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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF WASHINGTON**

10 STATE OF WASHINGTON,  
11 DEPARTMENT OF ECOLOGY,

12 Plaintiff,

13 v.

14 JENNIFER GRANHOLM,  
15 Secretary of the United States  
16 Department of Energy, and the  
17 UNITED STATES DEPARTMENT  
18 OF ENERGY,

19 Defendants.

NO. 2:08-cv-5085-RMP

JOINT MOTION TO  
AMEND CONSENT  
DECREE

08/23/2024  
Without Oral Argument

1 Plaintiff the State of Washington, Department of Ecology, and Defendants  
2 Jennifer Granholm,<sup>1</sup> Secretary of the United States Department of Energy, and  
3 the United States Department of Energy (collectively, “the Parties”) jointly seek  
4 the Court’s approval of a four-month extension of the Consent Decree’s  
5 deadline to start cold commissioning at the Hanford Nuclear Reservation’s Low-  
6 Activity Waste Facility.<sup>2</sup>

7 As described below, the Parties have agreed that this modest extension of  
8 one of the Consent Decree’s interim milestones is appropriate in light of  
9 ongoing technical challenges that have arisen during the complex process of  
10 installing, testing, and integrating the wide array of equipment and facilities  
11 needed to begin treating Hanford’s low-activity waste. Based on current  
12 information, the Department of Energy expects to address these issues within the  
13 next four months. Accordingly, the Parties respectfully request that the Court  
14 sign the accompanying Stipulation and Order to enter the proposed extension of  
15 interim milestone A-8 from August 1, 2024, to November 29, 2024.

### 16 **BACKGROUND**

17 The Court entered the original Consent Decree between the United States  
18 Department of Energy (“DOE”) and the State of Washington in this matter on  
19 October 25, 2010. ECF No. 59. Following contested proceedings to modify  
20 aspects of the Decree, the Court issued an Amended Consent Decree on March  
21 11, 2016. ECF No. 222. The Amended Decree included revised deadlines for  
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24 <sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Secretary Granholm is automatically  
substituted for former Secretary Brouillette.

25 <sup>2</sup> The Consent Decree defines the start of cold commissioning as “the  
26 introduction of feed simulants for the purpose of determining individual facility  
functionality.” Consent Decree (“CD”) Appendix A (ECF No. 59 at 29).

1 construction and initial operations of the Waste Treatment Plant, with a  
2 December 31, 2022 milestone for starting cold commissioning at the Low-  
3 Activity Waste Facility. *See id.* at 14. Upon joint motions by the Parties at  
4 various times over the past eight years, the Court has subsequently further  
5 modified the Amended Consent Decree to extend certain deadlines for Waste  
6 Treatment Plant construction and retrievals of tank wastes. Relevant here, in  
7 July 2022 the Court extended the Low-Activity Waste Facility cold  
8 commissioning milestone to August 1, 2024, to offset *force majeure* work  
9 interruptions caused by the COVID-19 pandemic. ECF No. 259 at 5.

10 This Joint Motion to Amend seeks a four-month extension of a single  
11 milestone: Interim Milestone A-8 (“Start LAW Facility Cold Commissioning”).  
12 On April 29, 2024, the Parties notified the Court that they had reached  
13 agreement through mediation on other potential modifications to the Amended  
14 Consent Decree, including potential changes related to the program of record for  
15 the treatment of Hanford’s high-level waste. ECF No. 262. An extensive public  
16 engagement process regarding those potential modifications remains ongoing,  
17 with public meetings and a written comment period running through September  
18 1, 2024. Any Amended Consent Decree modifications the Parties agree are  
19 appropriate after considering public comments will be the subject of a separate  
20 joint motion at a later date.

