CD-1, etc.) marks an authorization to increase the commitment of resources by DOE and requires successful completion of the preceding phase or CD. The amount of time between decisions will vary.

Washington disagrees with inclusion of this definition as a new term of the Consent Decree. The inclusion of this definition in the Consent Decree is premised on Energy's proposal that an internal Energy process govern Energy's legal obligations. As described above, Washington disagrees with tying the enforceability of Consent Decree obligations to Energy's internal decision-making processes.

c. "DOE Order 413.3B" means Department of Energy Order 413.3B, *Program and Project Management for the Acquisition of Capital Assets* (Nov. 29, 2010).

Washington disagrees with inclusion of this definition as a new term of the Consent Decree. The inclusion of this definition in the Consent Decree is premised on Energy's proposal that an internal Energy process govern Energy's legal obligations. As described above, Washington disagrees with tying the enforceability of Consent Decree obligations to Energy's internal decision-making processes.

d. "Low Activity Waste Pretreatment System" (LAWPS) means an installed capability or constructed facility with the ability to receive tank supernate, remove the cesium and majority of the solids, and transfer the supernate to the Low Activity Waste Facility. Removed solids and cesium may be either isolated for future processing or returned to the tank farms.

Washington does not disagree with this particular definition; however, Washington disagrees with the larger amendment proposal in which the definition is a part.

e. "Tank Waste Characterization and Sampling" (TWCS) means a facility that will receive, particle size, mix, enable sampling, stage, and provide tank waste to the Pretreatment Facility in accordance with the waste acceptance criteria.

Washington does not disagree with this particular definition; however, Washington disagrees with the larger amendment proposal in which the definition is a part.

f. "Pulse Jet Mixer Control Testing in Vessel RLD-8T" means the series of activities undertaken to demonstrate the effective control of pulse jet mixer

firing sequences and effects (such as overblows) that are needed to ensure the long term operability of the pulse jet mixer control system.

Washington does not disagree with this particular definition; however, Washington disagrees with the larger amendment proposal in which the definition is a part.

g. "Phase 2 Vessel Testing" means the second series of tests for a specific tank design that will test the ability to mix solids in the vessel to prevent inadvertent criticality and hydrogen gas accumulation greater than the Lower Flammability Level in the tank headspace.

Washington does not disagree with this particular definition; however, Washington disagrees with the larger amendment proposal in which the definition is a part.

h. "Erosion Wear Design Basis for Pretreatment Vessels" means the calculations, analysis, and identified modifications required to ensure sufficient vessel and piping wall thickness along with plant operating parameters to prevent pipe or vessel failures due to erosion.

Washington does not disagree with this particular definition; however, Washington disagrees with the larger amendment proposal in which the definition is a part.

i. "Melter #1 Refractory Installation" means completion of the installation of the refractory bricks in the Low Activity Waste Facility Melter #1. Installation includes physically placing the bricks, securing the bricks, and completion acceptance. (Note: This does not include Gas Barrier Lid refractory.)

Washington does not disagree with this particular definition; however, Washington disagrees with the larger amendment proposal in which the definition is a part.

j. "DFLAW Hot Commissioning Complete" means the point at which the Low Activity Waste Facility has demonstrated its ability to produce immobilized low activity waste glass of acceptable quality. The waste will be delivered to the Low Activity Waste Facility through the Low Activity Waste Pretreatment System.

Washington disagrees with this definition to the extent it contains a vague, undefined term (immobilized low activity waste glass "of acceptable quality"). Washington also disagrees with the larger amendment proposal in which the definition is a part.

k. "Conditional Authorization to Proceed with Engineering and Procurement for the High Level Waste Facility" means the specific approvals granted by the Manager of the Office of River Protection to resume these activities.

Washington disagrees with inclusion of this definition as a new term of the Consent Decree. The inclusion of this definition in the Consent Decree is premised on Energy's proposal that an internal Energy process govern Energy's legal obligations. As described above, Washington disagrees with tying the enforceability of Consent Decree obligations to Energy's internal decision-making processes.

