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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

and

STATE OF OREGON,

Plaintiff-Intervenor,

v.

ERNEST MONIZ, Secretary of the United States Department of Energy, and the UNITED STATES DEPARTMENT OF ENERGY,

Defendants.

NO. 2:08-cv-05085-RMP

PLAINTIFF STATE OF WASHINGTON'S RESPONSE TO UNITED STATES' MOTION TO MODIFY CONSENT DECREE

February 19, 2015, 2 p.m.

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AEA:	Atomic Energy Act
CERCLA:	Comprehensive Environmental Response, Compensation, and Liability Act
DOE:	Department of Energy
DST:	Double-Shell Tank
FFCA:	Federal Facility Compliance Act
HFFACO:	Hanford Federal Facility Agreement and Consent Order
LAWPS:	Low Activity Waste Pretreatment System
LDRs:	Land Disposal Restrictions
RCRA:	Resource Conservation and Recovery Act (federal)
SST:	Single-Shell Tank
TWCS:	Tank Waste Characterization and Staging Facility
WAC:	Washington Administrative Code
WTP:	Waste Treatment Plant

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I. INTRODUCTION

There is no dispute between the State of Washington (State) and the United States Department of Energy (Energy) over whether the Consent Decree should be amended. Both parties agree that the current schedule for the Waste Treatment Plant (WTP) is unattainable. Both parties agree that technical issues affecting the WTP's Pretreatment and High Level Waste facilities need to be resolved to ensure that the WTP operates safely and effectively. Both parties agree that a phased approach to completing the WTP, in which a Direct Feed Low Activity Waste facility is completed and brought on-line first, is an appropriate path for moving forward given the current state of delay. Both parties agree that the same new ancillary facilities—including a Low Activity Pretreatment System (LAWPS) and a Tank Waste Characterization and Staging facility (TWCS)—should be added to the WTP complex to enable this approach.

The crux of the Parties' disagreement is with respect to *how* the Consent Decree should be amended to implement this path forward. Energy proposes changing the entire structure of the 2010 Decree, eliminating virtually all enforceable deadlines for specific WTP activities and replacing them instead with a process by which Energy, as defendant to the Decree, will control how, when, at what cost, and even *if* it will take action. At the same time, Energy offers no mitigation for the fact that a WTP delay of indefinite duration will

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preclude the timely closure of Hanford's single-shell tank (SST) system, which to this point has been predicated on having WTP treatment capacity available.

Energy's proposal deprives the State of two central objectives of the 2010 Decree. First, it strips the Decree of the specificity, accountability, and enforceability the State bargained for. This promises to delay the WTP delay even further. Second, it negates the Decree's key role in the Parties' 2010 settlement, under which Energy's compliance with the Consent Decree—in particular, timely bringing the WTP on-line—was the premise for newly-extended retrieval and closure deadlines for Hanford's tanks. In practical terms, Energy's proposal will mean there *is* no schedule for Hanford's SST retrieval and closure mission.

The 2010 Decree was part of a comprehensive settlement to bring Energy into compliance with the requirements of state and federal hazardous waste law under which it is regulated. While circumstances relevant to the Decree have changed, Energy's proposal goes well beyond adapting the Decree to these circumstances. It instead rewrites the benefit of the bargain negotiated by the Parties. Under the legal standards for modification, Energy's proposal is not "suitably tailored" to resolve changed circumstances under the Decree. The Court should thus reject Energy's proposal.

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II. RESPONSE TO ENERGY'S STATEMENT OF BACKGROUND: RCRA REQUIREMENTS COMPEL HANFORD'S TANK WASTE MISSION

This case arises from Energy's failure to comply with requirements of the Resource, Conservation and Recovery Act (RCRA) and RCRA-authorized state law. RCRA authority governs the hazardous waste component of the mixed radioactive and hazardous waste that Energy manages at Hanford.[1] The regulation of nuclear materials is not at issue in this case, and is not a part of the Consent Decree that Energy seeks to amend. Energy, however, sets the tone for its proposal by declaring it is conducting cleanup of "*the nuclear materials at issue in this case*" under its exclusive Atomic Energy Act (AEA) authority. ECF No. 76 at 1 (emphasis added). The thrust of Energy's proposal is to turn a RCRA consent decree into an instrument that, under the guise of the AEA, cedes to Energy control over the terms of its hazardous waste management obligations.

Energy is a regulated entity under RCRA and RCRA-authorized state law (collectively "RCRA"). It has no authority under RCRA. *See, e.g., Wash. v. Chu*, 558 F.3d 1036, 1043 n.15 (9th Cir. 2009) (Energy not entitled to deference in interpreting the effect of a statutory amendment on the RCRA authority

[1] Both Energy and the Environmental Protection Agency have issued rules stating that mixed radioactive and hazardous wastes are subject to dual regulation, with the AEA governing the radioactive component and RCRA or RCRA-authorized state law governing the non-radioactive hazardous waste component. *See, e.g.*, 51 Fed. Reg. 24,504 (July 3, 1986); 52 Fed. Reg. 15,937 (May 1, 1987) (codified at 10 C.F.R. pt. 962); 53 Fed. Reg. 37,045 (Sept. 23, 1988); *United States v. Manning*, 527 F.3d 828, 833 (9th Cir. 2008).

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under which it is regulated). The Consent Decree at issue is to remedy alleged RCRA violations. *See* ECF No. 59 § I. The lawsuit, resolved in part by the Decree, was based upon Energy's violation of milestones in a RCRA-based order (the Hanford Federal Facility Agreement and Consent Order or HFFACO), as well as the RCRA requirements underlying those milestones.[2] *See* ECF No. 75 at 17-18. Unless a Constitutional conflict arises, *see* p. 32, *infra*, Energy's AEA authority is irrelevant to this matter.

The matter before the Court involves competing petitions to amend a consent decree that, together with the HFFACO, is meant to bring Energy into compliance with two key RCRA requirements at Hanford: the requirement to close Hanford's unfit for use single-shell tank (SST) system as soon as possible, and the requirement to treat all of Hanford's tank waste to a standard safe for disposal as soon as possible. These requirements are described below.

A. RCRA's Tank Closure Requirements

RCRA requires tanks storing hazardous waste to meet certain minimum criteria, including having secondary containment (i.e., a "double shell"). *See*

[2] The HFFACO makes no reference to establishing requirements or a schedule for implementing Energy's decision-making under the AEA. Instead, it is strictly a compliance schedule under RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See generally* HFFACO Article III (Purpose); HFFACO Article VII (Work); HFFACO Action Plan. *See also* HFFACO Action Plan, Section 1.1 ("The purpose of this action plan is to establish the overall plan for hazardous waste permitting, meeting closure and postclosure requirements, and remedial action under the Federal [RCRA] and [CERCLA], and the Washington State Hazardous Waste Management Act.").

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WAC 173-303-640(3), (4).[3] For tank systems built pre-RCRA that lack secondary containment (such as the SSTs), RCRA requires that the systems be assessed for both structural integrity (determining that the tanks have sufficient structural strength to not collapse, rupture, or fail) and leak integrity (determining that the tanks are not actually, or susceptible to, leaking) by a certified, qualified engineer. WAC 173-303-400(3), incorporating by reference 40 C.F.R. § 265.191.[4]

If the engineering assessment concludes that pre-RCRA tanks are leaking or otherwise "unfit for use," specific requirements trigger. 40 C.F.R. § 265.191(d). A leaking or unfit for use tank system must be "*removed from service immediately*," with no further waste added to the tanks. 40 C.F.R. § 265.196, .196(a) (emphasis added). Next, the facility owner or operator must, "*within 24 hours after detection of the leak*," or, if the owner or operator demonstrates that that is not possible, "*at the earliest practicable time*," remove from the tanks "*as much of the waste as is necessary* to prevent further release of hazardous waste to the environment . . . ." 40 C.F.R. § 265.196(b) (emphasis added). Unless the owner or operator demonstrates that the tank system has been appropriately repaired or upgraded (as confirmed by another engineering assessment), the tank system must be closed. 40 C.F.R. § 265.196(e).

