

## **INTRODUCTION**

This Order concerns the mutual agreements between the United States Department of Energy (“DOE”), Washington State, and Oregon State regarding the safe removal of radioactive waste from the Hanford Nuclear Reservation (“Hanford”) in a reasonable and expeditious manner.

In 2008, Washington filed a lawsuit against DOE regarding the clean-up of radioactive waste stored at Hanford. Oregon intervened and filed a similar complaint in 2009. In 2010, the parties entered into two Consent Decrees, one between Washington and DOE and the other between Oregon and DOE. DOE agreed to an established schedule of milestones for constructing a waste treatment plant and retrieving radioactive waste from specified storage tanks. The Consent Decrees also established a series of reporting requirements designed to ensure accountability of DOE’s progress and delays. Unfortunately, due to a variety of factors, DOE has been unable to satisfy its previously agreed-upon obligations under the Consent Decree milestone schedules.

Washington and Oregon allege that DOE has disregarded the mandatory reporting obligations, leaving Washington and Oregon uninformed concerning DOE’s progress towards resolving problems associated with attaining the ultimate goals under the Consent Decree. A variety of DOE’s unilateral actions, including ceasing construction of the Waste Treatment Plant (“WTP”) and failing to

reasonably adhere to the mandatory reporting requirements, have resulted in the motions before the Court.

Following a preliminary round of briefing, all parties petitioned the Court to modify the Consent Decrees to establish amended, attainable schedules for both WTP construction and the retrieval of nineteen single-shell tanks (“SSTs”) as well as implementing enhanced reporting requirements to increase DOE’s accountability.

Controlling law mandates that any modification of the Consent Decrees must be “suitably tailored” to “resolve the problems created by the change in circumstances” which brought the parties before the Court. Consequently, the Court cannot re-negotiate the parties’ underlying agreements, and is instead constrained to establishing reasonable, attainable solutions designed to resolve the parties’ disputes and set the Hanford Site clean-up back on schedule.

A primary goal of the Consent Decrees was to satisfy the “wish to resolve this action without litigation.” Having reviewed the parties’ disputes in detail, the Court concludes that a significant portion of the Consent Decrees’ value has been undermined by the insertion of litigation tactics, such as insistence that DOE’s reports to Washington and Oregon be shielded by Federal Rule of Evidence 408, in spite of DOE’s express agreement to the reporting requirements in the original Consent Decrees.

Reporting is essential to inform Washington and Oregon of DOE's progress and delay, to maintain DOE's accountability, and to facilitate cooperation between DOE, Washington, and Oregon to protect the public and the environment. For example, if reporting had occurred as required by the Consent Decrees, Washington and Oregon would have had sufficient notice of the extent of DOE's funding issues to be able to assist DOE by engaging with the legislature through the political process to obtain additional funds for the Hanford Site.

As Washington has argued, time is of the essence in this matter. It is uncontested that radioactive waste is leaking into the environment. The passage of time and the urgency of waste clean-up are inextricably linked: the longer that DOE takes to satisfy its obligations under the Consent Decree, the greater the likelihood of irreversible damage to the environment.

As in the original Consent Decree, the Court included milestone schedules that serve as benchmarks of DOE's progress. These milestones should be viewed as enforceable legal duties rather than optimal, idealistic goals. It is in the best interests of all the parties, as well as the public, to accomplish the Consent Decree goals in an expeditious manner, preferably before the actual milestone schedule dates.

This case is not typical litigation involving ordinary legal disputes. At the parties' request, the Court is modifying consent decrees that the parties voluntarily

entered into six years earlier. No party can “win” this litigation. The public and environment only can “lose” as more time passes without an operational solution to the radioactive waste problems at the Hanford Site.

The Court trusts that the parties will act in good faith to both achieve the milestones and comply with the reporting requirements established in the Amended Consent Decrees, instead of obfuscating issues with litigation tactics. The parties should expend their limited resources on cooperative efforts to serve the public’s best interest and achieve the common goals enshrined in the Consent Decrees.

A primary issue confronted by the Court throughout the Consent Decree modification process has been the irreconcilable tension between the restrictive legal standards governing the Court’s involvement in consent decree modification and the reality of establishing a schedule, projected to cover decades, governing an evolving scientific process. The Court is aware that many of the parties’ underlying assumptions have shifted since the Consent Decrees were entered in 2010; that technology has changed in the intervening years; and that all parties have requested modifications that are outside the scope of the Court’s authority under *Rufo*. The restrictive legal process governing consent decree modification does not permit the Court to freely alter the Consent Decrees to incorporate new technology, such as a direct feed approach to waste vitrification. However, the

parties are free to stipulate to Consent Decree modifications themselves, or to enter into a new consent decree drafted to account for new or different technological approaches. The Court notes that Congress is addressing the difficulties facing courts in modifying consent decrees, like the Hanford Consent Decrees, governing dynamic and evolving projects.

The Court encourages the parties to take whatever means necessary, including adopting newly developed technology, to effectuate clean-up at the Hanford Site. However, the Court is constrained by law only to modify these Consent Decrees based on the parties' original agreements.