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-5085-RMP ORDER REGARDING MOTIONS TO AMEND CONSENT DECREES

BEFORE THE COURT are three Motions to Amend Consent Decrees, filed respectively by Washington State, Oregon State, and the Department of Energy. ECF Nos. 75, 76, and 99. The Court heard oral argument regarding the applicable law and whether the parties had met their respective burdens under that law. The

parties filed supplemental briefing.[1] In this Order, the Court considers whether each party has met its initial burden under *Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367 (1992), and *Labor/Community Strategy v. Los Angeles Cnty.*, 564 F.3d 115,1120 (9th Cir. 2009), to show "a significant change either in factual conditions or in the law warranting modification of the decree." *United States v. Asarco, Inc.*, 430 F.3d 972, 979 (9th Cir. 2005). The Court also considers whether federal or state law applies to modification of the Consent Decrees, and whether and to what extent the Court may consider extrinsic evidence. *Id.*

For the reasons stated below, the Court finds that federal law applies and all parties have met their burden to show that there has been a significant change in factual conditions warranting modification of the Consent Decrees. Therefore, the Court will consider all three proposals for modification.

BACKGROUND

A. History of the Hanford Site

Beginning in 1943 and continuing for the next fifty years, the Hanford Site ("Hanford") produced nearly two-thirds of all the "nation's weapons-useable plutonium." ECF No. 76-2 at 4; ECF No. 70 at 5. The site spans 586 square miles

[1] The Court previously instructed the parties to prepare oral argument on the use of extrinsic evidence in this case, ECF No. 119, and the parties submitted supplemental briefing on this topic after oral argument, ECF Nos. 136, 137, and 138.

and housed nine nuclear reactors that produced irradiated uranium fuel elements. ECF No. 76-2 at 4-5; ECF No. 94 at 3; ECF No. 70 at 5.

To produce the plutonium, Hanford reprocessed nuclear fuel rods, which created "several hundred thousand metric tons of chemical and radioactive waste." ECF No. 76-2 at 5; ECF No. 70 at 5. Due to several factors, including "the varying waste streams from the different plutonium extraction processes used over time, the intermixing of the wastes between tanks, the addition of chemicals to the tanks to maintain chemistry control and reduce corrosion . . . , and the addition of chemicals from uranium extraction efforts," the waste consists of a "complex mixture of chemicals and radionuclides that continues to change over time due to radioactive decay and chemical reactions." ECF No. 94 at 9.

After the plutonium was produced, the waste was "neutralized," and then placed into large underground storage tanks with capacities ranging from 55,000 to 1.16 million gallons. ECF No. 94 at 5; ECF No. 70 at 5. Today, Hanford contains 177 underground storage tanks, distributed among eighteen "tank farms," holding approximately 56 million gallons of waste. ECF No. 70 at 4-5; ECF No. 76-2 at 4. Of those 177 tanks, 149 are "single-shell tanks" ("SSTs"), which contain a steel liner enclosed in a shell of reinforced concrete. ECF No. 94 at 5. The other 28 tanks are "double-shell tanks" ("DSTs"), which contain a primary carbon-steel tank inside of a secondary carbon-steel liner surrounded by a reinforced concrete shell. ECF No. 94 at 5. These double-shell tanks were designed in response to

concerns about leaks that were detected in SSTs in the late 1950s. ECF No. 94 at 5.

The last processing plant was shut down in 1990. ECF No. 76-2 at 4. Since that time, the mission at Hanford has been focused on cleaning up the radioactive and hazardous wastes and other site contamination. ECF No. 76-2 at 4. "Hanford is DOE's largest and most complex environmental cleanup project." ECF No. 76-2 at 4. The 56 million gallons of waste at Hanford account for 60 percent of the high level waste the Department of Energy ("DOE") is responsible for nationwide. ECF No. 77 at 8.

B. Governing Statutes[2]

[2] The parties disagree about which regulations govern modification of the Consent Decrees. Washington contends that this case is about the regulation of hazardous waste and that the Resource Conservation and Recovery Act is the controlling authority. ECF No. 75; ECF No. 102 at 3 ("RCRA authority governs the hazardous waste component of the mixed radioactive and hazardous waste that Energy manages at Hanford. The regulation of nuclear materials is not at issue in this case, and is not part of the Consent Decree that Energy seeks to amend."). In contrast, DOE argues that this case concerns the regulation of nuclear waste and that the Atomic Energy Act is the controlling authority. ECF No. 76; ECF No. 106 at 9 ("The WTP is a federal nuclear construction project, undertaken at a federal facility with federal funds, and must be designed to meet strict safety standards in

"Hazardous waste is regulated at both the federal and state levels." *United States v. Manning*, 527 F.3d 828, 832 (9th Cir. 2008). At the federal level, the Atomic Energy Act of 1954 ("AEA") authorizes the federal government[3] to "provide for safe storage, processing, transportation, and disposal of hazardous waste (including radioactive waste) resulting from nuclear materials production [and] weapons production . . . ." 42 U.S.C. §§ 2121(a)(3). The AEA "established a comprehensive regulatory scheme for military and domestic nuclear energy," *Natural Res. Def. Council v. Abraham*, 388 F.3d 701, 704 (9th Cir. 2004), and applies to the "processing and utilization of source, byproduct, and special nuclear material" as well as related production and utilization facilities,[4] 42 U.S.C. §§ 2012(c)-(e). The tank waste at Hanford contains a number of radioactive elements

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an area of regulation that Congress has entrusted to the exclusive control of federal authorities.").

[3] Originally, the AEA charged the Atomic Energy Commission with the regulation of nuclear materials. However, in 1974, Congress abolished the Atomic Energy Commission and transferred the majority of its functions to DOE and the Nuclear Regulatory Commission. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (Oct. 11, 1974).

[4] Section 2014 defines "source material," "byproduct material," and "special nuclear material." 42 U.S.C. §§ 2014 (e), (z) and (aa).

that are included within the definitions of source, byproduct, and special nuclear material. ECF No. 76 at 8; ECF No. 94 at 10; ECF No. 77 at 7.

A 1959 amendment to the AEA authorized the federal government "to turn some of its regulatory authority over to any state which would adopt a suitable regulatory program." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984). However, the amendment still precluded states from regulating the safety aspects of radioactive materials, and retained "exclusive regulatory authority" in the federal government for "the disposal of such . . . byproduct, source, or special nuclear material . . . ." *Silkwood*, 464 U.S. at 250.

In 1976, Congress enacted the Resource Conservation and Recovery Act ("RCRA") "in response to the environmental and public health risks associated with the mismanagement of hazardous waste." 42 U.S.C. §§ 6901-6992k; *Manning*, 527 F.3d at 832. The RCRA authorizes states to "apply to the EPA for authorization to administer a hazardous waste program in lieu of the federal program." *Manning*, 527 F.3d at 832 (citing 42 U.S.C. § 6926(b)). The "solid waste" regulated by the RCRA does not include "source, special nuclear, or byproduct material" as defined by the AEA. *Id.*; 42 U.S.C. § 6903(27). Washington administers its own program through the Hazardous Waste Management Act ("HWMA"). RCW 70.105. Therefore, despite Washington's authority to administer its own hazardous waste program, "[d]isposal of nuclear

and radioactive materials" is "separately regulated by the federal government." *Manning*, 527 F.3d at 832.

The waste at issue in this case is "mixed waste," comprised of both radioactive waste ordinarily governed by the AEA and non-radioactive waste governed by the RCRA and Washington's HWMA. ECF No. 76 at 9-10. There is "no separate federal statute [that] regulates this 'mixed waste.'" *Manning*, 527 F.3d at 833; *United States v. Kentucky*, 252 F.3d 816, 822 (6th Cir. 2011). Instead, DOE and EPA rules dictate that mixed waste is subject to "dual regulation": the AEA governs the radioactive component, and the RCRA or comparable state legislation governs the hazardous, non-radioactive component. *Manning*, 527 F.3d at 833; *Kentucky*, 252 F.3d at 822. The Ninth Circuit has held that a unilateral state legislative attempt to regulate the radioactive component of mixed waste is preempted by the AEA. *Manning*, 527 F.3d at 840-41.

In 1992, Congress enacted the Federal Facilities Compliance Act ("FFCA") "to make it as clear as humanly possible that Congress was waiving federal sovereign immunity and making federal facilities subject to state laws." *Id.* at 832 (citing 138 Cong. Rec. H9135-02 (daily ed. Sept. 23, 1992) (statement of Rep. Dingell)); Pub. L. No. 102-382, Title I, § 102(a), (b), 106 Stat. 1505, 1506 (1992) (codified in scattered sections throughout 42 U.S.C.). "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." *Washington v. Chu*, 558 F.3d 1036, 1040 (9th Cir. 2009). To achieve this goal, Congress through the FFCA "waived sovereign immunity for the operation of federal facilities and clarified that states could impose civil fines on federal facilities for violations of RCRA." *Id.*; 42 U.S.C. § 6961.

Likewise, the FFCA added a provision to the RCRA that explicitly required DOE to submit its mixed waste treatment plans to the states for approval, modification, or disapproval, if it wished to avoid fines and penalties associated with RCRA violations. 42 U.S.C. § 6939c; *see Chu*, 558 F.3d at 1041. The legislative history pertaining to the FFCA states that in an effort to ensure greater compliance with the RCRA "the bill explicitly provides that federal facilities are subject to all the same substantive and procedural requirements, including enforcement requirements and sanctions, to which state and local governments and private companies are subject." H.R. Rep. No. 102-111, at 2 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1287, 1288.

Congress's enactment of a statute requiring DOE to submit its treatment plans to the state for approval, modification, or disapproval, is distinguishable from the unilateral enactment of a state statute that governs the disposal of mixed waste, such as the statute the Ninth Circuit invalidated in *Manning*. *Manning*, 527 F.3d at 840-41. The requirement that DOE submit its treatment plans to the state to avoid fines and penalties implies a bilateral approach consistent with the dual regulatory nature of mixed waste. In imposing this requirement on DOE, Congress gave the

states some regulatory authority, if merely veto power, over the treatment of mixed waste. The parties contest the extent of that authority in this case.

