



Department of Energy
Richland Operations Office
P.O. Box 550
Richland, Washington 99352

19-AMRP-0081

SEP 19 2019

Ms. Alexandra K. Smith, Program Manager
Nuclear Waste Program
Washington State Department of Ecology
3100 Port of Benton Boulevard
Richland, Washington 99354

Dear Ms. Smith:

STATEMENT OF DISPUTE REGARDING HANFORD FEDERAL FACILITY
AGREEMENT AND CONSENT ORDER (TRI-PARTY AGREEMENT)
MILESTONE M-035-09K

This letter transmits the Statement of Dispute regarding Tri-Party Agreement Milestone M-035-09K to the Interagency Management Integration Team (IAMIT). The Statement of Dispute explains why the U.S. Department of Energy Richland Operations Office is in compliance with Tri-Party Agreement Action Plan Sections 9.6.2, "Agreement Data," and 9.6.5, "Electronic Data Access Requirements," preparatory to dispute resolution discussions with the IAMIT.

If you have any questions, please contact me, or your staff may contact Ben Ellison, Tri-Party Agreement Project Manager, on (509) 376-5318.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. F. Hamel".

William F. Hamel, Assistant Manager
for the River and Plateau

AMRP:KLH

Attachment:
Statement of Dispute for Tri-Party Agreement
Milestone M-035-09K

cc: See page 2

Ms. Alexandra Smith
19-AMRP-0081

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cc w/attach:

S. G. Austin, CHPRC
D. B. Bartus, EPA
J. Bell, NPT
S. L. Brasher, MSA
R. Buck, Wanapum
C. E. Cameron, EPA
K. A. Conaway, Ecology
L. Contreras, YN
S. W. Davis, MSA
D. R. Einan, EPA
M. Johnson, CTUIR
S. Leckband, HAB
J. W. Mathey, Ecology
N. M. Menard, Ecology
K. Niles, ODOE
C. P. Noonan, MSA
A. L. Palomarez, Ecology
J. B. Price, Ecology
S. N. Schleif, Ecology
Administrative Record (M-035-09K)
Environmental Portal

STATEMENT OF DISPUTE FOR TRI-PARTY AGREEMENT MILESTONE M-035-09K

I. NATURE OF DISPUTE

This dispute is raised pursuant to Article VIII, paragraph 30, of the *Hanford Federal Facility Agreement and Consent Order* (“Tri-Party Agreement” or “TPA”), concerning completion of TPA milestone M-035-09K, “Conduct biennial assessments of information and data access needs...” and “...propose implementation schedules (TPA milestones) for enhancements as a result of the biennial assessments.”

The M-035-09 project managers met over the course of a year and a half, during which time the Washington State Department of Ecology (Ecology) repeatedly asserted difficulty accessing TPA-relevant data. Despite multiple efforts and various approaches, the agency project managers were unable to come to agreement on what information Ecology has a legal right to access, or what TPA-related data, databases, or documents Ecology currently is unable to access. Ecology currently has access to Agreement related databases that are documented in the Agreement Appendix F but rarely ever uses those available databases.

DOE is hereby elevating the dispute to the Interagency Management Integration Team (IAMIT) for dispute resolution.

II. DOE-RL'S POSITION ON THE DISPUTE

Ecology argues that the TPA requires DOE to provide Ecology access to “all relevant electronic data and databases”, including the Integrated Document Management System (IDMS). Actually, the TPA defines the list of databases to which both U.S. Environmental Protection Agency (EPA) and Ecology will have access. Ecology should not be allowed to unilaterally change that list. It is not logical, reasonable, or just to interpret the TPA section about *how* Ecology gets its access to the databases as *overriding* the previous section that defined the data and databases.

There is no regulatory requirement to provide access to DOE databases. DOE provides most documents *as requested* because DOE has a legal obligation comply with its requirements under the *Privacy Act* and *Freedom of Information Act* (FOIA) and cannot simply allow other agencies

free access to its databases. The TPA must not be interpreted in a way that contradicts federal law. If Ecology had access to “all relevant electronic data and databases”, it would have access to prohibited information.

Courts use principles of contract interpretation to interpret Federal Facility Agreements. “A consent decree, which has attributes of a contract and a judicial act, is construed with reference to ordinary contract principles.” *City of Las Vegas v. Clark County*, 755 F.2d 697, 702 (9th Cir. 1985). Under contract principles, the TPA (1) needs to be read as a whole; (2) provisions should not be interpreted as to render any other provision meaningless; (3) when a general word follows a list of specifics, the general word will be interpreted to include only items of the same type; (4) the specific governs the general; and (5) the same words used in different parts of section have the same meaning.

