

AGREEMENT TO IMPLEMENT
U.S. DISTRICT COURT ORDER DATED MAY 25, 2006

The Parties to this Agreement are the United States Department of Energy (“DOE”), the United States Navy, Naval Nuclear Propulsion Program (“Navy”)¹ and the State of Idaho (by and through the Governor of the State of Idaho, C.L. “Butch” Otter, and the Idaho Attorney General, Lawrence G. Wasden) and the Governor of the State of Idaho, C.L. “Butch” Otter, individually in his official capacity (collectively “Idaho”).

The Parties hereto enter this Agreement in full and final settlement of the current dispute between the Parties in the matter entitled *Public Service Company of Colorado v. Batt*, CV-91-0035-S-EJL and CV 91-0054-S-EJL², regarding the interpretation of Paragraph B.1 of the October 17, 1995 Settlement Agreement and Consent Order which is attached hereto as Appendix A.

I. DEFINITIONS

A. “1995 Settlement Agreement” shall mean the October 17, 1995 Settlement Agreement and Consent Order in the matter entitled *Public Service Company of Colorado v. Batt*, CV-91-0035-S-EJL and CV 91-0054-S-EJL.

B. “741 Sludge” shall mean waste identified as 741 Sludge in the Waste Information Location Database (WILD) or otherwise having characteristics substantially similar to such waste.

C. “742 Sludge” shall mean waste identified as 742 Sludge in the Waste Information Location Database (WILD) or otherwise having characteristics substantially similar to such waste.

D. “743 Sludge” shall mean waste identified as 743 Sludge in the Waste Information Location Database (WILD) or otherwise having characteristics substantially similar to such waste.

E. “Court” shall mean the United States District Court of Idaho or any successor court having jurisdiction over matters arising under Federal Laws within the State of Idaho.

¹ The Navy is party to this Agreement due to the relationship of this Agreement to the 1995 Settlement Agreement and Consent Order in *Public Service Company of Colorado v. Batt*, CV-91-0035-S-EJL and CV 91-0054-S-EJL to which the Navy is a party. The provisions of this Agreement do not relate to or otherwise affect the terms of the 1995 Settlement Agreement as related to the Navy. The term “Parties” as used herein refers to Idaho and DOE.

² Pursuant to Federal Rule of Civil Procedure 25(d) the caption in this matter has been amended numerous times to reflect the Idaho Governors holding office at the time, Hon. Cecil Andrus, Hon. Philip Batt, Hon. Dirk Kempthorne and Hon. C.L. “Butch” Otter. For purposes of consistency of reference in this Agreement, the matter will be referred to as: *Public Service Company of Colorado v. Batt*, CV-91-0035-S-EJL and CV 91-0054-S-EJL.

F. "DOE" shall mean the United States Department of Energy, and any successor agency or agency of the United States Government assigned to assume ownership or control of the INL.

G. "Filters/pre-filters" shall mean waste identified as Filters/pre-filters in the Waste Information Location Database (WILD) or otherwise having characteristics substantially similar to such waste.

H. "Graphite waste" shall mean waste identified as Graphite waste in the Waste Information Location Database (WILD) or otherwise having characteristics substantially similar to such waste.

I. "INL" shall mean the Idaho National Laboratory (or any predecessor or successor name for the facility), which consists of approximately 900 square miles of area under the jurisdiction, custody and control of the United States and operated by DOE within the State of Idaho, and as more particularly set forth in Appendix B attached hereto.

J. "Radioactive Waste Management Complex" or "RWMC" shall mean that portion of the INL that is depicted in Appendix C attached hereto.

K. "Subsurface Disposal Area" or "SDA" shall mean that portion of the RWMC at the INL that is depicted in Appendix C.

L. "Targeted Waste" shall mean those wastes identified in Section IV of this Agreement and as defined therein.

M. "Transuranic Waste" shall be defined as set forth in Paragraph A.4 of the 1995 Settlement Agreement.

N. "Transuranic Waste Storage Area" or "TSA" shall mean that portion of the RWMC at the INL that is depicted in Appendix C.

O. "Uranium Oxide" shall mean waste identified as uranium oxide in the Waste Information Location Database (WILD) or otherwise having characteristics substantially similar to such waste.