2. WTP Construction and Startup

Each milestone set forth below shall be completed by the specified date for that milestone:

Project	Description	Date
D-1	Low Activity Waste Pretreatment System Approve Alternative Selection and Cost Range (CD-1) Decision Made	9/30/2015
D-2	DFLAW Hot Commissioning Complete	12/31/2022
D-3	TWCS Approve Alternative Selection and Cost Range (CD-1) Decision Made	6/30/2017
D-4	Initiate Pulse Jet Mixer Control Testing in Vessel RLD-8T	3/31/2015
D-5	Initiate Phase 2 Vessel Testing	9/30/2016
D-6	Confirm the Erosion Wear Design Basis for Pretreatment Vessels Based Upon Testing and Analysis	6/30/2016
D-7	Complete LAW Melter #1 Refractory Installation	6/30/2015
D-8	Conditional Authorization to Proceed with Engineering and Procurement for the High Level Waste Facility	12/31/2014

Overall:

Washington disagrees with the scope of milestones proposed in the above table. Only eight milestones are currently proposed for completing the entire WTP project. With the exception of DFLAW (D-2), no completion dates are established for any individual WTP facilities, and no completion date is established for the WTP as a whole. Four of the eight milestones (D-1, D-3, D-4, D-5) merely propose dates for (effectively) beginning a facility project or technical resolution activity, with no further milestones proposed for completing the activity or for taking additional steps following completion of the activity. Additional comments concerning Energy's proposed approach for completing facility projects and technical resolution activities, including

how Energy proposes to establish further milestones in this table, are included in response to paragraph 3 below.

Specific:

D-1: Washington disagrees with the milestone because it ties the enforceability of Consent Decree obligations to Energy's internal decision-making processes.

D-2: Washington disagrees with the milestone due date for proposed milestone D-2 ("DFLAW Hot Commissioning Complete"). Washington believes this date can be achieved by 12/31/2019.

Washington also believes that if a hot commissioning date can be established for DFLAW, preceding interim milestones for DFLAW, LAWPS, and related Laboratory and Balance of Facilities (BOF) tasks can (and should) also be established.

D-3: Washington disagrees with the milestone because it ties the enforceability of Consent Decree obligations to Energy's internal decision-making processes.

D-4 and D-5: Washington agrees that Pulse Jet Mixer Vessel testing milestones should be established. Washington believes, however, that hard milestones for the full testing process (including completion dates) should be established. Washington believes that technical issues for PT should be resolved by 9/30/2018.

D-6: Washington agrees that erosion testing milestones should be established. Washington believes, however, that hard milestones for the full testing process (including completion dates) should be established. Washington believes that technical issues for PT should be resolved by 9/30/2018.

D-7: Washington agrees that interim construction milestones for the LAW facility are appropriate. Additional milestones beyond the one proposed as D-7 are needed.

D-8: Washington disagrees with the milestone because it ties the enforceability of Consent Decree obligations to Energy's internal decision-making processes.

3. Establishment of Additional Appendix D Milestones

    a. This Paragraph 3 shall govern the establishment of new milestones for the WTP and the associated support facilities: the Low Activity Waste Facility, the High Level Waste Facility, the Pretreatment Facility, the Analytical Laboratory, the Balance of Facilities, the Low Activity Waste Pretreatment System, and TWCS.

b. Establishment of DFLAW Milestones and Milestones for the Low Activity Waste Pretreatment System

i. DOE shall complete Hot Commissioning of DFLAW by December 31, 2022, as set forth in milestone D-2.

ii. With regard to the Low Activity Waste Pretreatment System, DOE's critical decision on alternatives selection (CD-1) shall be made not later than September 30, 2015, as set forth in milestone D-1.

iii. Within 60 days of a critical decision approving the Low Activity Waste Pretreatment System at milestone D-1 pursuant to DOE Order 413.3B, DOE will propose a milestone for the CD-2 decision.

iv. After a critical decision has been made approving the Low Activity Waste Pretreatment System at the CD-2 stage pursuant to DOE Order 413.3B, DOE will, within 60 days after execution of a contract or contract modification for such facility, propose design and/or certain preliminary construction milestones for that facility.

v. After a critical decision has been made approving the Low Activity Waste Pretreatment System at the CD-3 stage pursuant to DOE Order 413.3B, DOE will, within 60 days after execution of a contract or contract modification for such facility, propose new and/or modified construction milestones for that facility through completion of Low Activity Waste Pretreatment System Hot Commissioning.

vi. DOE shall execute a contract or contract modification (if needed) identified in this Paragraph 3(b) as expeditiously as practicable after the associated CD-2 or CD-3 approval.

