

1 AUSTIN D. SAYLOR
2 Environmental Defense Section
3 Environment & Natural Resources Division
4 United States Department of Justice
5 P.O. Box 7611
6 Washington, D.C. 20044
7 (202) 598-7867

8 *ATTORNEY FOR DEFENDANTS*

9 *(Additional counsel listed on signature*
10 *page)*

11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF WASHINGTON**

13 STATE OF WASHINGTON,
14 DEPARTMENT OF ECOLOGY,

15 Plaintiff,

16 v.

17 JENNIFER GRANHOLM,
18 Secretary of the United States
19 Department of Energy, and the
20 UNITED STATES DEPARTMENT
21 OF ENERGY,

22 Defendants.

NO. 2:08-cv-5085-RMP

UNOPPOSED MOTION TO
ENTER CONSENT DECREE
MILESTONE EXTENSIONS

07/25/2022
Without Oral Argument

1 Defendants Jennifer L. Granholm, Secretary of the United States
2 Department of Energy,¹ and the United States Department of Energy
3 (collectively, “DOE”), submits this unopposed motion seeking entry of five
4 extended milestone dates in the Amended Consent Decree, entered by this Court
5 on March 11, 2016. ECF No. 222. The extensions accord with the method
6 approved by the Court on December 10, 2020, *see* ECF No. 251, to offset the
7 impacts of work interruptions at the Hanford Site caused by the coronavirus
8 pandemic. The milestone extensions we request in this unopposed motion
9 reflect the conclusion of Phase 2 of the remobilization process at Hanford on
10 March 13, 2022. DOE respectfully requests that the Court sign the
11 accompanying Stipulation and Proposed Order to incorporate into the Consent
12 Decree the extended dates for the five milestones affected by the coronavirus
13 *force majeure* event.² Plaintiff the State of Washington, Department of Ecology
14 (“State”), has reviewed and consented to the text and entry of the Stipulation and
15 Proposed Order.

16
17
18 ¹ Pursuant to Fed. R. Civ. P. 25(d), Secretary Granholm is automatically
19 substituted for former Secretary Dan Brouillette.

20 ² To the extent that the United States Department of Energy (“DOE”) may need
21 to seek any further milestone extensions or other Consent Decree modifications
22 due to additional or new impacts associated with this *force majeure* event, DOE
23 will propose any such modifications in accordance with the process specified in
24 Section VII.E of the Decree.
25
26

1
2 **BACKGROUND**

3 The Court entered a Consent Decree between DOE and the State in this
4 matter on October 25, 2010. ECF No. 59. Following contested proposals to
5 modify numerous aspects of that original Decree, the Court issued an Amended
6 Consent Decree on March 11, 2016. ECF No. 222. The Court has entered
7 subsequent amendments to the Decree upon joint motions, including in October
8 2018 to extend two milestones for the retrieval of waste from specified single-
9 shell tanks. See ECF Nos. 232, 242. The Court entered the most recent
10 modifications to the Amended Consent Decree in December 2020, when it
11 granted the Parties’ joint motion to address an undisputed *force majeure* event:
12 the coronavirus pandemic. See ECF No. 251.

13 Earlier that year, on March 23, 2020, the Hanford Site shifted to an
14 “essential mission critical operations” posture in recognition of increasing health
15 and safety concerns associated with the pandemic. On May 21, 2020, DOE
16 submitted to the State a proposal under Section VII of the Amended Consent
17 Decree to modify the Decree by extending affected milestones by one day for
18 each day of pandemic-related work interruptions, with new milestone dates to be
19 identified within a reasonable time after such impacts were no longer delaying
20 work. DOE proposed to calculate that period after-the-fact (*i.e.*, following a full
21 return to normal Site operations), when the agency expected to have a better
22 understanding of the schedule impacts caused by this significant, long-duration
23 *force majeure* event. In dispute resolution, however, the Parties sought to
24 identify a reasonable method for estimating up-front an extension that would
25 offset *force majeure* impacts based on best available information. The Parties
26

1 agreed that reference to the phases described in the Hanford Site Remobilization
2 Plan was a reasonable way to accomplish that goal.

