

1 ANDREW A. FITZ  
 Senior Counsel  
 2 DOROTHY H. JAFFE  
 KELLY T. WOOD  
 3 Assistant Attorneys General  
 Ecology Division  
 4 P.O. Box 40117  
 Olympia, WA 98504-0117  
 5 (360) 586-6770  
*Attorneys for Plaintiff*  
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 10 **UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF WASHINGTON**

11 STATE OF WASHINGTON,  
 12  
 Plaintiff,

13 and

14 STATE OF OREGON,  
 15  
 Plaintiff-Intervenor,

16 v.

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

20 Defendants.  
 21  
 22

NO. 2:08-cv-05085-RMP

STATE OF  
 WASHINGTON'S  
 RESPONSE TO UNITED  
 STATES' SECOND  
 PROPOSED CONSENT  
 DECREE MODIFICATION

1 The State is profoundly disappointed in Energy's November 13, 2015,  
2 Second Proposed Consent Decree Modification (Energy's proposed order).  
3 Rather than respond constructively to the Court's August 13, 2015 Order,  
4 Energy has chosen instead to argue with the Court's conclusions and ignore the  
5 Court's directives. For the reasons outlined below, the Court should reject  
6 Energy's proposed order.

## 7 I. ARGUMENT

### 8 A. The Court Should Reject Energy's Attempt to Re-Litigate Decided 9 Issues

10 The Court directed the parties to submit "new modification proposals"  
11 addressing the following: (1) specific milestone deadlines for constructing and  
12 achieving initial operations of the Waste Treatment Plant (WTP); (2) specific  
13 milestone deadlines for completing the retrieval of nineteen single-shell tanks  
14 (SSTs); (3) specific deadlines and milestones regarding use of the Evaporator to  
15 serve as conditions precedent to requiring Energy to build additional double-  
16 shell tanks (DSTs), together with the number of and deadlines for construction  
17 of such DSTs; and (4) specific reporting requirements, to include reports  
18 containing an explanation of reasons why Energy has determined that there is a  
19 serious risk that it may not meet a milestone, and its proposed recovery plan for  
20 resolving the risk. ECF No. 170 at 32. The Court allowed the parties to support  
21 their revised proposals with "supplemental briefing, . . . discussing the  
22 suitability of each milestone, deadline, and reporting requirement that they

1 propose . . . .” *Id.* at 33. In so ordering, the Court specifically admonished that it  
2 would “not revisit any of the first three *Rufo* [*v. Inmates of Suffolk Cty. Jail*, 502  
3 U.S. 367 (1992)] elements after this stage in the proceedings.” *Id.*

4 Rather than focus on the suitability of proposed milestones, deadlines,  
5 and reporting requirements related to the above directives, much of Energy’s  
6 briefing repackages and re-argues points the Court has already rejected. The  
7 Court should reject Energy’s attempt to re-litigate already-decided issues.

8 **1. The Court has already rejected Energy’s extrinsic expectations**  
9 **and legal deference to Energy as bases for modified conditions**

10 Throughout its earlier briefing, Energy insisted it was impossible to  
11 develop fixed milestone dates for the WTP’s Pretreatment and High Level  
12 Waste Facilities due to uncertainties related to technical issue resolution, the  
13 potential scope of redesign work, and the fact that Energy does not have revised  
14 project baselines and implementing contracts in place. While Energy now  
15 proposes actual milestone dates, its resubmitted WTP schedule is premised on a  
16 “new modification mechanism” that includes automatic extension provisions  
17 and the application of an arbitrary and capricious standard to any extension  
18 challenges. *See* ECF No. 196 at 15-17.

19 Energy acknowledges that such terms are found nowhere in the current  
20 Decree. *Id.* at 16, 17. Legally, it supports the provisions by: (1) alleging they are  
21 necessary to maintain the “original expectations of the parties,” given that  
22 Energy had approved WTP baselines and contracts in place when the current

1 Decree was entered in 2010, *id.* at 7-8; and (2) arguing that the provisions give  
2 “appropriate deference” to Energy’s “expertise and authority.” *Id.* at 17.