P. "Waste Information Location Database" or "WILD" shall mean the version, current as of February 28, 2007, of the database designated by this name and maintained by and in the possession of DOE's Idaho Operations Office and independently maintained in the possession of the State of Idaho for records of waste disposal at the SDA.

II. FINDINGS OF FACT

In executing this Agreement, the Parties agree to the following:

A. On October 17, 1995, the Parties to this Agreement entered into the 1995 Settlement Agreement, which was subsequently entered as a Consent Order in the matter entitled *Public Service Company of Colorado v. Batt*, CV-91-0035-S-EJL and CV 91-0054-S-EJL.

B. On April 18, 2002, Idaho sought to re-open the above-entitled matter seeking a declaratory ruling that Paragraph B.1 of the 1995 Settlement Agreement applied to "Transuranic Waste" located in the SDA at the INL³.

C. A trial was conducted before the Court in the above-captioned matter on February 6-10, 2006.

D. On May 25, 2006 the Court entered a Memorandum Decision and Judgment establishing the responsibilities of DOE under the 1995 Settlement Agreement with respect to Transuranic Waste buried in the Subsurface Disposal Area.

E. On July 24, 2006 the United States Department of Energy appealed the decision to the Ninth Circuit Court of Appeals. On March 17, 2008, the Ninth Circuit Court of Appeals affirmed the decision of the District Court.

F. Since the filing of the Motion to Re-open in 2002 and the date of this Agreement, DOE, Idaho and the United States Environmental Protection Agency (EPA) have continued to evaluate environmental hazards posed by the Subsurface Disposal Area and Transuranic and other wastes disposed of there. In furtherance of that evaluation, DOE conducted comprehensive reviews of shipping and disposal records, which information was compiled in the WILD Database, and generated maps showing the locations of waste forms in the SDA. In reaching this agreement, DOE and Idaho base their knowledge of waste locations on the WILD database and maps generated by DOE on or before February 28, 2007. Copies of these maps have been lodged with Idaho and shall be kept throughout the duration of this Agreement. Idaho's participation in this Agreement is based upon the representation by DOE that the information contained in the WILD Database and accompanying maps represents a substantially accurate estimate of the extent of Targeted Waste in the SDA.

G. In addition to shipping and disposal record review, DOE conducted a retrieval

³ At the time of the 1995 Settlement Agreement, the Idaho National Laboratory (INL) was denominated the Idaho National Engineering Laboratory. It was renamed in 2005 as the Idaho National Laboratory.

action at Pit 9 where complete excavation of the retrieval area yielded 454 55-gallon drums of waste of which 63 drums qualified as Targeted Waste.

H. DOE is currently conducting two Non Time Critical Removal Action retrievals and related sampling and record verification from Pit 4 in the SDA known as Advance Retrieval Projects I and II (ARP I, ARP II). DOE and Idaho have also reviewed documentation from retrievals conducted in the 1970s in Pits 2, 5, 10, 11 and 12 of the SDA; and a review of historic disposal records for items posing worker safety, practicality or national security concerns. DOE also continues to evaluate waste being retrieved from the Transuranic Storage Area, which includes waste previously excavated from the Subsurface Disposal Area.

I. Based upon operational experience to date and review of historic records as referenced in Sections II.F-H above, the Parties agree that Transuranic Waste located in the Subsurface Disposal Area is primarily found (based on curie content) in the following waste streams:

1. 741 Sludge
2. 742 Sludge
3. 743 Sludge
4. Graphite Waste
5. Filters/pre-filters

J. Based upon operational experience to date and the limitations of technology, other forms of Transuranic Waste located in the Subsurface Disposal Area are difficult to segregate or discern during retrieval from non-Transuranic Wastes.