3 In December 2020, the Parties filed a joint motion to modify the Decree
4 by identifying (1) five milestones impacted by the pandemic, and (2) a method
5 for calculating milestone extensions to offset pandemic-related work
6 interruptions occurring between March 23, 2020, and the end of Phase 2 of
7 Hanford Site Remobilization Plan. ECF No. 250. The Parties agreed that their
8 proposed resolution was the most efficient way to address ongoing impacts with
9 an as-yet-unknown conclusion. ECF No. 250-1 at 3. The Court entered those
10 proposed modifications on December 10, 2020. ECF No. 251. On March 13,
11 2022, the Hanford Site entered into its latest phase of remobilization, marking
12 the conclusion of the period covered by the Court-approved milestone extension
13 agreement. *See id.* at 3. The milestone extensions identified in this joint motion
14 were calculated according to the Court’s prior approval of a day-for-day
15 extension during the initial of the work interruptions (i.e., 160 days between
16 March 23, 2020, and August 31, 2020), combined with a three-quarters of a day-
17 for-day extension during the most recent phase of Hanford remobilization (i.e.,
18 419 days between August 31, 2020, and March 13, 2022).³

19
20
21
22
23
24
25 ³ Three-quarters of a day for each day between August 31, 2020 and March 13,
26 2022 sums to 419.25 days, but for purposes of this joint motion the Parties have
agreed to round that number to the nearest whole, 419.

DISCUSSION

I. The Court-Approved Method for Calculating the Length of Time Appropriate to Offset Estimated *Force Majeure* Impacts Yields a 579-Day Extension of the Affected Milestones.

The Decree “may be amended by mutual agreement of the State and DOE upon approval by the Court.” ECF No. 59 at 11 (CD Section VII.A.1). Section VII.E of the Decree establishes a presumption in favor of entry of *force majeure*-based amendments, including schedule extensions that “shall be equal to the number of days during which work is interrupted.” Here, the Parties previously reached agreement on a set of amendments to address work interruptions caused by undisputed *force majeure* event: the COVID-19 pandemic. The Court approved the proposed amendments in December 2020, thereby incorporating into the Decree the Parties’ agreed method for calculating schedule extensions appropriate to offset these *force majeure* work interruptions. The Parties stipulated that after the end of Phase 2, they would seek entry of the specific new milestone dates according to the method prescribed in the 2020 amendments to the Decree. *See* ECF No. 251 at 3. That is the relief DOE is now requesting in this unopposed motion.

As summarized above, the Parties agreed to a day-for-day schedule extension for the period between March 23, 2020 and August 30, 2020, which is 160 days. During Phase 2, which began on August 31, 2020, and ended as of March 13, 2022, the parties agreed to extend each affected milestone by three-quarters of a day for each passing calendar day. *See* Declaration of Brian Stickney In Support of Unopposed Motion to Enter Consent Decree Milestone Extensions (attached hereto). Rounded to the nearest whole number, that figure is 419 days. Each of the five affected milestones should therefore be extended

1 by a total of 579 days (i.e., 160 days + 419 days), yielding the following new
2 dates:

