



STATE OF WASHINGTON

March 5, 2020

20-NWP-051

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Re: Notice of Serious Risk under the Amended Consent Decree in *State of Washington v. Brouillette*
(E.D. Wash. No. 2:08-CV-5085)

Dear Mr. Vance and Mr. Saylor:

This letter relates to ongoing regulatory discussions, referred to as “holistic negotiations,” between the Washington State Department of Ecology (Ecology), the United States Department of Energy - Office of River Protection (USDOE), and the United States Environmental Protection Agency (EPA) (collectively, the Tri-Parties). For purposes of these negotiations, the federal entities are represented by the United States Department of Justice (DOJ), and Ecology is represented by the Washington State Attorney General’s Office (AGO).

On September 4, 2019, USDOE notified Ecology of a “serious risk” that it would not be able to meet a number of legally enforceable deadlines, known as milestones, that are set forth in the Amended Consent Decree in *State of Washington v. Brouillette* (E.D. Wash. No. 2:08-CV-5085) (Consent Decree). The milestones declared to be at-risk concern construction of certain components of the Waste Treatment Plant, including the High-Level Waste (HLW) Vitrification Facility and the Pre-Treatment (PT) Facility.

Preliminary Recovery Plan

When USDOE determines that it is at risk of missing a milestone, Section IV.C.3 of the Consent Decree requires USDOE to provide Ecology with “a detailed description of the factors constituting the serious risk” as well as a “preliminary recovery plan for remedying the serious risk.” These deliverables must be provided to Ecology “no later than fourteen days after the risk is identified.” Because the September 4 at-risk notice did not include this required information, Ecology’s Director sent USDOE a letter dated September 25, 2019, requesting submission of the detailed description of risk factors and the preliminary recovery plan required by Section IV.C.3.a of the Consent Decree.



On October 16, 2019, USDOE and Ecology met to discuss the at-risk notice pursuant to Section IV.C.3.b of the Consent Decree. During this meeting, USDOE asked for clarification of Ecology's expectations for the submission of information required by Section IV.C.3.a of the Consent Decree. USDOE also indicated that its ongoing Analysis of Alternatives (AoA) process would serve as the preliminary recovery plan required by the Consent Decree.

By letter dated October 25, 2019, Ecology provided a detailed description of its expectations for the information required by Section IV.C.3.a of the Consent Decree. Among other things, Ecology set forth the following expectations that need to be met in order for USDOE to justify using its internal AoA process to satisfy the requirement to provide a "preliminary recovery plan for remedying the serious risk":

To the extent that [USDOE] intends its AoA process to constitute all or part of the recovery plan, an explanation of how the AoA will allow [USDOE] to recover the Amended Consent Decree schedule and meet, or come close to, current Amended Consent Decree milestones. Explain how each alternative [USDOE] is analyzing through the AoA is aimed at remedying the above factors constituting the serious risk of meeting the "at risk" milestones.

On January 16, 2020, USDOE sent Ecology a letter purporting to provide the information required by Section IV.C.3.a of the Consent Decree. Ecology has significant concerns with the lack of pertinent information provided, especially related to the preliminary recovery plan. Notably, USDOE again failed to identify how each alternative being considered under the AoA process is designed to remedy the factors constituting the serious risk and bring USDOE back into compliance with the Consent Decree.

Ecology is aware that only one of the seven scenarios being analyzed under the AoA process includes the PT Facility in the configuration required by the Consent Decree. Moreover, that single scenario is merely the "baseline" against which all other alternatives are being evaluated. There is no indication that USDOE will proceed with commissioning that facility. For the past eight years, USDOE has stopped design and construction work related to the PT Facility. Furthermore, USDOE has sought no funding to advance design and construction of the PT Facility in its Federal Fiscal Year 2021 budget request, nor are there any indications in USDOE's longer range planning that it intends to complete construction of the PT Facility.

This is significant because none of the other alternatives being considered would result in the same capacity or configuration for pretreatment of high-level waste. This indicates that the AoA process is not designed to recover the schedule to meet current PT Consent Decree deadlines, and is instead focused on charting a new and different path forward. As a result, Ecology is concerned that USDOE is making unilateral decisions that are not consistent with either the letter or the spirit of the Consent Decree.

USDOE also indicated in its January 16 letter that, because the Consent Decree "does not specify any particular substantive requirements for a preliminary recovery plan," its ongoing informal engagement with Ecology staff should suffice. Ecology disagrees that allowing one Ecology staff member to attend AoA meetings as a non-voting "observer" is an acceptable substitute for the written plan required by Section IV.C.3.a of the Consent Decree.

USDOE also stated that the AoA process “does not stand alone, but is an important step in the overall DOE Systems Engineering Process.” This suggests that USDOE does not consider the AoA process, by itself, to constitute the entire preliminary recovery plan. As a result, Ecology is concerned that USDOE has not been forthcoming in describing the entirety of its preliminary recovery plan or how that plan is designed to remedy the serious risk and bring USDOE back into compliance with Consent Decree requirements.

Court Oversight and Joint Reporting

By letter dated May 29, 2019, Ecology’s then Director Maia Bellon expressed concern about USDOE’s lack of progress toward completing the PT and HLW Facilities as required by the Consent Decree as well as USDOE’s ability to continue performing single-shell tank retrievals with no significant gaps. In an attempt to address these concerns cooperatively rather than immediately returning to court to enforce the Consent Decree, Director Bellon extended an offer to USDOE’s then Assistant Secretary Anne White to enter into negotiations to holistically address the Hanford tank waste mission.

During an August 28, 2019, meeting of the Hanford Senior Executive Committee (HSEC), Director Bellon and USDOE Manager Brian Vance discussed the terms and conditions of Ecology’s offer.