K. As described in Sections II.F-J above, the Parties used historic disposal records generated by DOE to identify areas within the SDA where retrieval is, based upon current knowledge and technological capabilities, appropriate in light of countervailing considerations of worker safety and national security. The Parties based the identification of these areas upon the following criteria:

1. Estimated concentrations of curies of transuranic elements;
2. Density of Targeted Waste;
3. Amount and type of non-Targeted Waste requiring handling to retrieve and the corresponding risks posed to workers or the environment and

impacts on retrieval practicability (e.g., considerations given to areas with high gamma radiation or biological hazards, posing undue risks to workers, and areas containing large, unwieldy objects making retrieval impracticable);

4. Reasonable efficacy of retrieval technology in locating Targeted Wastes within the SDA;
5. Absence of classified materials in proximity to Targeted Waste that, for national security reasons, would make retrieval impracticable;
6. Collocation of other environmentally detrimental wastes such as volatile organic compounds; and
7. Existence of effective alternatives to retrieval to address environmental or health risks posed by leaving potential Targeted Waste in place.

III. AGREEMENT / PURPOSE AND INTENT

The Parties agree for the purpose of fully and finally settling the existing dispute and litigation regarding interpretation of Paragraph B.1 of the 1995 Settlement Agreement, that the May 25, 2006 Memorandum Order of the Court defines the Parties' responsibilities for carrying out the requirements of Paragraph B.1 as related to Transuranic Waste buried in the Subsurface Disposal Area at the INL. The purpose of this Agreement is to agree on detailed performance obligations that will fully implement the duties of the Parties under Paragraph B.1 related to Transuranic Waste buried in the Subsurface Disposal Area at the INL. Complete performance of the terms and conditions of this Agreement by DOE shall be deemed by the Parties to constitute compliance with Paragraph B.1 of the 1995 Settlement Agreement as that term has been interpreted by the Court as related to Transuranic Waste buried in the Subsurface Disposal Area at the INL.

IV. AGREEMENT TO RETRIEVE TARGETED WASTE

Based upon the facts and conclusions set forth above in Sections II.F-L the Parties agree that in determining compliance with Paragraph B.1 of the 1995 Settlement Agreement and the Court's May 25, 2006 Memorandum Order, with respect to Transuranic Waste located in the Subsurface Disposal Area, removal of the following waste streams (Targeted Waste) in accordance with Section V satisfies removal of Transuranic Waste from the Subsurface Disposal Area:

- A. 741 Sludge
- B. 742 Sludge

C. 743 Sludge

D. Graphite Waste

E. Filters/pre-filters

F. Uranium Oxide (DOE and Idaho recognize that Uranium Oxide is not a Transuranic Waste within the definition of the 1995 Settlement Agreement. Notwithstanding that, the Parties agree that removal of Uranium Oxide co-located with other Targeted Wastes is environmentally beneficial and thus have included it as a Targeted Waste.)

G. Other waste streams mutually agreed by the Parties, as the result of operational experience or process knowledge, to routinely be recognizable as Transuranic Waste.

V. TRANSURANIC RETRIEVAL VOLUME

A. DOE shall retrieve not less than 6,238 cubic meters of Targeted Waste from within that portion of the Subsurface Disposal Area identified in Appendix D attached hereto or areas immediately adjacent to those areas within retrieval enclosures constructed pursuant to this Agreement.

1. Compliance with the obligation set forth above in Section V.A shall be measured as 7,485 cubic meters packaged for shipment out of Idaho. The volume of Targeted Waste packaged for shipment shall be measured as the internal volume of the primary waste container as packaged from the Drum Packaging Station. One 55-gallon drum of waste shall constitute 0.208 m³ of Targeted Waste packaged for shipment; a Standard Waste Box full of waste shall constitute 1.88 m³ of Targeted Waste packaged for shipment; and a Standard Waste Box used as an over-pack of four 55-gallon drums of waste shall constitute 0.832 m³ of Targeted Waste packaged for shipment.

DOE will record a running volume of Targeted Waste packaged for shipment and will provide this information to the State upon request.

All primary waste containers will be filled with Targeted Waste, while maintaining necessary headspace. It is recognized that package liners and necessary absorbent materials may also be present. Final fill volume may be limited by weight and fissile loading limits, with the understanding that in such cases waste shall be packaged in the smallest container practical.

2 The Parties agree that pursuant to the Glovebox Excavator Method (GEM), ARP I and ARP II retrieval projects DOE has retrieved and packaged Targeted Waste for shipment from Idaho. The volume of this waste shall be verified pursuant to Section VI and counted toward meeting the requirements of Section V.A above.