3 This Court has already ruled it will not consider “extrinsic evidence  
4 regarding the settlement process,” nor consider what a party “believed it was  
5 receiving in exchange for entering into the Consent Decree.” ECF No. 139 at  
6 65-66; *see also* ECF No. 170 at 22. Energy’s attempt to tie proposed conditions  
7 to the parties’ “original expectations” is based solely on Energy’s own,  
8 subjective expectations, extrinsic to the Decree. They were not the State’s  
9 reasons for entering the Decree, and they do not provide a legal basis for  
10 modifying the Decree. The Court has also already rejected the argument that  
11 Energy’s actions and judgments are owed deference on the basis of its authority  
12 under the Atomic Energy Act, principles of sovereign immunity, and principles  
13 of federal preemption. ECF No. 170 at 13-14; *see also* ECF No. 102 at 29-30,  
14 32-33. This answers any continued attempt by Energy to suggest there is a legal  
15 basis for “deference” provisions in the modified Decree.

16 **2. The Court has already found changed circumstances that**  
17 **support additional accountability measures in the Consent**  
18 **Decree**

19 The Court has already concluded that Energy’s missed deadlines,  
20 quantity of at-risk milestones, unilateral cessation of the WTP construction, and  
21 delay of eighteen months before proposing Consent Decree modifications are  
22 “detrimental to the public interest and are changed conditions under *Rufo*.” ECF  
No. 139 at 64. Based in whole or in part on these conclusions, the Court has:

1 (1) rejected Energy’s attempt to eliminate set deadlines from the Decree, ECF  
2 No. 170 at 16; (2) concluded that contingent future DST construction  
3 milestones in the Decree are appropriate, given that the parties can already  
4 anticipate that the 242-A Evaporator may not perform as projected, *id.* at 27;  
5 and (3) concluded that additional reporting requirements are justified as  
6 “important means of holding DOE accountable to its obligations.” *Id.* at 32.

7 Energy spends the better part of four pages re-arguing the merits of these  
8 conclusions. *See* ECF No. 196 at 21-24. By the Court’s own order, these merits  
9 are not open for reconsideration. ECF No. 170 at 32-33. At the highest level,  
10 Energy selectively ignores aspects of its own conduct following Consent  
11 Decree entry, along with the broader context of its performance under the  
12 Decree. While the Court has recognized certain changed circumstances  
13 affecting Energy’s performance under the Decree, the Court has also recognized  
14 that Energy has unilaterally acted outside the terms of the Decree, and that  
15 when one steps back to take in the bigger picture, the broader context is “[b]y  
16 any definition . . . a failure of substantial compliance.” ECF No. 139 at 62 n.12,  
17 58-59, 60-61.<sup>1</sup> Every aspect of Energy’s performance under the Decree has  
18 been beset by one problem or another. Given Energy’s spectacular stumble out

19 \_\_\_\_\_  
20 <sup>1</sup> Energy’s conduct and continuing project management challenges are  
21 discussed at length in the State’s briefing. *See* ECF No. 75 at 21-28, 32-41, 54-  
22 55; ECF No. 102 at 25-28, 34-35, 43-45; ECF No. 108 at 25-29.

1 of the gates, the Court is fully justified in its conclusion that a more prescriptive  
2 Decree is necessary moving forward, both to resolve the problems created by  
3 the changed conditions and to preserve the objectives of the Decree. ECF  
4 No. 170 at 7, 16, 27, 32.

5 **3. The Court has already found changed circumstances that**  
6 **support conditions in the Consent Decree for the contingent**  
7 **construction of new DSTs**

8 Energy also re-argues the merits of the Court's determination that the  
9 Decree should be modified to include a contingent provision for new DST  
10 construction. Specifically, Energy argues that no "changed circumstances"  
11 found by the Court support such conditions and that DST construction is not a  
12 "suitably tailored" remedy. *See* ECF No. 196 at 25-37.

13 Once again, the Court should reject reconsideration of a matter that has  
14 already been extensively briefed, argued, considered by the Court, and ruled  
15 upon. Beyond this, Energy fundamentally misapprehends the basis for, and  
16 nature of, the Court's determination.