Washington disagrees with this proposed amendment. Energy's proposed process for establishing additional milestones is not appropriate in a court order intended to remedy Energy's non-compliance with applicable law. The proposed process effectively shifts control over the pace and substance of Consent Decree tasks to Energy. While the proposed process includes a hard deadline for Energy to make a CD-1 decision for the Low Activity Waste Pretreatment System (and a hard deadline for proposing a milestone for making a CD-2 decision on that system), the remainder of the process is open-ended. For instance, under paragraph 3.b.iv, the next set of milestones would not be proposed until after Energy enters into a contract for design and/or preliminary construction of the Low Activity Waste Pretreatment System, a matter which itself has no deadline, only an "as expeditiously as practicable" standard. Under paragraph 3.b.v, the next set of milestones would not be proposed until after

Energy makes a CD-3 approval (a matter which, by definition under paragraph 1.b, has no defined timeline) and then enters into a contract for the Low Activity Waste Pretreatment System (a matter which itself has no deadline, only an "as expeditiously as practicable" standard). Of equal concern, Energy is responsible for proposing additional milestones only after it has completed its own internal decision-making processes and has already entered into contracts for those tasks it has selected to perform. Rather than the Consent Decree dictating Energy's actions to come into compliance with the law, Energy's proposal would have Energy determining how, when, and at what cost it will undertake actions under the Consent Decree.

Although Washington recognizes that Energy proposes to retain a future placeholder for current Consent Decree milestone A-1 (requiring Energy to achieve initial operations for the full WTP by a date certain) (see paragraph 3.e.iii below), Energy proposes no milestone for achieving initial operations for DFLAW. Rather, Energy proposes DFLAW milestones only through hot commissioning. This is unacceptable to Washington.

c. Establishment of Milestones for the TWCS Project

i. Within 60 days of the alternatives selection (CD-1) approving the new capital facility for the TWCS project at milestone D-3 pursuant to DOE Order 413.3B, DOE will propose a milestone for the CD-2 decision.

ii. After a critical decision approving the new capital facility for the TWCS project at the CD-2 stage pursuant to DOE Order 413.3B, DOE will, within 60 days after execution of a contract or contract modification for such facility, propose design and/or certain preliminary construction milestones for that proposed facility.

iii. After a critical decision approving the new capital facility for the TWCS project at the CD-3 stage pursuant to DOE Order 413.3B, DOE will, within 60 days after execution of a contract or contract modification for such facility, propose new and/or modified construction milestones for the completion of that proposed facility.

iv. DOE shall execute a contract or contract modification identified in this Paragraph 3(c) as expeditiously as practicable after the associated CD-2 or CD-3 approval.

Washington disagrees with this proposed amendment. Energy's proposed process for establishing additional milestones is not appropriate in a court order intended to remedy Energy's non-compliance with applicable law. The proposed process effectively shifts control over the pace and substance of Consent Decree tasks to Energy. While the proposed process

includes a hard deadline for Energy to make a CD-1 decision for the TWCS project, the remainder of the process is open-ended. For instance, under paragraph 3.c.ii, the next set of milestones would not be proposed until after Energy enters into a contract for design and/or preliminary construction of the TWCS project, a matter which itself has no deadline, only an "as expeditiously as practicable" standard. Under paragraph 3.c.iii, the next set of milestones would not be proposed until after Energy makes a CD-3 approval (a matter which, by definition under paragraph 1.b, has no defined timeline) and then enters into a contract for the TWCS facility (a matter which itself has no deadline, only an "as expeditiously as practicable" standard). Of equal concern, Energy is responsible for proposing additional milestones only after it has completed its own internal decision-making processes and has already entered into contracts for those tasks it has selected to perform. Rather than the Consent Decree dictating Energy's actions to come into compliance with the law, Energy's proposal would have Energy determining how, when, and at what cost it will undertake actions under the Consent Decree.

d. Establishment of Design and Construction Milestones for the Low Activity Waste Facility, Analytical Laboratory Facility, and Balance of Facilities

i. At such time as DOE approves a performance baseline for the Low Activity Waste Facility, Analytical Laboratory Facility, and Balance of Facilities, DOE will, within 60 days after execution of a contract modification for such facilities, propose construction milestones for the completion of those facilities.

ii. DOE shall execute a contract or contract modification identified in this Paragraph 3(d) as expeditiously as practicable after approval of the performance baseline.