C. Various Hanford Agreements

i. The Hanford Federal Facility Agreement and Consent Order, or Tri-Party Agreement

In 1989, DOE, Washington, and the EPA entered into the Hanford Federal Facility Agreement and Consent Order, or Tri-Party Agreement ("HFFACO"), "to promote an orderly and effective cleanup of contamination at Hanford and to ensure compliance with RCRA and the HWMA." ECF No. 76 at 10; HFFACO, available at http://www.hanford.gov/page.cfm/TriParty. The HFFACO is a legally-enforceable agreement containing numerous milestones for cleanup of the Hanford site, many of which pertain to the treatment and prolonged storage of tank waste.[5] The HFFACO already had been entered when the FFCA was enacted and it "satisfied the requirement of a site treatment plan under 42 U.S.C. § 6939c(b)(1)(A)(ii)." *Chu*, 558 F.3d at 1041.

In addition to other projects, the HFFACO provided for the retrieval of all SSTs by 2018, and for the "pretreatment processing and vitrification" of Hanford's

[5]The HFFACO "recognizes DOE's authority under the AEA and provides that nothing in the Agreement shall be construed to require DOE to take any action under RCRA that is inconsistent with the AEA." ECF No. 76 at 10-11 (citing HFFACO art. I).

mixed waste by 2028. ECF No. 83-1 at 3. Since 1989 when the HFFACO was entered, these milestones have been extended to 2040 and 2047 respectively pursuant to the amendment process established in the agreement. HFFACO, app. D, Milestone M-045-70; Milestone M-062-00. The HFFACO also established numerous interim milestones designed to ensure that DOE met the two major milestones of (1) mixed waste treatment (vitrifying waste), and (2) SST retrievals (retrieving all of the SSTs and transferring their waste into DSTs). HFFACO, app. D.

Although the HFFACO governed cleanup of Hanford's hazardous waste, the mixed nature of Hanford's waste, both radioactive and non-radioactive, necessarily meant that HFFACO similarly governed the cleanup of Hanford's radioactive waste. There is no way to create milestones for the cleanup of Hanford's single-shell tanks, for instance, that does not also affect milestones for the cleanup of the radioactive waste inside those tanks. DOE agreed to the milestones in the HFFACO and the legally-enforceable nature of that consent decree, and DOE has since participated in and approved hundreds of modifications to the HFFACO agreement and the milestones that it contains.

In order to vitrify all of Hanford's mixed waste, DOE designed a Waste Treatment Plant ("WTP") that would separate, pre-treat, vitrify, and ultimately repackage, the waste. There are two classifications of waste at Hanford that must be treated: high-level waste ("HLW"), and low-activity waste ("LAW"). ECF No.

76-2 at 5-6. LAW is "the liquid portion of the tank waste, which contains a relatively small amount of radioactivity in a large volume of material," whereas HLW is found "primarily in the solids of the tank waste and contains most of the radioactivity in a relatively small volume of material." ECF No. 76-2 at 5-6. Both types of waste contain radioactive material, and both types are found in the SSTs. ECF No. 76-2 at 5-6.

DOE's plan to treat Hanford's waste requires that waste be "retrieved" from the SSTs and transferred to DSTs for temporary storage. ECF No. 94 at 12-3. The waste would then proceed into the WTP for treatment. The current WTP design plan provides for one Pretreatment Facility, which separates the LAW from the HLW, and feeds each type of waste into its own distinct treatment plant: the HLW Facility will treat and vitrify HLW, and the LAW Facility will treat and vitrify LAW. ECF No. 76-2 at 6-7. After the HLW is treated, it will be placed into cylindrical stainless steel canisters and stored pending the completion of a national storage facility. ECF No. 76-2 at 7-8. After the LAW is treated, it will be placed into large, stainless steel containers and reburied at the Hanford site. ECF No. 76-2 at 7.

The WTP also will contain two other prominent facilities: an Analytical Laboratory ("LAB"), that will support operations at the WTP by "analyzing the tank waste feed, the vitrified waste, and the effluent streams produced in the treatment process," ECF No. 76-2 at 8; and a Balance of Facilities ("BOF") that

will provide support infrastructures, including services and utilities, for WTP operations. ECF No. 76-2 at 8. All of the facilities "are highly dependent upon each other," and were designed to begin operation simultaneously. ECF No. 76-2 at 8.

ii. The Consent Decrees

In November of 2008, Washington filed a complaint against DOE for declaratory and injunctive relief alleging that DOE had "failed to meet certain key compliance milestones" contained in the HFFACO. ECF No. 1. Specifically, Washington alleged that DOE had failed to meet or was "certain to miss" ten milestone deadlines, seven pertaining to tank waste treatment and three pertaining to tank waste retrieval. ECF No. 1 at 2-3. Oregon intervened in Washington's suit against DOE in 2009. ECF No. 35. Oregon's interest in the suit stemmed from the effects that Hanford's waste has, or may have, on the Columbia River, which flows through Oregon less than 50 miles after passing through Hanford before flowing more than 200 miles along Oregon's northern border and through Portland into the Pacific Ocean. ECF No. 99 at 5.

a. Consent Decree Between DOE and Washington

In 2010, Washington and DOE agreed to a proposed settlement package consisting of the Consent Decree at issue in this case and several HFFACO amendments. ECF No. 59. The Court entered the Consent Decree in November

2010, and the HFFACO amendments were submitted for public comment. ECF No. 75 at 18.

The Consent Decree was limited to the resolution of any litigation over matters covered by the Consent Decree "regarding certain milestones in the HFFACO and alleged violations of those portions of the regulations which underlie these milestones and portions of milestones in the HFFACO . . . ." ECF No. 59. The Consent Decree set forth two primary milestones: (1) achieving initial plant operations of the WTP by December 31, 2022; and, (2) completing retrieval of nineteen SSTs in two groupings: ten SSTs to be retrieved by September 30, 2014, and nine more to be retrieved by December 31, 2022. ECF No. 59, §§ IV(A) and (B). Appendices A and B of the Consent Decree establish twenty-two interim milestones designed to keep DOE on track toward its completion of the two primary milestones previously described. ECF No. 59, apps. A and B.

The Consent Decree also established three reporting requirements. First, DOE is required to submit to Washington semi-annual reports "documenting WTP construction and startup activities and tank retrieval activities that occurred during the period covered by the report." ECF No. 59. § IV(C)(1). Second, DOE must submit to Washington monthly reports, approximating ten to fifteen pages in length, documenting "the cost and schedule performance . . . for each major activity," "significant accomplishments during the prior month," and "significant planned activities for the next month." ECF No. 59. § IV(C)(2). Third, DOE must

notify Washington "in a timely manner" if DOE "determines that a serious risk has arisen that DOE may be unable to meet a schedule" or milestone. ECF No. 59. § IV(C)(3).

The Consent Decree gives Washington authority to enter the Hanford site to (1) inspect "records, operating logs, contracts, and other documents relevant to the implementation of [the] Decree, subject to applicable limits on classified and confidential information"; (2) review DOE's progress in implementing the Decree; (3) conduct tests as Washington's Department of Ecology deems appropriate; and (4) verify data relating to the "work covered herein submitted to Ecology by DOE." ECF No. 59. § V.

Finally, the Consent Decree contains a detailed amendment process, providing for amendment of the Consent Decree with Court approval, and with public comment if Washington deems the amendment proposal to constitute a "significant modification to the Consent Decree." ECF No. 59. § VII. If the parties cannot agree upon a proposed amendment, either party may invoke the Consent Decree's dispute resolution procedures. ECF No. 59. § VII(3). Those procedures require the parties to attempt to resolve any disputes within a reasonable period of time, not to exceed forty days, prior to seeking relief from the Court. ECF No. 59. § IX(1). If the parties are unable to resolve the dispute, either party may petition the Court for relief. ECF No. 59. § IX(2).

b. Consent Decree Between DOE and Oregon

Contemporaneously with entering into the Consent Decree with Washington, DOE entered a separate Consent Decree with Oregon.[6] ECF No. 60.

DOE's Consent Decree with Oregon is narrower than the Consent Decree with Washington and contains no mandatory milestones, only reporting requirements. ECF No. 60. Under the terms of the Consent Decree, DOE must submit semi-annual and monthly reports that document "WTP construction and startup activities and tank retrieval activities" that occurred at Hanford during the reporting period and are covered in DOE's Consent Decree with Washington. ECF No. 60 at 2, 3. DOE also must submit the same notification to Oregon that it submits to Washington when it "determines that a serious risk has arisen that DOE may be unable to meet a schedule" as required under DOE's Consent Decree with Washington. ECF No. 60 at 3. In addition, DOE must inform Oregon at least ten days in advance that it intends to file a motion with the Court for modification or dispute resolution regarding DOE's Consent Decree with Washington. ECF No. 60 at 3-4. Finally, the Consent Decree permits Oregon to attend the three-year

[6]The Consent Decree between DOE and Oregon is similar to the Consent Decree between DOE and Washington. It is called the "Consent Decree Between Defendants Secretary of Energy Steven Chu and the U.S. Department of Energy and Intervener State of Oregon."

review meetings scheduled between DOE and Washington and requires DOE to inform Oregon of those meetings. ECF No. 60 at 4.

D. Current Procedural History

Almost immediately after the Consent Decree was entered, DOE gave Washington notice that one or more of the Consent Decree milestones was "at risk." ECF No. 82-1. In May 2012, DOE informed Washington that it believed ten of the twenty-five Consent Decree milestones were at risk due to technical and funding issues. ECF No. 82-6. DOE provided notices of three additional milestones that were "at risk" in June of 2013, October of 2013, and September of 2014. ECF Nos. 82-12; 82-13; and 82-15. As of the date of this Order, two milestones have been missed, and fourteen milestones are "at risk." ECF No. 76-2 at 19-24; ECF No. 83 at 17.

Despite attempts to negotiate modifications, and two extensions to the dispute resolution period, the parties have been unable to reach agreement on amendment proposals that would maintain the purpose of the Consent Decree while creating new, attainable milestones for achieving initial operations of the WTP and the retrieval of nineteen SSTs.[7] ECF No. 75 at 46; ECF No. 76 at 28.