17 In linking contingent DST construction milestones to performance of the  
18 242-A Evaporator, the Court first took into consideration two "changed  
19 conditions" since Consent Decree entry. The first is the failure of DST AY-102,  
20 the effect of which is to further diminish Energy's already-limited DST  
21 capacity. *See* ECF Nos. 139 at 60-61; 170 at 6; *see also* ECF Nos. 84, ¶ 24; 150,  
22 ¶¶ 7, 15; 154, ¶¶ 5-6. The second is, again, Energy's broader "history of delay  
and noncompliance," ECF No. 170 at 27, which includes Energy already having

1 missed three SST retrieval milestones under the Decree.<sup>2</sup>

2 The Court did not order contingent DST milestones in direct response to  
3 these changed conditions. Rather, the Court considered Energy's task at hand in  
4 relation to the changed conditions. The changed conditions alter the view of  
5 Energy's ability to timely complete the remaining retrievals under the Decree.  
6 Energy concedes that it does not have enough DST space currently available to  
7 retrieve the remaining Consent Decree tanks, plus transfer over waste from  
8 Tank AY-102. *See* ECF No. 153 ¶¶ 4-5, 8. Rather than building more tank  
9 space now, however, it is instead relying on 242-A Evaporator performance to  
10 create more space in the existing DST system. *Id.* ¶ 8. The State has fairly  
11 questioned the optimism of Energy's projected levels of Evaporator operation  
12 and operating efficiency.<sup>3</sup> *See* ECF Nos. 150, ¶¶ 7-18; 154, ¶¶ 5-7.

13 \_\_\_\_\_  
14 <sup>2</sup> During this proceeding, Energy has also already twice extended its  
15 proposed end date for completing SST retrievals. *Compare* ECF No. 76-1 at 12  
16 (B-2) *with* ECF No. 147-1 at 12 (B-2) *and* ECF No. 196-1 at 18 (B-2).

17 <sup>3</sup> The State did not raise the issue of Energy's reliance on the 242-A  
18 Evaporator for the first time at oral argument. After the Court rejected the  
19 State's original proposal for new DSTs under a different rationale, ECF No. 139  
20 at 65-66, the Court invited the parties to submit "any supplemental supporting  
21 materials regarding the suitability of their proposals." *Id.* at 67. The State  
22 accepted the Court's invitation and addressed Energy's critical reliance on

1 In directing the parties to propose milestones for contingent DST  
2 construction, the Court has addressed what is now an *actually anticipated*  
3 potential future changed condition: Energy’s inability to timely complete  
4 Consent Decree retrievals due to space limitations caused by insufficient  
5 Evaporator performance. The Court has crafted a “suitably tailored” response in  
6 the event this circumstance occurs. Before the construction of any new DSTs  
7 would actually be required, the Evaporator would actually have to fail to  
8 perform as needed; i.e., a “changed circumstance” would have to be realized.  
9 This addresses Energy’s argument that there is no nexus between changed  
10 conditions and new DST construction. *See* ECF No. 196 at 27-28.

11 Beyond this, Energy argues that new DSTs are exclusively addressed by  
12 the Tri-Party Agreement. As the State has previously argued, the fact that the  
13 Tri-Party Agreement contains a negotiating provision for new DSTs does not  
14 mean the Agreement provides an exclusive remedy. *See* ECF No. 108 at 22-23.  
15 Energy cites to no such limitation in the Agreement, because no such limitation  
16 exists. Further, the State fully expects that if it did attempt to use Tri-Party  
17 Agreement authority to further Consent Decree performance, Energy would  
18 argue that the exclusive avenue for such relief is through the Decree.

19  
20  
21 242-A Evaporator performance in two supplemental declarations. *See* ECF  
22 Nos. 150, 154. Energy fully responded. *See* ECF No. 153.

1 Energy also argues that new DSTs are unnecessary to complete the  
2 Consent Decree retrievals. First, Energy once again argues that “risk” and  
3 “public interest” considerations favor prolonging SST retrievals over  
4 constructing new DST capacity, even at the risk of further tank leaks. ECF No.  
5 196 at 35. As argued before, Energy’s unilateral assessment of “risk” and the  
6 “public interest” is legally immaterial in this matter. *See* ECF No. 108 at 18-22.

7 Second, Energy argues that even if Consent Decree retrievals are delayed  
8 by space limitations, there are other, more suitable means for completing the  
9 retrievals within the timeframe for constructing new DSTs, such as simply  
10 extending the Consent Decree deadline and running the Evaporator longer. ECF  
11 No. 196 at 33-36. As the Court has recognized, however, the Decree’s 2022  
12 deadlines are material terms.<sup>4</sup> ECF No. 170 at 19. Energy is obligated after  
13 2022 to complete further SST retrievals under the Tri-Party Agreement. ECF  
14 No. 111, ¶ 21, Ex. 3. Energy’s continued reliance on the Evaporator to make  
15 space for Consent Decree retrievals after 2022 would come at the expense of  
16 using the Evaporator to further its retrieval commitments under the Tri-Party  
17 Agreement. If Evaporator failure forces Consent Decree retrievals beyond 2022,  
18 the only “suitably tailored” modification is to order Energy to make space for  
19 completing the retrievals through building additional DST capacity.