Washington disagrees with this proposed amendment. Energy's proposed process for establishing additional milestones is not appropriate in a court order intended to remedy Energy's non-compliance with applicable law. The proposed process effectively shifts control over the pace and substance of Consent Decree tasks to Energy. The proposed process includes no enforceable deadlines. There is no deadline whatsoever for Energy to complete the initial triggering event in the process, which is approving a performance baseline for the referenced facilities. Assuming that event is ever accomplished, there is no deadline for Energy to then execute contract modifications for the facilities, only an "as expeditiously as practicable" standard. Of equal concern, Energy is responsible for proposing additional milestones only after it approves its own new, internal performance baseline (which would be premised on Energy's own internal "approved funding profile," as defined in paragraph 1.a) and has already entered into contracts for those tasks it has selected to perform. Rather than the Consent Decree dictating Energy's actions to come into compliance with the law, Energy's proposal would have Energy determining how, when, and at what cost it will undertake actions under the Consent Decree.

Energy has stated that there are no technical issues preventing Energy from moving forward to achieve hot start of DFLAW. Indeed, Energy proposes to complete hot start by 12/31/2022 (a date that Washington disagrees with above). If a hot commissioning date can be established for DFLAW, there is no reason why preceding interim milestones for DFLAW, LAWPS, and related Laboratory and BOF tasks cannot (and should not) also be established.

e. Establishment of Design and Construction Milestones for the Pretreatment and High Level Waste Facilities

i. Within 60 days of providing the notice of the resolution of all technical issues required by Paragraph 4(e) below with respect to the Pretreatment Facility, DOE will propose a milestone by which DOE will provide conditional authorization to proceed with engineering and procurement with respect to the Pretreatment Facility.

ii. At such time as DOE approves a performance baseline for the High Level Waste Facility, DOE will, within 60 days after execution of a contract modification for such facility, propose construction milestones through completion of the High Level Waste Facility.

iii. At such time as DOE approves a performance baseline for the Pretreatment Facility, DOE will, within 60 days after execution of a contract modification for the Pretreatment Facility, propose milestones for construction through completion of the Pretreatment Facility, cold commissioning and hot commissioning of the Pretreatment Facility and the High Level Waste Facility, and initial plant operations for the WTP.

iv. DOE shall execute a contract or contract modification identified in this Paragraph 3(e) as expeditiously as practicable after approval of the performance baseline.

Washington disagrees with this proposed amendment. Energy's proposed process for establishing additional milestones is not appropriate in a court order intended to remedy Energy's non-compliance with applicable law. The proposed process effectively shifts control over the pace and substance of Consent Decree tasks to Energy. The proposed process includes virtually no enforceable deadlines. There is no deadline whatsoever for Energy to complete the initial triggering event in the process for proposing additional construction, cold and hot commissioning, and initial plant operations milestones for the HLW, PT, and WTP Facilities (as applicable), which is Energy approving certain performance baselines. Assuming those events are ever accomplished, there is no deadline for Energy to then execute the specified contract

modifications, only an "as expeditiously as practicable" standard. Of equal concern, Energy is responsible for proposing additional milestones only after it approves its own new, internal performance baselines (which would be premised on Energy's own internal "approved funding profile," as defined in paragraph 1.a) and has already entered into contracts for those tasks it has selected to perform. Rather than the Consent Decree dictating Energy's actions to come into compliance with the law, Energy's proposal would have Energy determining how, when, and at what cost it will undertake actions under the Consent Decree.

4. Technical Issue Resolution

    a. This Paragraph shall apply to the following unresolved technical issues associated with the WTP: hydrogen gas events in pulse jet mixed vessels and in piping and ancillary vessels; criticality in vessels in the Pretreatment Facility; pulse jet mixer control; erosion and localized corrosion in WTP vessels and piping; and ventilation balancing.

    b. Not later than 12 months after the Consent Decree has been modified according to this proposal, DOE shall submit to the State a report detailing the progress made on the unresolved technical issues identified in Paragraph 4(a) and the steps DOE plans over the subsequent 24 months toward resolution of these issues.

    c. Upon completion of each technical resolution milestone D-4 through D-7 and the associated design changes, and any other technical resolution milestone established pursuant to this Paragraph 4(c) and the associated design changes, DOE will propose as expeditiously as practicable any appropriate new milestones for resolving that particular technical issue.

    d. Until such time as DOE resolves each of the technical issues identified in Paragraph 4(a) and notifies the State of such resolution in writing as provided in Paragraph 4(e) below, DOE shall brief the Washington State Department of Ecology, either in person or by teleconference or other electronic means, every 90 days to advise the Washington State Department of Ecology on DOE's progress towards resolving these technical issues.

    e. DOE shall notify the State in writing as expeditiously as practicable after DOE makes each of the following determinations:

        i. that DOE has resolved any of the technical issues in Paragraph 4(a) and made the associated design changes;

ii. that DOE has resolved all of the significant technical issues pertaining to the Pretreatment Facility and made the associated design changes; and

iii. that DOE has resolved all of the significant technical issues pertaining to the HLW Facility and made the associated design changes.

Washington disagrees with the proposed process for resolving technical issues. Overall, the proposed approach lacks sufficient specificity concerning the process and timing for resolving technical issues. The approach does not include any requirements that Energy complete the resolution of the technical issues or take action to move forward as soon as such issues are resolved. The approach cedes control to Energy over the substance and timing of resolving technical issues, without deadlines and with little accountability to Washington or the Court. Given the importance of resolving these issues to completing and operating the WTP, this lack of specificity, accountability, and enforceability is unacceptable in a court order intended to remedy Energy's non-compliance with applicable law.

With respect to paragraph 4.b, Washington believes Energy already has sufficient information within its control to share a plan for resolving technical issues now, rather than a year from when the Consent Decree would be amended. Washington further believes that updates should be provided on a quarterly basis to both the Department of Ecology and the Court.

With respect to paragraph 4.c, Washington notes that to date, the action specified in milestone D-7 ("Complete LAW Melter #1 Refractory Installation") has had no technical issues ascribed to it by Energy.

5. Process and Standards for Establishing New Milestones

a. If the State agrees to DOE's proposal to establish a new milestone under Paragraphs 3 or 4 above, the parties shall submit an appropriate amendment for approval of the new milestone by the Court. If the parties cannot agree upon the establishment of a new milestone within a reasonable time, not to exceed 60 calendar days from the date of DOE's proposal (unless the State and DOE agree to a longer period of time), then either party may seek relief from the Court by filing a petition with the Court within 40 calendar days after the completion of the 60-day negotiation period.

b. Milestones added to Appendix D through the procedure set forth in this Paragraph: (1) shall be in furtherance of, and shall not extend beyond, the establishment of initial plant operations for the WTP, as defined in Paragraph IV-A-3 of the Consent Decree; and (2) shall be based on considerations of achievability within the proposed timeframe taking into

account all relevant factors, including available funding, technical issues, safety, the need to coordinate construction milestones and schedules among the WTP facilities, and any other factors that might foreseeably affect the facility's schedule.

Washington disagrees with the proposed process and standards for establishing new milestones. For the reasons discussed in conjunction with paragraphs 3 and 4 above, Washington disagrees with the very concept of building in a mechanism for adding "rolling milestones" into the Consent Decree. Washington also disagrees with the process and timing under which Energy offers to propose such milestones, which would result in milestones being proposed after Energy has already built a budget to fund and entered into contracts to execute the tasks that would be the subject of such milestones. Rather than the Consent Decree dictating Energy's actions to come into compliance with the law, Energy's proposal would have Energy determining how, when, and at what cost it will undertake actions under the Consent Decree.

Further, as it would apply to the specified WTP facilities, Washington disagrees with replacing the existing process for amending the Consent Decree under Section VII with the process proposed above.

6. Conforming Provisions

    a. Except as set forth in Paragraph 5 above, amendment of milestones established pursuant to this Appendix D shall be governed by the standards and procedures in Section VII of the Consent Decree.

    b. The milestones and schedule set forth in Appendix D above are subject to the WTP Construction and Startup Concerns and Assumptions set forth in Paragraph 2 of Appendix A.

    c. DOE shall provide the notice required in Section IV-C-3 of the Consent Decree, as applicable, with respect to milestones established pursuant to this Appendix D.

    d. Section IX-C of the Consent Decree shall be applicable to any DOE requests for extensions of milestones established pursuant to this Appendix D.

Because Washington disagrees with the form and substance of Energy's proposed Appendix D (including the milestone amendment process proposed in paragraph 5 above), Washington disagrees with the above conforming provisions. They are unnecessary.

7. Savings Provision: Nothing in this Consent Decree shall be interpreted to require DOE to undertake any obligation that is inconsistent with applicable law.

Washington disagrees with the need for a savings provision to be added to the existing Consent Decree. If Energy encounters a circumstance in which it believes the requirements of the Consent Decree (a court order addressing Energy's existing non-compliance with applicable law) are inconsistent with other applicable law, Energy has mechanisms already available to it under the Decree to bring the issue to the attention of Washington and the Court for appropriate resolution. See, e.g., Consent Decree § VII.

- Paragraph XV-B of the Consent Decree (Effective and Termination Dates) is stricken and replaced with the following: "This Consent Decree shall terminate when the milestones in Appendix B and Appendix D have been met, and initial plant operations for the Waste Treatment Plant, as defined in Paragraph IV-A-3 of the Consent Decree, have been achieved. As appropriate, a Party, or the Parties jointly, will notify the Court of this event by a motion to terminate the Consent Decree."

Washington disagrees with this proposed amendment. Washington believes that additional substantive requirements under the Decree are necessary in order to mitigate for schedule extensions for completing the WTP, among other matters. These additional substantive requirements would extend beyond the date on which the WTP achieves initial plant operations as defined in Section IV.A.3 of the Consent Decree.

Amendments for Single Shell Tank Retrievals

- The deadline in Paragraph IV-B-1 of the Consent Decree is changed from September 30, 2014, to September 30, 2015.

Washington disagrees with this proposed amendment. The justification for amendment only asserts good cause reasons for extending the deadline for two tanks—Tanks C-102 and C-105—while the proposal would extend the deadline for six C-Farm tanks. Therefore, Energy's proposal on its face fails to provide any justification for extensions to deadlines related to C-101, C-107, C-110, and C-111.

As to tanks C-102 and C-105, Washington disagrees with Energy's suggestion that good cause justifies a one-year extension. Energy has been aware of the sludge height issue since at least April 2010. Energy promised analysis of this issue to Washington by the end of April 2014. Energy cannot justify how an issue it has known about for at least four years now provides good cause for extension of the current schedule.

- The following milestones are substituted for the milestones in Appendix B of the CD:

Project	Description	Date
B-1	Complete retrieval of tank wastes from the following remaining single shell tanks in Waste Management Area C: C-101, C-102, C-105, C-107, C-110, and C-111	9/30/2015
B-2	Subject to the requirements of Section IV-B-3, DOE will advise the Washington State Department of Ecology of the nine single shell tanks from which waste will be retrieved by 2022. Subject to the requirements of Section IV-B-3, DOE may substitute any of the identified nine single shell tanks and advise the Washington State Department of Ecology accordingly.	9/30/2014
B-3	Initiate startup of retrieval in two of the single shell tanks referred to in B-2	12/31/2017
B-4	Initiate startup of retrieval in two additional single shell tanks referred to in B-2	12/31/2019
B-5	Initiate startup of retrieval in five additional single shell tanks referred to in B-2	12/31/2021
B-6	Complete retrieval of tank wastes from the nine single shell tanks selected to satisfy B-2	9/30/2022

Washington disagrees with this proposed amendment. Overall, Washington believes that delaying the "initiate retrieval" dates as proposed unacceptably heightens the risk that Energy will not meet the 12/31/2022 date for completing retrievals from 9 SSTs under current Consent Decree milestone B-4 (and proposed milestone B-6). The proposal provides less time for completing retrievals than past performance justifies (even with any assumed improvements). In particular, the date in proposed milestone B-5, as shown in the above table, suggests that Energy can complete 5 retrievals in 9 months, which is unprecedented and unsupported. With specific respect to proposed milestone B-5, Washington notes there is inconsistency between Energy's description of the milestone in Figure 1 of its proposal, see Energy's proposal at 4, which indicates "Initiate Retrieval of 7 Tanks—12/2019," and proposed milestone B-5 as reflected in the above table, which indicates 5 such retrievals would be initiated by 12/31/2021. Although Energy represents that replacing current Consent Decree milestone B-3 with proposed milestones B-3, B-4, and B-5 will "allow for more efficient sequencing of the work," see Energy's proposal at 5, no information is provided to support this assertion. Washington believes that current Consent Decree milestone B-3 provides a higher degree of confidence that current Consent Decree milestone B-4 (proposed milestone B-6) will be met.

Conclusion

In a February 11, 2014, letter, Governor Inslee and Attorney General Ferguson informed you that for a Consent Decree amendment proposal to be acceptable to Washington, it must comprehensively address all Consent Decree and TPA requirements related to tank waste retrieval and treatment, including out-year life cycle requirements. An acceptable path forward would need to be aggressive, but realistic, and it would have to give the State confidence that the tank waste retrieval and treatment missions will be completed as soon as possible.

Energy's March 31, 2014, amendment proposal fails to meet these expectations. As outlined above, Energy's proposal instead takes the Consent Decree a step back in terms of specificity, accountability, enforceability, and substance. Based on this, Energy's proposal is not acceptable to Washington.

Please feel free to contact us if you have questions regarding Washington's rejection of Energy's proposal.

Sincerely,

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MSW:AAF:def
By e-mail
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