[7] Washington makes several allegations alluding that DOE did not act in good faith during the period when it notified Washington of the risk that certain milestones would not be met. ECF No. 75. In particular, Washington contends that DOE refused to provide Washington with adequate information regarding which

All parties now petition the Court for relief and submit their respective proposals for modification of the Consent Decree. ECF Nos. 75,76, and 99. Oregon moves to modify its own Consent Decree with DOE in response to recent events and in order to track any modifications made to the Consent Decree between Washington and DOE.[8] ECF No. 99. Oregon supports Washington's proposed amendment to the Decree, including most major components. ECF No. 99.

E. Jurisdiction

The terms of the Consent Decrees give the Court jurisdiction over the parties and the subject matter until the Consent Decrees' terms and conditions have been performed. ECF No. 59, § XII; ECF No. 60 at 2. Additionally, the Court has inherent authority and jurisdiction to modify the Consent Decree pursuant to Federal Rule of Civil Procedure 60. Fed. R. Civ. P. 60; *see Rufo*, 502 U.S. at 378-80; *Sys. Fed'n No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642, 651

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milestones were at risk and why. ECF No. 75. Washington does not seek sanctions against DOE for any violation of the Consent Decree, and Washington admits that DOE negotiated for a Consent Decree amendment in good faith. ECF No. 75 at 46.

[8] Like Washington, Oregon contends that DOE has not been forthcoming about the issues at the Hanford site since the Consent Decrees were entered in 2010 and also contends that DOE has used unfair tactics to justify this lack of disclosure. ECF No. 99.

(1961). However, neither Consent Decree gives the Court jurisdiction over the HFFACO, its amendments, or its enforcement, even though certain Consent Decree provisions or amendments may affect the deadlines in the HFFACO. ECF No. 59, § XI(A).

F. Issues Before the Court

The primary issues before the Court are whether to amend the Consent Decrees, and if so, how to amend it. In this Order, the Court addresses whether the parties have met their burden to have this Court amend the Consent Decrees.

DISCUSSION

A. Standard of Review

A consent decree, though contractual in nature, is "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo*, 502 U.S. at 378. Therefore, a district court has inherent authority to amend a consent decree pursuant to Federal Rule of Civil Procedure 60, which permits modification when it is "no longer equitable" to apply the order or decree prospectively. Fed. R. Civ. P. 60(b)(5); *Rufo*, 502 U.S. at 378 (holding that Rule 60 applies to consent decrees). However, modification is not appropriate simply because "it is no longer convenient to live with the terms of a consent decree." *Rufo*, 502 U.S. at 383 (quoting Fed. R. Civ. P. 60(b)(5)).

The terms of the Consent Decree between Washington and DOE permit amendment to milestone deadlines if "(1) a request for amendment is timely, and (2) good cause exists for the amendment." ECF No. 59, § VII.B. Good cause exists when "the schedule cannot be met due to circumstances or events either (1) unanticipated in the development of the schedule . . . , or (2) anticipated in the development of the schedule, but which have a greater impact on the schedule than was predicted or assumed at the time the schedule was developed . . . ." ECF No. 59, § VII.D. Because these terms are consistent with Supreme Court and Ninth Circuit law governing the modification of consent decrees, and because "[a] court's inherent power to modify a consent decree . . . is not circumscribed by the language of the decree," *Thompson v. United States Dept. of Housing & Urban Dev.*, 404 F.3d 821, 832, n.6 (4th Cir. 2005), the Court will focus its inquiry on whether the circumstances in this case meet the burden established by law.

The party seeking modification of a consent decree bears the burden of establishing the following four conditions: (1) "a significant change either in factual conditions or in the law occurred after execution of the decree"; (2) "the change was not anticipated at the time it entered into the decree"; (3) "the changed factual circumstance makes compliance with the consent decree 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.*, 564 F.3d at 1120 (quoting *Asarco*, 430 F.3d at 979); *see Rufo*, 502 U.S. at 383-93. Because all parties in this case are seeking modifications of their respective Consent Decrees, each party bears the burden under the *Rufo* framework.

"The failure of substantial compliance with the terms of a consent decree can qualify as a significant change in circumstances that would justify the decree's temporal extension." *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1120-21 (citing *Thompson v. U.S. Dept. of Housing & Urban Dev.*, 404 F.3d 821, 828-29 (4th Cir. 2005)). "Substantial compliance" is a "less precise standard that cannot be satisfied by reference to one particular figure, while ignoring alternative information." *Id.* at 1122. "Instead, we must determine, using a holistic view of all of the available information, whether [the party's] compliance with the Decree overall was substantial, notwithstanding some minimal level of compliance." *Id.*

A significant change in factual circumstances may have been foreseeable. A moving party need not show that a change was "both unforeseen and unforeseeable." *Rufo*, 502 U.S. at 385; *see Evans v. Williams*, 206 F.3d 1292, 1298 (D.C. Cir. 2000) ("But *Rufo*'s modification standard does not require absolute unforeseeability. It is enough that the parties did not actually contemplate the changed circumstances."). "Litigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree." *Rufo*,

502 U.S. at 385. However, if the change was actually anticipated when the decree was entered, then ordinarily, modification is not warranted. *Id*.

To determine whether a moving party actually anticipated a condition that it now maintains constitutes a significant changed factual condition, ". . . a court must first interpret the terms and provisions of the decree as it would a contract to determine if the moving party anticipated a significant change in factual conditions, thereby making modification improper." *Asarco*, 430 F.3d at 976. If it is clear that the moving party did actually anticipate the changed conditions, then the party seeking modification has a "heavy burden to convince a 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 under Rule 60(b)." *Rufo*, 502 U.S. at 385.

Washington argues that it need not meet this burden under *Rufo*. Instead, Washington contends that it may modify its Consent Decree pursuant to Section X.C of the Consent Decree, which states:

> 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 are 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. Washington concedes that its proposal still must be suitably tailored to resolve the problems justifying the modification, but argues that if it

shows that it has received previously unknown or undetected information indicating that the current Consent Decree is insufficient, then it may proceed directly to the fourth *Rufo* factor, bypassing the first three factors.

The Court disagrees that Washington may obtain modification of the Consent Decree if it satisfies the terms of Section X.C. Washington does not provide any legal support other than the language of the Decree for its contention that the Consent Decree terms alleviate part of its burden under *Rufo*. The plain language of Section X.C does not bestow upon Washington the right to obtain modification of the decree if it meets the stated conditions. *See* ECF No. 59, § X.C. Section X.C states that "the State reserves the right to *seek* amendment of this Decree . . . ." ECF No. 59, § X.C (emphasis added). Nothing in the Consent Decree terms requires the Court to grant a motion for modification if Washington makes the showing required by Section X.C. Instead, Section X.C operates as an agreement between Washington and DOE that Washington may request amendment of the Consent Decree if the stated conditions are met without fear that DOE will accuse Washington of having breached the Consent Decree terms.

Although Washington's position is arguable under standard contract law, a consent decree is not a standard contract. A consent decree is only quasi-contractual in nature. A consent decree is a judicial order entered by the court, and the court has inherent authority to modify its own orders according to the standard set out in Supreme Court precedent. *See Swift*, 286 U.S. at 115 ("We reject the

argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."). The parties agree that the Court's power to modify its own order is both inherent and codified in Federal Rule of Civil Procedure 60. ECF No. 75 at 51; ECF No. 76 at 34.

In addition, case law supports the proposition that a consent decree's terms cannot restrict the Court's power and ability to modify the decree. The Supreme Court has "never departed from that general rule," that the Court may modify a consent decree regardless of the decree's terms. *Sys. Fed'n No. 91*, 364 U.S. at 650-51. "The parties cannot by giving each other consideration purchase from a court of equity a continuing injunction" that is unmodifiable. *Id.*

Similarly, other circuit courts have concluded that a consent decree's terms cannot restrict the court's inherent power to modify its own order. *See, e.g.*, *Thompson v. United States Dept. of Housing & Urban Dev.*, 404 F.3d 821, 832, n.6 (4th Cir. 2005) ("This argument, as well as others made by HUD, seems to teeter on the edge of asserting that the modification was improper because it was inconsistent with the terms of the Consent Decree. Such an argument, of course, would be doomed to fail. Issues of *interpretation* and *enforcement* of a consent decree typically are subject to traditional rules of contract interpretation, and the district court's authority is thus constrained by the language of the decree. . . . A court's inherent power to *modify* a consent decree, however, is not circumscribed by the language of the decree.") (emphasis in *Thompson*); *David C. v. Leavitt*, 242

F.3d 1206, 1210-11 (10th Cir. 2001) ("Contrary to Utah's assertions, a court's equitable power to modify its own order in the face of changed circumstances is an inherent judicial power that cannot be limited simply because an agreement by the parties purports to do so. . . . To hold otherwise would allow the parties, by the terms of their agreement, to divest a court of its equitable power or significantly constrain that power by dictating its parameters."); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985), *abrogated on other grounds by Rufo*, 502 U.S. 106 ("Of course, the parties could not agree to restrict the court's equitable powers to modify its judgment enforcing the consent decree . . . in light of 'changed circumstances.'").

Although the standard for modification under Federal Rule of Civil Procedure 60(b) as applied to consent decrees is "flexible," *Rufo*, 502. U.S. at 381, the Court still must find that "a significant change in circumstances warrants revision of the decree." *Id.* at 383. A court's decision to modify a consent decree is reviewed on appeal for abuse of discretion. *See Asarco*, 430 F.3d at 976; *Labor/Cmty. Strategy Cntr.*, 564 F.3d at 1119; *Hook v. Arizona*, 120 F.3d 921, 924 (9th Cir. 1997). Therefore, the Court declines to permit Washington to modify the Consent Decree solely pursuant to Section X.C.

In this case, the Consent Decree terms under Section X.C are sufficiently similar to the *Rufo* standard that Washington will not suffer prejudice from being required to meet its burden under *Rufo*. Section X.C requires a showing of

"previously unknown information or conditions," much like the *Rufo* requirement of "significant changes in factual conditions that were unanticipated." Similarly, Section X.C requires a showing that these conditions demonstrate that the Consent Decree's terms are not protective of human health or the environment, while *Rufo* requires a showing that the changed factual conditions make the decree onerous, unworkable, or detrimental to the public interest.

B. Applicable Law

The parties agree that *Rufo* applies to modification of consent decrees. ECF No. 75 at 51; ECF No. 76 at 34. However, the parties disagree about whether federal or state law governs the parameters of the *Rufo* analysis. *See* ECF Nos. 136, 137, and 138.