[3] Corresponding to 40 C.F.R. §§ 264.192, .193.

[4] For convenience, subsequent citations to RCRA regulations incorporated through WAC 173-303-400(3) will be to federal regulation only.

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"Closure" requires that the facility owner or operator remove or decontaminate the entire tank system, including all waste residues, the tanks themselves, ancillary tank components such as piping and valves, and any soils contaminated by tank system releases. WAC 173-303-610(2), -640(8)(a).[5] If not all contaminated soils can be practicably removed or decontaminated, the contamination left in place must be closed and managed in "postclosure" according to the requirements applicable to hazardous waste landfills. WAC 173-303-640(8)(b).[6]

Specific timeframes apply to these closure actions. All hazardous waste must be removed within 90 days. WAC 173-303-610(4)(a).[7] All other remaining closure activities must be completed within 180 days. WAC 173-303-610(4)(b).[8] Under both timeframes, if these activities will take longer than prescribed, longer timeframes can be established so long as the owner or operator "demonstrates that he has taken and will continue to take all steps to prevent threats to human health and the environment." WAC 173-303-610(4)(a), (b).[9]

Upon entering into the HFFACO, Energy chose to proceed directly to closure of the SST system rather than attempting to repair or upgrade the

[5] Corresponding to 40 C.F.R. § 264.197(a).
[6] Corresponding to 40 C.F.R. § 264.197(b).
[7] Corresponding to 40 C.F.R. § 264.113(a).
[8] Corresponding to 40 C.F.R. § 264.113(b).
[9] Corresponding to 40 C.F.R. § 264.113(a)(1), (b)(1).

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system. Later, in 2002, Energy provided Ecology with a formal "unfit for use" determination for the SST system. That determination concluded that while the SSTs may retain *structural* integrity, the history of tank leaks and condition of the tank liners meant that long-term *leak integrity* for liquids remaining in the tanks "*cannot be proven for any of the SSTs* . . . ." ECF No. 84 ¶ 10, ECF No. 84-3 (emphasis added). Energy concluded: "In recognition of the *inability to meet current regulatory leak integrity requirements*, these tanks and ancillary systems should be considered not fit for use per 40 CFR 265.191." ECF No. 84-4 (emphasis added). Nothing in the current Energy Motion or its supporting declarations contradicts these conclusions.

In sum, since 1989, Energy has had RCRA obligations to: (1) immediately remove the SSTs from service; (2) within 24 hours, or if that is not possible, at the earliest practicable time, remove as much waste from the tanks as is necessary to prevent further releases to the environment; and (3) within 90 days, remove all hazardous waste from the SST system, and within 180 days, complete closure of the system, unless longer timeframes can be justified.

To date, Energy's ability to remove waste from and close the SST system has been constrained by three things: (1) no treatment capacity for the waste, given its highly radioactive nature; (2) not enough compliant storage capacity to transfer all the waste out of the SSTs; and (3) obstacles to retrieval posed by the

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difficult nature of waste, among other matters. ECF No. 84 ¶ 24; Second Declaration of Jeffery Lyon (Second Lyon Decl.) ¶ 17.

Under RCRA, any schedule of compliance for a hazardous waste facility must provide for coming into compliance "as soon as possible." WAC 173-303-815(3)(a)(i).[10] Based on the constraints associated with closing the SST system, the original HFFACO afforded Energy a nearly 30-year schedule for removing waste from all 149 SSTs (1989-2018) and a 35-year schedule for closing the SST system (1989-2024). The 2010 settlement (Consent Decree plus HFFACO amendments) extended these timelines even further, with the waste retrieval deadline moved to no later than December 31, 2040 (Milestone M-45-70) and the ultimate tank system closure deadline moved to 2043 (Milestone M-45-00).

In both cases, the timeline for removing waste from the SST system has been tied to the timeline for completing and operating the Waste Treatment Plant (WTP), without consideration of building additional compliant storage capacity. As outlined in Washington's Petition, the date under the HFFACO for removing waste from the SST system "as soon as possible" (no later than 2040) was based on Energy's own modeling of the rate at which SSTs could be retrieved once the WTP gained its "initial operations" operating rate in 2022. *See* ECF No. 75 at 19-20. This 2022 date is the "achieve initial operations" date

[10] Corresponding to 40 C.F.R. § 270.33(a)(1).

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required under the current Consent Decree. ECF No. 59 at 27 (Milestone A-1).

B. RCRA's Storage Prohibition and the Federal Facility Compliance Act

RCRA does not just subject hazardous waste to "safe storage" requirements, such as the tank requirements described above. RCRA also provides a set of "land disposal restrictions" (LDRs) to ensure that waste will only be disposed of after first meeting stringent treatment requirements. *See* 42 U.S.C. § 6924(b)-(m); WAC 173-303-140(2)(a) (incorporating by reference 40 C.F.R. pt. 268); *Chu*, 558 F.3d at 1039-40.

To prevent hazardous waste from being stored indefinitely in lieu of this treatment, the LDRs include a "storage prohibition" restricting hazardous waste storage to those quantities that are "solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal." 42 U.S.C. § 6924(j). Congress enacted this provision because it "believed that permitting storage of large quantities of waste as a means of forestalling required treatment would involve health threats equally serious to those posed by land disposal, 'and therefore' opted . . . for a 'treat as you go' regulatory regime." *Hazardous Waste Treatment Council v. U.S. Envtl. Prot. Agency*, 886 F.2d 355, 357 (D.C. Cir. 1989).

In 1992, Congress enacted the Federal Facility Compliance Act (FFCA), codified in RCRA. Among other things, the FFCA compelled Energy facilities such as Hanford to address the vast backlog of untreated mixed radioactive and

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hazardous waste that accumulated while Energy and its predecessors exercised sole AEA authority over the waste. "The FFCA was enacted *specifically to motivate recalcitrant officials at federal facilities into addressing the continuing backlogs of stored, untreated, mixed waste subject to RCRA's strict storage prohibitions*." *Chu*, 558 F.3d at 1040 (emphasis added) (citing H.R. Rep. 102-111, at 2 (1992)).

The FFCA waived sovereign immunity so that states could impose civil fines on federal facilities for RCRA violations. *See* 42 U.S.C. § 6961. The FFCA also singled out Energy specifically, requiring Energy to develop plans and schedules for "treatment capacities and technologies" that would address its mixed waste backlog. *See* 42 U.S.C. § 6939c(b)(1)(A)(i). Once approved by a state and incorporated into a state order, such "site treatment plans" would constitute enforceable compliance schedules against Energy. 42 U.S.C. § 6939c(b)(2)(C).

At Hanford, the pre-existing HFFACO satisfied the site treatment plan requirement. *See* 42 U.S.C. § 6939c(b)(1)(A)(ii); *Chu*, 558 F.3d at 1041. With respect to backlogged tank waste, this was addressed by the HFFACO's schedules for developing a WTP and completing the treatment of all tank waste. These schedules are now split between the Consent Decree and the HFFACO.

While Energy asserts it entered into the Consent Decree because it determined the Decree's milestones were "achievable and . . . consistent

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with . . . DOE's responsibilities under the Atomic Energy Act," ECF No. 76 at 18, the Consent Decree also serves Congress's intended FFCA function: together with related HFFACO provisions, it compels Energy to address a critical environmental waste management issue. Indeed, it is through RCRA, and not the AEA, that Congress has entrusted the cleanup of Hanford's backlogged tank waste.

III. ARGUMENT

A. Energy's Proposal Should Be Rejected Because It Is Not Within the Scope of Modification Authority

In arguing it need not need demonstrate "good cause" to modify the Consent Decree (as required under Decree Section VII.B), Energy argues the Court's inherent authority to modify the Decree is not limited by the Parties' negotiated language. *See* ECF No. 76 at 50 n.21. Later, when anticipating the State's amendment proposal, Energy argues in contradiction that the Decree must be "construed as it is written" and that the Court should not, "absent exceptional circumstances," impose any burdens on Energy beyond those required by the original Decree. *See id.* at 64-65.