B. Notwithstanding Section V.A above, DOE shall do both of the following:

1. Fully excavate those areas identified in Appendix E attached hereto.
 - a) In complying with the obligation set forth in Section V.B, DOE shall excavate to the full lateral extent of the areas identified in Appendix E. The vertical extent of excavation will go down as steeply as possible without compromising slope stability until bedrock is reached, underburden is encountered, further excavation is not warranted based on factors identified in Section VII.A or the presence of large, unwieldy objects makes excavation impracticable.
 - b) The Parties agree that pursuant to ARP I, DOE had, as of February 14, 2008, excavated 0.385 acres of the area identified in Appendix E which shall be counted toward meeting the requirements of Section V.B.

2. Retrieve all Targeted Waste from those areas of the SDA identified in Appendix E in conformity with the protocol attached hereto as Appendix F.

C. The Parties may by mutual agreement and consistent with Section IX of this Agreement, modify the boundaries of the areas identified in Appendix E, provided however, that such modifications shall not affect the requirement of Section V.A.

D. If DOE is unable to recover the volume of Targeted Waste identified in Section V.A above from the areas identified in Appendix E, DOE shall continue to excavate from those additional areas identified in Appendix D until such time as it has met the requirement of Section V.A.

VI. CONFIRMATION OF WASTE IDENTIFICATION AND VOLUME:

In satisfying the obligations set forth in Sections V and VI DOE shall comply with the protocol identified in Appendix F. The Parties may, by mutual agreement in writing, modify the protocol identified in Appendix F to reflect operational experience.

A. To ensure the appropriateness of the Parties' reliance on disposal records for identifying retrieval areas under this Agreement; DOE shall use means acceptable to Idaho to compare disposal records with actual waste disposal. These means shall

include at a minimum:

1. Comparison of information contained in the WILD database reflecting waste disposal volumes, types and locations with volumes of and locations of retrieved 741 Sludge, 742 Sludge, 743 Sludge, and Uranium Oxide, and
2. Comparison of information contained in the WILD database reflecting locations of disposal containers with identifiable labeling or other unique characteristics with actual disposal locations of those containers as determined during the course of retrieval.

B. DOE shall follow the protocol identified in Appendix F and shall be subject to Idaho oversight, to ensure proper identification of Targeted Waste at the dig face and any other process where Targeted Waste segregation occurs so as to assure that retrieved volume calculations are accurate and that wastes meeting the definition of "Targeted Waste" set forth in Section IV.G are identified, segregated and packaged for shipment in future retrievals.

C. DOE shall follow the protocol identified in Appendix F and shall be subject to Idaho oversight to ensure that volume measurements of waste retrieved and packaged pursuant to Section V for the purpose of satisfying Section V.A are accurate and appropriate.

D. For purposes of compliance verification, DOE shall provide qualified Idaho personnel unrestricted access to all excavation records, information, sampling data, and exhumation video recordings. Further, DOE shall provide qualified Idaho personnel unrestricted access for direct observation of exhumation operations, waste sorting, waste container packaging, and waste container assay.

VII. SAFETY/SECURITY ISSUES

A. Excavation and retrieval of Targeted Waste as set forth in Section V of this Agreement are required unless such excavation and/or retrieval presents a substantial danger to worker or public safety or to the environment, or implicates national security issues involving classified information, such factors constituting the exclusive basis upon which DOE may request the suspension of a retrieval obligation under this Agreement.

B. If excavation and retrieval of Targeted Waste from the areas identified in Appendix D or E present a substantial danger to worker or public safety or to the environment or implicates national security issues involving classified information, the Parties agree that retrievals may be suspended until such time as such issues are resolved either through negotiation or judicial determination. The Parties agree to promptly meet and confer regarding any such issues and to attempt in good faith

to resolve such issues. If such resolution cannot be promptly achieved the Parties agree to use the dispute resolution procedures in Section IX.

C. In the event the suspension occurs in an area identified in Appendix E and the cause for such suspension cannot be resolved so to allow for completion of retrieval, the Parties shall agree upon an area of at least equivalent size containing an equivalent volume of Targeted Waste from within the areas identified in Appendix D from which to excavate and retrieve Targeted Waste so as to satisfy the obligations of Sections V.A-C.