When analyzing the *Rufo* factors, the Court must refer to the Consent Decrees' terms to determine whether a particular condition claimed by one party to constitute a "significant changed factual condition" is in fact a changed condition. Similarly, when determining whether a changed condition was actually anticipated by the moving party, the Court must "first interpret the terms and provisions of the decree as it would a contract to determine if the moving party anticipated a significant change in factual conditions . . . ." *Asarco*, 430 F.3d at 976. Next, the Court must consider the Consent Decree terms to decide whether the changed conditions make compliance with the Consent Decree more onerous, unworkable, or detrimental to the public interest than when the Consent Decree was executed.

Finally, the Court must determine whether the modification proposal is "tailored to resolve the problems created by the change in circumstances," but does no more, "for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Rufo*, 502 U.S. at 391.

Washington argues that the Court should apply Washington contract law to this analysis. ECF No. 137. In particular, Washington urges the Court to apply two theories of Washington contract law: (1) the "Context Rule," which according to Washington "permits a court to look to extrinsic evidence to discern the meaning or intent of words or terms used by contracting parties, even when the parties' words appear to the court to be clear and unambiguous;" and (2) the "Objective Manifestation Rule," which Washington argues limits the Court's consideration to objective, rather than subjective, extrinsic evidence regarding whether a party actually anticipated a changed condition. ECF No. 137 at 3-5.

DOE argues that "the grounds and procedures for modifying a federal consent decree are governed entirely by federal law." ECF No. 136 at 1. DOE argues: (1) the application of federal law is appropriate because the *Rufo* standard is "an elaboration of Rule 60(b)(5)"; and (2) "federal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party." ECF No. 136 at 2-3.

Therefore, the Court must decide whether Washington contract law or federal common law regarding modification of consent decrees governs this Court's analysis of the *Rufo* factors.

Washington cites *FTC v. EDebitPay, LLC*, 695 F.3d 938 (9th Cir. 2012), to support its argument that the "law of the situs state" applies to construction of consent decrees. ECF No. 137 at 1. In *EDebitPay*, the FTC sued an online company for violations of the Federal Trade Commission Act. *Id.* at 940. The parties settled the matter and stipulated to the terms of a Final Order, which the district court approved. *Id.* at 941. Thereafter, the FTC obtained information that EDebitPay was violating the Final Order terms and moved for an order to show cause why EDebitPay should not be held in contempt. *Id.* at 940-41. The district court held EDebitPay in contempt, and the Ninth Circuit affirmed that decision after analyzing the terms of the Final Order. *Id.* The Ninth Circuit stated:

> In construing consent decrees like the one at issue here, "courts use contract principles. The contract law of the situs state applies." [*Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990)] [ ]. In California, a contract is interpreted "to give effect to the mutual intention of the parties as it existed at the time of contracting." Cal. Civ. Code § 1636. The contract's language governs "if the language is clear and explicit." *Id.* § 1638.

EDebitPay, 695 F.3d at 943. The court determined that the Final Order's language was unambiguous and declined to consider extrinsic evidence regarding the meaning of the Final Order's terms. *Id.* at 944.

EDebitPay is distinguishable from this case. First, *EDebitPay* involved an enforcement action, not a modification to the Final Order's terms. *See id.* This is significant because Federal Rule of Civil Procedure 60(b)(5) and *Rufo* apply to modification of consent decrees, not their enforcement. *See* Fed. R. Civ. P. 60(b)(5) ("On motion and just terms, the court may *relieve* a party . . . from a final judgment . . .) (emphasis added); *Rufo*, 502 U.S. at 378 (applying Rule 60(b) to the modification of a consent decree).

The Ninth Circuit in *EDebitPay* never cited to Rule 60(b) or *Rufo*. *See EDebitPay*, 695 F.3d 938. The *EDebitPay* Court did not discuss the *Rufo* factors or any of the case law concerning the use of extrinsic evidence to determine whether the moving party actually anticipated a changed condition or whether a modification proposal was suitably tailored. In addition, the *EDebitPay* Court relied on only one case for support that the contract law of the situs state applied to interpretation of the Final Order decree. *EDebitPay*, 695 F.3d at 943. That case, *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990), predates *Rufo* and does not cite Rule 60 as the basis for the Court's authority to modify the consent decree at issue, but instead relies on the jurisdictional provision in the decree. *See id.* at 1388-89.

Washington also argues that *EDebitPay* stands for the principle that "[e]ven when [the federal government] enters a decree to settle a challenge to its own enforcement action, a federal agency does not enter the decree 'pursuant to federal

law,'" because the Ninth Circuit applied California contract law to the Final Order. ECF No. 137 at 2 (citing *EDebitPay*, 695 F.3d at 943). However, the Ninth Circuit does not discuss in *EDebitPay* whether the Final Order was entered pursuant to federal or state law. *See EDebitPay*, 695 F.3d at 938. The court did not engage in any analysis regarding whether federal or state law applied, and there is no indication from the opinion that the applicable law was in dispute. *See id.*

The scope of a court's authority in modifying a consent decree is broader than the court's authority in enforcing a consent decree. *See Sys. Fed'n No. 91*, 364 U.S. at 647-52. When enforcing a consent decree, an issuing court is constrained by the decree's terms and may not enlarge or diminish a party's obligations or rights due to changed external conditions. *See Thompson*, 404 F.3d at 832, n.6 ("A federal district court may not use its power of enforcing consent decrees to enlarge or diminish the duties on which the parties have agreed and which the court has approved."); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 521-24 (1986) (finding that courts may not require that additional obligations prescribed by federal statute be included in a consent decree's terms prior to entering the decree, because consent decrees are consensual). Conversely, when modifying a decree, the court may consider changes in fact or law that warrant enlarging or diminishing a party's rights or obligations. *Sys. Fed'n No. 91*, 364 U.S. at 647 ("There is also no dispute but that sound judicial discretion may call for the modification of the terms of an

injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.").

The Supreme Court has held that when modifying a consent decree:

> . . . the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

Washington also relies on *Berg v. Hudesman*, 115 Wn.2d 657 (Wash. 1990), to show that under Washington contract law a court may consider extrinsic evidence when interpreting a contract, regardless of whether the contract terms are ambiguous. *Berg*, 115 Wn.2d at 667, 669 ("We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible."). In *Hearst Communications*, the Washington Supreme Court stated that "surrounding circumstances and other extrinsic evidence are to be used to determine the meaning of *specific words and terms used*, and not to show an intention independent of the instrument, or to vary, contradict, or modify the written word." *Hearst Commc'ns.*, 154 Wn.2d at 503 (emphasis in *Hearst*) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96 (Wash. 1999)).

Washington's policy of permitting courts to consider extrinsic evidence despite lack of ambiguity in a contract's terms conflicts with Supreme Court precedent holding that a consent decree must be interpreted within its four corners and extrinsic evidence is only admissible to resolve ambiguity in the decree's terms. *Compare Berg*, 115 Wn.2d at 667-69, *and Hearst Commc'ns*., 154 Wn.2d at 503, *with Armour*, 402 U.S. at 681-82, *and Rufo*, 502 U.S. at 391-92, *and Swift*, 286 U.S. at 116-17. Under California law, which was applied in *EDebitPay*, "[t]he contract's language governs if the language is clear and explicit." Cal. Civ. Code § 1638. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ." Cal. Civ. Code § 1639. The conflict between Washington state law and federal law distinguishes this case from *EDebitPay*, where California law was consistent with federal common law.

EDebitPay involved enforcement of a consent decree, not modification of a consent decree. The court did not rely on *Rufo* or cite to the court's authority under Rule 60. The law of the situs state in *EDebitPay* paralleled Supreme Court precedent regarding interpretation of consent decrees, because California law is consistent with federal law, while Washington contract law conflicts with federal law. Therefore, the Court concludes that *EDebitPay* does not create binding precedent requiring this Court to apply Washington contract law in this case.

DOE relies on *Asarco*, 430 F.3d 972, to support its argument that federal courts apply federal common law when modifying consent decrees. In *Asarco*, the moving parties contended that the United States had represented in negotiations that it would not take a particular action that was subsequently taken. *Id.* at 977. The district court determined. based on extrinsic evidence of the United States' representations during negotiations, that the moving parties had not actually anticipated that the United States would take the contested action. *Id.* The Ninth Circuit reversed, holding that the district court abused its discretion when it considered extrinsic evidence because the consent decree terms were unambiguous and unequivocal. *Id.* at 976-82 (relying on *Armour* , 402 U.S. at 682-82, *United States v. ITT Cont. Baking Co.*, 420 U.S. 22 (1975), and *Thompson*, 220 F.3d at 241).

Asarco concerned the modification of a consent decree entered into between the United States and private parties. The Ninth Circuit recognized its inherent power to modify the consent decree under Rule 60 and proceeded to analyze the modification proposal under *Rufo*. The court made no mention of state contract law when applying the *Rufo* factors and interpreting the terms of the consent decree at issue. *See Asarco*, 430 F.3d at 978-83. Instead, the *Asarco* court relied on U.S. Supreme Court case law and case law from other circuits. *Id.* The court stated: "A consent decree, like a contract, must be discerned within its four corners . . . ." *Id.* at 980. "Only if the decree's terms are ambiguous . . . do

[courts] consider extrinsic evidence." *Id.* at 981. *Asarco* is binding precedent in this Court.

DOE also cites *Chickaloon-Moose Creek Native Ass'n, Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004), for the principle that "federal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party." ECF No. 136 at 2-3. In *Chickaloon-Moose*, the Ninth Circuit interpreted a consent decree between the U.S. Department of the Interior and an Alaska Native regional corporation to determine whether the decree terms required Alaska Native villages to accept certain lands in lieu of others under the Alaska Native Claims Settlement Act of 1971. *Chickaloon-Moose*, 360 F.3d at 974. The Ninth Circuit in *Chickaloon-Moose* applied federal law because the federal government was a party to a "contract entered pursuant to federal law." *Id.* at 980 (citing *O'Neill v. United States*, 50 F.3d 677, 682 (9th Cir. 1995)).