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21 <sup>4</sup> To be clear, the State has made this assertion since its opening brief.  
22 *See, e.g.*, ECF Nos. 75 at 42-43; 102 at 36-37.

1 Next, Energy once again argues that any requirement to build new DSTs  
2 is “inconsistent with DOE’s determination pursuant to the [Atomic Energy Act]  
3 that new double-shell tanks are not required for the retrieval of waste from  
4 single-shell tanks.” ECF No. 196 at 36. As the State has already pointed out,  
5 however, Energy’s only “determination” to not build DSTs was made on the  
6 express assumption that the full WTP would begin operating in 2018. ECF No.  
7 108 at 8-9. Energy has made no “determination” applicable to the current  
8 circumstance. *See* 10 C.F.R. § 1021.315(b)-(e) (governing Energy’s Records of  
9 Decision). Further, the State rejects Energy’s unsupported suggestion that it can  
10 through unilateral determination override the requirements of RCRA and other  
11 environmental laws. ECF No. 108 at 8-9.

12 Ultimately, Energy argues that the contingent DST condition is  
13 unnecessary because the 242-A Evaporator will, in fact, create the needed space  
14 in the existing DST system. ECF No. 196 at 32-33. If Energy is correct, it has  
15 nothing to worry about with the contingent condition. If Energy is wrong,  
16 however, the Court’s directive will prove to be an important backstop in  
17 Hanford’s cleanup. The Court should not revisit its determination.

18 **B. The Court Should Reject Energy’s Proposed Conditions That**  
19 **Diminish, Rather Than Enhance, Its Accountability**

20 This Court has already recognized that a key feature of the 2010 Consent  
21 Decree is its enforceable structure of milestone tasks on a schedule, together  
22 with accountability provisions. ECF No. 170 at 14-15. The Court has further

1 recognized that such features are essential to the effectiveness of consent  
2 decrees in general, as noted in case law. *Id.* at 15. In rejecting Energy’s initial  
3 proposed order, the Court concluded that modifying the Decree to eliminate  
4 fixed, enforceable deadlines would “make the modifications less likely than the  
5 current Consent Decree” to resolve the problems leading to the current delay, as  
6 well as “create a vacuum in which DOE would be free to proceed at its own rate  
7 without any safeguards for Washington or enforcement by the Court.” *Id.* at 16.  
8 The Court then declared: “DOE’s assurances to this Court that it will perform  
9 its obligations under the Consent Decree despite an absence of predetermined,  
10 enforceable deadlines lacks credibility given the current state of DOE’s lack of  
11 compliance with the current Consent Decree schedule and DOE’s unilateral  
12 cessation of WTP construction.” *Id.*

13 As highlighted below, the multitude of unilateral extensions, off-ramps,  
14 and favorable “deference” provisions in Energy’s revised proposed order  
15 amount to precisely what the Court has already rejected: an absence of  
16 accountability and enforceable deadlines, creating a regulatory vacuum.

17 **1. Proposed WTP milestone conditions and extension provisions**

18 Energy’s proposed WTP milestone conditions and extension provisions  
19 are neither “narrow,” “reasonable,” nor “collaborative.” They render Energy’s  
20 schedule largely unenforceable and fundamentally alter the bargain under the  
21 Decree.

22 Energy proposes automatic extension provisions associated with

1 Pretreatment and High Level Waste technical issue resolution, facility redesign,  
2 and project rebaselining and contracting. If Energy determines it will be unable  
3 to complete any of these tasks by specified “trigger dates,” it is guaranteed an  
4 automatic one-year extension, subject to even greater extension upon Energy’s  
5 unilateral “determination” that more time is necessary. Such automatic one-year  
6 (or more) extensions can be triggered multiple times, and they will  
7 automatically extend all subsequent WTP milestones. In conjunction with each  
8 such extension, the State is provided with a limited opportunity to seek the  
9 Court’s review of “the duration of the extension” only, not whether there is  
10 good cause for the extension in the first place. The Court is limited to reviewing  
11 such durations under an “arbitrary or capricious” standard of review. *See* ECF  
12 Nos. 196-1 at 4-14; 196 at 12-14. Finally, Energy includes a provision that if,  
13 after contracts for Pretreatment and High Level Waste Facility construction are  
14 entered, the contract dates conflict with the Decree’s remaining milestone dates,  
15 Energy will “designate” new milestones dates for the Decree that are “informed  
16 by the dates established in the contract.” These “designated” dates will  
17 supersede the dates in the Decree unless the Court determines they are arbitrary  
18 and capricious.<sup>5</sup> ECF No. 196-1 at 14.