The State agrees the Court has inherent authority to modify the Decree, as codified in Federal Rule of Civil Procedure 60(b)(5).[11] *See* ECF No. 75 at

[11] Consent Decree Section VII provides that the Decree may be amended if (1) a request for amendment is timely, and (2) good cause exists for the amendment. ECF No. 59 § VII.B. Washington maintains that Energy's March 31, 2014, proposal does not meet either criterion. Second Declaration of Andrew Fitz (Second Fitz Decl.), Ex. 2 at 4-6. Washington recognizes that the

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47. However, with respect to adding tasks and terms to the Decree, Energy ignores specific provisions of the Decree. Specifically, Energy ignores the State's express reservation to seek amendment of the Decree in light of changed information or circumstances:

> Notwithstanding any other provision of this Decree, *the State reserves the right to* (1) *seek amendment of this Decree*, if previously unknown information is received, or previously undetected conditions discovered, *and these previously unknown conditions or information together with any other relevant information indicates that the work to be performed and schedule under this Decree are not protective of human health or the environment* . . . .

ECF No. 59 § X.C (emphasis added).

Any such amendment, of course, would be sought through the Decree's amendment provision, Section VII, and is subject to the Decree's dispute resolution provision, which provides for judicial resolution over "whether or how the Decree should be amended." *See id.* § IX.A, B. Thus, the Decree "as it is written" allows the State to propose adding tasks and terms to the Decree and gives the Court express authority to change Energy's substantive duties on

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Court's jurisdiction to modify its own order is inherent and is not constrained by the Parties' agreement. *David C. v. Leavitt*, 242 F.3d 1206, 1210-1211 (10th Cir. 2001). Regardless, the same considerations that factor into whether "good cause" is shown under the Decree (i.e., whether a circumstance was anticipated and whether reasonable diligence was applied in attempting to comply with the Decree) are considerations under the judicial test for modification. *Compare* ECF No. 59 § VII.D with *Labor/Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120 (9th Cir. 2009).

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such petition.[12] *See, e.g., United States v. Asarco, Inc.*, 430 F.3d 972, 982 (9th Cir. 2005) (plaintiff action could be "anticipated" based on express reserved rights in decree); *David C. v. Leavitt*, 242 F.3d 1206, 1210-11 (10th Cir. 2001) (rejecting argument that only defendants can seek equitable modification of unlitigated decree).

At issue here is Energy's amendment motion. The State agrees with Energy's recitation of the conditions for modification, as framed by the Ninth Circuit: (1) there must be a "significant change either in factual conditions or in the law"; (2) the change was not anticipated at the time the decree was entered; (3) the changed factual circumstances make compliance with the decree substantially "more onerous, unworkable, or detrimental to the public interest"; and (4) the proposed modification is "suitably tailored to resolve the problems created by the changed . . . conditions." *Labor/Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120 (9th Cir. 2009) (citations omitted). With respect to the second condition, if a factual circumstance *was* anticipated, the moving party must "satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable

[12] As outlined in the State's Petition, "previously unknown conditions or information" together with "other relevant information" exist here in the form of Energy's failure to comply with the schedule for constructing and achieving initial operations of the WTP; the magnitude of Energy's continuing pattern of project management difficulties; the fact that a double-shell tank (DST) now must be taken out of service (thus further diminishing available capacity in the DST system); and evidence that at least one SST is actively leaking. *See* ECF No. 75 at 21-31, 45.

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effort to comply with the decree, and should be relieved of the undertaking." *Asarco, Inc.*, 430 F.3d at 984 (citation omitted). With respect to the last requirement, a suitably tailored modification will "further the purpose of the consent decree, without upsetting the basic agreement between the parties," *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994), and should "return *both* parties as nearly as possible to where they would have been" absent the changed conditions. *Pigford v. Veneman*, 292 F.3d 918, 927 (D.C. Cir. 2002). The burden is on Energy, as the moving party, to demonstrate each modification condition. *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1121.

Energy's proposal to amend the WTP schedule should be rejected under these conditions. Principally, Energy's proposal is not "suitably tailored" to the change in circumstances.[13] First, Energy's proposal changes essential terms of

[13] As argued *infra*, Energy's WTP proposal should be rejected on the basis that it is not suitably tailored to the changed circumstances. Energy also fails, however, to meet the initial "heavy burden" applied when a change in factual circumstance is anticipated by a moving party. *Asarco, Inc.*, 430 F.3d at 984. Energy argues the test as to whether changed circumstances are "anticipated" is whether the circumstances are "unforeseen," not "unforeseeable." ECF No. 76 at 46-47. Energy's cited cases, however, are distinguishable on the facts. Here, the change in circumstance related to matters directly within Energy's knowledge and control. Prior to entering the Decree, Energy was well aware of the primary technical issues affecting the WTP's Pretreatment and High Level Waste facilities. Second Declaration of Suzanne Dahl-Crumpler (Second Dahl Decl.) ¶¶ 20-21. If it did not "foresee" how significant these matters were, the fault for this lack of awareness lies

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the Decree by eliminating nearly all current enforceable milestones in favor of a process that leaves performance under the Decree almost entirely within Energy's exclusive control. This negates the specificity, accountability, and enforceability Washington obtained in the Decree and sets the stage for even further future delays. Just as important, Energy fails to demonstrate that any fundamental change to the structure of the Decree is necessary.

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squarely with Energy. *See* Second Dahl Decl. ¶¶ 21-34; *see also* pp. 25-26, *infra*.

Under the "heavy burden" standard, Energy must convince the Court that it "agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking." *Asarco, Inc.*, 430 F.3d at 984. Here, Energy did not make a reasonable effort to comply with the Decree. Instead, it unilaterally steered the WTP project in an entirely new direction as many as two years before the instant amendment request, without the consent of the State and without the approval of the Court. *See* ECF No. 75 at 2-3, 22-25, 40-41; Second Dahl Decl. ¶¶ 6, 13, 19, 20, 40-41. This action came despite repeated requests by the State for information; for Energy to evaluate alternative approaches that would maintain compliance with the Decree as closely as possible; and for Energy to propose a Decree amendment. *See* ECF No. 75 at 23-27; Second Dahl Decl. ¶¶ 6, 17, 41.

Even if the initial "heavy burden" test is not applied, some circuits (as noted by Oregon) apply a more rigorous standard to defendants seeking to modify a consent decree. This is because defendants usually seek modification "not to achieve the purposes of the provisions of the decree, but to escape their impact." ECF No. 99 at 15 n.6 (quoting *Holland v. New Jersey Dep't of Corr.*, 246 F.3d 267, 283-84 (3rd Cir. 2001)). The circumstances under which Energy has brought its request justify such a higher burden. These circumstances also justify Washington's request for additional "accountability measures" in the Decree. ECF No. 75 at 54-56. Energy's request, however, can and should be denied regardless of the rigor of burden applied.

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Second, if adopted, the consequence of Energy's proposal will be indefinite delay of the two key RCRA compliance efforts the Decree is specifically intended to further: closing Hanford's SST system and treating Hanford's backlogged tank waste. Energy's requested relief directly conflicts with other provisions of the 2010 settlement for retrieving waste from and closing the SST system. In practical terms, it will result in having no schedule at all for closing the SST system.

Finally, Energy's proposal to amend Appendix B (SST retrieval schedule) should be rejected both because it fails to meet the "heavy burden" applied when a change in factual circumstances is anticipated by a moving party, *Asarco, Inc.*, 430 F.3d at 984, and because Energy's proposal is not suitably tailored to resolve changed circumstances. Although Energy's proposal does not on its face extend the date for completing all retrievals under the Decree, Energy's request to push back the start of retrieval in multiple tanks (including proposing to start retrieval in five tanks just nine months before the 2022 deadline) sets the stage for a future failure.