Washington argues that *Chickaloon-Moose* is inapposite because the consent decree in *Chickaloon-Moose* was "entered pursuant to specific federal laws authorizing federal government contracting to carry out federal programs." ECF No. 137 at 1. Specifically, Washington contends that the consent decree in *Chickaloon-Moose* was entered pursuant to the Alaska Native Claims Settlement Act of 1971, which Washington argues "authoriz[ed] federal government contracting." ECF No. 137 at 1. Washington argues that "[a]n entirely different situation is presented" here, because "[a] federal agency does not enter a consent

decree pursuant to a federal law authorizing contracting." ECF No. 137 at 2. But Washington's argument is not supported by the facts as described in *Chickaloon-Moose*.

In *Chickaloon-Moose* the court found that the Alaska Native Claims Settlement Act "extinguished all aboriginal title in Alaska and, in partial compensation, provided for Native villages to select specific acreages of land from the public domain." *Chickaloon-Moose*, 360 F.3d at 974. The Act "did not convey lands directly to village or regional corporations, but provided a method for accomplishing transfer," including withdrawing all available public lands near any Native Village, and permitting the villages to select acreages from the withdrawn land. *Id.* at 974-75. The Ninth Circuit noted that "[t]he selection process ran into difficulties" and resulted in the Native Villages filing a lawsuit against the Department of the Interior. *Id.* at 976.

In settling that lawsuit, the Department of the Interior entered into a consent decree with an Alaska Native regional corporation in order to "govern the conveyance of lands . . . ." *Id.* A later administrative appeal led to a second round of negotiations and produced a second consent decree, the subject of interpretation before the Ninth Circuit in *Chickaloon-Moose*. *Id.* at 977-78. Notably, the Department of the Interior did not enter into the consent decrees because the Alaska Native Claims Settlement Act expressly required or authorized it to do so.

See id. at 974-75. Instead, the parties voluntarily entered into the consent decrees in order to settle two legal actions pertaining to the Act. *Id.* at 976-78.

The facts of *Chickaloon-Moose* are comparable to the facts in this case. DOE, Washington, and Oregon entered into the Consent Decrees at issue to settle a lawsuit filed by Washington and Oregon against DOE. ECF Nos. 59 and 60. Washington and Oregon's lawsuit concerned DOE's compliance with a prior consent decree, the HFFACO. ECF No. 1. The HFFACO was entered in order to "ensure compliance with RCRA," a federal statue governing cleanup of hazardous waste. ECF No. 75 at 10; 42 U.S.C. § 6939c. After the RCRA was amended by FFCA, it explicitly required DOE to submit its mixed waste treatment plans to the states for approval, modification, or disapproval. 42 U.S.C. § 6939c; *see Chu*, 558 F.3d at 1041. The HFFACO "satisfied the requirement of a site treatment plan under 42 U.S.C. § 6939c(b)(1)(A)(ii)," although it was entered prior to the RCRA amendment. *Chu*, 558 F.3d at 1041.

Thus, the Consent Decrees at issue were entered into voluntarily to settle a lawsuit brought by Washington and Oregon to enforce DOE's compliance with a federal statute. This procedural history parallels the history in *Chickaloon-Moose* where the parties voluntarily entered into a consent decree to settle a lawsuit filed against the federal government regarding the government's implementation of a federal statute. Even though the federal government in *Chickaloon-Moose* entered into the consent decrees to settle litigation, the Ninth Circuit applied federal law

when interpreting those consent decrees stating that "federal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party." *Chickaloon-Moose*, 360 F.3d at 980. *Chickaloon-Moose* is binding precedent in this Court.

DOE also cites to *United States v. Seckinger*, 397 U.S. 203 (1970), to support its argument that the Court must apply federal common law when modifying the Consent Decrees. In *Seckinger*, the United States entered into a contract with a private contracting company to perform plumbing work at a marine base. *Seckinger*, 397 U.S. at 204. One of the contractor's employees was injured on the job. *Id.* at 204-05. The injured employee successfully sued the United States under the Federal Tort Claims Act. *Id.* Subsequently, the United States sued the contractor for indemnification, arguing that through a provision in the contract the contractor had accepted responsibility for all damages to persons that occur during the course of the contract as a result of the contractor's negligence. *Id.* The Supreme Court stated that federal law controlled the interpretation of the contract, because "the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution." *Id.* at 209-10. *Seckinger* is binding precedent in this Court.

Washington argues that *Seckinger* is distinguishable from the instant case because in *Seckinger* the United States entered into the plumbing contract "pursuant to specific federal laws authorizing federal government contracting to

carry out federal programs." ECF No. 137 at 1. However, the Supreme Court does not refer to a "specific federal law" that authorized the federal government to enter the contract at issue in *Seckinger*. *See Seckinger*, 397 at 209-10, n.13. Rather, the Court refers to a "statutory scheme" in which "Congress has provided extensive arrangements for the procurement, management, and disposal of government property." *Id.* The Supreme Court also cites to federal authority conferred by the Constitution to enter contracts. *Id.* at 209-10.

The Consent Decrees in this case arguably were entered into pursuant to specific federal laws authorizing the federal government to make contracts with states regarding the disposal of hazardous and nuclear waste. The RCRA requires DOE to submit its mixed waste treatment plans to the states for approval, modification, or disapproval, and the Ninth Circuit held that the first consent decree entered between the parties in this case, the HFFACO, satisfied this requirement. 42 U.S.C. § 6939c; *Chu*, 558 F.3d at 1041. The Consent Decrees now at issue are extensions of the HFFACO, intended to settle disputes over DOE's compliance with that decree, and ultimately the RCRA, a federal statute. Therefore, it is appropriate to apply federal, rather than state law, to modification of the Consent Decrees.

Washington also argues that the federal government lacks substantial interest in the application of federal law in this case. Washington argues without support that "[t]here is no specific federal statute, program or legislative objective

implicated," when the federal government enters into a consent decree to avoid litigation. ECF No. 137 at 2. Washington notes that federal programs implemented pursuant to "specific federal laws authorizing federal government contracting" "require national uniformity of application, including uniformity in contract interpretation," but contends that there is no need for national uniformity here. ECF No. 137 at 1.

The Court agrees that federal programs require national uniformity of application, but disagrees that this principle is inapplicable here. In addition to the two Consent Decrees at issue, DOE also has entered into consent decrees with four other states regarding cleanup of hazardous and nuclear waste within their borders. U.S. Gov't Accountability Office, GAO-11-230, DOE Nuclear Waste: Better Information Needed on Waste Storage at DOE Sites as a Result of Yucca Mountain Shutdown 9-10 (2011). All of these consent decrees were entered into pursuant to the federal government's obligations under the AEA, the RCRA, and the FFCA, and all would benefit from national uniformity in the law applied to their interpretation and modification.

DOE cites *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), in support of its argument that there are unique federal interests implicated in this case. ECF No. 136 at 5. *Boyle* addressed whether a federal contractor could be held liable under state tort law for injury caused by a design defect in the contractor's product. *Boyle*, 487 U.S. at 502. The Supreme Court discussed federal preemption of state

law and stated that "[i]n most fields of activity . . . this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, [ ] or a direct conflict between federal and state law . . . ." *Id.* at 504.

The Court noted that in areas involving "uniquely federal interest," "state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called 'federal common law.'" *Id.* The Court described one area of unique federal interest as that pertaining to the "obligations to and rights of the United States under its contracts." *Id.* The Court concluded that imposing liability on federal contractors would directly affect the terms of Government contracts, and in turn, directly affect the interests of the United States. *Id.* at 507.

Similarly, the Supreme Court stated in *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981), that "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States" among others. "In these instances, our federal system does not permit the controversy to be resolved under state law . . . because the authority and duties of the United States as sovereign are intimately involved . . . ." *Id. See Nat'l Audubon Soc. V. Dept. of Water*, 869 F.2d 1196, 1202 (9th Cir. 1989) (citing the same).

The facts and analysis of *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1989), are instructive. In *National Audubon Society*, the

Ninth Circuit considered an action by the Society against the Los Angeles Department of Water and Power alleging several claims including common law public and private nuisance. *Id.* at 1198. The court addressed whether air pollution was a uniquely federal interest. *Id.* at 1200. The court considered whether air pollution implicated "unique rights and obligations of the United States." *Id.* at 1202-04.

The *National Audubon Society* court analyzed *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604 (1973), and *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). In *Little Lake Misere*, the Supreme Court held that "in a setting in which the rights of the United States are at issue in a contract to which it is a party and the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program." *Little Lake Misere*, 412 U.S. at 604. Similarly, in *Clearfield Trust*, the Supreme Court held that "the rights and duties of the United States on commercial paper which the United States issues are governed by federal rather than local law." *Clearfield Trust*, 318 U.S. at 366. *National Audobon Society* noted the similarity in the two cases stating that their "controversies intimately involved the authority and duties of the United States as sovereign . . . therefore making application of anything but federal law inappropriate." *Nat'l Audubon Soc.*, 869 F.2d at 1203-04 (quoting *Texas Indus.*, 451 U.S. at 641).

In contrast, the Ninth Circuit distinguished air pollution from the interests implicated in *Little Lake Misere* and *Clearfield Trust* reasoning that "[a]lthough there might be some unquantified federal interest in protecting the nation's air quality, this type of interest does not necessarily involve the authority and duties of the United States as sovereign to the extent that our federal system requires . . . ." *Id.* at 1204. The Court noted that there was no conflict between the "alleged federal policies or interests that might be involved in this case and the use of California's common law of nuisance. *Id.* Additionally, the court concluded that air pollution "did not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Id.* (quoting *Texas Indus.*, 451 U.S. at 642).

In the statutes involved in this case, Congress clearly manifested federal interest in the management and disposition of radioactive nuclear waste, as well as concern that DOE was not adequately, and in a timely manner, cleaning up hazardous waste at its nuclear sites throughout the country. *Manning*, 527 F.3d at 832; 138 Cong. Rec. H9135-02 (daily ed. Sept. 23, 1992) (statement of Rep. Dingell). Congress passed federal legislation to govern the regulation and cleanup of radioactive and hazardous waste, which is the basis for the HFFACO or the Consent Decrees. The Consent Decrees at issue in this case implicate federal statutes and interests.

Like the federal interests implicated in *Little Lake Misere* and *Clearfield Trust*, the Consent Decrees in this case directly affect the rights and duties of the United States. They impose obligations on DOE as well as delineate certain legal rights retained by DOE. Any interpretation or modification of the Consent Decrees will directly affect the interests of the United States concerning its duties, obligations, and rights.

