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May 21, 2020

VIA ELECTRONIC MAIL

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Re: Proposal to Amend Consent Decree in *State of Washington v. Brouillete, et al.*, No. 2:08-cv-5085-RMP (E.D. Wash.), Due to *Force Majeure* Event

Dear Andy:

On behalf of the U.S. Department of Energy (“DOE”), and pursuant to Section VII-E of the Consent Decree in the above-captioned matter, enclosed please find a proposal to the State of Washington to amend the Consent Decree in *State of Washington v. Brouillete, et al.*, No. 2:08-cv-5085-RMP (E.D. Wash.). Section VII-E-4 of the Decree provides for schedule extensions due to *force majeure* events. As described in the enclosed proposal, Consent Decree-related work at the Hanford Site has been interrupted since March 23, 2020, due to the COVID-19 pandemic. Consistent with the mandate in the Consent Decree that *force majeure*-based schedule extensions “shall be equal to the number of days during which work is interrupted,” Section VII.E, the enclosed proposal would amend the Decree to provide a day-for-day extension of the specified milestones (*i.e.*, A-7 through A-9, B-2, and B-3) until the date on which DOE is able to resume normal operations.

Pursuant to Consent Decree Section VII-A-1, the State has ten working days from receipt of this letter and accompanying proposal to notify DOE (through undersigned U.S. Department of Justice counsel) as to whether the amendment is acceptable. If by June 1, 2020, we have not received a notification regarding acceptability of the proposed amendment and an explanation of any disagreement as to the existence of a *force majeure* event, *see* Sections VII-A-3 and VII-E, we will proceed with submitting this amendment to the court for approval.

Sincerely,

s/ Austin D. Saylor

AUSTIN D. SAYLOR
CHLOE H. KOLMAN
SONYA SHEA
United States Department of Justice
Environmental Defense Section

Enclosure: DOE Proposal to Amend Consent
Decree Pursuant to *Force Majeure*

U.S. DEPARTMENT OF ENERGY'S PROPOSAL TO AMEND CONSENT DECREE SCHEDULE DUE TO *FORCE MAJEURE*

CASE NO. 2:08-cv-5085-RMP (E.D. Wash.)

INTRODUCTION

The Consent Decree entered by the U.S. District Court for the Eastern District of Washington on October 25, 2010, as amended on March 11, 2016, April 12, 2016, and October 12, 2018 (hereinafter, "Consent Decree"), requires DOE to retrieve waste from nine single-shell tanks by 2026, with certain of those tanks to be retrieved by 2021. ECF Nos. 59, 222, 232 & 242. Additionally, the Consent Decree requires construction and startup of the Waste Treatment and Immobilization Plant ("WTP"). ECF No. 222. Appendix A of the Consent Decree requires, among other things, that construction of the Low-Activity Waste (LAW) Facility be substantially complete by December 31, 2020, start of LAW Facility cold commissioning by December 31, 2022, and completion of LAW Facility hot commissioning by December 31, 2023. ECF. No. 222.

On March 23, 2020, the Hanford Site moved to an "essential mission critical operations" posture in recognition of increasing health and safety concerns associated with the ongoing coronavirus pandemic.¹ The virus and the illness it causes ("COVID-19") have severely disrupted daily life worldwide, and have necessitated significant limitations on in-person work at the Hanford Site. While much of the Hanford Site workforce is able to continue certain tasks via telework, only a limited number of workers are being allowed on Site to perform activities necessary to maintain the Site in a safe condition. As discussed in more detail below, all other field work at the Site has been halted since March 23, 2020. This unanticipated impact to Site operations has interrupted work toward meeting the Consent Decree's milestones for tank waste retrievals and construction and startup of the WTP.

