



U.S. Department of Energy

Office of River Protection

0057523

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02-EMD-073

JUN 27 2002

Mr. Michael A. Wilson, Program Manager
Nuclear Waste Program
State of Washington
Department of Ecology
1315 W. Fourth Avenue
Kennewick, Washington 99336

RECEIVED
JUN 28 2002

EDMC

Dear Mr. Wilson:

HANFORD FEDERAL FACILITY AGREEMENT AND CONSENT ORDER (TRI-PARTY AGREEMENT) STATEMENT OF DISPUTE, SUBMITTED IN SUPPORT OF DISPUTE RESOLUTION REGARDING CHANGE CONTROL FORM M-45-02-02.

On January 29, 2002, the U.S. Department of Energy (DOE), Office of River Protection, signed Tri-Party Agreement Change Control Form M-45-02-02, as a Class I change under the provisions of Section 12.0, Action Plan, Attachment 2, of the Tri-Party Agreement. The DOE proposed change was intended to reinstate the originally agreed to completion date of February 28, 2004, for Tri-Party Agreement Major Milestone M-45-00C. On February 12, 2002, the State of Washington Department of Ecology (Ecology) disapproved Change Control Form M-45-02-02. DOE initiated the Tri-Party Agreement dispute resolution process on February 19, 2002, as set forth in Tri-Party Agreement Article VIII.

DOE and Ecology subsequently agreed to extend the dispute at the project managers' level three times beyond the original 30 day period provided for under the Tri-Party Agreement. On June 21, 2002, Ecology informed DOE that informal negotiations at the project managers' level would not be further extended, and that the dispute would be elevated to the Inter-Agency Management Integration Team, per Tri-Party Agreement Article VIII, Paragraph 30, on June 22, 2002. DOE and Ecology formally agreed that the due date for submittal of the Statement of Dispute required by Article VIII, Paragraph 30.A, was extended to June 28, 2002.

The DOE statement of dispute is attached. If you have any questions, please contact Woody Russell, of my staff, (509) 373-5227.

Sincerely

James E. Rasmussen, Director
Environmental Management Division

EMD:RWR

Attachment

cc: See page 2

Mr. Michael A. Wilson
02-EMD-073

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cc w/attach:

S. Bensussen, CHG

W. T. Dixon, CHG

F. R. Miera, CHG

S. Dahl, Ecology

R. F. Stanley, Ecology

D. Bartus, EPA

L. Gadbois, EPA

J. S. Hertzell, FHI

E. M. Mattlin, RL

TPA Administrative Record

**STATEMENT OF DISPUTE
HFFACO Change Request M-45-02-02**

I. NATURE OF DISPUTE

This dispute involves Milestone M-45-00C of the Hanford Federal Facility Agreement and Consent Order (HFFACO, also known as the Tri-Party Agreement or TPA), "Complete Renegotiation of Second Phase (i.e., September 30, 2006, through September 30, 2015) Single-Shell Tank (SST) Waste Retrieval Activities", and the following facts:

On January 29, 2002, the U.S. Department of Energy, Office of River Protection (hereinafter DOE or ORP), submitted signed TPA Change Control Form M-45-02-02, as a Class I change under the provisions of Section 12.0, Action Plan, Attachment 2, of the HFFACO.¹ As more fully described hereinafter, this change was intended to reinstate the originally agreed to completion date of February 28, 2004 for Milestone M-45-00C.

On February 12, the Washington State Department of Ecology (hereinafter Ecology) disapproved TPA Change Control Form M-45-02-02, stating that:

We have reviewed your letter and its attached change control form and have carefully considered your request. As a result, we are disapproving your request pursuant to HFFACO Action Plan section 12.3.3 (sic) in that DOE has not demonstrated good cause for modification.

As you know, Ecology has been increasingly concerned regarding the slow progress of the SST waste retrieval program. At the same time, we recognize that storage space is constrained and that scheduling additional waste retrieval projects must be done with care. We recognized each of these distinct elements when DOE and Ecology finalized modification of the M-45-00 series on January 8, 2001 by 1) renegotiating HFFACO waste retrieval requirements to schedule only initial high risk waste retrievals, while at the same time 2) including a provision by footnote requiring that:

"Should DOE fail to initiate construction of the Phase I Hanford Tank Waste Treatment complex by December 31, 2001, as defined in Agreement milestone M-62-06, the due date for this M-45-00C milestone shall be automatically adjusted to 4/30/2002."