## 21 DISCUSSION

### 22 **I. Amendment of the Consent Decree Is Warranted.**

23 The Consent Decree in this matter “may be amended by mutual  
24 agreement of the State [of Washington] and DOE upon approval by the Court.”  
25 CD Section VII-A-1 (ECF No. 59 at 11). The schedules set forth in Section IV  
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1 of the Decree, including the milestones for Waste Treatment Plant construction  
2 and initial startup, “may be amended . . . if (1) a request for amendment is  
3 timely, and (2) good cause exists for the amendment.” CD Section VII-B (ECF  
4 No. 59 at 12). The Parties agree that both of those criteria are met with regard to  
5 the extension of interim milestone A-8 proposed in this Joint Motion.

6 *A. The Proposed Amendment is Timely.*

7 The Consent Decree specifies that “[t]o be timely, a request must be  
8 submitted to the other party as expeditiously as practicable within a reasonable  
9 time from when the party learns that underlying facts give rise to the need for  
10 the schedule amendment.” CD Section VII-C (ECF No. 59 at 12). Here, DOE  
11 has kept the Washington State Department of Ecology (“Ecology”) well-  
12 apprised of progress during the process of commissioning the Low-Activity  
13 Waste Facility, including various technical challenges that have emerged. In  
14 many cases, DOE has promptly resolved such issues. Declaration of Robert M.  
15 Irwin (“Irwin Decl.”) at 4, ¶¶ 8–9.

16 In April 2024, as part of regular meetings between DOE and Ecology  
17 staff, DOE identified several ongoing technical challenges that it was working to  
18 resolve during the final leadup to cold commissioning. Irwin Decl. at 4, ¶ 10.  
19 Those challenges included repeated clogs of simulated waste in the conveyors  
20 and valves of the glass former system. *Id.* at 4–5, ¶ 11. The Parties met again in  
21 late May 2024, and DOE provided an update on the status of the issues. *Id.*  
22 DOE had successfully resolved some of the issues identified during the April  
23 meeting, but others remained under analysis. By approximately mid-June, it  
24 was apparent that certain technical challenges—and particularly the tendency of  
25 the glass-former system to clog—were not likely to be sufficiently resolved  
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1 before the August 1 deadline for starting cold commissioning of the Low-  
2 Activity Waste Facility. *Id.* at 6–7, ¶ 15. DOE communicated this news to  
3 Ecology during another meeting on June 18, and on June 20 provided written  
4 notice of the “serious risk” to that milestone. *Id.* Based on that history, the  
5 Parties agree that the proposed schedule amendment is timely.

6 The Parties anticipate continued close communications over the course of  
7 the proposed four-month extension period, and DOE will remain available to  
8 respond to any Ecology requests for further information regarding the technical  
9 challenges. Irwin Decl. at 7, ¶ 16.

10 *B. There Is “Good Cause” for the Proposed Amendment.*

11 The Consent Decree specifies that “good cause” for schedule amendment  
12 exists “when the schedule cannot be met due to circumstances or events either  
13 (1) unanticipated in the development of the schedule in Section IV of [the]  
14 Consent Decree, or (2) anticipated in the development of the schedule, but  
15 which have a greater impact on the schedule than was predicted or assumed at  
16 the time the schedule was developed.” CD Section VII-D-1 (ECF No. 59 at 12–  
17 13); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992)  
18 (“a party seeking modification of a consent decree must establish that a  
19 significant change in facts or law warrants revision of the decree and that the  
20 proposed modification is suitably tailored to the changed circumstance”).

21 The Decree also expressly recognizes that the milestones for Waste  
22 Treatment Plant startup and initial operations “are based upon project planning  
23 that requires assumptions to be made and raises concerns about a broad range of  
24 circumstances and events, including unforeseen circumstances.” *Id.* at  
25 Appendix A, Section 2. “Because of the highly complex nature of the [Waste  
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1 Treatment Plant], the milestones and schedule cannot anticipate all of the  
2 requirement changes and unknown technical obstacles that may be encountered  
3 and that may require time to remedy.” *Id.* at Section 2.b. In addition, the  
4 Decree also recognizes that equipment failures are generally expected to occur  
5 but “may take place more often and require more time to remedy than  
6 anticipated in the development of the milestones and schedule.” *Id.* at Section  
7 2.c.