Federal law applies when modifying a consent decree under Federal Rule of Civil Procedure 60(b)(5) and federal law applies to the modification of these Consent Decrees because they were executed pursuant to federal law and directly affect the obligations and rights of the United States. Therefore, the Court will apply federal common law when determining whether to modify the Consent Decrees. The Court will consider extrinsic evidence only if the terms of the Consent Decrees are ambiguous. *Asarco*, 430 F.3d at 980-81.

C. DOE's Burden Under *Rufo*

i. DOE's Alleged Significant Changes in Factual Conditions

DOE argues that "significant and persistent technical obstacles" and "funding restrictions" constitute qualifying significant factual changes since the Consent Decree was entered in 2010. ECF No. 76 at 35; 37-46. Regarding the WTP Project, DOE cites five primary technical concerns: (1) preventing potential hydrogen build-up; (2) preventing criticality, which is the build-up of plutonium particles; (3) ensuring control of the pulse jet mixers; (4) protecting against

possible erosion and corrosion of the system parts; and (5) ensuring ventilation balancing to protect workers once the WTP is operational. ECF No. 76 at 22-24.

With regard to tank retrievals and the LAW Facility, DOE states that it has experienced "funding constraints and technical obstacles" that constitute qualifying significant changes in factual conditions. DOE argues that "sequestration, continuing resolutions, and . . . misaligned appropriations" delayed construction on the LAW Facility and caused trained tank retrieval workers to be replaced with more senior workers with little or no retrieval experience. ECF No. 76 at 44-45, 48.

DOE also alleges technical difficulties with the tank retrieval process, specifically that the tank farm contractor notified DOE of a concern that "accumulated sludge above a certain height in the double-shell tanks could lead to a significant hydrogen release and a potential explosion." ECF No. 76 at 45. DOE investigated and limited the sludge height in the DSTs, which slowed the tank retrieval process. ECF No. 76 at 45. DOE also experienced equipment failure in the "sluicing equipment it was putting in place to begin the retrieval of tank C-111," which prevented DOE from retrieving that tank by the September 30, 2014, deadline. ECF No. 76 at 45.

ii. Whether DOE's Cited Conditions Were Actually Anticipated

DOE admits to having anticipated the first four of the five major technical issues, but contends that resolution of these issues has been impeded by

"unanticipated complexities in the methods available to confirm that the design of the WTP equipment and processes will operate in conformance with nuclear-safety requirements." ECF No. 76 at 24. In other words, DOE claims that it did not anticipate that the testing process necessary to resolve the first four technical obstacles would be so complex. DOE states that it must now initiate "full-scale testing of the vessels," as opposed to its initial plan to conduct "small-scale testing," and DOE expects that full-scale testing will take at least three years, which was not "contemplated" when the Consent Decree was entered in 2010. ECF No. 76 at 24-25. The fifth technical issue that pertains to ventilation balancing apparently came to DOE's attention in 2013 when a design review indicated problems in the HLW Facility. ECF No. 76 at 24, 41.

When determining whether a moving party actually anticipated the cited changed factual conditions, the Court looks to the four corners of the Consent Decree and only considers extrinsic evidence if the Consent Decree's terms are ambiguous. *Asarco*, 430 F.3d at 972. DOE's admission that it anticipated four of the five changed conditions is extrinsic evidence which the Court may not consider unless the Consent Decree's terms are ambiguous. Therefore, the Court looks to the four corners of the Consent Decree to determine whether DOE actually anticipated any of the changed conditions that it now cites as a basis for modification.

a. Technical Concerns Affecting the WTP

DOE alleges specific technical concerns regarding the design of the WTP as changed conditions. The Consent Decree does not refer to the five specific technical issues that DOE cites: "hydrogen build-up"; "criticality"; "pulse jet mixers"; "erosion and corrosion"; or "ventilation balancing." *See* ECF No. 59.

The terms of the Consent Decree show that DOE anticipated confronting unforeseen technical and safety concerns. For example, in Section VI of the Consent Decree, the parties expressly anticipated "unforeseen technological and logistical difficulties," and intentionally negotiated for joint three year reviews of the Consent Decree milestones in order to discuss such difficulties and consider appropriate modifications. ECF No. 59, § VI. The Consent Decree further states that "Both parties to this Consent Decree understand that to develop this schedule, assumptions had to be made about a broad range of circumstances and events including unforeseen circumstances that might arise which could affect the schedule." ECF No. 59, § VII.D.2. The Consent Decree lists the "general types of circumstances and events that may give rise to 'good cause'" to amend, including: "requirement changes and unknown technical obstacles . . . ." ECF No. 59, § VII.D.3.

Section VII.F pertains exclusively to unforeseen safety concerns that may affect the milestone schedule and details the process for amending the schedule. ECF No. 59, § VII.F. Similarly, Section VII.D.2 lists "safety concerns" as a

potential circumstance that may constitute good cause for amendment. ECF No. 59, § VII.D.2. Appendix A, which details the milestone schedule for the WTP, states that the milestone schedule "raises concerns about a broad range of circumstances and events, including unforeseen circumstances." ECF No. 59, Appendix A.

In addition to references to potential "unforeseen circumstances," the Consent Decree also contains a "non-exhaustive" list of some of these concerns, identifying specific technical issues that DOE did actually anticipate, including: "achieving the Maximum Achievable Control Technology standards during performance testing, difficulties in adoption of laser ablation technologies resulting in extended sample turn-around times, integrated control software obsolescence, [and] formation of hazardous mercury compounds in the evaporators . . . ." ECF No. 59, Appendix A.2.B. The Consent Decree terms are not ambiguous, and the Court will not consider extrinsic evidence.

The Consent Decree lists specific technical issues that DOE actually anticipated at the time that it entered the Consent Decree, but none of those specific issues is the same as those that DOE now cites as the basis for modification. The fact that DOE anticipated that unforeseen technical or safety issues would arise does not mean that DOE actually anticipated the specific changed factual conditions that DOE now cites. The five cited technical problems

may have been foreseeable, but there is nothing in the Consent Decree to indicate that DOE actually anticipated the technical and safety concerns affecting the WTP.

Washington argues that the technical issues that DOE cites as changed circumstances were "directly within Energy's knowledge and control." ECF No. 102 at 14, n.13. However, this argument misstates the standard, which does not require a showing of whether the moving party could have foreseen the changed conditions, but whether the moving party actually anticipated the changed conditions. *Rufo*, 502 U.S. at 385. The Consent Decree terms are unambiguous that DOE did not actually anticipate the five technical issues that it now cites as significant changed factual conditions.

b. Funding and Manpower Issues Affecting Tank Retrievals

DOE contends that sequestration and furlough reduced its budget and experienced manpower, stunting its ability to retrieve SSTs according to the Consent Decree's milestone schedule. ECF No. 76 at 44-45, 48.

The Consent Decree terms are arguably ambiguous on this point. The Consent Decree reflects that the parties anticipated the possibility that milestone performance might be delayed by "regulatory actions/inactions" or "labor shortages." ECF No. 59, § VII.D.3. Similarly, the parties agreed that "Government shutdown or a government- or agency-wide prohibition of work by essential or non-essential personnel" constituted a force majeure event warranting amendment. ECF No. 59, § VII.E.6. The parties agreed to utilize the Consent

Decree's amendment procedures "[i]f DOE asserts that appropriated funds necessary to fulfill an obligation under this Decree are not available . . . ." ECF No. 59, § VIII.

Although the Consent Decree lists specific examples of regulatory or staffing related delays, it does not specifically state that sequestration and furlough are anticipated. *See* ECF No. 59, Appendix A.2.f. Washington argues that DOE did actually anticipate sequestration, because "Energy has extensive experience with equipment failure, technical issues, and funding problems," and that, therefore, "[a]ll of these circumstances were anticipated." ECF No. 102 at 43. But Washington fails to cite to any provision in the Consent Decree that reflects that DOE actually anticipated sequestration or furlough.

Thus, the Court finds that the Consent Decree is ambiguous as to whether DOE actually anticipated sequestration and furlough, and the effects that those events would have on DOE's ability to meet the milestone schedule contained in the Consent Decree. Therefore, the Court will consider extrinsic evidence on this question.

In support of its argument that DOE actually anticipated funding shortages, Washington provides a Declaration by Jeffrey Lyon, a Tank Waste Storage Specialist in Washington's Department of Ecology Nuclear Waste Program. ECF Nos. 84 and 105. Mr. Lyon contends that DOE is behind schedule not because of unanticipated circumstances outside of its control, but because it failed to initiate

tank retrievals early enough to accommodate any delays caused by "reasonably expected" issues. ECF No. 105 at 3. Mr. Lyon further states that "due to its experience with obstacles and delays encountered over the years of retrieval operations in the tank farms, Energy has no basis for complaining that equipment failure, funding problems, and technical concerns caught it by surprise." ECF No. 105 at 4-5. In the same declaration, Mr. Lyons labels funding problems as "well known" and accuses DOE of failing to apply lessons from past failures. ECF No. 105 at 7-8.

Mr. Lyon's arguments are irrelevant to the question of whether DOE actually anticipated sequestration and furlough. Rather than pointing to any concrete evidence showing that DOE did actually anticipate the funding problems and staff shortages that it suffered as a result of sequestration and furlough, Washington argues that funding problems were reasonably foreseeable and that DOE is to blame for having failed to anticipate those issues. But the standard is not whether the changed conditions were foreseeable. *Rufo*, 502 U.S. at 385. The standard is whether the moving party actually anticipated those conditions, and Washington has failed to provide any persuasive evidence that DOE actually anticipated sequestration and furlough. Therefore, the Court finds that DOE did not actually anticipate the funding and manpower issues affecting tank retrieval that it now cites as changed circumstances.

c. Technical Difficulties and Equipment Failures Affecting Tank Retrievals

DOE cites two changed factual conditions with regard to tank retrievals: (1) a recent concern that "accumulated sludge above a certain height in the double-shell tanks could lead to a significant hydrogen release and a potential explosion"; and (2) equipment failure in the "sluicing equipment [DOE] was putting in place to begin the retrieval of tank C-111," which prevented DOE from retrieving that tank by the September 30, 2014, deadline. ECF No. 76 at 45. Again, the Court looks to the four corners of the Consent Decree to determine whether DOE actually anticipated these changed conditions.