19 Energy argues that if it has not completed work by one of the initial  
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21 <sup>5</sup> The current Decree provides for judicial review under a *de novo*  
22 standard. ECF No. 59 at 20 (§ IX.B).

1 specified “trigger dates,” it speaks for itself that an underlying assumption in  
2 Energy’s milestone table was “inadequate” and an extension is therefore  
3 justified. ECF No. 196 at 12. In truth, the only thing this speaks to is that  
4 Energy will have missed a Consent Decree date. Under Energy’s proposal,  
5 however, there will be no further inquiry if and when a date is missed. The  
6 current Decree’s requirement that extensions be justified by “good cause” will  
7 be eliminated. *See* ECF No. 59 at 12-14 (§ VII.D). Any extension will be  
8 automatic, and the State’s only avenue of challenge—and the Court’s only  
9 permitted scope of review—will concern how much time the extension will  
10 involve, insulated by a highly deferential scope and standard of review.

11 Energy’s automatic extension provisions rewrite the Consent Decree just  
12 as radically as Energy’s original proposal. They remove any real incentive for  
13 Energy to meet the Decree’s schedule and reward Energy for missing dates. The  
14 contracting provision gives Energy a further perverse incentive to enter into  
15 contracts at odds with the Decree’s schedule. Collectively, the provisions  
16 diminish, rather than enhance, Energy’s accountability under the Decree.  
17 Energy’s proposal fails to “retain the essential features and further the primary  
18 goals” of the original Decree, *Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir.  
19 1986), and it substantially re-writes the bargain of the parties. *See* *Vanguards of*  
20 *Cleveland v. City of Cleveland*, 23 F3d 1013, 1018 (6th Cir. 1994); *Rufo*, 502  
21 U.S. at 383-93 (court should “do no more” than necessary in modifying decree).  
22 For the very same reasons the Court rejected Energy’s original proposal as not

1 “suitably tailored,” *see* ECF No. 170 at 16, the Court should reject Energy’s  
2 proposed WTP extensions.

3 **2. Proposed SST retrieval extension provisions**

4 Similarly, the Court should reject Energy’s proposed SST retrieval  
5 extension provisions. Energy proposes that unless it has “determined” by a  
6 certain date that tank farm workers do not need to continue wearing Self-  
7 Contained Breathing Apparatus (SCBA), all remaining SST retrieval milestones  
8 will automatically be extended by one day for every two days SCBA continues  
9 to be used. The same extension triggers if, in Energy’s sole discretion, a  
10 “significant number” of tank farm workers voluntarily choose to wear SCBA,  
11 despite Energy’s determination it is unnecessary. Other than providing for a  
12 potential challenge to Energy’s “significant number” determination, the  
13 proposed terms expressly disallow any other dispute process or Court review of  
14 the extension or its duration. ECF No. 196-1 at 19-20.

15 Once again, these terms put significant schedule control solely in  
16 Energy’s hands. They provide for an extension without any showing of “good  
17 cause,” as required under the current Decree, Section VII.D. The one-day-for-  
18 every-two-days provision creates an extension that compounds as work is  
19 performed and bears no relation to the length of extension (if any) Energy might  
20 actually need to complete finite tank retrievals. Lyon 7th Decl. ¶ 5. The terms  
21 serve as a disincentive for Energy to resolve schedule problems and work with  
22 any urgency. The terms also mean Energy will be insulated from any

1 | accountability to the State or the Court. Energy's terms are not "suitably  
2 | tailored" in response to the Court's August 13 Order. *See* ECF No. 170 at 16.