¹January 29, 2002 Letter J.E. Rasmussen, DOE, to M.A. Wilson, Ecology, "Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement) Change Request M-045-02-02, Revision of the Completion Date for M-045-00C, "Complete Renegotiation of Second Phase (i.e., September 30, 2006 through September 30, 2015) Single-Shell Tank (SST) Waste Retrieval activities.

As you know, Ecology has offered to extend the (now revised) due date for these M-45-00C negotiations, provided that in doing so, we commit to schedule the next few high risk waste tanks to be sequenced by the close of 2002. In addition, we have asked that DOE act on recommendations made recently by its contractor regarding tank space optimization. In submitting its (M-45-02-02) change request we note that DOE has made no mention of the State's concerns.

Please note that though we can not approve DOE's request for modification, we are fully committed to work with ORP staff in order to resolve this issue in a timely fashion.

In addition, we note two associated issues: 1) that our concern to avoid undue additional delay's in high risk waste retrieval appears to be consistent with Assistant Secretary Roberson's recently released Top/Bottom review priorities. 2) We also note our recent commitment to explore the scheduling of early (retrieval) and SST closures (further modifying the M-45 series).²

DOE's basis and rationale for requesting this extension have been clear and consistent from the outset of discussions concerning this milestone. In its January 29, 2002 letter to Ecology, DOE stated:

"We do not believe that all the technical details are fully developed to support completion of negotiations by April 30, 2002. We are proposing to move the date to support the Program Plan."

In addition, the TPA Change Control Form attached to the DOE's January 29, 2002, letter further elaborated on this point:

"The M-45-00C milestone was originally developed to take into account having adequate technical information with respect to retrieval technology and respective SST sequencing decisions. With DOE's failure to meet the TPA "Start of construction" for the Phase I Waste Treatment Plant, the due date for milestone M-45-00C was adjusted from February 28, 2004 to April 30, 2002.

Milestone M-45-00C requires that DOE and Ecology "Complete renegotiation of second phase (i.e., 9/30/06 through 9/30/15) Single-Shell waste retrieval activities." In addition, the scope of the required negotiations is now broadened due to language included in a TPA change request signed by ORP and Ecology in January 2001 that directed "These negotiations will also consider the need for additional compliant storage space." It would be premature to make a decision

²February 12, 2002 Letter, M. Wilson, Ecology, to J. E. Rasmussen, DOE, RE: Disapproval of U.S. Department of Energy (DOE) Hanford Federal Facility Agreement and Consent Order (HFFACO), change Request M-45-02-02, dated January 29, 2002.

on tank space and additional retrievals when key pieces of data such as how much dilution water is needed to retrieve waste, and how much (sic) simultaneous retrievals can be accomplished at one time are unknown. "

Consequently, DOE filed a Notice of Dispute on February 19, 2002. DOE and Ecology subsequently agreed to extend the dispute at the project managers' level three times beyond the original 30 day period provided for under the Tri-Party Agreement (May 15, May 31, and June 21, 2002 respectively) stating:

"The parties are working to resolve this issue at the project managers' level during the informal dispute resolution period, and through parallel discussions that are taking place for the C3T "Tank Closure Demonstration Project". The parties are making meaningful progress in the C3T discussions, however, additional time is required to complete these activities."³

II. DOE'S POSITION ON THE DISPUTE

DOE states that under the terms and conditions of the HFFACO and the facts discussed herein, good cause exists to extend milestone M-45-00C as requested by TPA Change Control Form M-45-02-02. Good cause for Change Control Form M-45-02-02 exists under HFFACO Article XL, Paragraph 119, a timely request for extension was met by DOE, and Paragraph 121, absent agreement of the lead regulatory agency with the respect to existence of good cause, DOE seeks to obtain a determination through the Dispute Resolution process that good cause exists. DOE believes that good cause exists as is evidenced by the strategy used by DOE and Ecology in establishing the M-45 milestones. This strategy focused on the performance of key retrieval technology demonstrations on a variety of waste forms and tank farm locations, and to establish a technical basis for future work. The M-45-00C milestone was established to negotiate the second phase of retrieval and closure milestones for the SSTs. The intent was to utilize technical information gained from the first phase demonstrations of retrieval technologies that are to be completed by 2006 to negotiate the 2007 through 2015 milestones in 2004 to support budget requirements.

III SUPPORTING INFORMATION

HFFACO Change Control Form M-45-02-02, dated January 29, 2002, requested the reinstatement of the completion date for milestone M-45-00C to February 28, 2004, as originally agreed to by DOE and Ecology when this milestone was negotiated in January

³Dispute Extension signed March 20, 2002, by M.E. Burandt, ORP, and S. Dahl, Ecology, Extension of Hanford Federal Facility Agreement and Consent Order Dispute Resolution Regarding Change Request M-45-02-02, "Complete Renegotiation of Second Phase (i.e., September 30, 2006, through September 30, 2015) Single-Shell Tank (SST) Waste Retrieval Activities.

2001. This request was primarily based on the strategy used by the parties to establish the M-45 milestone series, and the premise that establishing additional retrieval milestones at this time was premature. The "Description/Justification of Change" section of M-45-00-01A Change Control Form (January 2001) further supports this position as follows:

This Agreement modification establishes near term Agreement milestones, target dates, and associated Agreement language governing single-shell tank (SST) waste retrieval activities prior to September 30, 2006, i.e., Agreement modifications necessary to achieve compliance with federal and state hazardous waste requirements. Ecology and USDOE have concluded negotiations and have submitted this M-45-00-01A change, the approval of which will establish/modify Agreement requirements. The near term strategy for SST waste retrieval activities has shifted from focusing on maximizing the number of tanks entered for retrieval (regardless of waste volume or content) to a focus on scheduling the retrieval of wastes from those SST's with a high volume of contaminants of concern. These contaminants are defined as mobile, long-lived radionuclides that have a potential of reaching the groundwater and Columbia River. ***The near term strategy also focuses on the performance of key retrieval technology demonstrations in a variety of waste forms and tank farm locations to establish a technical basis for future work.*** (emphasis added)

The DOE believed that conducting the M-45-00C negotiations at this time was premature to the above strategy, and that completion of existing M-45 milestones for design and documentation of retrieval demonstration technologies was necessary prior to developing additional retrieval milestones.

In accordance with the August 1, 2001 Notice of Penalty Incurred and Due (issued by Ecology for missing interim milestone M-62-06), DOE submitted a Recovery Plan on October 1, 2001.⁴ The Recovery Plan proposed that the February 28, 2004 date be reinstated. Ecology countered on November 16, 2001, with a proposal for additional HFFACO milestones for retrieval.⁵ These retrieval milestones were deemed outside the scope of the DOE baseline, and the Ecology proposal was subsequently rejected. The parties then informally agreed to address the M-45-00C milestone as a separate issue from approval of the Recovery Plan. The Recovery Plan was finalized in May 2002.

⁴ October 1, 2001 Letter from H.L. Boston, DOE, to T.C. Fitzsimmons, Ecology, "U.S. Department of Energy (DOE) Recovery Plan Submittal as Required by Final Determination Pursuant to Hanford Federal Facility Agreement and Consent Order Dated July 26, 2001.

Subsequently, DOE and Ecology entered into the M-45-00C negotiations in parallel with formal discussions as part of the Cleanup Constraints and Challenges Team (C3T) to accelerate cleanup at the Hanford Site, that were initiated in February 2002, between the U.S. Environmental Protection Agency, Ecology, and DOE. The C3T went on to establish a separate initiative entitled "Accelerated Tank Waste Retrieval and Closure Demonstration".

During these two sets of concurrent discussions, the DOE has made a good faith effort to address concerns raised in the Ecology February 12, 2002, disapproval letter, in order to resolve this dispute at the project managers level. On May 16, 2002, DOE submitted, in draft form, a revision to the January 29, 2002 Change Control Form that was not formally responded to by Ecology. This Change Control Form addressed the following of Ecology's concerns:

"As you know, Ecology has offered to extend the (now revised) due date for these M-45-00C negotiations, provided that in doing so, we commit to schedule the next few high risk waste tanks to be sequenced by the close of 2002."