VIII. SHIPMENT OF RETRIEVED TRANSURANIC WASTE

DOE agrees to ship any Transuranic Waste retrieved from the SDA prior to December 31, 2017 from the State of Idaho by not later than December 31, 2018. Any Transuranic Waste retrieved from the SDA after December 31, 2017 shall be shipped from the State of Idaho to an appropriate disposal facility within 365 days of the date from which it was retrieved from the SDA and placed in a container.

IX. DISPUTE RESOLUTION: The Parties agree that in the event an impasse is reached in the implementation of this Agreement or that any Party to this Agreement contends that any other Party has violated any terms of this Agreement, the Parties shall seek to resolve their differences informally, which shall at a minimum involve: (1) written notice from either Party identifying the nature of the impasse and/or breach; (2) thirty (30) days within which to meet and confer following written notice; and (3), at least one conference either in person or by telephone between the signatories hereto or their successors before asking for resolution by the Court.

X. JUDICIAL REVIEW

The Parties agree that disputes arising from the performance of this Agreement which cannot be resolved by dispute resolution pursuant to Section IX, shall be resolved by the Court, which having retained jurisdiction over the 1995 Settlement Agreement, shall have continuing jurisdiction over disputes arising under this Agreement.

XI. REMEDY

In the event that the Court determines that DOE is in breach of Paragraph B.1 of the 1995 Settlement Agreement and/or this Agreement, the sole and exclusive remedy for such breach shall be the remedy specified in Paragraph B.2 of the 1995 Settlement Agreement.

XII. AMENDMENT, MODIFICATION AND TERMINATION

A. This Agreement may only be amended by mutual agreement of the Parties or their successors in office. Any amendment or modification of this Agreement shall be in writing, shall have as the effective date the date of signature by the Governor and the Attorney General of Idaho, and shall be incorporated into this Agreement and be enforceable in the same manner as any other requirement of this Agreement.

B. This Agreement shall bind the Parties, their employees, officers, directors, officials, trustees, contractors, subcontractors, consultants, tenants, agents, successors and assigns until such time as the terms of this Agreement are met and this Agreement is terminated in writing by the Parties.

C. Termination of this Agreement shall not affect any remaining obligations of the Parties under the 1995 Settlement Agreement.

XIII. RESERVATION

It is expressly understood and agreed by the Parties that the basis for this agreement are the factual findings set forth in Section II of this Agreement. The Parties reserve the right to seek appropriate relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

XIV. FUNDING

A. Consistent with Paragraph H of the 1995 Settlement Agreement, DOE shall take all necessary steps to obtain sufficient funding to comply with the provisions of this Agreement and, once obtained, shall obligate those funds for the purpose of compliance with this Agreement.

B. Consistent with Paragraph J.3 of the 1995 Settlement Agreement, DOE maintains that any requirement for the obligation of funds under this Agreement is subject to the provisions of the Anti-Deficiency Act, 31 U.S.C. § 1341. DOE also maintains that any requirement for the obligation of funds under this Agreement is subject to the availability of appropriated funds and that the unavailability of such funds may constitute a valid defense to any judicial action that may be brought to enforce the terms of this Agreement. Idaho recognizes the provisions of the Anti-Deficiency Act but has specifically reserved the right to exercise its remedy pursuant to Paragraph K.1.a. of the 1995 Settlement Agreement.

C. If, at any time, adequate funds or appropriations are not available to comply with this Agreement, DOE shall notify Idaho in writing and Idaho shall determine whether it is appropriate to adjust the deadlines set forth in this Agreement or otherwise

pursue any and all available remedies under this Agreement and the 1995 Settlement Agreement.

XV. MISCELLANEOUS PROVISIONS:

A. APPLICABILITY OF THIS AGREEMENT AND RELATIONSHIP TO OTHER OBLIGATIONS: This Agreement is intended solely to govern the rights and liabilities of the Parties as related to Transuranic Waste located at the SDA. Nothing in this Agreement shall affect the remaining obligations, rights or remedies of the Parties pursuant to the 1995 Settlement Agreement, including but not limited to shipments of Transuranic Waste from the Transuranic Waste Storage Area and other locations at the INL.