3 | **3. Proposed 242-A Evaporator targets and DST construction**  
4 | **conditions**

5 | Finally, Energy proposes conditions on contingent DST construction that  
6 | virtually guarantee no new DSTs will ever be built. Energy's convoluted  
7 | Evaporator targets include caveats allowing Energy to readjust the targets, and  
8 | avoid triggering new DSTs, by determining that it can still meet its overall  
9 | goals through schedule adjustments or other mitigation measures. ECF  
10 | No. 196-1 at 23-26. Even if new DSTs are otherwise triggered, Energy allows  
11 | itself to unilaterally "suspend" the obligation if it "determines" in its exclusive  
12 | judgment that, among other things, constructing additional DSTs would "result  
13 | in a diversion of funds" that would "jeopardize" Energy's ability to undertake  
14 | other cleanup activities, or that "the detriments of [constructing] additional  
15 | DSTs" are "greater than the detriments to the Hanford tank waste project or the  
16 | risk to public health and the environment" from a schedule delay. *See id.* at  
17 | 26-27. In each case above, the burden shifts to the State to invoke dispute  
18 | resolution and challenge Energy's "determinations" under an arbitrary and  
19 | capricious standard. *See id.* at 28-29.

20 | These conditions should also be rejected. As argued above, the Court has  
21 | already considered and rejected Energy's argument that its unilateral  
22 | determinations of "risk" and the "public interest" should be given deference.

1 ECF No. 170 at 13-14. Further, the proposed conditions are not “modifications  
 2 consistent with the rulings” of the Court’s August 13 Order. *Id.* at 36. They  
 3 once again result in exactly what the Court has already rejected: a modified  
 4 Decree that leaves the details of how, when, and even whether the Decree is  
 5 complied with in Energy’s hands. *See id.* at 16.

6 **C. The State’s Proposed Milestone Dates, Evaporator Targets, DST  
 7 Construction Milestones, and Enhanced Reporting Requirements  
 Are More “Suitably Tailored” Than Energy’s Proposals**

8 Once Energy’s repackaged arguments and Decree-restructuring  
 9 provisions are stripped away, the Court is left to evaluate the parties’ orders  
 10 with respect to its directive that the parties propose: (1) specific milestone  
 11 deadlines for the WTP; (2) specific milestone deadlines for completing SST  
 12 retrievals; (3) specific “condition precedent” deadlines and milestones  
 13 regarding Evaporator use, together with DST construction milestones; and  
 14 (4) additional reporting requirements, including requirements for Energy to  
 15 explain why it determines a milestone is at risk and its recovery plan for  
 16 resolving that risk. *See* ECF No. 170 at 32. In all four areas, the State’s  
 17 proposals are more “suitably tailored” than Energy’s proposals.

18 **1. WTP dates**

19 With respect to the Pretreatment and High Level Waste Facilities, the  
 20 parties propose substantially similar timeframes for technical issue resolution.  
 21 McDonald 3d Decl. ¶¶ 9, 14. The State’s proposal, however, requires Energy to  
 22 submit technical issue resolution plans for approval and incorporation into the

1 Decree. *See* ECF No. 198-1 at 10-11 (A-19 & A-27). This approach is better  
2 suited to resolve the problem created by the unresolved technical issues—  
3 prolonged WTP delay—than Energy’s approach of a single, multi-year  
4 technical issue resolution period, with a moving target end date, no interim  
5 milestones, and a vague “briefing” provision. *See* ECF No. 196-1 at 4-7.

6 Beyond technical issue resolution, the primary rationale for Energy’s  
7 longer timeframes appears to be that Energy’s assumed budget levels force it to  
8 draw out its schedule. *See* ECF No. 196 at 10-11; McDonald 3d Decl. ¶ 8.  
9 Energy has repeatedly reminded the Court that a Consent Decree modification  
10 must take into account what is “realistically achievable.” ECF No. 196 at 10  
11 (quoting *Keith*, 784 F.2d at 1460). Energy has no legal basis, however, for tying  
12 compliance requirements under the Decree to its own political and budget  
13 prognostications. *See, e.g., In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir.  
14 2013). The current Consent Decree does not premise its schedule on budget  
15 assumptions, nor does it predicate compliance on Energy receiving specified  
16 appropriations. *See generally* ECF No. 59. Including budget-premised  
17 conditions at this point would be a material change to the bargain struck  
18 between the parties. Energy’s budget assumptions are not a baseline for  
19 developing a “realistically achievable” schedule.

