STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 13, 2015

Via e-mail to steven.croley@hq.doe.gov and john.kotek@ne.doe.gov
and U.S. Postal Service

Mr. Steven P. Croley
General Counsel
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, DC 20585

Mr. John Kotek
Acting Assistant Secretary
Office of Nuclear Energy
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, DC 20585

RE: Request for a Waiver of the 1995 Settlement Agreement

Dear Messrs. Croley and Kotek:

I appreciated the opportunity to meet with you last Wednesday, October 7. Also, thank you for your follow-up call last Friday, October 9, in which you conveyed the Department of Energy's (DOE) offer that, in exchange for allowing two shipments of Commercial Spent Nuclear Fuel (SNF) to come to Idaho, DOE would remove two times that amount of heavy metal from Idaho, and that Secretary Moniz was willing to come to Idaho for a press conference to help explain the benefit of these shipments.

While I appreciate DOE's offer, it does not address the underlying problem – DOE is not in compliance with the 1995 Settlement Agreement (1995 Agreement). As I hope I have made clear, my duty is to ensure compliance with all terms of the 1995 Agreement. DOE's request for a waiver places me in the position of having to reconcile two objectives of the 1995 Agreement – the clean-up of INL and the research mission of the Laboratory. Through open and candid conversation, I am hopeful that we can find a pathway for reaching a resolution that fulfills both the research and cleanup objectives of the 1995 Agreement. Thus, enclosed is a counter proposal that, in combination with your proposal, would address both DOE's request for a waiver and provide for a cure of DOE's breach of the 1995 Agreement.

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I have long been a supporter of the research mission of the INL and fully appreciate and understand the importance of the INL research mission. I demonstrated my support by agreeing to the 2011 Memorandum of Agreement ("2011 MOA") that would have provided a waiver for limited quantities of commercial fuel, such as those DOE currently desires to ship INL. Unfortunately, the 2011 MOA is inoperative because of DOE's breach of the 1995 Agreement.

As was stated in the January 8, 2015 letter from Governor Otter and myself, and again in my February 27, 2015 letter, I have no objection to the shipment of the two research quantities of spent fuel coming to Idaho, so long as there is an enforceable agreement in place to resolve DOE's breach of the 1995 Agreement. Our recent discussions have illuminated the issues for me, and I hope that the attached proposal will provide a pathway to cure DOE's breach of the 1995 Agreement so that INL can conduct this research consistent with the 2011 MOA.

One thing that has become clear in our recent discussions is, that while DOE remains committed to the Integrated Waste Treatment Unit (IWTU) project and hopes it will prove successful, there is growing concern among DOE staff as to whether this technology will ever be deemed safe enough to begin treatment of radioactive waste. If that proves to be true, it will be many years before DOE will be able to meet the requirement of section E.5 of the Settlement Agreement and this imperils other provisions of the 1995 Agreement (e.g. E.6 and C.3). Even if DOE concludes the IWTU is able to treat waste, it is apparent that both DOE and Idaho must reach an agreement on how to cure DOE's noncompliance with the deadlines of the 1995 Agreement. Likewise, with respect to DOE's breach relating to Transuranic Waste, I have come to realize that DOE may not have any options available to meet its obligation under the 1995 Agreement to remove the Transuranic Waste by 2018. I realize I cannot ask DOE to do the impossible as a condition of reaching an agreement on a waiver. At the same time, I cannot, consistent with my duty as Attorney General, agree to grant a waiver to allow DOE to bring fuel to Idaho (Idaho's only remedy under the 1995 Agreement) without addressing how DOE intends to cure its breach of the 1995 Agreement.

Therefore, we must agree on a new course and timeline so that DOE meets its ultimate obligation to treat the High Level Waste in Idaho so that it is ready for shipment to a disposal site by the end of 2035, and to remove the Transuranic Waste from Idaho as soon as practicable, once there is a location to which it can be shipped. The attached proposal represents an amendment to the 1995 Agreement that charts such a course

and asks that DOE renew its commitment to Idaho by agreeing to pursue alternatives, make decisions, and commit to milestones designed to meet these ultimate objectives. Those interim milestones and agreements are modeled after terms to which DOE already agreed in the 1995 Agreement (e.g. E.6) or to which DOE has already agreed in other contexts (e.g. Fifth Modification to NON-CO). If we can reach an agreement on how to cure DOE's noncompliance with the 1995 Agreement, I can in good conscience uphold my legal obligation to protect the integrity of the 1995 Agreement, while also allowing DOE to ship two limited research quantities of spent fuel to INL.