B. Energy's WTP Proposal Is Not "Suitably Tailored" Because it Strips the Consent Decree of Negotiated Enforceable Provisions and Is Not Necessary to Address Changed Circumstances

1. The State negotiated for, and got, enforceable obligations in a judicial consent decree.

The 2010 Decree and related HFFACO amendments were part of a comprehensive settlement of a suit to enforce against Energy's violations of

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RCRA's tank closure and LDR storage prohibition provisions, together with HFFACO milestones intended to remedy those violations. *See* ECF No. 75 at 17-20. A fundamental objective of the Decree was to create greater specificity, accountability, and enforceability than had been afforded by the HFFACO. *See Asarco, Inc.*, 430 F.3d at 983 ("broader purpose" of a consent decree is to "obtain[] the greater enforceability (compared to an ordinary settlement) that a court judgment provides"). This is reflected throughout the Parties' responsiveness summary to public comment on the draft settlement:

> *The benefits to the State of creating court-ordered obligations include: (1) creating a strong incentive for USDOE to meet the obligations (in order to avoid court sanctions) and, (2) giving the State the ability to swiftly and strongly respond if, in the future, USDOE does not meet the obligations*.
>
> . . . .
>
> As explained above, the settlement package includes many provisions in addition to the extension of the SST retrieval schedule [under the HFFACO]. *These include the oversight of a federal court between now and 2022 . . . . Provisions like court oversight* and the opportunity to accelerate the end date *provide benefits to the State*.
>
> . . . .
>
> The State agreed to extend the deadline *in exchange for other provisions in the settlement package that gave the State confidence that the new settlement requirements would be achieved*. The settlement includes provisions for: (1) *court oversight of WTP construction and initial operations requirements, including court oversight of 17 interim milestones (included to ensure DOE stays on pace to achieve hot start and initial operations on time) . . . .*

ECF No. 83 at 4, 7-8, 16 (emphasis added). Energy's proposal fundamentally

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alters this key objective of the Decree.

2. By stripping the Decree of nearly all enforceable milestones, Energy's WTP proposal eliminates specificity, accountability, and enforceability from the Decree.

a. Energy's proposal completely restructures the manner in which the Consent Decree approaches WTP tasks and schedule.

Energy does not just seek an extension of WTP deadlines. It seeks a complete restructuring of the manner in which the Decree approaches the WTP. This restructuring eliminates nearly all of the current hard deadlines and specific tasks from the Decree in favor of a "process" for establishing future milestones that rests entirely within Energy's exclusive control, has no internal deadlines, and no external enforceability. As a result, Energy will have no meaningful accountability to the State or the Court.

Energy's WTP proposal eliminates all of the current express deadlines for completing specified construction tasks, starting and completing cold and hot commissioning of individual WTP facilities (with one exception), and achieving initial plant operations for the WTP as a whole. In their place, Energy offers a total of five enforceable milestones: four near-term "next step" deadlines for activities Energy is already implementing, *see* ECF No. 76 at 54, and a contingent 2022 deadline for completing hot commissioning of the Direct Feed Low Activity Waste Facility. *See* ECF No. 76-1 ¶ 2.

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Beyond that, all potential future milestones are left largely to Energy's discretion and control. With respect to resolving Pretreatment and High Level Waste Facility technical issues,[14] Energy offers no milestones other than two near-term starting deadlines. *See id.* ¶ 2. Instead, it offers to provide periodic briefings and submit one written report to the State, with a requirement to notify the State "as expeditiously as practicable" after Energy (1) determines it has resolved such issues, and (2) has made any associated design changes specific to the two facilities. *See id.* ¶ 3.e. There are no timeframes for actually accomplishing these two tasks. Indeed, nothing in the proposal requires that Energy ever actually resolve the WTP technical issues or make resulting design changes. *See generally* ECF No. 76-1.

With respect to completing the Pretreatment and High Level Waste Facilities, nothing is required of Energy until it makes the above notifications. If and when the notifications occur, Energy proposes that with respect to the Pretreatment Facility, it will within 60 days offer a milestone to the State designating a date by which it will authorize itself to proceed with further engineering and procurement work. *See id.* ¶ 3.e.i. Energy then proposes that with respect to both the Pretreatment and High Level Waste Facilities, it will propose further milestones for construction, cold commissioning, and hot

[14] Defined as: "hydrogen gas events in pulse jet mixed vessels and in piping and ancillary vessels; criticality in vessels in the Pretreatment Facility; pulse jet mixer control; erosion and localized corrosion in WTP vessels and piping; and ventilation balancing." ECF No. 76-1 ¶ 4.a.

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commissioning after two conditions precedent occur: (1) Energy has approved new "performance baselines" for the two facilities, and (2) Energy has executed contracts or contract modifications to implement those performance baselines. *See id*. ¶ 3.e.ii, iii. Nothing in the proposal requires that Energy ever actually produce the performance baselines, let alone produce them on any timeline. *See generally* ECF No. 76-1. Further, assuming the performance baselines are produced at some point, Energy's conditions precedent mean that Energy's direction and schedule will already be committed before it proposes adding milestones to the Decree, effectively tying the hands of the State and the Court. Energy will have already defined a project budget based on its own "approved funding profile," established a project schedule, and executed contracts for construction, cold commissioning, and hot commissioning based on that budget and schedule. *See id*. ¶ 1.h. Finally, Energy does not propose adding an achieve WTP initial operations milestone to the Decree until the year after hot commissioning of the WTP has been achieved, whenever that might be. *See id*. ¶ 3.e.v.

With respect to the two new proposed WTP ancillary facilities (TWCS and LAWPS), Energy proposes following its own internal project management process under DOE Order 413.3B. *See* ECF No. 76-1 ¶¶ 3.b.ii-vii, d.i.-iv. Under Energy's proposed approach, it would offer to add new milestones to the Decree only when (and if) it has completed sequential "critical decision" steps

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under the Order. *Id*. Importantly, Order 413.3B has no internal deadlines and no independent schedule-forcing function. *See generally* U.S. Dep't of Energy Order 413.3B, *Program and Project Management for the Acquisition of Capital Assets* (Nov. 29, 2010), *available at* https://www.directives.doe.gov/directives-documents/400-series/0413.3-BOrder-b. Therefore, Energy's proposal contains two layers of "non-deadlines" for the new facilities: the Decree will have no deadlines until they are established through Energy's internal process, and Energy will have no deadlines for completing that internal process. In addition, just as with the Pretreatment and High Level Waste facilities, Energy would not propose primary construction and commissioning milestones until after project contracts for the new facilities have already been executed and Energy's course is committed, leaving the State with little choice but to acquiesce, or face further delay. *See* ECF No. 76-1 ¶ 3.c.

Finally, with respect to completing and operating the Direct Feed Low Activity Waste Facility, Energy offers no interim deadlines in the seven years preceding the proposed 2022 hot commissioning deadline. *See id.* ¶ 2. Instead, it offers to propose further interim milestones after it approves a performance baseline for the facility and (once again) after it already commits itself to contracts. Neither of these triggering actions, however, are themselves on any timelines, nor are even actually required to be completed under the Decree. Energy's Proposed Order also places a huge contingency on the 2022 hot

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commissioning milestone: if Congress has not authorized and appropriated funding for the Low Activity Pretreatment System by February 2015, the 2022 milestone will be unenforceable.[15] *Id.* ¶ 3.b.i.

To appease the State, Energy offers to report on its progress on a yearly basis and offers that the State will have an "opportunity to challenge" any future milestones it may propose.[16] ECF No. 76 at 55. As Oregon points out, annual reporting with so few enforceable requirements is not meaningful. ECF No. 99 at 4, 20-21. Further, any opportunity to challenge Energy's proposed milestones will come only after Energy has already committed itself to a direction through its baseline schedule/budget and its executed contracts. This shifts the burden under the Decree and renders any opportunity to challenge largely illusory. The State as plaintiff-regulator should not be in the position of having to challenge after-the-fact the defendant's unilaterally developed work scope and schedule, at the cost of even further delay in achieving schedule certainty while the matter is litigated.