20 In arguing what is “realistically achievable,” Energy actually says very  
21 little about what it can achieve. McDonald 3d Decl. ¶¶ 10-18. Instead, it gives  
22 hosts of reasons as to why things *might* go wrong and lead to further delay. *See*

1 ECF Nos. 196 at 5-8; 196-2 ¶¶ 8, 21. Conversely, the State’s timeframe is built  
2 on reasonable assumptions of what can be achieved, based in part on  
3 timeframes already established in the Decree. *See* ECF No. 198 at 9-12;  
4 McDonald 3d Decl. ¶¶ 6-7, 9-18. If a valid reason develops for extending a  
5 timeframe, the existing Decree provides for relief. *See* ECF No. 59 at 11-19  
6 (§ VII). Energy criticizes the “inefficiency” of this process, ECF No. 196 at 16,  
7 but the State respectfully suggests that considerable efficiency will be gained if  
8 Energy focuses less on trying to change the fundamental framework of the  
9 Decree and more on the strict merits of schedule adjustment.

10 With respect to the Low Activity Waste Facility, Energy again confirms  
11 that the Facility is not affected by the same “changed circumstances”  
12 (unresolved technical issues) that affect the Pretreatment and High Level Waste  
13 Facilities. ECF No. 196-2, ¶ 4. It also again confirms that it can and will begin  
14 waste treatment at the Facility independent from the Pretreatment and High  
15 Level Waste Facilities. *Id.* Given this, there is no reason why the Consent  
16 Decree’s current hot commissioning milestone for the Low Activity Waste  
17 Facility should be extended any further than the 2022 date proposed in the  
18 State’s order, which matches the date in Energy’s prior proposed order.  
19 *Compare* ECF No. 198-1 at 10 (A-12) *with* ECF No. 76-1 at 4 (D-5).

## 20 2. SST retrieval dates

21 Even recognizing that the use of SCBA results in some reduction in  
22 worker efficiency, Energy fails to justify its need for an associated schedule

1 extension *now*, some seven years before the Consent Decree’s 2022 deadline.  
 2 Lyon 7th Decl. ¶ 7. Just as important, Energy fails to give any indication of its  
 3 efforts to mitigate the need for a delay. *Id.*; *see also* ECF No. 59 at 12-14  
 4 (§ VII.D). As before, Energy’s revised schedule proposal also backloads SST  
 5 retrievals, allowing it to push difficult retrievals to the end when any problems  
 6 encountered will mean unavoidable delay. Lyon 7th Decl. ¶ 9. The State’s  
 7 proposal—which does not backload the schedule, and stages more difficult  
 8 tanks at the start—is more “suitably tailored” in light of the Court’s August 13  
 9 Order. *See* ECF No. 198 at 19-23.

### 10 **3. Evaporator targets and DST construction milestones**

11 Energy has submitted a new report, prepared specifically for this  
 12 litigation, that significantly reduces its prior projections with respect to the  
 13 amount of DST space necessary to complete Consent Decree retrievals and the  
 14 tank waste volume reductions it needs to create through use of the 242-A  
 15 Evaporator.<sup>6</sup> *See* ECF No. 196-3, Ex. C; Lyon 7th Decl. ¶ 12. The assumptions  
 16 underlying Energy’s reduced volumes are unreasonable. Lyon 7th Decl. ¶ 13.  
 17 Further, the ever-shifting nature of Energy’s own numbers and assumptions, as  
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19 <sup>6</sup> The State objects to this report because it is submitted after the record  
 20 has been closed, *see* ECF No. 170 at 32-33, and is inadmissible unsworn  
 21 testimony. *See Wittmer v. Peters*, 87 F.3d 916, 917 (7th Cir. 1996) (unsworn  
 22 expert reports are inadmissible).

1 well as the multiple contingencies involved, demonstrate the inexact nature of  
2 such projections compared to on-the-ground realities. *Id.* ¶ 14. The State’s  
3 proposal—which is based upon Energy’s own prior estimates of retrieval and  
4 DST space needs—is less sensitive to, and provides a greater buffer against,  
5 such variability and uncertainties. *Id.* ¶ 14. If Energy can indeed complete its  
6 retrievals with a smaller volume of waste reduction, the worst that will happen  
7 is that Energy will end up with extra DST capacity (which is a good thing). *Id.*  
8 In addition, the State’s proposed two-million gallon DST trigger provides a  
9 safeguard against unnecessarily triggering DST construction without the  
10 convoluted contingencies and caveats in Energy’s proposal. *Compare* ECF  
11 No. 196-1 at 20-22 *with* ECF No. 198-1 at 15. The Court should not accept  
12 Energy’s current reduced numbers as the basis for Evaporator targets.

13 Finally, Energy proposes no DST planning, permitting, or construction  
14 milestones. *See* ECF No. 196-1 at 28. Instead, it proposes a single, lump ten-  
15 year timeframe running from the date DST construction is triggered, with no  
16 interim milestones. This approach does not adequately track Energy’s progress  
17 or provide for accountability. It also does not ensure that DSTs will be available  
18 at the earliest possible time in case they are needed. Lyon 7th Decl. ¶ 20. The  
19 State’s proposal addresses both of these needs. *See* ECF No. 198 at 27-28.

#### 20 **4. Reporting requirements**

21 In sharp contrast with the detail of its extension provisions and off-ramps,  
22 Energy re-proposes the same modest “additional reporting requirements” in its

1 original order. ECF No. 196 at 20. Without further detail, it offers to file annual  
2 reports “appris[ing] the Court of DOE’s progress in complying with the  
3 requirements of this Consent Decree.” ECF No. 196-1 at 16. Without specifying  
4 the detail or form of communication, it commits that within ninety days of any  
5 “at risk” notice, it will provide the State with a one-time “explanation” of “the  
6 reasons for that notice” and “the steps DOE is taking to address the issue.” *Id.*  
7 The Court has already held that Energy’s unilateral behavior justifies enhancing  
8 the Decree’s information-sharing provisions. ECF No. 170 at 32. Energy’s  
9 limited, vague provisions commit it to very little and promise no enhanced  
10 accountability over the current Decree, in contrast with the more specific (and  
11 more suitably-tailored) requirements of the State’s conditions. *See* ECF  
12 No. 198-1 at 3-8. Only the State’s conditions respond to the directive of the  
13 Court’s August 13 Order. *See* ECF No. 170 at 32.

## 14 II. CONCLUSION

15 Energy’s proposed order is yet another attempt to rewrite the Consent  
16 Decree in a way that minimizes enforceability, minimizes accountability, and  
17 changes the position of the parties. For the reasons above, the State respectfully  
18 requests that Energy’s proposed order be denied.

19 DATED this 14th day of December 2015.

20 ROBERT W. FERGUSON  
21 Attorney General

22 *s/ Andrew A. Fitz*

ANDREW A. FITZ, WSBA #22169

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Senior Counsel  
DOROTHY H. JAFFE, WSBA #34148  
KELLY T. WOOD, WSBA #40067  
Assistant Attorneys General  
Attorneys for Plaintiff  
State of Washington  
Office of the Attorney General  
P.O. Box 40117  
Olympia, WA 98504-0117  
(360) 586-6770  
andyf@atg.wa.gov  
dorij@atg.wa.gov  
kellyw1@atg.wa.gov

**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:

- **Kenneth C Amaditz**  
kenneth.amaditz@usdoj.gov,efile\_eds.enrd@usdoj.gov
- **Amanda Shafer Berman**  
amanda.berman@usdoj.gov
- **Elizabeth B Dawson**  
elizabeth.dawson@usdoj.gov,EFILE\_EDS.ENRD@usdoj.gov
- **Nina R Englander**  
nina.englisher@doj.state.or.us,toni.c.kemple@doj.state.or.us
- **Andrew A Fitz**  
andyf@atg.wa.gov,daniellef@atg.wa.gov,ecyolyef@atg.wa.gov,  
tanyar@atg.wa.gov
- **Dorothy Harris Jaffe**  
dorij@atg.wa.gov
- **David Kaplan**  
david.kaplan@usdoj.gov
- **Chloe Hamity Kolman**  
chloe.kolman@usdoj.gov,efile\_eds.enrd@usdoj.gov
- **Cynthia J Morris**  
c.j.morris@usdoj.gov,EFILE\_EDS.ENRD@USDOJ.GOV
- **Todd Reuter**  
todd.reuter@klgates.com,april.ENGH@klgates.com,  
tim.peckinpaugh@klgates.com
- **Austin David Saylor**  
austin.saylor@usdoj.gov,efile\_eds.enrd@usdoj.gov
- **Kelly T Wood**  
kellyw1@atg.wa.gov,ecyolyef@atg.wa.gov,  
deborah.holden@atg.wa.gov

DATED this 14th day of December 2015.

s/ Andrew A. Fitz  
ANDREW A. FITZ, WSBA #22169