In its May 2002 Change Control Form, DOE committed to add new retrieval milestones. This commitment was also contained in the "C3T Accelerated Retrieval and Closure Demonstration Team Status Report for Gang of Five, June 21, 2002"; which contained the following in Item 2) Agreements Reached by the Team:

- a) SST waste retrieval and closure demonstration projects will be undertaken at an initial set of 4 tanks comprised of both high risk waste tanks (significant volumes), and tanks with low volumes and (consequently) less risk.
- b) All demonstrations will include a waste retrieval component (or components), as required by Washington's Hazardous Waste Management Act, HFFACO Milestone M-45, and it's associated Appendix H. Tank selection and team agreement for this process assumed that retrieval would precede closure per the TPA.
- c) Existing HFFACO requirements for SST waste retrieval technology and initial retrieval demonstrations in tanks (C104, S102, and S112) will be maintained and met independent of the parties retrieval and closure demonstrations.

Ecology also raised the following concern in their February 12, 2002 letter:

"In addition, we have asked that DOE act on recommendations made recently by its contractor regarding tank space optimization."

⁵November 16, 2001 Letter from R. Stanley, Ecology, to M.E. Burandt and W.J. Taylor, DOE, "Ecology Review of the U.S. Department of Energy's (DOE's) October 1, 2001 Recovery Plan".

To satisfy this concern, DOE proposed in their May 18, 2002 change request to implement the space savings options identified in their completion report for HFFACO milestone M-45-12-T01, submitted September 30, 2001. (*Single Shell Tank Retrieval Sequence and Double Shell Tank Space, RPP-8554, Rev 0, and Tank Space Options Report; RPP-7702, Rev. 0*) This option would provide for an additional 1 million gallons of Double-Shell Tank space for retrieval of the SSTs.

In the February 12, 2002 letter, Ecology also made the following statement:

In addition, we note two associated issues: 1) that our concern to avoid undue additional delay's in high risk waste retrieval appears to be consistent with Assistant Secretary Roberson's recently released Top/Bottom review priorities. 2) We also note our recent commitment to explore the scheduling of early (retrieval) and SST closures (further modifying the M-45 series).

DOE has worked diligently from February 2002 to present in the C3T initiatives meetings to address these concerns as well. As part of these discussions, DOE and Ecology developed a Team charter to guide these efforts. The Team charter provides the following as the scope of the discussions:

Pursuant to the Accelerated Retrieval and Closure Demonstration team charter, our objectives have been to evaluate the potential for, and to design initial single-shell tank (SST) waste retrieval and closure demonstrations enabling the parties to begin the process of SST closure in a manner supporting the acceleration of Hanford site cleanup.

DOE's commitment to this activity, and the significant progress being made in this regard were cited in the Status Report accomplishments above. The parties have agreed conceptually to SST waste retrieval and closure demonstration projects on an initial set of four tanks. The parties may increase this number by August 1, 2002. These retrievals and closures are in addition to milestones that already exist in the Tri-Party Agreement for three SST retrievals.

On June 21, 2002, Ecology informed DOE that informal negotiations at the project managers level would not be extended, and that the dispute would be elevated to the Inter-Agency Management Integration Team, per HFFACO Article VIII, paragraph 30.

IV. HISTORY OF ATTEMPTED RESOLUTION

In response to DOE's submittal of signed HFFACO Change Control Form M-45-02-02, dated January 29, 2002, Ecology submitted a letter of disapproval on February 12, 2002. On February 19, 2002, DOE initiated Dispute Resolution pursuant to HFFACO Article VIII, Resolution of Disputes, paragraph 30. Subsequent to initiation of the dispute resolution process, DOE has made a reasonable and good faith effort to informally resolve this dispute with Ecology. To this end, DOE submitted a revised draft Change Control form dated May 16, 2002, that DOE believes addresses the issues

raised in Ecology's February 19, 2002 letter. However, the DOE and Ecology have been unable to come to a mutual agreement in settlement of this dispute on an informal basis.