This is not what the State sued for in 2008 and negotiated into the 2010 Decree. In Energy's own words, "modification of a Consent Decree does not open the door for reconsidering the parties' basic agreement, nor is it an

[15] Energy's proposal also defers proposing a milestone for achieving Low Activity Waste Facility "initial operations" until sometime in the year after hot commissioning has been achieved. ECF No. 76-1 ¶ 3.b.vii.

[16] Energy did not include this reporting provision in its March 31, 2014, amendment proposal to the State.

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opportunity for a party to renegotiate the original bargain." ECF No. 76 at 65 (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391-92 (1983)). This, however, is precisely what Energy's proposal does by converting the Consent Decree from an instrument that dictates how the defendant is to come into legal compliance into an instrument under which the defendant controls how, when, at what cost, and even *if* it will undertake action. Because Energy's proposal strips the Decree of nearly all enforceable requirements, the Court should reject the proposal. *See, e.g., Pigford*, 292 F.3d at 927 (rejecting request to replace negotiated hard deadlines with arbitrator's discretion).

b. Energy's WTP proposal conflicts with RCRA requirements and the intent of the FFCA.

Energy's WTP proposal conflicts with RCRA itself. RCRA's regulations mandate that any compliance schedules must "require compliance as soon as possible." WAC 173-303-815(3)(a)(i).[17] If a compliance schedule extends beyond one year, interim milestones must be provided. If the time necessary for completing an interim requirement is not readily divisible into stages, the schedule must specify interim dates for submitting progress reports and "indicate a projected completion date." WAC 173-303-815(3)(a)(ii)(B).[18] Energy's proposal does not meet these requirements.

[17] Corresponding to 40 C.F.R. § 270.33(a)(1).
[18] Corresponding to 40 C.F.R. § 270.33(a)(2)(ii).

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Energy's WTP proposal is also not consistent with the intent of the FFCA amendments to RCRA. As reflected in the FFCA's final bill report, the Energy-specific amendments were directed at correcting "severe environmental contamination at the Department of Energy's nuclear weapons production complex" created by "*decades of self-regulation, without independent oversight or meaningful public scrutiny*." Second Declaration of Andrew Fitz (Second Fitz Decl.), Ex. 1 at 3 (emphasis added). The report singled out Hanford's tank waste among this "contamination," commenting that no treatment capability for the waste "will likely be available *for at least ten years*." *Id*. at 26 (emphasis added).

As outlined above, the FFCA's response to this situation was to require Energy to develop "site treatment plans" for developing and implementing mixed waste treatment technologies, with such plans made enforceable against Energy through state RCRA orders. 42 U.S.C. § 6939c(b)(1)(A)(i), (b)(2)(C). Congress recognized that the HFFACO (which the current Consent Decree succeeds, in part) already served this purpose. 42 U.S.C. § 6939c(b)(1)(A)(ii); *Chu*, 558 F.3d at 1041.

In practical terms, Energy's WTP proposal would give Energy almost exclusive control over the substance and pace of developing treatment for Hanford's tank waste. This undermines the intent of the FFCA.

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3. By stripping the Decree of nearly all enforceable WTP milestones, Energy's proposal promises even more delay.

Energy asserts that its approach presents a "clear path" to resolving WTP technical issues while ensuring the Decree's original objectives are "preserved and advanced." ECF No. 76 at 36. However, nothing in Energy's proposal gives comfort that a clear, structured path to success is even known to Energy, much less will be followed. To the contrary, Energy's proposal promises even more WTP delay.

As outlined in the State's Petition, Energy has already been widely criticized for its management and execution of the WTP project. ECF No. 75 at 32-37; ECF No. 77 ¶¶ 31-90. Nothing better illustrates this criticism than the circumstances leading to the current WTP delay. When Energy entered into the Decree, it asserted an 80-percent confidence level in meeting its own *internal* WTP schedule, which was more aggressive than the schedule in the Decree. Second Declaration of Suzanne Dahl-Crumpler (Second Dahl Decl.) ¶ 39. Barely a year later, Energy determined it would miss nearly all of the Decree's pending WTP deadlines by an indeterminate margin. Energy insists that it simply failed to appreciate the magnitude of technical issues affecting the Pretreatment and High Level Waste facilities when it entered the Decree. ECF No. 76 at 20, 24. Energy leaves unanswered, however, the question of *how* and *why* it was so startlingly misinformed. Concerns about mixing and erosion/corrosion in Pretreatment vessels, for instance, were hardly new: they

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had been brought to Energy's attention for nearly a decade. *See* ECF No. 77 ¶¶ 62-84. If there was a failure to appreciate the magnitude of technical issues, the fault must lie squarely with Energy. In the years prior to 2010, Energy failed to give the issues adequate attention while continuing to push ahead with design and construction. *See id.* ¶¶ 65-84; Second Dahl Decl. ¶¶ 24, 27, 28, 30-35. More recently, the ventilation issue identified in 2013 was again identified not by Energy itself, but by an independent review panel. Second Dahl Decl. ¶ 37. The root cause of the issue traces back to Energy's original WTP design and was a basic design matter that should have been caught through internal review years ago. *Id*. ¶¶ 37-38. These examples demonstrate that to this day, Energy has still not shown it has effectively addressed its past project management difficulties. Energy has still not shown it has solved other systemic issues that have plagued the WTP project, such as the disconnect between design and "safety basis" review and the failure to assure compliance with quality assurance standards. *See* ECF No. 75 at 33-36.

In spite of this, Energy asks that the Decree now be amended to provide for even less accountability and oversight. Energy presents nothing to justify this request. Energy cites the "unprecedented" magnitude and complexity of its project, ECF No. 76 at 2, 3, 15-16, but it presents no detail to the Court on how it will complete such a massive project. Energy's complete lack of detail gives the Court no objective basis on which to expect that Energy's past project

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performance difficulties will improve.[19] *See* Second Dahl Decl. ¶¶ 43-49. If there is a plan and schedule for resolving technical issues, Energy has not shared it. Energy's approach for proposing additional milestones for new capital facilities unaffected by technical issues (e.g., LAWPS and TWCS) is hinged on developing project baselines for the facilities, ECF No. 76 at 32-33, but Energy nowhere indicates when it plans to develop such baselines.[20] Energy describes none of its planning for how entire new facilities will be funded, designed, built, and integrated with existing WTP facilities already partially completed. In short, Energy provides no timelines or details for any of the critical tasks needing action. Most telling, in a 70-page motion with multiple supporting declarations, Energy nowhere shares with the Court the central issue in this matter: how long it expects the WTP will be delayed.

The largest capital construction project in the country should be matched with the best project management plans in the country. Even in the face of unresolved technical issues, every contingency should already be anticipated and planned for. Energy, however, implies that such planning is impossible. *See id.* at 31, 57-58. Energy is either not fully disclosing what it knows to the State and the Court, or it truly has no plans for the critical tasks needing action.

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[19] While current Energy officials might blame the competence of their predecessors, that is no answer. This Decree will likely outlast the careers of every individual involved today. *See* ECF No. 100 at 14 (citing Energy and contractor turnover). The structure of the Decree is more important than the individuals involved.

[20] Once again, DOE Order 413.3B provides no independent timelines.

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If it is the former, then the Parties and the Court can use the information to craft an enforceable plan and schedule. If it is the latter, it reinforces just how important it is to hold Energy accountable to an enforceable plan and schedule. For a project that depends on predictable Congressional funding, *id.* at 42-43, 61, it is difficult to see how such funding will be obtained without this level of detail.[21] Further, without a defined schedule, it is unclear how Energy will effectively coordinate tasks requiring advance planning by others, such as the massive task of processing future permits Energy must obtain from the State. Second Dahl Decl. ¶¶ 45, 50.

