

Environmental Attorneys' Training Workshop

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Federal Appropriations – Recovery Act Presentation by Barbara Williamson

ARRA's SAVING GRACE

In the Beginning there was the Hanford Facility Agreement and Consent Order also known as the Tri-Party Agreement or TPA. This TPA was established in 1989 to govern the hazardous substances cleanup schedules and hazardous waste management operations of the U.S. Department of Energy Richland Operations Office (RL)¹ in Richland, Washington, under certain notorious environmental laws² and in accordance with the grave authorities of the U.S. Department of Energy (DOE), U.S. Environmental Protection Agency (EPA) and the State of Washington Department of Ecology (aka State or Ecology). These TPA authorities (aka the Parties) would often come together to exchange ideas and discuss the cleanup schedules established by the TPA when there were substantial technical issues or higher priority concerns with which to contend. Although through the years there were many disputes and even the settling of schedule slips with stipulated fines, for the first time since the beginning the Parties had to wrestle with changing the schedule (aka TPA Milestones or Milestones) based only on not having enough funding to maintain the recorded course of the cleanup and waste management operations. The TPA, being all encompassing, included certain provisions for dealing with funding.

In accordance with Tri-Party Agreement, Article XLVIII, Cost, Schedule, Scope, Integration, Planning and Reporting, Sections 148 and 149, the DOE appropriately took the necessary steps to integrate the project priorities, and requested the funding to meet its obligations under the Tri-Party Agreement to achieve full compliance. In concert with the other Parties, they considered the values expressed by the Hanford Stakeholders to address the work scope, priorities, and schedules to achieve the prudent use of resources to obtain compliance through its budget formulation and execution process.

On November 5, 2008, RL sent a letter (09-AMCP-0007) to the State and EPA addressing 2009 Funding and Tri-Party Agreement Milestones. The purpose of that letter was to notify EPA and Ecology of the anticipated impacts to the Tri-Party Agreement due to the funding levels for FY-2009 and the Continuing Resolution (Congressional authorization to continue operation in FY-2009 utilizing FY-2008 level funding pending final FY-2009 appropriations). Both the State and EPA responded with their dismay but following the process of the TPA and not forgiving any of the existing milestones offered the top list of priorities to the extent appropriated funds were inadequate to fund all required milestone activities.

¹ Richland Operations performs cleanup activities in two contiguous geographical areas: River Corridor and Central Plateau.

² Resource Conservation and Recovery Act (RCRA), State of Washington Hazardous Waste Management Act (HWMA) and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Despite the efforts to obtain the adequate resources, DOE's FY-2009 funding levels and the implementation of the Continuing Resolution process utilizing FY-2008 funding levels created impacts to some Central Plateau work. Applying these funding impacts to the Central Plateau work allowed higher priority work along the River Corridor to be fully funded and continue without delay towards completion. Examples of project work associated with the proposed changes that help fulfill the Parties' priorities include continued full-scale River Corridor cleanup such as waste site remediation, enhancements to groundwater systems, decontamination and demolition of River Corridor excess facilities, groundwater pump-and-treat enhancements on the Central Plateau, implementation of the selected remedy in accordance with the 200-ZP-1 Record of Decision, continuing de-inventory of plutonium from the Plutonium Finishing Plant (PFP), and accelerating PFP towards its demolition.

However, the allocated FY-2009 and Continuing Resolution funding levels fell short of both allowing accomplishment of the aforementioned high priority work and all the remaining lower priority existing Tri-Party Agreement milestone work. The most impacted of this remaining project work due to lack of available funding and prioritization were the M-15 CERCLA decision process and the M-91 TRU Waste Management series milestones in the Central Plateau. In particular, the RI/FS document preparation and submittal and the TRU waste Retrieval, Treatment and Certification milestone work was curtailed. Compounding the situation for the TRU waste management activities due of lack of funding in FY-2009, is the projection that there will be no FY-2010 and FY-2011 baseline funding for the activity.

With the addition of the American Recovery and Reinvestment Act (ARRA) funding in FY-2009 thru FY-2011, funding has been allocated towards most of the suspended milestone work. Regardless, with the late arrival of the ARRA funding in FY-2009 most of the work resumed was therefore, late in starting and thus several of the associated milestones with that work were being projected to be missed. In some cases, like the RI/FS work, the ARRA funding allowed the work to be accomplished as planned. In other cases work such as the TRU retrieval, treatment, and/or certification the planned work could not be recovered fully resulting in partial completion of commitments for FY-2009 and projected recovery of commitments occurring in the out-years. It is hopeful that acceleration of activities can be achieved in areas such as retrieval, treatment, and certification in the out-years. To accomplish this task, the contractor's approach to retrieving and processing waste is much different than was planned in the past. Next generation retrieval technologies, use of mobile hot cells, train shipments, aiding other facilities to allow more offsite treatment, and point of generation compliance for disposal allow for more flexibility. Instead of over-relying on large complex facilities and processes, the approach allows the use of simpler more proven technologies.

The Parties finalized a Tentative Agreement under TPA processes August 2009 that reflected changes to the RL TPA schedules which accommodated the accelerations and delays in the schedule impacted by the 2009 and ARRA funding. The Parties, but particularly DOE, are looking for new and/or more efficient approaches to address the cleanup schedule. Central Plateau cleanup activities are being rearranged to reflect consistent cleanup criteria and more efficient work patterns. The Tentative Agreement provided Milestones to negotiate some of our more difficult Central Plateau cleanup schedule issues. In addition, the work that can be accomplished given the reduced budget outlook followed by the subsequent addition of funds from ARRA still needs to be reflected in the some of the Central Plateau cleanup Milestones.

Even with ARRA funding supplementing or replacing non-existent base funding, certain work-scopes were unrecoverable and require new planning of scope and schedule. This and other project uncertainties required replacement of milestone dates with target dates or TBDs (To Be Determined) until such time the project can ascertain what it will require to recover lost schedule and timeframes for implementation of the new ideas for attainment of the project commitments and milestones. As a result, in the Tentative Agreement the parties agreed to new interim enforceable milestones M-015-40E (Required Central Plateau CERCLA documentation) and M-091-45 (Required TRU waste activities). These two Milestones have due dates of December 31, 2009 to renegotiate and replace current TBD and target dates with enforceable new milestones and dates utilizing the established projects baselines as rationales for the basis for changes.

We are marching forward with the TPA negotiations. But for ARRA's saving grace and the additional funding provided for meeting short-term but finite activities, our FY 09 cleanup story would have been one of woe. While ARRA funding came with limitations and additional reporting requirements, it has been worth effort of the oversight.

Attachments

Letter: 2009 Funding and Hanford Facility Agreement and Consent Order (Tri-Party Agreement) Milestones, to the State of Washington and U.S. Environmental Protection Agency, from DOE, dated November 05, 2009 (09-AMCP-0007).

Letter: Funding and Hanford Facility Agreement and Consent Order (Tri-Party Agreement) Milestones, to U.S. DOE, from State of Washington Department of Ecology, dated January 22, 2009.

U.S. Department of Energy, Environmental Management, Facts At a Glance, American Recovery and Reinvestment Act Funding at the Hanford Site, May 2009.

ARRA Weekly Report, Week ending October 2, 2009, Contract DE-AC06-08RL1488.

Recovery Act Weekly Report, October 6, 2009, Contract DE-AC06-14655.

Agreement: Final Approval Package for the Tentative Agreement on Hanford Facility Agreement and Consent Order Modifications Regarding Accelerated Groundwater and Soils Management/K Basins and Other Issue Solutions, Signed August 11, 2009.