The parties drafted the original Consent Decree to anticipate the possibility that certain circumstances would constitute *force majeure* events allowing for day-for-day extensions of the milestones established by the Decree. *See* Section VII-E ("Force Majeure"). The COVID-19 pandemic is such a situation. Accordingly, DOE submits this requested amendment to the State to adjust the dates specified in WTP Milestones A-7 through A-9 and tank waste retrieval Milestones B-2 and B-3 to add a day-for-day extension equal to the period of time during which work is interrupted.² At this time, the duration of the work interruption and day-for-day extension is unknown. DOE expects that the eventual resumption of field work at the Site will

¹ On March 13, 2020, the President of the United States issued a proclamation declaring the COVID-19 outbreak in the United States a national emergency. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, March 13, 2020.

² DOE is continuing to evaluate potential COVID-related work interruptions associated with the remainder of the Consent Decree WTP milestones. DOE will inform the State if additional amendments to the Decree are necessary to address the impacts of this *force majeure* event.

occur in phases, and it is likely that this phased resumption to full operations will be hindered by factors such as supply chain delays or shortages (including cleaning supplies and certain personal protective equipment), and the need to maintain “social distancing” among workers. Accordingly, as noted below, the proposed amendment memorializes the day-for-day extension but does not yet set new milestone dates because the necessary extension will not be known with certainty until the impacts from the pandemic can be ascertained.

Under the terms of the Consent Decree, this amendment is presumed to be justified and “will be granted unless the State does not agree that a *force majeure* event has occurred.” Section VII-E. The State is obligated to notify DOE of any such disagreement within ten working days of receipt of this proposal. If the State does not notify DOE by June 1, 2020, DOE will proceed to submit this amendment to the District Court for its approval.

SUMMARY OF RELEVANT CONSENT DECREE AMENDMENT PROVISIONS

The Consent Decree “may be amended by mutual agreement of the State and DOE upon approval by the Court.” Section VII-A-1. Proposed amendments must be submitted “in writing to the other party, along with a justification for the amendment.” *Id.* The party receiving the amendment shall “[w]ithin ten working days of receipt . . . notify the party proposing the amendment whether or not the amendment is acceptable.” *Id.* Any proposal to amend Section IV schedules (i.e., tank waste retrievals or Waste Treatment Plant construction and startup) must specify “[t]he particular deadlines(s) for which the amendment is sought,” “[t]he length of the extension(s) sought,” “[t]he basis for the amendment,” and “[a]ny other requirements of th[e] Consent Decree or of the [Tri-Party Agreement] that would be affected if the proposal to amend the schedule were accepted.” Section VII.G.1.a–d. For amendments deemed acceptable, the State has sole discretion to determine whether the amendment constitutes a “significant amendment to the Consent Decree.” Section VII-A-2. If so, a public comment period is required. *Id.*

Sections VII-B–D of the Consent Decree specify that, typically, proposals to amend Consent Decree milestones must be “timely” and justified by “good cause.” Under Section VII-E of the Consent Decree (Force Majeure), the Parties stipulated that force majeure events “are of such a magnitude that they will be presumed to justify amendment.”³ The Decree establishes the length of the schedule amendment for any *force majeure* event: “Extensions of the schedule shall be equal to the number of days during which work is interrupted due to *force majeure* events.” It further specifies that, “[a]ny amendment requested on the grounds that [a *force majeure* event] has occurred will be granted unless the State does not agree that a force majeure event has occurred.” If the State disagrees, DOE “may pursue dispute resolution” under Section IX of the Decree. If the parties are unable to resolve the dispute through Section IX procedures, DOE may seek judicial review. If the court “determines that, under the pertinent facts and circumstances,

³ DOE’s proposal also meets the standard for Consent Decree modification under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992). The work interruptions caused by the COVID-19 pandemic are a significant change in factual circumstances not anticipated at the time that the Decree was entered, and have made compliance with the Decree “more onerous or unworkable,” *Labor/Cnty. Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120 (9th Cir. 2009). A day-for-day extension for certain milestones for the duration of the work interruption is “suitably tailored” to address the changed factual circumstances.

the event does constitute a *force majeure* event,” then the court “shall approve the requested extension.”