Energy's amendment proposal offers nothing to change the troubled dynamic that has already delayed the WTP. The proposal's lack of structure means there is no way for the State or Court to hold Energy accountable, and no way of knowing whether Energy is holding *itself* accountable, to a continued consistent long-term project direction.[22] The foreseeable consequence of granting Energy's request will be further indefinite delay of the WTP, denying the State the essential relief it negotiated in the Consent Decree.

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[21] The State agrees with amici TRIDEC and Hanford Communities on this point. *See* ECF No. 100 at 14.

[22] Indeed, even under the structure of the current Decree, the State has had great difficulty ascertaining Energy's progress and direction, leading to the State's request for greater accountability measures in the Decree. *See* ECF No. 75 at 21-27, 54-55; Second Dahl Decl. ¶¶ 5-19. This situation will only worsen without a defined plan and schedule by which to measure Energy's progress and direction.

4. Energy's WTP amendments are not necessary to address the changed circumstances.

A party may obtain relief from a consent decree "when it is no longer equitable that the judgment should have prospective application, *not when it is no longer convenient to live with the terms of a consent decree*." *Rufo*, 502 U.S. at 383 (emphasis added) (internal quotation marks omitted). In determining whether Energy's proposal is "suitably tailored" to the changed circumstances, the Court should look to whether a radical change in the Decree's structure is necessary, not just more convenient for Energy. Energy does not justify such a change.

a. Energy's "judgments about the planning and construction of nuclear facilities . . . under the Atomic Energy Act" are not entitled to significant weight.

Energy asks the Court to defer to its "judgments about the planning and construction of nuclear facilities," saying these judgments should be given "significant weight." ECF No. 76 at 60-61 (citing *Native Village of Point Hope v. Salazar*, 680 F.3d 1123, 1130 (9th Cir. 2012)). Specifically, Energy argues that the "The milestones in DOE's proposed modification reflect timeframes that DOE's field managers . . . *have determined to be achievable* . . . ." ECF No. 76 at 60 (emphasis added).

For the most part, however, the only "achievable" WTP timeframes Energy claims are *no* timeframes. *See id.* Energy's only cited authority does not support deference to this position. *Native Village* involved judicial review

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of an agency's approval of a technical geologic exploration plan, as approved within the agency's statutory authority. *Native Village*, 680 F.3d at 1129. The court granted deference to the agency's judgment within the context of the arbitrary and capricious standard of review. *Id*. at 1129-30. Here, Energy asks for deference as the defendant to a Decree in which it is a regulated entity, in the course of litigation in which it bears the burden of attempting to modify that Decree. Even though it provides almost no detail behind its "judgment" that no enforceable schedule is warranted, Energy asks for deference as a simple matter of course. Case law, however, does not support such *carte blanche* deference. *See, e.g., Natural Res. Def. Council v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) ("The [Forest] Service cannot rely on 'reminders that its scientific determinations are entitled to deference' in the absence of reasoned analysis"); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004) (interested position taken in litigation owed little, if any, deference); *Indiana Michigan Power Co. v. United States*, 57 Fed. Cl. 88, 95 (2003) (deference to Energy's contract interpretation could "endorse self-serving views that an agency might offer in a post hoc reinterpretation").

b. New milestones can be established even without technical issues fully resolved.

Contrary to Energy's suggestion, the Parties and the Court can devise a schedule that is realistic and achievable, accommodates the need to resolve

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technical issues affecting some WTP facilities, and provides Energy with a full opportunity to address nuclear safety concerns under its AEA authority.

Even in light of unresolved Pretreatment and High Level Waste technical issues, there is enough information on which to generate a proposed WTP schedule. Second Dahl Decl. ¶¶ 52-57. Indeed, there is reason to believe Energy already has detailed scope, schedule, and cost information, together with estimates on how long it will take to resolve technical issues, none of which it has shared with the Court and very little of which it has shared with the State. *Id*. ¶¶ 54-57. With respect to technical issues, it is possible to estimate conservative timeframes for issue resolution and defer setting specific construction milestones until after such resolution (as proposed in the State's Petition). *Id*. ¶¶ 47, 50, 51, 57. For those facilities without technical issues (e.g., Low Activity Waste, LAWPS, and TWCS), nothing precludes establishing new, enforceable schedules now. *Id*. ¶¶ 53, 55, 56.

In considering a modification request, the Court "should do no more" than is necessary to resolve the problems created by a change in circumstances. *Rufo*, 502 U.S. at 391. Energy fails to show it is not "realistically achievable" to comply with a revised WTP schedule that, while taking into account uncertainty and risk, still retains the essential enforceable structure of the current Decree. *Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986) (modification must take into account what is "realistically achievable" by

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parties). Because the Decree's schedule structure can be adjusted, rather than wholly replaced, Energy's proposal is not suitably tailored to the changed circumstances. *Rufo*, 502 U.S. at 391.

c. A structured schedule does not conflict with Energy's AEA authority or 413.3B decision-making process.

There is no inherent conflict in Energy conforming to a RCRA compliance schedule while exercising its AEA authority over nuclear safety. As outlined above, Congress, through the FFCA, mandated that Energy be subject to RCRA schedules for developing and implementing *mixed waste* treatment capacity, including for Hanford's tank waste. So long as the Consent Decree does not make compliance with both AEA and state RCRA authority "a physical impossibility" and does not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," no Supremacy Clause issues arise. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 203 (1983).

There is also nothing inconsistent about Energy being subject to an enforceable schedule and conforming its internal project management process to that schedule. Energy Order 413.3B allows for "tailoring" of the Order's "critical decision" process, including "consolidation or phasing of [critical decisions], substituting equivalent documents, [a] graded approach to document development and content, concurrency of processes, or creating a portfolio of projects to facilitate a single [critical decision] for an entire group of projects."

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413.3B Order at 4(a)(3); App. C at 22.a. With respect to Energy's environmental management projects (which include Hanford cleanup), Order 413.3B states that "a tailored approach is necessary" because "the performance and scope parameters and start/end dates *are based on negotiated terms with Federal and/or State regulatory agencies*." Order 413.3B, App. C at 22.c (emphasis added). The Order acknowledges: "These projects are conducted under a variety of regulatory processes and site-specific cleanup agreements which are legally binding *and specify the process, end states, decision points and approvals required*." *Id*. (emphasis added).

Energy must offer more than unsubstantiated "expert judgment under the Atomic Energy Act," ECF No. 76 at 68, to override the compliance schedule requirements of RCRA and the FFCA. The current *60- and 70-year* schedules for closing unfit for use SSTs and treating Hanford's tank waste speak to the extreme accommodations that have already been made for "nuclear safety." The fact that nuclear material is mixed with Hanford's hazardous waste does not allow Energy to use nuclear safety as a shield to endlessly delay Hanford's tank waste mission, or dictate a schedule on its own terms.

d. The current Decree offers a mechanism for responding to changed circumstances.

Energy stresses the need for flexibility and adaptability in the Consent Decree. *See, e.g.*, ECF No. 76 at 53-54. However, Energy nowhere acknowledges that the Decree already has a "good cause" provision for

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amending the schedule in response to new information and circumstances. *See* ECF No. 59 § VII.D. Energy fails to explain why this existing term is insufficient to address, for instance, the "iterative and evolving" resolution of technical issues. *See* ECF No. 76 at 53. Indeed, while Energy claims to have learned that the WTP project "is difficult to fit into the mold of traditional, fixed consent decree deadlines," *id.* at 61, not once prior to March 2014 did Energy utilize the Decree's existing tools to address "unanticipated circumstances," despite the State's urging. *See* ECF No. 75 at 21-28.

e. Having enforceable deadlines in the Decree is not detrimental to the public interest.