The Consent Decree refers to "equipment failures" and "safety concerns" as circumstances or events that might provide good cause for amendment of the Consent Decree. ECF No. 59, § VII.D.3. Additionally, the Consent Decree provides a non-exhaustive list of potential "unforeseen safety concerns" and technical obstacles that may affect tank retrievals including: "unknown physical, chemical, and radiological characteristics present in the wastes; differences between the assumed and actual configurations of the tanks and tank farms; changes to the hazardous waste management requirements; and significant changes in the nature and extent of assumed environmental contamination." ECF No. 59, Appendix B.2.b. None of these identified potential issues includes a concern about the sludge height in the DSTs. The Consent Decree also lists foreseeable equipment failures including "failures in the Single-shell Tank waste retrieval

systems, tank farms, and supporting infrastructure . . . ," ECF No. 59, Appendix B.2.c, but the Consent Decree does not specifically state that the sluicing equipment for a tank may fail.

The Consent Decree terms identify certain conditions and not others. None of the changed conditions concerning equipment failures that DOE cites now are specifically identified in the Consent Decree terms. The Court recognizes the incongruity of determining whether DOE actually anticipated a specific condition when it is evident from the Consent Decree's terms that the parties foresaw the general possibility that technical, safety, or equipment issues may arise. Yet the Court would be disregarding the clear language of the Consent Decree if it were to define the standard more broadly and conclude that DOE actually anticipated the conditions that it now cites as bases for modification because DOE anticipated categories of some unknown and unforeseen issues.

The Consent Decree terms are unambiguous, and the Court will not consider extrinsic evidence. The Court finds that DOE did not actually anticipate the technical difficulties and equipment failure regarding tank retrievals that it now cites as a basis for modification.[9]

[9] Washington argues that DOE actually anticipated all of the conditions that it argues warrant modification, and therefore contends that DOE must meet the heavy burden to show the Court that it agreed to the Consent Decree milestones in "good faith," and that it "made a reasonable effort to comply with the decree."

iii. Whether the Cited Conditions Make Compliance with the Consent Decree More Onerous, Unworkable, or Detrimental to the Public Interest

DOE submits that the technical issues have made the Consent Decree milestones unworkable and detrimental to the public interest. ECF No. 76 at 49. Construction on both the Pretreatment System and the HLW Facility has been completely halted, rendering deadlines pertaining to those facilities unworkable. DOE argues that resuming construction prior to the resolution of the technical issues would be unsafe, and thus detrimental to the public interest. ECF No. 76 at 49-50.

The Court agrees that DOE's delay in accomplishing the Consent Decree's current milestone schedule makes the current deadlines unworkable and detrimental to the public interest. The technical issues currently delaying construction of the Pretreatment System and the HLW Facility appear to support the conclusion that the design plan requiring that all five major facilities begin operating simultaneously is no longer be in the public interest. Instead, the parties propose implementing a new design plan in which DOE will begin treating LAW prior to the completion of the Pretreatment System and the HLW Facility. Both parties argue that a plan that enables DOE to move forward with treating some

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ECF No. 102 at 15, n.13 (quoting *Asarco*, 430 F.3d at 984). Because the Court finds that DOE did not actually anticipate its cited conditions, the Court will not require DOE to meet the heavy burden standard required by *Rufo*.

waste while resolving the remaining technical issues promotes the public interest more than delaying all waste treatment pending resolution of the problem issues.

The Court finds that DOE has met its burden with respect to the first three elements of the *Rufo* test. DOE has shown that the technical issues affecting the design of the WTP, the funding and manpower issues, and the technical difficulties and equipment failures affecting the tank retrievals, are significant changes in factual conditions which DOE did not actually anticipateat the time that the Consent Decree was entered and which render the Consent Decree milestones unworkable and detrimental to the public interest.

D. Washington's Burden Under *Rufo*

i. Washington's Significant Changes in Factual Conditions

Washington maintains that DOE's non-compliance with the Consent Decree milestones constitutes a significant change in factual circumstances that was unanticipated at the time that the Consent Decree was entered. ECF No. 75 at 48. Washington alleges that DOE refused to give Washington sufficient information regarding "at risk" milestones and made plans consistent with a determination not to comply with the Consent Decree without Washington's approval. ECF No. 75 at 21-23.

Washington also notes that at least fourteen of the pending sixteen milestones are "at risk" and draws the Court's attention to new tank issues: one DST is out of service due to an internal leak, and one SST is actively leaking. ECF

No. 75 at 28-29. Washington alleges that the WTP project is plagued with mismanagement and "outright project dysfunction," which Washington argues warrants modifying the Consent Decree to contain "more specificity, accountability, and enforceability."[10] ECF No. 75 at 32-36. Washington also contends that events since the Consent Decree was entered in 2010 demonstrate "gaps" in the Consent Decree's terms that should be modified. ECF No. 75 at 37-42.[11]

[10] Washington admits in its briefing that it knew about alleged patterns of mismanagement before the Consent Decree was entered. ECF No. 75 at 15. However, the Court will not consider this extrinsic evidence, including Washington's admissions, unless the Court finds that the Consent Decree terms are ambiguous.

[11] DOE contests Washington's accusations that it abandoned efforts to meet Consent Decree milestones or that it failed to adequately involve Washington. ECF No. 106 at 12-14. DOE also argues that it did not make plans consistent with a determination not to comply with the Consent Decree without Washington's approval. Rather, DOE states that it instructed its contractor to initiate planning and design for Direct Feed LAW in order to "assess this new approach." ECF No. 106 at 13. However, DOE acknowledges that the majority of the milestones are "at risk" and does not deny Washington's allegations regarding the two leaking tanks. ECF Nos. 76 and 106.

First, the Court considers whether the terms of the Consent Decree are ambiguous on whether Washington actually anticipated any of these conditions or whether the Court should consider extrinsic evidence.

ii. Whether Washington's Cited Conditions Were Actually Anticipated

a. Quantity of "At Risk" Milestones

Washington contends that it did not anticipate the quantity of milestones that DOE would fail to meet, specifically that fourteen of sixteen pending milestones would be "at risk" at one time. ECF No. 75 at 28-29. However, it is evident from the terms in the Consent Decree that Washington anticipated that DOE would fail to meet some milestones. The Consent Decree terms record a history of DOE's falling behind schedule and note the potential that the failure to meet one milestone might affect other milestones, requiring a modification of the Consent Decree's schedule. The Introduction states that DOE previously received several schedule extensions to the deadlines specified in the HFFACO, that DOE is currently behind schedule on construction of the WTP and waste retrievals, and that DOE requires additional time to perform beyond the amount allotted in the HFFACO. ECF No. 59, § I.

The Consent Decree also requires DOE to submit semi-annual reports to Washington in which it provides a "definitive statement describing whether or not DOE has complied with milestones that have already come due as of the date of the report, and how many missed milestones may affect compliance with other

milestones." ECF No. 59, § IV.C.1.b. The Consent Decree requires DOE to notify Washington if it "determines that a serious risk has arisen that DOE may be unable to meet a schedule . . . ." ECF No. 59, § IV.C.3. In "Joint Three Year Reviews," the parties are required to meet to "address any schedule changes, describe unforeseen technological and logistical difficulties, and explain any good cause reasons for modifications." ECF No. 59, § VI.

If a modification is necessary, the Consent Decree sets forth a detailed, step-by-step amendment process including the standard a moving party must meet to justify amendment. ECF No. 59, § VII. Both parties "understand that to develop this schedule, assumptions had to be made about a broad range of circumstances and events including unforeseen circumstances that might arise which could affect the schedule." ECF No. 59, § VII.D.2. The Consent Decree states: "It is possible that circumstances and events will arise whose effect on the schedule exceeds an allowance for uncertainty beyond what is now intended in the schedule." ECF No. 59, § VII.D.2.

The Consent Decree notes that unforeseen safety concerns, technical issues, equipment failures, regulatory actions or inactions, force majeure events, staffing issues, funding restrictions, delivery delays, and significant changes in the nature or extent of assumed environmental contamination all may affect DOE's ability to meet the milestone schedule and require a modification. ECF No. 59.

The Consent Decree includes numerous terms that support the conclusion that Washington actually anticipated DOE's failure to meet the milestone deadlines. There is no ambiguity in the Consent Decree's terms, and the Court will not consider extrinsic evidence on this issue. However, there is no evidence within the four corners of the Consent Decree that Washington actually anticipated that DOE would fall behind schedule as extensively as it has.

In *Hook v. Arizona*, the Ninth Circuit held that a district court abused its discretion in failing to modify the terms of a consent decree based on the government's representation that it had anticipated an increase in the prison population, but had not anticipated the extent of that increase. *Hook v. Arizona*, 120 F.3d 921, 924-25 (9th Cir. 1997). In just over twenty years, the prison population in Arizona had increased from 1,759 prisoners to over 19,500. *Id.* at 924. The court stated that "[c]ertainly, the Department anticipated an increase in the prison population. However, there is no evidence which suggests that, at the time the Department entered into the decree, it foresaw the explosion in the number of incarcerated prisoners . . . ." *Id.*

Similarly, there is no evidence within the Consent Decree suggesting that Washington anticipated that DOE would fail to meet fourteen out of sixteen milestones this early in the schedule. Therefore, the Court finds that the extent to which DOE has failed to comply with the schedule in the Consent Decree is a changed condition that Washington had not actually anticipated.

b. DOE's Unilateral Cessation of WTP Construction

DOE "suspended" design and construction of the PT and HLW Facilities in August of 2012, allegedly due to "nuclear-safety concerns." ECF No. 76 at 49. Washington argues that as early as February 2012, DOE already was intending not to comply with certain Consent Decree requirements, because DOE allegedly instructed its contractor to develop a new WTP baseline that assumed annual funding caps and an extension of the schedule. ECF No. 75 at 22-23. DOE did not deliver a proposal to amend the Consent Decree until eighteen months later, on March 31, 2014. ECF No. 76 at 28.

The Consent Decree contains no mention of a unilateral cessation of construction or work to be performed under the milestone schedule. *See* ECF No. 59. Instead, the Consent Decree assumes that any technical or safety concerns requiring an extension or modification of the schedule would be disclosed to Washington in one of the required reports, either semi-annual, monthly, or serious risk reports, and that if DOE required a schedule modification, DOE would initiate the amendment process. *See* ECF No. 59. DOE does not contest that it took unilateral action to completely stop design and construction activities at the WTP, and then waited a year and a half before initiating the Consent Decree's amendment process.