- 3 • Milestone B-2 (“Complete retrieval of tank wastes from the
4 following [nine single-shell tanks] in Tank Farms A and AX . . .”)
 - 5 ○ Existing deadline: 09/30/2026
 - 6 ○ Extended deadline: **05/01/2028**
- 7 • Milestone B-3 (“Of the 12 [single-shell tanks referred to in
8 [milestones] B-1 and B-2, complete retrieval of tank wastes in at
9 least 5”)
 - 10 ○ Existing deadline: 06/30/2021
 - 11 ○ Extended deadline: **01/30/2023**
- 12 • Milestone A-7 (“LAW Facility Construction Substantially
13 Complete”)
 - 14 ○ Existing deadline: 12/31/2020
 - 15 ○ Extended deadline: **08/02/2022**
- 16 • Milestone A-8 (“Start LAW Facility Cold Commissioning”)
 - 17 ○ Existing deadline: 12/31/2022
 - 18 ○ Extended deadline: **08/01/2024**
- 19 • Milestone A-9 (“LAW Facility Hot Commissioning Complete”)
 - 20 ○ Existing deadline: 12/31/2023
 - 21 ○ Extended to **08/01/2025**

22 The Stipulation and Proposed Order accompanying this unopposed motion
23 specifies modifications to the Decree’s text that would memorialize these new
24 milestone dates.

1 The *force majeure*-based extensions requested in this motion reflect a
2 straightforward application of the extension-calculating method already agreed
3 to between the Parties and approved by the Court. *See* ECF No. 251 at 4–13
4 (specifying automatic day-for day and three-quarters of a day for day extensions
5 during defined phases of remobilization). Entry of the requested relief will
6 restore date-certain milestones to the affected provisions of the Decree. In
7 addition, entry of the Parties’ Stipulation containing the new milestone dates
8 will simplify the Decree by removing the existing terms related to calculation of
9 the extensions.

10 The Parties have not discussed, nor reached any agreements, regarding
11 potential Decree modifications to address work interruptions that may persist or
12 arise anew during or after the current phase of DOE’s remobilization efforts at
13 the Hanford Site. Should DOE elect to seek further schedule extensions or other
14 relief for pandemic-related work interruptions, it will submit new amendment
15 proposals in accordance with Section VII of the Decree. In the meantime, DOE
16 anticipates that entry of the extended milestones will sufficiently address
17 impacts through March 13, 2022. DOE therefore respectfully requests that the
18 Court enter the new milestone dates set forth in the accompanying Stipulation
19 and Proposed Order.

20 **II. DOE Has Made All Required Notifications.**

21 The separate consent decree between DOE and the State of Oregon in this
22 matter requires, absent exigent circumstances, that DOE provide notice to
23 Oregon at least ten days prior to the filing of a motion to modify the Consent
24 Decree between DOE and the State of Washington. *See* ECF No. 60 at 3 (CD ¶
25
26

1 6). DOE provided such notice, including a description of the proposed
2 modifications, to Oregon on June 14, 2022.

3 Counsel for DOE has also notified the United States Environmental
4 Protection Agency, Region 10, of the proposed modifications. See Consent
5 Decree Section VII.G.3 (ECF No. 59 at 19) (“[n]otice of any proposal to amend
6 shall also be provided to the United States Environmental Protection Agency,
7 Region 10.”).

8 **CONCLUSION**

9 DOE respectfully requests that the Court sign the accompanying Stipulation
10 and Proposed Order adopting the *force majeure*-based extensions of specified
11 Consent Decree milestones discussed above.

12
13 DATED: June 24, 2022

14 Respectfully Submitted,

15
16 TODD KIM
17 Assistant Attorney General
18 Environment & Natural Resources
19 Division
20 United States Department of Justice

21 VANESSA WALDREF
22 United States Attorney
23 Eastern District of Washington

24 /s/ Austin D. Saylor
25 AUSTIN D. SAYLOR
26 CHLOE H. KOLMAN
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 598-7867 (Saylor)
(202) 514-9277 (Kolman)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

JOHN T. DRAKE
Assistant United States Attorney
920 West Riverside Ave., Suite 340
Spokane, WA 99201
(509) 835-6347

ATTORNEYS FOR DEFENDANTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022, I electronically filed the foregoing and subsequent documents with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel of record in this matter.

s/ Austin D. Saylor
Austin D. Saylor
Senior Attorney
U.S. Department of Justice