Finally, having enforceable deadlines in the Decree is not detrimental to the public interest. While Energy implies that deadlines can place "undue pressure" on officials to make "hasty decisions," *see* ECF No. 76 at 49-50, ECF No. 76-5 ¶ 23, Energy cites no example in which the deadlines in the current Decree have led to such a result. To the contrary, since 2011, Energy has proceeded without regard to the Decree's current WTP deadlines. *See* ECF No. 75 at 2-3, 22-25, 40-41; Second Dahl Decl. ¶¶ 13, 19, 40-41. Further, while Energy suggests it is premature to establish enforceable milestones before completing internal baselines and executing work contracts, *see, e.g.,* ECF No. 76-5 ¶¶ 23, 38, Energy regularly undertakes such matters in the face of pre-existing milestones. Indeed, since 1989, the HFFACO has required that Energy

conform its project baselines and contracting to HFFACO deadlines. *See* HFFACO Article II, ¶ 10; HFFACO Action Plan, Section 11.4.

Energy argues that foregoing an enforceable schedule in favor of an "adaptive management approach" is important to account for the "various moving parts" involved in a large capital project. ECF No. 76-5 ¶ 23. From the State's perspective, however, Energy's demonstrated project management difficulties compel the opposite conclusion. Given the scale and complexity of the WTP project, the public interest will not be served by casting Energy adrift without a rudder. Instead, the public interest requires greater specificity, enforceability, and accountability in the Decree as proposed in the State's Petition, to ensure that the myriad moving parts remain coordinated and are timely completed.

C. Energy's Proposal Indefinitely Delays SST Retrieval and Closure

At the same time Energy refuses to commit to any timeframe by which the WTP might come on-line, it offers no mitigation for an indefinite WTP delay. If accepted, this would put the post-Decree SST retrieval and closure mission in indefinite abeyance, in conflict with other express provisions of the Parties' 2010 settlement.

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1. The State negotiated for, and got, a judicial consent decree that paved the way for completing Hanford's SST retrieval and closure mission.

As discussed in the State's Petition, the Parties negotiated corollary extensions to the HFFACO's SST retrieval and closure "end dates" concurrent with the Consent Decree. ECF No. 75 at 19-20. The Parties recognized that Energy's compliance with the Decree—in particular, in timely bringing the WTP on-line—was key to meeting the new HFFACO deadlines. The Parties' responsiveness summary to the settlement indicated:

> The approach to the timelines for the near-term . . . SST retrievals was based on projected project capabilities. Considerations for longer-term (defined as between 2022 and 2040) SST retrievals included projections regarding WTP operational capacity and pace.
>
> *Recognizing that getting the WTP constructed and operational is an integral part of the entire tank waste mission, the Parties selected a settlement approach that maintained the connection between WTP construction and operation and SST retrievals and requires*: (1) that USDOE remains on schedule to meet the new SST retrieval schedule; (2) *that USDOE remains on schedule to meet the new WTP construction and operation schedule . . . .*

ECF No. 83-2 at 4-5 (emphasis added).

Indeed, the new HFFACO dates were based directly on Energy's modeling of how quickly SSTs could be retrieved if the WTP was completed and gained initial operations according to the Consent Decree's schedule. ECF No. 84 ¶ 31. This pace established the RCRA compliance schedule for tank retrieval and closure: (1) the "earliest practicable time" by which Energy could remove as much waste from the entire SST system as is necessary to prevent

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further releases to the environment, as required under 40 C.F.R. § 265.196(b); and (2) the "as soon as possible" alternative date for removing all hazardous waste from the SST system and achieving complete closure of the SST system, as required under WAC 173-303-610(4). These dates are set at no later than December 31, 2040 (HFFACO Milestone M-45-70) and December 31, 2043 (HFFACO Milestone M-45-00), respectively.

2. Energy's proposal will indefinitely delay SST retrieval and closure.

Energy claims its proposal advances the original objective of the Consent Decree because it will (at some point) deliver an operating WTP, as well as 19 SST retrievals. ECF No. 76 at 28, 66. Any such success, however, will not be on a timeframe to support the SST retrieval and closure deadlines Energy agreed to in the HFFACO. Energy is silent to this consequence, other than to hint that completion of the tank waste retrieval mission "will be delayed beyond current milestones" and that "waste will remain in the tanks for a longer period of time." *Id.* at 62, 63. Extending the WTP schedule without mitigation, however, will cause violation of the Decree's corollary HFFACO milestones for completing SST retrieval and closure.

Between 2022 (the retrieval deadline under the Consent Decree) and the end of 2040, Energy will have to retrieve approximately 27 million gallons of waste remaining in the SST system to stay on schedule. ECF No. 84 ¶ 23.

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Given Energy's projected limited double-shell tank (DST) capacity,[23] Energy will have no place to put most of this waste (which will expand in volume during retrieval) unless: (1) the waste volume already in the DST system is reduced through treatment; and/or (2) additional DST capacity is built. *Id*. at 24.

Energy's proposal provides no reason to count on the first possibility. It offers no hint as to when the full WTP might reach operations. Even though it commits (contingently) to bringing Direct Feed Low Activity Waste treatment on-line by 2022 (which could result in some volume-reducing treatment[24]), it indefinitely defers proposing any milestone for achieving full-scale "initial operations" of this treatment. *See* ECF No. 76-1 ¶ 3.b.vii. In practical terms, this means that Energy's proposal offers no effective space-reducing treatment capacity for an indefinite period, leaving the status of more than 20 million gallons of waste in unfit for use SSTs up in the air. Even if the State wanted to extend the HFFACO retrieval and closure deadlines (which it does not), the lack of detail and enforceability in Energy's WTP proposal would make it impossible to define a new, effective compliance schedule for closing the SST

[23] As of June 2014, Energy's DST space available for retrieved waste was only 1.8 million gallons. If Energy runs proposed campaigns to "evaporate" some of this waste, the State estimates the space available for further retrievals after the Consent Decree retrievals are completed in 2022 will be approximately 4.8 million gallons. ECF No. 84 ¶ 29.

[24] The State describes such a scenario in the Declaration of Jeffery Lyon, ¶¶ 33-35, attached to its Petition (ECF No. 84).

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system. Without mitigation (building additional DST capacity), Energy's proposal will indefinitely delay SST retrieval and closure.

3. The likelihood of further SST leaking will increase with time.

Energy anticipates the State's criticism of this delay by suggesting it has "implemented a number of initiatives designed to reduce the likelihood of tank leaks and to prevent waste from reaching the environment." ECF No. 76 at 63. This statement, however, does not fully or accurately convey the current and potential future reality in the Tank Farms.

Even after having been "interim stabilized," the SSTs still hold approximately 2.7 million gallons of "drainable liquid" that is available to leak, plus the potential for additional liquid intrusion into tanks. Second Lyon Decl. ¶¶ 22-28. Although Energy emphasizes that the SSTs retain structural integrity, *see* ECF No. 76 at 63, ECF No. 94 ¶ 39, structural integrity says nothing about whether the tanks are prone to further leaking. Second Lyon Decl. ¶ 33. Energy concluded in 2002 that the "leak integrity of the SSTs *cannot be proven*." ECF No. 84 ¶ 10; ECF No. 84-3 (emphasis added). This remains true today. Second Lyon Decl. ¶ 23. What can be said is that the likelihood of further SST liner deterioration and leakage will only increase as time passes. ECF No. 84 ¶ 10.

Energy overstates its ability to detect such leaks. *See* ECF No. 94 ¶ 38.e.; Second Lyon Decl. ¶¶ 37-44. Because of limitations in Energy's current

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monitoring methods, leaks may be occurring now—and may occur in the future—without being detected by Energy. *Id*. Energy is correct, however, in saying it has no intention of addressing such leaks. ECF No. 94 ¶ 38.f. ("[T]here is no required immediate action by DOE if a tank leaks after interim stabilization.").[25] Further, Energy's description of future leak mitigation actions, such as installing surface barriers, overstates its current legal commitment to such actions. Second Lyon Decl. ¶ 45.