The proposal addresses three areas of concern. First, it asks DOE to cure its breach relating to the Sodium Bearing High Level Waste, by making decisions regarding the IWTU, selecting a new alternative, if necessary, and committing to implement that technology in a time certain.[1] Second, it asks DOE to continue work that is required to treat the Calcine so that it is likewise completed in a time certain. Delays associated with the IWTU have resulted in delays relating to this work, so Idaho is asking that DOE recommit itself to assuring the waste is treated and "road ready." Finally, the proposal asks DOE to cure its breach relating to Transuranic Waste shipments by pursuing options it may have (such as shipment to Texas) and if that cannot occur, then prioritizing Idaho's waste for shipment to WIPP once it reopens.

I ask that you carefully consider the attached proposal. My staff will be available to respond to any questions that you might have about the proposal. I have intentionally left the interim dates blank expecting that we would negotiate these dates.

If we can reach general consensus on the pathway for curing DOE's breach of the 1995 Agreement, I am prepared to offer DOE the assurance it needs to move forward with the two proposed shipments of research quantities of spent fuel. Even if we cannot reach such agreement prior to your deadline for deciding where to ship the North Anna spent fuel, I am hopeful we can continue the discussion as it relates to the shipment from the Byron Generating Station, since the window relating to this shipment has more flexibility. Such an agreement, coupled with DOE's commitment that any commercial SNF brought to Idaho will be offset by two times that amount of heavy metal being shipped from Idaho, will allow both Idaho and DOE to move forward toward the future.

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[1] In the attached amendment, I have left this and certain other dates blank so that we can have a candid discussion regarding time frames for DOE to meet the obligations. I must emphasize, however, that while the interim dates are open to discussion, the end-date of 2035 in the 1995 Agreement is not negotiable. The interim dates must be such that they will ensure that DOE complies with the 2035 end-date.

Again, I thank you for the time and attention you have dedicated to this matter, and I look forward to discussing this with you.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

LGW:jc

Attachment

C: The Honorable C. L. "Butch" Otter

FIRST AMENDMENT TO 1995 SETTLEMENT AGREEMENT
Public Service Co. of Colorado v. Batt, No. CV 91-0035-S-EJL (D. Id.) and United States v. Batt, No. CV-91-0054-S-EJL (D. Id.) ("1995 Agreement")

This Amendment is entered into this _____ day of _____ 2015, between the United States Department of Energy (DOE), by and through the Assistant Secretary for Environmental Management, and the State of Idaho, by and through the Governor of the State of Idaho and the Idaho Attorney General (Idaho) (collectively "the Parties").

RECITALS:

WHEREAS, on January 1, 2013, the DOE failed to meet its obligation under section E.2 of the 1995 Agreement to have treated all of the Sodium Bearing Liquid High Level Waste; and

WHEREAS, on January 1, 2015, the DOE failed to meet the obligation of section B.1.c of the 1995 Agreement to ship a running average of 2,000 m^3 per year of Transuranic Waste from Idaho to the Waste Isolation Pilot Plant (WIPP); and

WHEREAS, the failure of DOE to meet these obligations is a breach of the 1995 Agreement; and

WHEREAS, the indefinite closure of WIPP and the inability of DOE to ship Transuranic Waste will result in breach of the requirement to remove "all transuranic waste now located at the INL" from Idaho contained in section B.1 of the 1995 Agreement; and

WHEREAS, the delays associated with the IWTU imperil the ability of DOE to meet its commitment in Section C.3 of the 1995 Agreement to have all high-level waste currently at INL treated so that it is ready to be moved out of Idaho for disposal by a target date of 2035 and the requirement of section E.6 to have treated all calcined wastes by a target date of 2035.

WHEREAS, the breaches and prospective breaches identified above require that the State and DOE agree to new provisions as a pathway to cure these breaches and assure compliance with the remaining provisions of the 1995 Agreement.

NOW THEREFORE IT IS HEREBY AGREED:

I. Section E.5 is hereby replaced with the following provisions:

E.5. Treatment of Sodium Bearing Liquid High-Level Waste.

(a) DOE shall, within thirty (30) days of the effective date of this Amendment, commence the process of analyzing alternative treatment technologies to the IWTU for sodium bearing liquid high level waste. DOE shall provide Idaho with quarterly briefings on the evaluation of alternatives.

(b) DOE shall, not later than _____, determine whether to continue with the Integrated Waste Treatment Project (IWTU) for the solidification of Liquid High Level Waste remaining at the INL or whether to terminate the project.

(c) If DOE determines to terminate the IWTU project, DOE shall solicit proposals for alternative treatment technologies within thirty (30) days of such determination.

(d) By not later than _____, DOE shall commence the required NEPA analysis of alternative treatment technologies.

(e) By not later than _____, DOE shall issue a Record of Decision selecting an alternative treatment technology. The Record of Decision shall provide a schedule for the construction and implementation of the selected treatment technology, which will provide a date for completion of treatment not later than _____.

(f) By not later than _____, DOE shall submit an application for a RCRA Part B permit for the selected alternative treatment technology.

(g) DOE shall complete the construction and implementation of the alternative treatment technology in accordance with the schedule provided under paragraph 5(e).

II. Section E.6 of the 1995 Agreement is hereby amended to add the following language:

(a) If DOE terminates the IWTU as provided in section E.5(b) above, within ninety (90) days of such termination, Idaho, by and through the Idaho Department of Environmental Quality (IDEQ), shall issue to DOE any appropriate technical Notice of Deficiency on the Part B permit application submitted by DOE pursuant to this Section. DOE shall thereafter comply with all applicable requirements of IDEQ's Rules for Hazardous Waste relating to issuance of the final permit.

(b) Within ____ days of the issuance of the final RCRA Part B permit for the treatment technology selected pursuant to this Section, DOE shall commence construction of the selected treatment technology authorized by the final permit.

(c) DOE shall complete construction of the treatment technology by not later than _____.

(d) DOE shall commence systems testing of the treatment technology by not later than _____.

(e) DOE shall complete treatment of calcined waste by not later than December 31, 2035.

III. Section B.1 of the 1995 Agreement is replaced by the following provisions:

B.1. Transuranic Waste Shipments:

(a) Except for buried Transuranic Waste that has not been exhumed and is governed under the 2008 Agreement to Implement, DOE shall have all Transuranic Waste located at INL packaged and certified for shipment out of the State of Idaho on or before December 31, 2018.

(b) DOE shall complete retrieval and packaging of buried Transuranic Waste located at the INL as required by Section B.1 of the 1995 Agreement and Section V of the July 1, 2008 Agreement to Implement by not later than December 31, 2019.

(c) Within thirty (30) days of the effective date of this Amendment, DOE shall request permission from Waste Control Specialists (WCS) to ship Transuranic Waste now located at the INL to the WCS facility in Andrews, Texas. If DOE is able to obtain permission and legal authority to make such shipments, DOE shall commence shipments of Transuranic Waste to the WCS facility as soon as practicable following receipt of authority, and shall ship a running average of no fewer than 2,000 cubic meters per year out of the State of Idaho for so long as it is authorized to make such shipments, or all Transuranic Waste now located at the INL is removed from the State of Idaho.

(d) If DOE is unable to obtain permission to ship Transuranic Waste to WCS, as provided in B.1(c) above, upon the reopening of WIPP, or the opening of an alternative storage facility permitted for the receipt of Transuranic Waste, DOE shall ship fifteen (15) truck shipments of Transuranic Waste from INL outside of Idaho each week until all Transuranic Waste now located at the INL is removed from the State of Idaho. Truck shipments for purposes of this Agreement shall mean three TRUPact II shipping containers, or an equivalent volume in similar containers.

IV. EFFECTIVE DATE:

The effective date of this Amendment shall be the date upon which the United States District Court enters the Consent Order as provided herein.

V. CONSENT ORDER

A. The Parties agree they shall jointly present this Amendment to the U.S. District Court with a proposed Consent Order that will provide for the incorporation of this Amendment and continuing jurisdiction of the Court. This Amendment and Consent Order shall not preclude any Party from applying to the Court under Rule 60, of the Federal Rules of Civil Procedure, or the Court from granting relief thereunder.

B. If the Consent Order is not entered by the Court, in accordance with paragraph VII.A above, within forty-five (45) days of lodging with the Court, then any Party to this Amendment may elect to terminate this Amendment, in which case this Amendment becomes null and void, and of no force or effect and all terms of the 1995 Agreement shall be fully enforceable as though this Addendum had never been executed.

VI. EFFECT ON OTHER PROVISIONS

Nothing in this Amendment shall be construed to alter or amend any other provisions of the 1995 Agreement, nor shall this Amendment be admissible in any judicial proceeding other than one for the enforcement of this Amendment.

DATED this ___day of _____ 2015.