8 Here, the technical obstacles affecting DOE’s ability to meet the August 1  
9 interim milestone for cold commissioning of the Low-Activity Waste Facility  
10 were not anticipated at either the time that the Court issued the Amended  
11 Consent Decree in March 2016, or in July 2022 when the Court extended the  
12 milestone to offset *force majeure* impacts. In particular, the problems with the  
13 glass-former system that DOE encountered during testing this spring arose only  
14 after the physical introduction of powdered chemicals as part of equipment  
15 testing. Irwin Decl. at 6, ¶ 13.

16 The Parties agree that, based on current information, four months is an  
17 appropriate length by which to extend the A-8 milestone, from August 1, 2024,  
18 to November 29, 2024. DOE has been working diligently with its contractors to  
19 devise solutions, and currently anticipates that those few additional months will  
20 allow it sufficient time to address the cold commissioning-related technical  
21 obstacles. Irwin Decl. at 6–7, ¶ 15. DOE will promptly inform Ecology (and  
22 may seek additional schedule relief) if any new such obstacles arise, or if it  
23 becomes apparent that resolution of the current obstacles will take longer than  
24 anticipated. *Id.* at 7, ¶ 16. For now, as reflected in the accompanying  
25 Stipulation and Order, only the following minor change to the text of the  
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1 Amended Consent Decree is needed to effectuate the agreed schedule  
2 modification: substitution of the revised A-8 milestone in the relevant row of  
3 Appendix A's "Waste Treatment Plant" table.

4 **II. All Other Criteria for Amendment of the Consent Decree Are Met.**

5 *A. Public Comment Is Not Required.*

6 The State has "sole discretion" to determine "whether [an agreed]  
7 amendment constitutes a significant modification to the Consent Decree." CD  
8 Section VII-A-2 (ECF No. 59 at 11). If so, then the State and DOE "shall take  
9 public comment on the amendment." *Id.* "Unless public comments disclose  
10 facts or considerations which indicate the amendment is inappropriate, the  
11 Parties shall submit the amendment to the Court for its approval." *Id.* at 11-12.  
12 Here, the State has determined that a four-month extension of the interim  
13 milestone to start cold commissioning at the Low-Activity Waste Facility does  
14 not constitute a "significant modification" to the Decree. Thus, the Parties are  
15 not soliciting public comment.

16 *B. Required Notifications Have Been Made.*

17 The separate Consent Decree between DOE and the State of Oregon in  
18 this matter requires, absent exigent circumstances, that DOE provide notice to  
19 Oregon at least ten days prior to the filing of a motion to modify the Consent  
20 Decree between DOE and the State of Washington. *See* ECF No. 60 at 3 (CD ¶  
21 6). Undersigned counsel for DOE provided such notice to Oregon on July 8,  
22 2024.

23 Undersigned counsel for DOE has also notified the United States  
24 Environmental Protection Agency, Region 10, of the proposed modifications.  
25 *See* Consent Decree Section VII-G-3 (ECF No. 59 at 19) ("[n]otice of any  
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1 proposal to amend shall also be provided to the United States Environmental  
2 Protection Agency, Region 10.”).

3 **CONCLUSION**

4 The Parties respectfully request that the Court sign the accompanying  
5 Stipulation and Order to enter the four-month extension of the interim milestone  
6 for the start of cold commissioning at the Low-Activity Waste Facility.  
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8 DATED: July 24, 2024  
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10 Respectfully Submitted,

11 TODD KIM  
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10 *ATTORNEY FOR PLAINTIFF*

## 1 CERTIFICATE OF SERVICE

2 I hereby certify that on July 24, 2024, I electronically filed the foregoing  
3 JOINT MOTION TO AMEND CONSENT DECREE with the Clerk of the Court  
4 using the CM/ECF system, which will send notice of such filing to all counsel of  
5 record in this matter.

6 s/ Austin D. Saylor

7 Austin D. Saylor

8 Senior Attorney

9 U.S. Department of Justice  
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