By letter dated September 11, 2019, USDOE confirmed its “willingness to participate in holistic negotiations to include the Amended Consent Decree activities.” USDOE acknowledged in the September 11 letter that one element of the parties’ agreement to initiate negotiations was to “prepare and present to the court filings describing the parties’ intended path forward for holistic negotiations to address Amended Consent Decree activities.” USDOE’s September 11 letter further confirmed that the initial joint court filings “will identify the scope of the negotiations, define time frame within which the negotiations will be completed, and [establish] a schedule for reporting to the Court on the progress of the negotiations.”

In addition to memorializing the parties’ agreement regarding the scope of the initial court filings, USDOE’s September 11 letter also confirmed the parties’ agreement to “provide regular joint reports to the court regarding the Amended Consent Decree milestones at risk and the status of joint efforts to develop a new path forward” until the “end of the negotiating period.”

By letter dated October 2, 2019, Ecology confirmed its “willingness to move forward with the process described” in USDOE’s September 11 letter. Ecology reiterated its expectation that the parties’ “respective legal counsel will be involved in the process from the outset, including discussions regarding the scope of negotiations, the mechanics of notifying and reporting to the federal district court, and selection of a mediator.” The parties then participated in a series of scoping meetings, culminating with the HSEC’s agreement on the scope of the holistic negotiations in December 2019.

At the conclusion of the scoping meetings, USDOE and Ecology delegated the preparation of a mediation agreement and a draft court filing to Austin Saylor from DOJ and Andy Fitz from the AGO. The following summarizes the attorneys' pertinent communications regarding court oversight of the holistic negotiation process.

On December 26, 2019, Mr. Saylor notified Mr. Fitz that DOJ would not agree to Mr. Fitz's proposed language in the draft court filing that asked the court to supervise the negotiation process and required quarterly joint status reports regarding the status of Consent Decree milestones declared to be at-risk.

On January 2, 2020, Mr. Fitz told Mr. Saylor that Ecology considered court oversight and joint reporting to be necessary pre-conditions of its agreement to engage in holistic negotiations with USDOE and EPA. Mr. Fitz summarized a series of written and oral communications demonstrating that USDOE had already agreed to this condition. Mr. Fitz encouraged Mr. Saylor to reconsider DOJ's position on the issue and offered to discuss minor modifications of the proposed language at issue.

On January 13, 2020, Mr. Saylor told Mr. Fitz that DOJ disagreed with the assertion that USDOE had previously agreed to court supervision of the holistic negotiation process. Mr. Saylor also noted that even if USDOE had made such a commitment, DOJ would not approve a federal court filing memorializing it. Instead, Mr. Saylor suggested that the parties agree to a single initial joint filing followed by "voluntary joint status updates."

On February 18, 2020, Ecology Director Laura Watson met with USDOE Manager Brian Vance at Ecology's Headquarters in Lacey. Director Watson told Mr. Vance that Ecology is deeply disappointed that DOJ is unwilling to honor the Tri-Parties' mutual agreement regarding court oversight of the holistic negotiations process and asked Mr. Vance to encourage his attorneys at DOJ to reconsider their position.

As indicated above, Ecology is aware that USDOE is no longer moving forward with design or construction of the PT Facility, as such work is not included in USDOE's current budget or work plans. Ecology is aware that USDOE has available, unspent carry-over funds of approximately \$500 million, but has elected not to allocate any of these funds towards PT design and construction. Ecology is also aware that there are significant challenges and uncertainties related to progress on the HLW Facility. Completing construction and operation of these two key facilities is a central component of the Consent Decree, and USDOE's actions to date have not demonstrated that USDOE appreciates the importance of the milestones established to ensure such work is timely completed.

Even if the AoA process was designed to remedy the factors constituting serious risk or otherwise bring USDOE back into compliance with Consent Decree requirements, none of the alternatives being considered can be implemented in a time frame consistent with existing Consent Decree requirements and expectations, given USDOE's decision-making and project management processes and timelines and the impact any such decisions will have on the pace of tank retrievals and treatment plant throughput. The AoA process is fraught with uncertainty, especially with respect to the anticipated timeline for completing the comparative analysis, selecting a preferred alternative, re-baselining, and obtaining the necessary budget and regulatory approvals.

Considering all of the above, the path forward for the treatment of high-level waste at Hanford is filled with uncertainty with no indication that USDOE intends to recover the schedule set forth in the Consent Decree. Ecology has serious concerns about how long it will take to identify and implement a preferred alternative; whether such alternative will be able to comply with applicable regulatory requirements; and whether such alternative will be consistent with the letter and spirit of the Consent Decree. Accordingly, Ecology believes it is critically important to notify the court of the at-risk milestones and to keep the court apprised of our progress in attempting to remedy the serious risk.

Ecology remains deeply disappointed that USDOE, through DOJ, has backed away from the Tri-Parties' mutual agreement regarding court oversight of the holistic negotiations process. We are concerned this may be an indication that USDOE does not intend to negotiate in good faith. Although Ecology is still willing to negotiate in good faith, we also believe we have an obligation to notify the court that certain Consent Decree milestones have been declared at-risk, and to provide the court with regular updates regarding the status and adequacy of USDOE's preliminary recovery plan and its implementation.

If USDOE remains unwilling to prepare a joint court filing with mutually-agreeable language, Ecology will proceed to file its own notification to the court prior to the first holistic negotiation meeting with the mediator.

If you have any questions, please do not hesitate to contact us at alex.smith@ecy.wa.gov or 509-372-7905 or andy.fitz@atg.wa.gov or 360-586-6752, respectively.

Sincerely,



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cc: NWP Central File