Even if Energy's portrayal were accurate, it would not provide a *legal* justification for allowing continued waste storage in, and leaking from, the unfit for use SST system. Contrary to Energy's suggestion, there *is* no "useful life" remaining in the SSTs.[26] *See* ECF No. 94 ¶ 40.n. Energy chose in 1989 to close the SST system rather than repair and upgrade it. In the 25 years since, Energy has been under a regulatory obligation to remove waste from the tanks "as soon as practicable" and close the system "as soon as possible." *See*

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[25] Energy's current leak response protocol was established in 2003, at a time when Energy's HFFACO deadline for completing SST waste retrievals was in 2018. The assumed response to any leak was to proceed with retrieving the tank, which would occur in short order. Second Lyon Decl. ¶ 35. This rationale no longer applies in light of the extended retrieval deadline under the HFFACO (no later than 2040), or an indefinite delay in completing retrievals under Energy's proposal. *Id*.

[26] Energy implies that the SSTs are still "usable." ECF No. 94 ¶ 40.n. This conflicts with the engineering and regulatory determination that the SST system is unfit for use under 40 C.F.R. § 265.191. A 2002 report used the term "usable" in the context of describing structural integrity over the expected duration of continued waste storage in the SSTs prior to the (then) 2018 waste retrieval deadline. Second Lyon Decl. ¶¶ 32, 33.

pp. 5-7, *supra*. Unless mitigation is ordered, the Court cannot extend the Consent Decree's WTP deadlines without causing the violation of the HFFACO's deadlines for these tasks, which were negotiated concurrently with and are integrally related to the Decree. As requested in the State's Petition, this mitigation should be in the form of ordering Energy to, during the period of WTP delay, retrieve SSTs on pace to meet the no later than 2040 retrieval deadline (something Energy already agreed to do in the 2010 settlement) and build the DST capacity necessary to support these retrievals (a possibility the 2010 settlement expressly anticipated). *See* ECF No. 75 at 51-54. This relief is necessary to "return both parties as nearly as possible to where they would have been" absent the changed conditions. *Pigford*, 292 F.3d at 927.[27]

[27] Related to the State's requested relief, four matters raised by Amici TRIDEC and Hanford Communities bear correcting. First, the most recent cost documentation the State has seen from Energy puts the cost of a new DST at roughly $85 million per tank (and possibly lower), not $120 million per tank as asserted by Amici. Second Lyon Decl. ¶ 47. Second, Amici appear to understand the State's position to be that new DSTs should be constructed at the expense of progress on the WTP and further SST retrievals. *See* ECF No. 100 at 8-9. To be clear, the State's position is that under RCRA, the SST system must be closed (necessitating waste retrieval) and backlogged tank waste must be treated (necessitating WTP completion). The State asks the Court to order that a limited number of new DSTs be built only so that SST retrievals can continue on pace while the WTP is delayed. Third, the State most certainly does not view SST retrieval as a "relatively low-urgency project." Amici Brief at 9. The statements cited by Amici are taken out of context. Second Lyon Decl. ¶ 48. Finally, Amici invite the Court to engage in judgment prioritizing relative risks at the Hanford site. *See* ECF No. 100 at 10-11. This invitation goes well beyond the Court's role in ruling on the competing modification

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D. Energy's Appendix B Proposal Should Be Rejected Because Energy Anticipated Changed Circumstances and Energy's Proposal Is Not "Suitably Tailored" to Resolve Such Circumstances

While Energy does not propose extending the Decree's deadline for completing the retrieval of 19 SSTs, it does propose changing a number of interim dates in Consent Decree Appendix B. Specifically, it proposes:

- Extending the current September 30, 2014, deadline for retrieving SSTs C-102 and C-111 (current Milestone B-1) to December 31, 2015 (proposed new Milestone B-1);
- Eliminating the current September 30, 2014, deadline for retrieving SST C-105 (current Milestone B-1) to instead require the Parties to initiate negotiations on retrieval technologies by December 31, 2014 (proposed new Milestone B-1A) and Energy to propose a milestone for completing retrieval of the tank no later than 60 days after selection of that technology (proposed Milestone B-1B); and
- Modifying the current December 31, 2017, deadline for initiating retrieval in at least five of the "next nine" SSTs (Milestone B-3) to instead require such initiation in two additional SSTs by December 31, 2017 (new proposed Milestone B-3); two more SSTs by December 31, 2019 (proposed Milestone B-4); and the remaining five SSTs by December 31, 2021 (proposed Milestone B-5).

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requests at issue and should be rejected. All of the priorities listed by Amici are critical; however, only matters within the Decree are before the Court.

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See ECF No. 76-1 at 12.[28]

Energy first fails to meet the "heavy burden" standard for modifying the deadlines for Tanks C-102, C-105, and C-111. *Asarco, Inc.*, 430 F.3d at 984. Energy contends it was unable to retrieve these tanks on schedule because of delays due to equipment failure, technical issues, and sequestration. ECF No. 76 at 44-45, 48; ECF No. 94 at 31-32. The Consent Decree's Appendix B schedule, however, was developed "assuming that equipment failures will occur," ECF No. 59 at 35 (app. B ¶ 2.c), and Energy has extensive experience with equipment failure, technical issues, and funding problems. *See* Second Lyon Decl. ¶¶ 4, 7, 12, 15. All of these circumstances were anticipated. Energy's real problem is that it did not allow enough time for the retrievals by starting early enough and having sufficient contingency measures in place. *Id.* ¶¶ 8-11, 13, 17, 18. Energy delayed starting the retrieval of C-102, leaving little margin for schedule risks. *Id.* ¶¶ 8-9. Energy similarly waited until the end of its C-Farm retrieval sequence to begin retrieving C-105, which promised to be a difficult tank. *Id.* ¶ 10. Finally, retrieval activity in C-111 stalled over four years ago, and Energy has still not resumed retrieval. *Id.* ¶ 11. Where changes in circumstances are anticipated, a decree may not be modified unless the movant carries the "heavy burden" of showing it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be

[28] Energy did not include proposed milestones B-1, B-1A, and B-1B in its March 31 amendment proposal to the State.

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relieved of the undertaking. *Asarco, Inc.*, 430 F.3d at 984. Energy failed to apply lessons learned and plan for known schedule challenges. It should not in equity be relieved of the Decree's requirements.

Further, Energy's proposed schedule extension for C-105 is not suitably tailored to resolve any change in circumstances. *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1120. Energy's proposal is to replace the current (already passed) September 2014 deadline with no real deadline, other than the 2022 milestone for the retrieval of all 19 tanks. There is no reason to allow up to eight more years to retrieve this tank. Second Lyon Decl. ¶ 10.

With respect to the "next nine" tanks (already selected to be tanks from the A and AX Tank Farms), Energy does not even allege a change in circumstances to justify a modification. *See* ECF No. 76 at 59; *Rufo*, 502 U.S. at 384 ("Modification . . . may be warranted *when changed factual circumstances make compliance with the decree substantially more onerous*.") (emphasis added). Regardless, Energy proposes pushing back the start dates for retrieval in seven of the nine tanks, including waiting until just nine months before the 2022 deadline to begin retrieving the last five tanks.

Based on experience to date, the State expects Energy to miss the 2022 deadline if Energy's proposal is accepted. Second Lyon Decl. ¶¶ 5, 12-22. Energy itself admits that it takes two-and-one-half years on average to retrieve a tank, ECF No. 94 ¶ 46, but its proposal is based on achieving unprecedented

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retrieval rates in the near future (including retrieval of five tanks in nine months). Second Lyon Decl. ¶¶ 20-22. Most of the A and AX tanks promise to be difficult or time-consuming, and Energy's only explanation for how it expects to gain efficiency (larger-scale infrastructure installation) does not quantify any expected time savings. *Id*. ¶¶ 19-21. Because it will imperil compliance with the Decree's 2022 deadline, Energy's proposal is not a "suitably tailored" modification request. It should therefore be denied. *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1120.

IV. CONCLUSION

For the above reasons, the State of Washington respectfully requests that Energy's October 3, 2014, Motion to Modify Consent Decree be denied.

DATED this 5th day of December, 2014.

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PROOF OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of the U.S. District Court using the CM/ECF system which will send notification of such filing to all parties of record as follows:

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