The terms of the Consent Decree are not ambiguous on this issue, and the Court will not consider extrinsic evidence. The Court finds that nothing in the

Consent Decree indicates that Washington actually anticipated this kind of non-compliance by DOE with the Consent Decree's terms. Therefore, DOE's failure to comply with the schedule is a changed condition.

c. Leaks Affecting Tank Retrievals

Washington and Oregon contend that one DST is out of service due to an internal leak, and one SST is actively leaking. ECF No. 75 at 28-29; ECF No. 99 at 4, 18. The Consent Decree requires DOE to select nine SSTs to retrieve by December 31, 2022, and it sets forth a selection criteria that addresses "tanks that pose a high risk due to tank contents, previous leaks, or the risk of future leaks." ECF No. 59, § IV.B.3. DOE must submit a Tank Waste Retrieval Work Plan ("TWRWP") for each SST it intends to retrieve, which includes "leak detection monitoring and mitigation plan," a "pre-retrieval risk assessment of potential residues, consideration of past leaks, and potential leaks during retrieval," "long-term human health risks associated with potential leaks during retrieval," and "process management responses to a leak during retrieval and estimated potential leak volume." ECF No. 59, Appendix C. It is evident from the inclusions of these requirements that Washington actually anticipated that an SST would leak.

The Consent Decree does not include terms about the potential of a DST leaking. *See* ECF No. 59. However, the Consent Decree does state that "[d]uring WTP start-up and operations, failures in the Site infrastructure (e.g., Double-shell Tank system . . .) may occur." ECF No. 59, Appendix A.2.c. The Consent Decree

does not explain what constitutes a "failure" in the Double-shell Tank system, and therefore is ambiguous as to what Washington actually anticipated would occur. Because the terms are ambiguous, the Court will consider extrinsic evidence regarding whether Washington actually anticipated that a DST would leak.

There is no evidence that any other DSTs have ever leaked. The DST that is actively leaking was one of Hanford's first DSTs. However, many of the SSTs have leaked over the last several decades, a fact that was well-known to Washington when it entered into the Consent Decree. ECF No. 75. On the other hand, the Consent Decree intentionally created a plan to transfer waste from the SSTs to the DSTs because the DSTs were believed to be more stable and capable of storing the waste for a longer period of time without leaking. The Court finds that although it may have been foreseeable that a DST might leak, Washington did not actually anticipate that a DST would leak, which is a changed condition.

iii. Whether the Cited Conditions Make Compliance with the Consent Decree More Onerous, Unworkable, or Detrimental to the Public Interest

DOE's missed deadlines and conduct in unilaterally stopping design and construction work on the WTP is detrimental to the public interest because it effectively disregards the oversight that the parties built into the Consent Decree to ensure that DOE maintains its end of the bargain to build and begin initial operations of the WTP. The fact that one DST is out of service due to an internal leak makes compliance with the Consent Decree more onerous, because it limits

the storage capacity available for waste retrieved from the SSTs. This limitation likely will slow the tank retrieval process, which is detrimental to the public interest by exposing the public to more waste over a longer period of time.

The Court notes that "[t]he failure of substantial compliance with the terms of a consent decree can qualify as a significant change in circumstances that would justify the decree's temporal extension." *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1120-21 (citing *Thompson*, 404 F.3d at 828-29). Although DOE has met five milestone deadlines, ECF No. 76-2 at 24-26, DOE has missed at least two deadlines, which remain uncompleted, and fourteen remaining milestones that are "at risk" of being missed. ECF No. 76-2 at 19-24.

The Court finds that Washington has met its burden with respect to the first three elements of the *Rufo* test. The Court finds that the quantity of at-risk milestones, the missed deadlines, DOE's unilateral cessation of the WTP construction, and the leaking DST affecting tank retrievals make the current Consent Decree unworkable and detrimental to the public interest and constitute changed conditions under *Rufo*.[12]

[12] "Our analysis requires we do more than simply count the number of technical deviations from the decree." *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1122. The five milestones that DOE has met are not major milestones in terms of the Consent Decree's ultimate purpose to create a waste treatment facility and remove nineteen SSTs. Construction on two of the five primary facilities comprising the WTP has

E. Oregon's Burden under *Rufo*

i. Oregon's Significant Changes in Factual Conditions

Oregon states that it is appropriate to amend its Consent Decree with DOE "based on the missed deadlines and Oregon's experience of DOE's belated communications that either lack information altogether or are vague and conceptual." ECF No. 99 at 22.

ii. Whether Oregon's Cited Conditions Were Actually Anticipated

Oregon's Consent Decree, entered into on the same day as Washington's, states clearly that it is "separate" from Washington's Consent Decree. ECF No. 60 at 1. Nevertheless, Oregon's Consent Decree similarly anticipates that DOE will fail to meet milestone deadlines and requires that DOE report to Oregon in its semi-annual and "serious risk" reports. ECF No. 60. For the same reasons as stated above, the Court concludes that Oregon actually anticipated that DOE would miss milestone deadlines established in the Washington Decree, but not to the extent that has occurred.

Oregon also argues that it took DOE "over two years" to propose amendments to the Consent Decrees, despite a requirement in Washington's Consent Decree that DOE submit a request for amendment "as expeditiously as

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ceased completely pending the resolution of technical issues. By any definition, DOE's progress at Hanford constitutes a failure of substantial compliance with the terms of the Consent Decree.

practicable within a reasonable time from when the party learns that underlying facts give rise to the need for a schedule amendment." ECF No. 99 at 10 (quoting ECF No. 59 at 12).

The Court finds that the terms of the Oregon Consent Decree are not ambiguous, and the Court will not consider extrinsic evidence. As discussed above, the Court finds that nothing in Oregon's Consent Decree indicates that Oregon actually anticipated that DOE would fail to meet the schedule as extensively as has occurred, or that DOE would take unilateral action to cease design and construction of the WTP and then wait eighteen months before proposing Consent Decree amendments.

Therefore, the Court finds that Oregon did not actually anticipate DOE's failure to meet the schedule or propose amendments as required, both of which are changed conditions.

Oregon also alleges that DOE has failed to communicate as required, and that "DOE has shirked its existing obligations to provide timely information to each state through notices, reporting, and three-year review meetings." ECF No. 99 at 4. Oregon contends that DOE provided scant information regarding missed milestones when it submitted its required reports. ECF No. 99 at 9-10. Oregon objects that when DOE provided notice that a milestone was at risk of not being met, it did not provide any additional information regarding why or how the milestone had come to be at risk. ECF No. 99 at 9-10. However, the terms of the

Oregon Consent Decree do not require more specific information than what DOE provided. ECF No. 60 at 3; *see* ECF No. 99.

The terms of the Consent Decree are unambiguous that DOE need only notify Oregon if it "determines that a serious risk has arisen that [it] may be unable to meet a schedule as required in Section IV of the Consent Decree entered in this case between DOE and Ecology . . . ." ECF No. 60 at 3. That is exactly what DOE provided. Thus, Oregon actually anticipated that DOE would do exactly what it did. DOE's failure to provide more information than the Consent Decree required is not an unanticipated changed factual condition.

iii. Whether the Cited Conditions Make Compliance with the Consent Decree More Onerous, Unworkable, or Detrimental to the Public Interest

For the same reasons that were discussed with regard to Washington's Consent Decree, the Court finds that the quantity of at-risk milestones, the missed deadlines, and DOE's unilateral cessation of the WTP construction, and delay of eighteen months before DOE's proposing Consent Decree modifications, are detrimental to the public interest and are changed conditions under *Rufo*. The Court finds that Oregon has met its burden with respect to the first three elements of the *Rufo* test.

F. Whether the Parties' Proposals are Suitably Tailored

The Court will next consider whether each party's respective modification proposal is suitably tailored to "resolve the problems created by the change in

circumstances" that were unanticipated by the moving party. *Rufo*, 502 U.S. at 391. In order to determine whether each proposal is suitably tailored, the Court will consider evidence regarding the scientific or technical suitability of each proposed amendment.

In addition to considering extrinsic evidence regarding the scientific or technical suitably of the proposed amendments, Washington asks the Court to consider extrinsic evidence on the issue of whether a party's proposed modification will place the parties where they would have been had the Consent Decree terms been fulfilled. *Rufo* states that apart from ensuring that a modification proposal is suitably tailored to "resolve the problems created by the change in circumstances," "[a] court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Rufo*, 502 U.S. at 391.

Arguably, if a modification proposal does not restore the parties to where they would have been had the Consent Decree terms been fulfilled, then it is not resolving the problems created by the changed circumstances. On the other hand, in asking the Court to consider the benefit of the bargain, Washington is asking the Court to consider extrinsic evidence regarding the settlement process and what Washington believed it was receiving in exchange for entering into the Consent Decree.

The Supreme Court has considered and rejected similar arguments to consider the overall objective or purpose of a consent decree when interpreting its

terms. *Hughes v. United States*, 342 U.S. 353, 356-57 (1952); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959). Similarly, *Rufo* states that when determining whether a proposed modification is suitably tailored, "[t]he court should not 'turn aside to inquire whether some of the provisions of the decree upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition." *Id.* at 391-92 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 116-17 (1932)).

A consent decree is a product of compromise and "embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Armour*, 402 U.S. at 681-82. "[T]he instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Id.*

Therefore, the Court declines to consider extrinsic evidence on the issue of whether the parties' proposed modifications will place them where they would have been had the Consent Decree terms been fulfilled, but will consider whether the proposed modifications are "suitably tailored to resolve the problems created by the changed . . . conditions." *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1120 (quoting *Asarco*, 430 F.3d at 979); *see Rufo*, 502 U.S. at 383-93.

Accordingly, **IT IS HEREBY ORDERED**:

1. The Court will schedule a telephonic conference to hear whether the parties request oral argument on whether each party's proposed modifications are

"suitably tailored" and whether the parties anticipate calling witnesses at an evidentiary hearing.

2. The parties may submit any supplemental supporting materials regarding the suitability of their proposals no later than **May 22, 2015**.

The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED this 11th day of May 2015.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge