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91-TDB-406

DEC 6 1991

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Mr. Randy Smith
U.S. Environmental Protection Agency
Region 10
Seattle, Washington 98101

Ms. Narda Pierce
State of Washington
Department of Ecology
Mail Stop PV-11
Olympia, Washington 98504

Dear Mr. Smith and Ms. Pierce:

LOW LEVEL MIXED WASTE LABORATORY CHANGE REQUEST (M-14-00) STATEMENT OF DISPUTE

In accordance with the Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement) ARTICLE XV, Section 50, the U.S. Department of Energy, Richland Field Office (RL) is enclosing the Statement of Dispute for Milestone M-14-00.

RL submitted a request for change on October 31, 1991, to Environmental Protection Agency (EPA) and State of Washington Department of Ecology (Ecology) for the Tri-Party Agreement Milestone M-14-00. The request was denied on November 8, 1991. The change requested a modification to the milestone to reflect Hanford's capability to provide analytical services to support Hanford's clean-up milestones. A subsequent letter from DOE on November 15, 1991, proposed initiation of dispute resolution for the milestone.

The Statement of Dispute focuses on the intent of the milestone, the use of offsite contract laboratories for analytical services, laboratory turnaround times, and the methods used to inform EPA and Ecology of DOE's evaluations of options for obtaining analytical services. DOE felt that status meetings, quarterly milestone reports, and other meetings provided timely notification of DOE's intent and provided sufficient opportunity for Ecology and EPA to raise any objections.

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If questions arise pertaining to the Statement of Dispute, please contact J. R. Hunter, Assistant Manager for Operations, on (509) 376-7434.

Sincerely,

W. W. Bixby, Deputy Manager
for Environmental Management

WMD:JMH

cc: P. T. Day, EPA
T. L. Nord, Ecology
T. B. Veneziano, WHC
M. K. Korenko, WHC
L. P. Duffy, EM-1
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C. W. Frank, EM-50
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STATEMENT OF DISPUTE

LOW-LEVEL MIXED WASTE LABORATORY
MILESTONE M-14-00

1.0 NATURE OF DISPUTE

On October 31, 1991, DOE submitted a change request to EPA Region 10 and Ecology requesting that Milestone M-14-00, Low-Level Mixed Waste Laboratory, be redefined to reflect the original intent of the milestone, i.e., a commitment that by January 1992 DOE would have adequate laboratory capacity to handle the sample load from cleanup and compliance actions covered by the Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement). The existing Tri-Party Agreement Milestone requires DOE to complete construction and initiate operations of a low-level mixed waste laboratory by January 1992. The basis for the dispute is the contention by EPA and Ecology that there is no convincing evidence that DOE's proposed milestone redefinition is necessary or appropriate. DOE believes that the proposed change is reasonable and necessary. It is therefore DOE's position that the denial of the change request at this point was not a reasonable action. As such DOE has invoked dispute resolution in accordance with Tri-Party Agreement Articles XV and XL on November 15, 1991. This Statement of Dispute is submitted as required by Article XV.

2.0 WORK AFFECTED

The proposed change to the milestone definition has had no impact, and will have no impact, to Tri-Party Agreement waste characterization activities. The change will require Hanford to extend and expand the existing commercial contracts to accommodate the projected sample growth beginning in CY 1992 and continuing through clean up of the Hanford Site. The only work affected by the proposed milestone change is that directly associated with the construction of new low-level radioactive laboratory facilities at Hanford.

3.0 CHRONOLOGY OF DISPUTE ISSUES

During the original negotiations for the Tri-Party Agreement, all three parties acknowledged the lack of adequate laboratory capabilities to meet the existing sampling demands. The three parties recognized that the number of samples requiring analyses would increase significantly as Hanford cleanup and compliance actions progressed. Since the commercial sector was believed to have limited capacity to handle radioactive samples, it was determined that a new laboratory should be constructed at Hanford. Subsequent to the signing of the Tri-Party Agreement, however, it became apparent that more commercial capacity was available than had previously been identified. For this reason, DOE-HQ decided that a reevaluation of the planned action was in order.

In late October 1990, DOE placed a construction hold on Project W-011H, Waste Sampling and Characterization Facility (WSCF) pending a DOE review of what

portion, if any, of the sample analysis effort should be procured from the commercial sector (reference 1). EPA and Ecology project managers were promptly notified of the ongoing project evaluation during the November 5, 1990, project managers meeting (reference 2). The issue was also discussed by a representative of DOE-RL (Julie Erickson) and the EPA Hanford Project Manager (Paul Day) on November 8, 1990. At that time, it was anticipated that commercialization would entail a private firm constructing and operating a new laboratory close to Hanford. The EPA project manager expressed no opposition to this approach provided that it did not impact sample schedules for Tri-Party Agreement activities.

In a February 6, 1991, letter to Christine Gregoire and Dana Rasmussen of Ecology and EPA, respectively, DOE-RL discussed its ongoing review of alternative approaches for meeting Hanford's analytical requirements (reference 3). DOE-RL reaffirmed its commitment to meeting the intent of the milestone but indicated that adequate analytical support could potentially be achieved through the placement of contracts with a number of commercial laboratories.

The commercialization review was completed in mid-February 1991 with a determination that commercial analytical services would be utilized for the bulk of routine CERCLA/RCRA mixed waste samples, including groundwater samples and the soil samples previously envisioned to be analyzed at the Waste Sampling and Characterization Facility (WSCF). At this time, Hanford began preparation of a Request for Proposal (RFP) for an analytical laboratory.

The March 31, 1991, Hanford Federal Facility Agreement and Consent Order Quarterly Progress Report discussed the changed approach to meeting Milestone M-14-00 and indicated that a change package would be submitted to the regulators once the full determination of the work allocation between commercial facilities and government owned and operated facilities was completed (reference 4). In April 1991, DOE-RL also addressed the proposed milestone change during a budget briefing with EPA and Ecology (reference 5). DOE again reaffirmed its commitment to obtain adequate analytical support by January 1992 to satisfy the intent of the milestone.

In its May 16, 1991, response to an Ecology letter of April 8, 1991, DOE-RL agreed to meet with Ecology in June 1991 to further discuss the laboratory issues (references 6 and 7, respectively). That meeting occurred on June 13, 1991 (reference 8). DOE-RL addressed the actions which had been taken to obtain analytical support by January 1992. It was stressed that the change in approach would not impact other Tri-Party Agreement actions. The June 1991 Quarterly Progress Report also again discussed the actions planned to meet the intent of Milestone M-14-00 (reference 9). The RFP for commercial analytical services was issued in August 1991.

On September 4, 1991 a draft change request for M-14-00 was submitted to EPA and Ecology (reference 10). Further discussions were held with EPA and Ecology on September 18, 1991, and a letter (dated September 18, 1991) was provided to EPA and Ecology transmitting copies of correspondence dealing with the WSCF construction hold (reference 11 and 12, respectively). A draft change package was discussed with the regulators on October 1, 1991. Both the EPA and Ecology project managers indicated at that time that the change package would be denied upon submittal. The change package requesting a

redefinition of the milestone was formally submitted to EPA and Ecology on October 31, 1991, and was denied by both agencies on November 8, 1991 (reference 13 and 14, respectively). DOE-RL invoked dispute resolution in accordance with Tri-Party Agreement Articles XV and XL on November 15, 1991 (reference 15).

4.0 STATEMENT OF POSITION

4.1 Validity of Change Request

In February 1991, DOE decided to strengthen commercial involvement in the cleanup mission. As a result, WSCF was rescoped to reflect the decision to utilize commercial laboratories for the analyses of soil as well as groundwater samples. Commensurate with this intent, Hanford awarded two commercial contracts, one for nonradioactive sample analyses and one for low-level radioactive sample analyses. Two additional contracts were awarded in May 1991. The original value of the four contracts totalled $800,000 with subsequent supplements resulting in contract values of more than $4 million. In FY 1992, Hanford plans to place additional laboratory contracts to ensure long-term analytical services are available to meet the growing sample loads. The new contracts will have an estimated value of $250 million and span a five-year period, with a five-year renewal option. The combination of the existing contracts and the new contracts will ensure that all Tri-Party Agreement commitments for low-level mixed waste analyses are met.

DOE acknowledges that the commercial laboratories initially experienced difficulty meeting the Tri-Party Agreement turnaround times specified in their contracts. This was due in part to contract startup being more difficult than expected and in part to higher-than-projected initial sample loads. All of the commercial laboratories currently under contract are projected to meet the specified turnaround times by the spring of 1992. DOE is working with the commercial laboratories to utilize untapped resources through the placement of new subcontracts to further improve turnaround times and to provide additional analytical capacity.

DOE contends that difficulty in meeting sample turnaround times would be encountered regardless of whether radioactive samples were being analyzed at a DOE-owned laboratory or at a commercial laboratory. This difficulty is due to the nationwide shortage of qualified radiochemists needed to perform the complex separations required for the radiochemical analyses. As such, sample turnaround times should not be a determining factor for acceptance of the change request.

4.1.1 Milestone Intent

The original intent of Milestone M-14-00 was to ensure that adequate analytical capabilities would be available to meet selected Hanford RCRA and CERCLA sampling needs. This intent was acknowledged by EPA and Ecology in their letter of November 8, 1991. The placement of contracts with commercial laboratories to provide analytical support sufficient to meet projected sample loads will ensure that Hanford's RCRA and CERCLA sample analyses needs will be met. Thus, the intent of the milestone will be satisfied.

4.1.2 Commercial Laboratory Contracts

Hanford currently has contracts in place which provide for a total of 250 samples per month with an average of 30 analyses per sample. This capacity will be expanded as required to meet CY 1992 sample projections. A Request for Proposal (RFP) was issued to obtain bids for long-term contracts for mixed waste sample analyses. A total of eight proposals were received in response to the RFP. An evaluation of the qualified bidders is currently underway. Contracts will be placed by the summer of 1992.

4.1.3 Improvements to Sample Turnaround Times

DOE is taking action (as specified in Sections 4.1.3.1 through 4.1.3.3) to ensure that its contracted laboratories meet the sample turnaround times specified in the Tri-Party Agreement.

4.1.3.1 Past Performance and Current Trend

DOE acknowledges that sample turnaround times from its contracted commercial laboratories for low-level radioactive sample analyses have been longer than agreed upon in the August 1990 amendment to the Tri-Party Agreement. Due to Hanford's unique contractual requirements, a learning curve was experienced by the laboratories, thus impacting the turnaround times. Contributing factors to the longer than anticipated turnaround times were:

- Analytical requirements beyond the CLP Routine Analytical Services (RAS), especially in the areas of radiochemistry (see Table 1)

- Commercial laboratory implementation of reporting format changes and software upgrades required by Tri-Party Agreement

- Large initial sample load submitted at contract award (in excess of commercial laboratories' expectations).

Hanford officials have worked closely with the commercial laboratories to improve sample turnaround performance; the success of these ongoing efforts is evidenced by the decreasing trend in sample turnaround times shown on Tables 2 through 5. Both Weston and TMA, the two laboratories which perform radiochemical analyses, have committed to further improve their sample turnaround times, as described below:

- Weston has committed to meeting the 35-day contract turnaround time for chemical data packages for all samples submitted after November 7, 1991.

- Weston also placed a subcontract with EcoTek Laboratories for additional analytical support with a resulting 125 percent increase to its current radiochemistry capacity.

- In October 1991, Weston purchased a new Inductively Coupled Plasma Indicator (ICP), doubling the ICP metals capacity.

- Weston is pursuing a subcontract with Barringer Laboratories for additional radiochemistry capacity.

- TMA plans to increase its current Hanford sample throughput capacity of 48 samples per month to 72 samples per month by early December 1991, 82 samples per month by January 1992, and 100 samples per month by March 1992.

- TMA is expanding existing facilities, hiring and training new staff, and preparing to obtain Hanford approval for use of other TMA corporate facilities.

4.1.3.2 Additional Near-Term Actions

Hanford personnel also continue to investigate methods for improving laboratory performance and cost effectiveness. Planned areas of investigation and self-assessment include:

- Reevaluation of data quality objectives with the possibility of reducing analytical requirements.

- Purchase of a specified percentage of total capacity of one or more commercial laboratories.

- Routine submittal of sampling schedules to facilitate commercial laboratory resource planning.

- Improved field-level sampling batching to enhance laboratory efficiency.

- Liquidated damage clauses and/or graduated analytical price list based upon sample analyses turnaround times.

The placement of large-scale ($250 million over ten years), long-term contracts (five years with optional five-year extension) is intended to ensure dedicated analytical support is available to support Tri-Party Agreement activities. Hanford is considering incorporating specific provisions into the laboratory contract to improve laboratory performance and service. The provisions being considered for contract incorporation include:

- Formation of assessment pools.

- Options for different levels of data deliverables.

- Multiple contract awards.

The objective of these options is to establish an overall program which will enable a balance of commercial and onsite laboratories to provide consistent and reliable analytical services to support Tri-Party Agreement activities.

We believe however, as discussed in Section 4.3, it would be useful for all parties to discuss and agree on a process for addressing anticipated changes, to Tri-Party Agreement milestones, in the future.

4.2.3 Process Followed for Revising Milestone M-14-00

DOE provided ample opportunity for EPA and Ecology to be involved in the decision-making process for Milestone M-14-00. In November 1990, DOE discussed the alternative approach being considered for meeting the intent of Milestone M-14-00. Opportunity was provided to EPA and Ecology throughout the ensuing year to obtain more information regarding the proposed change in laboratory construction plans and to voice objections to the changes. In March 1991 Ecology indicated concern with the proposed new approach, but that concern did not extend to Ecology taking a position that obtaining analytical support from commercial sources would be unacceptable to the department. DOE contends that although it implemented actions which impacted the laboratory construction without first obtaining formal approval from EPA and Ecology, information on the actions being taken was provided to the regulators through both informal and formal means. Thus, the regulators were aware of the change in approach which was being implemented by DOE. DOE also contends that these actions are consistent with the intent of the milestone.

4.3 Summary of DOE's Position on Issues Addressed in the Dispute

DOE contends that it properly notified EPA and Ecology of its evaluation of alternative approaches to meeting the intent of Milestone M-14-00 and that it provided ample opportunity for EPA and Ecology to become involved in the evaluation of those alternatives. DOE also contends that the decision to obtain analytical services from offsite laboratories will fully support its commitments under the Tri-Party Agreement, including the sample turnaround time commitments for low-level mixed waste samples. It is DOE's position that EPA and Ecology do not have adequate justification for denying the proposed change package on technical grounds. DOE further believes that it was complying with the informal dispute-resolution provisions of the Tri-Party Agreement, and that informal discussions occurred and information was provided to Ecology and EPA over a number of months. However, DOE acknowledges that a formal change package was not submitted until October 1991. DOE further acknowledges that it is the position of Ecology and EPA as stated in correspondence dated November 8, 1991, that DOE failed to follow the formal protocol for seeking modifications to the Tri-Party Agreement.

To resolve the dispute in a timely manner, and to support Ecology and EPA approval of the change package to all ow a cost-effective use of commercial laboratory analytical services, DOE therefore proposes that the following actions be taken:

1. In recognition of the advance notification provided to and consultation with Ecology and EPA related to the proposed milestone modification, and because DOE actions to acquire commercial laboratory services will ensure that the intent of the Tri-Party Agreement milestone is met, that a penalty of $10,000 be imposed to satisfy the position of Ecology and EPA that DOE violated a procedural requirement of the Tri-Party Agreement. consistent with Article XIX of the Tri-Party Agreement, such penalty shall be payable to the Hazardous Substances Response Trust Fund from funds authorized and appropriated for the specific purpose.