The TPA Must Be Read As a Whole

The TPA allows processes to be mutually defined, and does not allow one part to re-write any section. Ecology’s argument that it must have direct access to “all relevant data and electronic databases”, and that Ecology may independently determine those databases is inconsistent with the TPA as a whole. Granting Ecology unfettered access to any database it independently identifies would upset the balance of the TPA as a whole because it would allow Ecology to change a TPA section unilaterally. Ecology could be granted access to databases not identified or agreed to by EPA. This change would grant Ecology not just a peek into DOE’s playbook, but ongoing access to DOE’s playbook.

Section 9.6.5 Must Not Render Section 9.6.2 Meaningless

Section 9.6.2 defines *what data* are being addressed in these sections. It states

“Agreement Data. Ecology and EPA shall be granted access to *all data that is relevant to work performed, or to be performed, under the Agreement*. Access to Agreement related databases will be documented in the Agreement Appendix F document ‘Agreement Databases, Access Mechanisms, and Procedures’ (includes all databases and the method of accessing each database). This document will also describe method(s) for regulatory access to DOE communications networks and system configurations to meet electronic transfer of data.”

(emphasis added). This section first defines data broadly and then requires all three parties to agree on and list (document) the databases in the TPA Appendix F. Those databases are then to be accessible to both Ecology and EPA. Ecology does not dispute that it has access to all Agreement related databases that are listed in Appendix F. Instead, Ecology points to section 9.6.5:

Electronic Data Access Requirements. EPA and Ecology shall have *direct read, retrieve, and transfer access* to all relevant electronic data and databases.

(emphasis added) This section is about the *types* of access. Even though data and databases were defined and addressed *only three sections prior*, Ecology interprets this sections purpose as *re-defining* what data and databases are being addressed. Ecology's interpretation can mean only that data and databases are defined twice within the space of four sections, with section 9.6.5 negating the section 9.6.2 definition and requirements. If the Appendix F database list did not represent "all" databases then 9.6.2 would be rendered meaningless.

The Specific Words Defining Data and Requiring a Database List Governs the General Words "...All Relevant Electronic Data and Databases"

Section 9.6.2 specifically defined Agreement Data and put a requirement on all three parties to agree which databases were relevant. That specific definition of data, and the requirement for a database list (section 9.6.2), control the general words "all relevant electronic data and databases" (section 9.6.5).

The Same Words about All Relevant Data and Databases That Are Used In Different Parts of Data Section Have the Same Meaning

Sections 9.6.2 and 9.6.5 are all part of a section about data and databases. The sections use almost the same words to describe data and databases. It is logical and necessary to link the requirement that databases be listed with the requirements describing the types of database access.

Ecology's argument fails under all five prongs of evaluation, and a single failure defeats the argument.

Moreover, even if there is an ambiguity in the language relative to granting access to data that is set forth in the Agreement, applying ordinary contract principles, such ambiguity is resolved by the parties past practice. In this case, there has been no previous interpretation or demand for access that justifies the Ecology's current position for unfettered access to all information.

There is a difference between having access to data that supports the cleanup mission and having direct read, retrieve, and transfer access to that data. The TPA makes it clear that DOE will provide all relevant data to Ecology and EPA to support cleanup. However, Ecology and EPA will only have direct read, retrieve, and transfer access to databases that are agreed to in Appendix F of the TPA. Agreement related databases are explicitly identified as those documented in Appendix F of the TPA. Ecology and EPA have access to all Agreement related databases that are documented in Appendix F of the TPA.

DOE Must Meet its Legal Duties to Review Documents for Privileged Information

Article XLV of the TPA states that "Parties are not required to provide legally privileged information. At the time any information is furnished which is claimed to be business confidential, all Parties shall afford it the maximum protection allowed by law." DOE has the responsibility to protect privileged information, which it cannot do if the information is accessed in real time. DOE O 206.1, *Department of Energy Privacy Program*, requires all DOE employees to prevent the unauthorized breach of Personally Identifiable Information (PII). This means that PII cannot be improperly released. FOIA protects proprietary business information, deliberative process, attorney-client privilege or attorney work product, as well as private personnel information. The *Privacy Act* protects individuals against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them. When information is requested, DOE fulfills its duty to protect that information by going through a redaction process. If another agency had direct read, retrieve, and transfer access to DOE internal databases, then DOE would be in violation of its responsibilities under DOE O 206.1, the *Privacy Act*, and FOIA.

There Is No Legal Basis for Ecology or EPA to Impose Additional Access Requirements to DOE Databases

There is no regulatory requirement for direct read, retrieve, and transfer access to DOE databases. Ecology has no regulatory authority to require access to DOE databases generally. The Hanford Site-Wide permit only requires that DOE provide information within a reasonable time (Condition I.E.8-9). Neither the WAC 173-303 nor the Permit require direct read, retrieve, and transfer access to DOE internal databases. The designation of a lead regulatory agency shall not change the jurisdictional authorities of the Parties and Ecology has no jurisdiction over DOE databases. In the TPA we have agreed to provide data as it relates to the cleanup but not direct read, retrieve, and transfer access to that data other than the databases identified in Appendix F. The M-035-00 milestone itself states that data management enhancements are “negotiated and approved”, meaning that all parties have to agree. DOE has no legal responsibility to provide greater and greater access to its databases and can only provide access to databases to the extent that it is legal and practicable.

III. SUPPORTING INFORMATION

Milestone M-035-09 was established via TPA change control form M-35-95-01 in February 1995, with an original due date of March 31, 1998, and biennially thereafter. The due date of M-035-09K, originally March 31, 2018, was extended at the project manager level to March 31, 2019. DOE considers the milestone complete; Ecology does not.

IV. HISTORY OF ATTEMPTED RESOLUTION

In addition to eleven formal project manager meetings held between March 2017 and April 2019, and six IAMIT meetings during which the milestone was discussed, the following significant exchanges took place:

3/15/2019 Ecology transmits letter 19-NWP-050, stating that DOE must grant ECY access to all data and databases that are relevant to work performed or to be performed under the TPA, or propose TPA milestones to resolve data access issues with all relevant data and databases by March 31, 2019.

- 3/29/2019 RL transmits 19-AMRP-0059, stating that the M-035-09K milestone was complete and that no new milestones are needed at this time.
- 4/11/2019 Ecology requests, via email, a copy of the completed assessment and proposed implementation schedule (Price 2019a).
- 4/17/2019 DOE responds to Ecology's request, explaining that per the administrative record file, no formal assessments have ever been completed for this milestone (Higgins 2019).
- 4/16/2019 Ecology notifies the Mission Support Alliance, LLC, and DOE (on copy) that Ecology is preparing a letter related to this milestone that may lead to an IAMIT dispute, and requests that the M-035-09K be added to the IAMIT agenda to status (Price 2019b).
- 5/7/2019 DOE and Ecology meet informally to discuss a path forward for the milestone.
- 5/8/2019 Ecology states the intent to work the dispute informally until the June IAMIT (Price 2019c).
- 5/28/2019 DOE and Ecology meet and discuss the milestone. Ecology takes the action to draft a plan on a path forward.
- 5/31/2019 Ecology transmits a summary of the May 28 meeting, along with a list of actions that would establish a list of TPA-related documents and a plan to pilot a project that would allow Ecology access to the TPA-related documents in IDMS. The email includes a list of document types Ecology considers TPA-related. A status meeting is planned for June 12 (Palomarez 2019a).
- 6/10/2019 Ecology requests a status on the actions transmitted on May 31 (Palomarez 2019b).
- 6/11/2019 DOE provides a status of the actions assigned to the Assistant Manager of River and Plateau, explains that DOE does not agree with the list of TPA-related documents provided by Ecology in Palomarez 2019a, and strongly suggests the agencies form a working group to define TPA-related documents (Hamel 2019a).

- 6/21/2019 DOE transmits a proposed “easy list” of TPA-related documents, and explains the intent to prepare a draft change control form that reestablishes M-035-09K, but immediately replaces it with new milestones (Hamel 2019b).
- 6/27/2019 DOE describes a plan to provide Ecology with draft milestone replacement wording during the week of July 8 (Hamel 2019c).
- 7/16/2019 DOE shares draft change control form M-35-19-01 with Ecology. The change control form includes three new target dates for implementation of a pilot project to give Ecology and EPA direct access to TPA-related records in IDMS (Hamel 2019d).
- 7/23/2019 Ecology provides a markup of M-35-19-01 that includes four interim milestones, and requires DOE/RL-93-69 to become a primary document (Price 2019d).
- 8/19/2019 DOE and Ecology meet to discuss a path forward. Ecology provides draft milestones that DOE immediately rejects. Ecology delivers a predated, pre-signed letter 19-NWP-092 that notifies DOE the M-035-09K milestone has been missed, and abruptly leaves the meeting.
- 8/20/2019 DOE transmits 19-AMRP-0075, invoking dispute resolution.
- 8/22/2019 DOE transmits 19-AMRP-0076, describing Ecology’s failure to provide a definition of TPA-related documents and data, and requesting that Ecology re-engage in discussions.
- 8/29/2019 DOE transmits 19-AMRP-0078, requesting that Ecology “provide a comprehensive and actionable list of Tri-Party Agreement related data/databases/documents that Ecology believes they do not have electronic access to.”
- 9/3/2019 DOE and Ecology hold a “dispute resolution project manager meeting”, and DOE proposes milestones that would create a comprehensive TPA data management plan that would include ongoing schedules for data enhancements.
- 9/4/2019 DOE transmits draft change control form M-35-19-02 to Ecology for comment.

V. RECOMMENDED RESOLUTION

DOE recommends the TPA agencies collectively establish, as a secondary document, a comprehensive *Tri-Party Agreement Data Management Strategy* that:

- Defines criteria for TPA-related documents/data
- Describes document/data types the TPA agencies agree are TPA-related
- Describes where or how TPA-related document/data types are stored
- Identifies criteria for determining whether direct access can be provided to EPA and Ecology
- Establishes whether direct regulator access to the document/data types can be provided
- Contains a schedule for providing EPA and Ecology with direct electronic read access to systems containing TPA-related data/information.
- Defines and contains a schedule for establishing an automated workflow through which EPA and Ecology can request TPA-related data they cannot directly access
- Defines and contains other schedules as necessary to address access improvements in the areas of information management, expanded access, categorical clearance, etc.

The plan would be regularly reviewed and updated by the assigned M-035-00 project managers.

VI. REFERENCES

[19-AMRP-0059](#), 2019, “Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement) Milestone M-035-09K, Data Access Needs Completion,” letter from W.F. Hamel, U.S. Department of Energy, Richland Operations Office, to A.K. Smith, Washington State Department of Ecology, and D.R. Einan, U.S. Environmental Protection Agency, Richland, Washington, March 29.

[19-NWP-050](#), 2019, “Re: Notification the United States Department of Energy (USDOE) Actions Jeopardize Completion of Tri-Party Agreement (TPA) Milestone M-35-09K,” letter from A.L. Palomarez, Washington State Department of Ecology, to B.A. Ellison,

U.S. Department of Energy, Richland Operations Office, Richland, Washington,
March 15.

Ecology, DOE and EPA, 1989, *Hanford Federal Facility Agreement and Consent Order*, as amended, Washington State Department of Ecology, U.S. Environmental Protection Agency, and U.S. Department of Energy, Olympia, Washington.

Hamel, W.F., 2019a, "RE: M-35-09k meeting summary," (email to A.L. Palomarez and J.B. Price, Washington State Department of Ecology, Nuclear Waste Program), U.S. Department of Energy, Richland Operations Office, Richland, Washington, June 11.

Hamel, W.F., 2019b, "M35k the "easy list" of TPA related documents/path fwd," (email to A.L. Palomarez and J.B. Price, Washington State Department of Ecology, Nuclear Waste Program), U.S. Department of Energy, Richland Operations Office, Richland, Washington, June 21.

Hamel, W.F., 2019c, "RE: M35-09k the "easy list" of TPA related documents/path fwd," (email to A.L. Palomarez and J.B. Price, Washington State Department of Ecology, Nuclear Waste Program), U.S. Department of Energy, Richland Operations Office, Richland, Washington, June 27.

Hamel, W.F., 2019d, "RE: M35-09k the "easy list" of TPA related documents/path fwd," (email to A.L. Palomarez and J.B. Price, Washington State Department of Ecology, Nuclear Waste Program), U.S. Department of Energy, Richland Operations Office, Richland, Washington, July 16.

Higgins, K.L., 2019, "RE: M-035-09K milestone has been removed from the TPA. Documentation Requested," (email to J.B. Price, Washington State Department of Ecology, Nuclear Waste Program), U.S. Department of Energy, Richland Operations Office, Richland, Washington, April 17.

Palomarez, A.L., 2019a, "FW: M-035-09k meeting summary," (email to W.F. Hamel et al., U.S. Department of Energy, Richland Operations Office), Washington State Department of Ecology, Nuclear Waste Program, Richland, Washington, May 31.

Palomarez, A.L., 2019b, "FW: M-035-09k meeting summary," (email to W.F. Hamel et al., U.S. Department of Energy, Richland Operations Office), Washington State Department of Ecology, Nuclear Waste Program, Richland, Washington, May 31.

Price, J.B., 2019a, "M-035-09K milestone has been removed from the TPA. Documentation Requested," (email to K.L. Higgins, U.S. Department of Energy, Richland Operations Office), Washington State Department of Ecology, Nuclear Waste Program, Richland, Washington, April 11.

Price, J.B., 2019b, "New item to status at IAMIT," (email to M.J. Turner et al., Mission Support Alliance, LLC), Washington State Department of Ecology, Nuclear Waste Program, Richland, Washington, April 16.

Price, J.B., 2019c, "IAMIT status, M-035-09K," (email to W.F. Hamel et al., U.S. Department of Energy, Richland Operations Office), Washington State Department of Ecology, Nuclear Waste Program, Richland, Washington, July 23.

Price, J.B., 2019d, "IAMIT status, M-035-09K," (email to M.J. Turner, Mission Support Alliance, LLC (U.S. Department of Energy, Richland Operations Office on cc), Washington State Department of Ecology, Nuclear Waste Program, Richland, Washington, May 8.