JUSTIFICATION FOR AMENDMENT

Consistent with the Consent Decree’s provisions on amendment and *force majeure*, DOE is providing an amendment to extend the schedules for WTP milestones A-7 through A-9 and tank waste retrieval milestones B-2 and B-3 due to a *force majeure* event, *i.e.*, the COVID-19 pandemic.

On March 23, 2020, the Hanford Site moved to an “essential mission critical operations” posture in recognition of the President’s declaration of a national emergency and increasing concerns associated with COVID-19. This means that the number of employees on the Hanford Site decreased to the minimum needed to operate safety and security systems, provide utility and emergency services, and operate and manage the information technology systems supporting the thousands of staff members who are teleworking.

The COVID-19-caused transition to only essential mission critical operations has directly and significantly impacted all fieldwork activities, including work toward meeting Consent Decree milestones. Although the full extent of impacts is not yet known – and cannot be accurately assessed until normal operations have resumed – some examples of affected work activities associated with the WTP and tank waste retrieval milestones are described below.

Impacts to WTP LAW Facility Construction and Startup Milestones

The WTP Project has continued to focus on completion of the more near-term milestones associated with the LAW Facility, Balance of Facilities (BOF), and Analytical Laboratory (LAB) (collectively known as LBL, including direct-feed low-activity waste [DFLAW] and LBL facility services).

LAW Facility

Work stoppages associated with COVID -19 have interrupted all construction, systems testing, and operability preparations associated with LAW Facility systems. Recent efforts at the LAW Facility were focused on implementing design changes against the approved safety basis and completion of procurement and construction activities. Construction teams were also walking down completed systems with the startup organization in support of turnover for testing and subsequent handover for facility commissioning.

Balance of Facilities (BOF)

Work stoppages associated with COVID -19 have interrupted BOF startup activities and construction efforts including the installation of siding, piping, and electrical commodities at the EMF, and startup testing for systems in the steam plant and the standby diesel generator. Construction and turnover activities to support early startup testing activities have also been affected.

Analytical Laboratory (LAB)

Work stoppages associated with COVID -19 have interrupted operational testing of LAB systems as well as installation and tuning of analytical equipment. Additionally, LAB methods validation, system operability reviews, and commissioning activities have been affected.

Direct-Feed Low Activity Waste (DFLAW)

Work stoppages associated with COVID-19 have interrupted all WTP and tank farm related field work associated with the DFLAW approach, including modifications for the WTP Project, as well as construction and operations activities for the Low Activity Waste Pretreatment System (LAWPS) including tank-side cesium removal (TSCR). Ongoing projects needed to support DFLAW have also been impacted, including at the Effluent Treatment Facility (ETF), which processes liquid waste to remove chemical contaminants, and at the Liquid Effluent Retention Facility (LERF), which is a series of retention basins designed to store liquid waste until it can be processed at the ETF.

Impacts to Tank Waste Retrieval Milestones

All field work at the Hanford tank farms, except essential mission critical operations activities, has been paused due to concerns associated with COVID-19. This includes all retrieval and construction activities in the A and AX tank farms necessary to complete the B-2 and B-3 Milestones in the Decree. By way of example, work stoppages have interrupted installation and testing of waste retrieval equipment, waste sampling, installation of electrical and support infrastructure, conduit installation, backfilling, compacting, and wire pulling. Additionally, cover block removals, pit cleaning, and removal of long-length equipment in preparation for future retrieval equipment installation have also been impacted. The high radiation environment within the tanks also has a damaging effect on equipment installed within the tanks. This equipment may now need to be replaced prior to use or initiation of retrieval work activities.

Anticipated Additional Impacts to WTP LAW Facility Construction and Startup Milestones and Tank Waste Retrievals

DOE anticipates that additional COVID-related work interruptions, the extent of which are not yet known or quantifiable, will likely arise in the coming weeks and months. Such additional impacts could include, for example, supply chain issues (e.g., availability of personal protective equipment (PPE) and consumables like cleaning supplies). Further, the duration of the work interruptions will be longer than simply the days during which workers remain off-Site: DOE will need to make a methodical and safe return to normal operations, including gradually remobilizing work crews and restarting affected work activities.

Accordingly, DOE's amendment proposes to extend the relevant milestones by the number of days elapsing between March 23, 2020, and (on a milestone-by-milestone basis) the date on which DOE is able to fully resume normal operations. DOE will inform the State and the court upon cessation of the *force majeure* event identified above, with appropriate

documentation to support the duration of the impacts. At that time, the parties may file a joint motion to further amend the Decree to substitute date-certain milestones that accord with the extensions provided in this amendment and by the *force majeure* provisions.

At this time, DOE is not aware of any other amendments to the Decree that are necessary to address the impacts of this *force majeure* event. Also, at this time, no other requirements of the Decree or of the Tri-Party Agreement are affected by this proposal. As noted above, however, DOE is continuing to evaluate potential COVID-related work interruptions, and will inform the State if additional amendments to the Decree are necessary.

PROPOSED AMENDMENT

DOE’s submission to the District Court will request an order stating as follows:

“Section IV-B-2 of the Consent Decree, ECF No. 59, as amended by ECF Nos. 222, 232 & 242, is hereby VACATED and is SUPERSEDED by the following:

In accordance with Appendix B, DOE shall complete retrieval of tank waste from nine (9) additional SSTs selected by DOE on a date calculated consistent with the force majeure notification and proposal submitted by DOE to the State of Washington on May 21, 2020. That date shall be the sum of September 30, 2026, plus one additional day for each day that elapses between March 23, 2020, and the date upon which DOE is able to resume normal operations following the work interruptions.

The first sentence of Section IV-B-4 of the Consent Decree, ECF No. 59, as amended by ECF Nos. 222, 232 & 242, is hereby VACATED and is SUPERSEDED by the following, with the remainder of the paragraph to remain unchanged:

In accordance with Appendix B, DOE shall complete the retrieval of five (5) SSTs selected by DOE from the remaining C, A, and AX-Farm SSTs on a date calculated consistent with the force majeure notification and proposal submitted by DOE to the State of Washington on May 21, 2020. That date shall be the sum of June 30, 2021, plus one additional day for each day that elapses between March 23, 2020 and the date upon which DOE is able to resume normal operations following the work interruptions.

The Table in Appendix B.1 of the Consent Decree, ECF No. 59, as amended by ECF Nos. 222, 232 & 242, is hereby VACATED and is SUPERSEDED by the following:

1. Tank Waste Retrievals

| Project | Description | Date |
|----------------|--|---|
| B-1 | Complete retrieval of tank wastes from the following remaining SSTs in WMA-C: C-102, C-105, and C-111. | 3/31/2024 |
| B-2 | Complete retrieval of tanks wastes from the following SSTs in Tank Farms A and AX: A-101, A-102, A-104, A-105, A-106, AX-101, AX-102, AX-103, and AX-104. Subject to the | 9/30/2026 plus one additional day for each day that elapses between |

| | | |
|------------|--|--|
| | <i>requirements of Section IV-B-3, DOE may substitute any of the identified 9 SSTs and advise Ecology accordingly.</i> | <i>3/23/2020 and the date upon which DOE is able to resume normal operations</i> |
| <i>B-3</i> | <i>Of the 12 SSTs referred to in B-1 and B-2, complete retrieval of tank wastes in at least 5.</i> | <i>6/30/2021 plus one additional day for each day that elapses between 3/23/2020 and the date upon which DOE is able to resume normal operations</i> |

The Table in Appendix A of the Consent Decree, ECF No. 59, as amended by ECF Nos. 222, 232 & 242, is hereby VACATED and SUPERSEDED by the following:

1. WTP Construction and Startup

The milestones referred to in Section IV above are as follows:

| <i>Project</i> | <i>Description</i> | <i>Date</i> |
|------------------------|--|---|
| <i>A-1</i> | <i>Achieve Initial Plant Operations for the Waste Treatment Plan</i> | <i>12/31/2036</i> |
| <i>A-2 Interim</i> | <i>HLW Facility Construction Substantially Complete</i> | <i>12/31/2030</i> |
| <i>A-3 Interim</i> | <i>Start HLW Facility Cold Commissioning</i> | <i>06/30/2032</i> |
| <i>A-4 Interim</i> | <i>HLW Facility Hot Commissioning Complete</i> | <i>12/31/2033</i> |
| <i>A-5 Interim</i> | <i>LAB Construction Substantially Complete</i> | <i>12/31/2012 (COMPLETED)</i> |
| <i>A-6 Interim</i> | <i>Complete Methods Validations</i> | <i>06/30/2032</i> |
| <i>A-7 Interim</i> | <i>LAW Facility Construction Substantially Complete</i> | <i>12/31/2020 plus one additional day for each day that elapses between 3/23/2020 and the date upon which DOE is able to resume normal operations</i> |
| <i>A-8 Interim</i> | <i>Start LAW Facility Cold Commissioning</i> | <i>12/31/2022 plus one additional day for each day that elapses between 3/23/2020 and the date upon which DOE is able to resume normal operations</i> |
| <i>A-9 Interim</i> | <i>LAW Facility Hot Commissioning Complete</i> | <i>12/31/2023 plus one additional day for each day that elapses between 3/23/2020 and the</i> |

| | | <i>date upon which DOE is able to resume normal operations</i> |
|---------------------|--|--|
| <i>A-12 Interim</i> | <i>Steam Plant Construction Complete</i> | <i>12/31/2012 (COMPLETED)</i> |
| <i>A-13 Interim</i> | <i>Complete Installation of Pretreatment Feed Separation Vessels FEP-SEP-00001A/1B</i> | <i>12/31/2031</i> |
| <i>A-14 Interim</i> | <i>PT Facility Construction Substantially Complete</i> | <i>12/31/2031</i> |
| <i>A-15 Interim</i> | <i>Start PT Facility Cold Commissioning</i> | <i>12/31/2032</i> |
| <i>A-16 Interim</i> | <i>PT Facility Hot Commissioning Complete</i> | <i>12/31/2033</i> |
| <i>A-17</i> | <i>Hot Start of Waste Treatment Plant</i> | <i>12/31/2033</i> |
| <i>A-18 Interim</i> | <i>Complete Structural Steel Erection Below Elevation 56' in PT Facility</i> | <i>12/31/2009 (COMPLETED)</i> |
| <i>A-19 Interim</i> | <i>Complete Elevation 98' Concrete Floor Slab Placements in PT Facility</i> | <i>12/31/2031</i> |
| <i>A-20 Interim</i> | <i>Complete Construction of Structural Steel to Elevation 14' in HLW Facility</i> | <i>12/31/2010 (COMPLETED)</i> |
| <i>A-21 Interim</i> | <i>Complete Construction of Structural Steel to Elevation 37' in HLW Facility</i> | <i>12/31/2012 (COMPLETED)</i> |

”

CONCLUSION

DOE remains committed to operation of the LAW Facility (including as needed the operations of the LAB and BOF) and completing the tank retrievals required under the Consent Decree, and to advancing the broader tank waste retrieval and treatment mission at the Hanford Site. Planning for the eventual return of more than 11,000 workers to the Site is a complex undertaking. DOE intends to follow a safety-conscious, deliberate, and transparent process for a phased occupancy of on-site work locations. Further, the timing and pace of each phase will consider factors such as the capability and capacity of the local healthcare system, and the robustness of the supply chain for PPE and consumables, as well as local, state, and national COVID-19 guidance. DOE welcomes the opportunity to continue working with the State to ensure that the tank waste retrieval and treatment missions can move forward in a manner consistent with the safety and health of the workforce, the public, and the environment.