2. In light of inability of DOE, Ecology, and EPA to implement existing informal-dispute resolution provisions in the Tri-Party Agreement, that

a technical support group composed of independent experts selected with the mutual consent of Ecology, EPA and DOE established and funded by DOE to assist in the cooperative resolution of technical issues that arise in the future implementation of the Tri-Party Agreement.

3. That DOE, Ecology, and EPA develop a formal written protocol that would supplement the Tri-Party Agreement, be subject to Tri-Party Agreement dispute resolution procedures, and establish specific procedures for: (a) DOE submission of a written request to review potential modifications to milestones; (b) following approval of DOE's request by Ecology and EPA, the joint review of potential modifications to Tri-Party Agreement milestones, with an allowance provided by Ecology and EPA for any delay in DOE's performance in support of these milestone while such reviews are being conducted; and (c) submission of a formal change package, as appropriate, to reflect the results of such a review.

5.0 Supporting Information

The following supporting information is attached:

1. October 29, 1990, Letter, L. C. Williams to R. D. Izatt, PROJECT W-011H, WASTE SAMPLING AND CHARACTERIZATION FACILITY CONSTRUCTION HOLD

2. November 5, 1990, Tri-Party Agreement Project Manager Meeting Minutes

3. February 6, 1991, Letter, John D. Wagoner to Christine O. Gregoire and Dana A. Rasmussen, Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement) Change Packages

4. March 31, 1991, Hanford Federal Facility Agreement and Consent Order Quarterly Progress Report

5. April 30, 1991, Presentation to EPA and Ecology, FY 1993 Budget Requirements, Environmental Management

6. May 16, 1991, Letter, John D. Wagoner to Christine O. Gregoire and Dana A. Rasmussen, Hanford Federal Facility Agreement and Consent Order Change Packages

7. April 8, 1991, Letter, Christine O. Gregoire and Dana A. Rasmussen to John D. Wagoner

8. June 13, 1991, Tri-Party Agreement Major Milestone Review for June 1991, Presentation on Milestone M-14-00

9. June 30, 1991, Hanford Federal Facility Agreement and Consent Order Quarterly Progress Report

10. September 4, 1991, Letter, Steven H. Wisness to Paul T. Day and Timothy, L. Nord, DRAFT CHANGE PACKAGE FOR TRI-PARTY AGREEMENT (TPA) MILESTONE M-14-00

11. September 18, 1991, Tri-Party Agreement Major Milestone Review for September 1991, Presentation on Milestone M-14-00

12. September 18, 1991, Letter, Steven H. Wisness to Paul T. Day and Timothy L. Nord, LOW LEVEL LABORATORY (without attachments)

13. October 31, 1991, Federal Facility Agreement and Consent Order Change Control Form M-14-91-1, M-14-00, WSCF (without attachments)

14. November 8, 1991, Letter, Dana A. Rasmussen and Christine O. Gregoire to John D. Wagoner, Low-Level Mixed Waste Laboratory Change Request (M-14-00)

15. November 15, 1991, Letter, John D. Wagoner to Dana A. Rasmussen and Christine O. Gregoire, Low-Level Mixed Waste Laboratory Change Request (M-14-00) Notice of Dispute

16. November 1991, Assessment of Hanford's Tri-Party Agreement Laboratory Analysis Turnaround Time Performance for Samples Reading <10 mR/Hr, WHC-SD-RE-RPT-001

CORRESPONDENCE DISTRIBUTION COVERSHEET

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Subject: LOW LEVEL MIXED WASTE LABORATORY CHANGE REQUEST (M-14-00) STATEMENT OF DISPUTE

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List 2