B. EFFECT OF OTHER LAWS: This Agreement shall not relieve the Parties from their obligation to comply with any applicable federal, state, or local law. Nothing in this Agreement shall be construed to limit or otherwise constrain DOE's authority or obligation under other laws, including but not limited to CERCLA, to excavate or retrieve waste from outside of the areas identified in Appendix D.

C. RELATIONSHIP TO THE FEDERAL FACILITY AGREEMENT AND CONSENT ORDER ("FFA/CO"): The Parties recognize that there are actions being undertaken at the RWMC and SDA pursuant to the terms and conditions of the 1991 FFA/CO between DOE, Idaho and the United States Environmental Protection Agency ("EPA") which are intended to satisfy the requirements of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). It is the intent of the Parties that actions undertaken pursuant to this Agreement be coordinated with those undertaken under the FFA/CO process for addressing contamination at the SDA. It is the expectation of the Parties that simultaneously with the filing of this Agreement a draft Record of Decision (ROD) will be issued for remediation of the SDA. It is further the expectation of the Parties that the draft ROD and any final ROD will be consistent with this Agreement. It is the intention of the Parties to work together and to consult with EPA to assure that implementation of this Agreement and the final ROD will proceed in a harmonious manner. Notwithstanding the foregoing, however, nothing in the FFA/CO or in the draft or final ROD, shall affect the independent obligations to retrieve and ship Targeted Waste located at the SDA as set forth herein. Moreover, DOE reserves its rights pursuant to CERCLA and the FFA/CO.

D. PROPOSED CONSENT JUDGMENT: The Parties agree that they shall jointly present this Agreement to the United States District Court for the District of Idaho with a proposed Order that will provide for the incorporation of this Agreement into the 1995 Settlement Agreement and Consent Decree, continuing jurisdiction of the Court and administrative termination of the matter entitled *Public Service Company*

of *Colorado v. Batt*, CV-91-0035-S-EJL and CV 91-0054-S-EJL without prejudice to the right of the Parties to reopen the proceedings for good cause shown.

E. NO ADMISSION OF LIABILITY: The Agreement effected hereby is a compromise of a disputed claim, and except for purposes of enforcement of this Agreement, shall not be construed as an admission of liability by any person or entity, the same being denied.

F. INTEGRATED AGREEMENT: The Parties declare and represent that no promise, inducement or agreement not herein expressed has been made and that this Agreement contains the entire agreement between the Parties and that the terms of this Agreement including all definitions contained herein are contractual and not mere recital.

G. ADVICE OF COUNSEL: The Parties acknowledge that each is represented by counsel and that each has been fully advised concerning this Agreement and the obligations of the Parties contained in this Agreement.

XVI. EFFECTIVE DATE

The effective date of this Agreement shall be the entry of the Consent Order by the Court as provided for in Section XV.D.

Each of the undersigned representatives of the Parties warrants that he or she is fully authorized to and does hereby enter into and legally bind his or her agency or State to this Agreement.

SO AGREED:

SIGNED: _____ DATE _____
HON. JAMES RISPOLI
ASSISTANT SECRETARY FOR ENVIRONMENTAL
MANAGEMENT
U.S. DEPARTMENT OF ENERGY

SIGNED: _____ DATE _____
ADMIRAL KIRKLAND DONALD
DIRECTOR, NAVAL NUCLEAR PROPULSION PROGRAM

SIGNED: _____ DATE _____
HON. C.L. "BUTCH" OTTER, GOVERNOR
STATE OF IDAHO

SIGNED: _____ DATE _____
HON. LAWRENCE G. WASDEN, ATTORNEY GENERAL
STATE OF IDAHO

- Appendix A: 1995 Court Settlement
- Appendix B: Map of INL
- Appendix C: Map of INL's Radioactive Waste Management Complex, including the Transuranic Storage Area and Subsurface Disposal Area
- Appendix D: Map of 7.40 Acre Retrieval Area
- Appendix E: Map of 5.69 Acre Retrieval Area
- Appendix F: Protocol for Targeted Waste Retrievals and Volume Determinations