THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D C 203018000

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MEMORANDUM FOR DEPUTY FOR ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH, OASA (I&L)
DEPUTY DIRECTOR FOR ENVIRONMENT, OASN (S&L)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE, (E,SLOH) SAF/RQ
DIRECTOR, DEFENSE LOGISTICS AGENCY (DLA-W)

SUBJECT: State Participation in CERCLA IAGs

It's extremely important that states participate in federal facility cleanups. For final and proposed National Priorities List sites, where we are negotiating interagency agreements with the Environmental Protection Agency, they should be parties to these agreements.

In regards to the State role in our cleanup program, when I issued the IAG "model language" (June 17), I recognized that state concerns and issues must be addressed at site-specific negotiations and factored into each agreement as appropriate. There are, however, a number of activities covered in the model language in which I see the states as having a significant role. We should lay that out for them as early as possible in our negotiations, if they want to be actively involved in our cleanup actions. The attached "modified" version of the model langauge reflects my views of an appropriate state role in this area of the agreement. It incorporates where I see the states commonly fitting into the IAG process for those provisions.

I would appreciate your sharing this with the staff that i now handling site-specific negotiations for IAGs in the field.

William H. Parker, III, P.E.
Deputy Assistant Secretary of Defense
(Environment)

Attachment

20 September 1988

MODIFIED IAG CLAUSES WITH A STATE ROLE

The model DOD-EPA interagency agreement provisions have been modified herein to reflect a state role beyond the role provided in the original model clauses issued on 17 June 1988. The additional language is <u>underscored</u> throughout the document.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [ ]
AND THE
[STATE/COMMONWEALTH OF _____]*
AND THE
UNITED STATES [DOD Component]

IN THE MATTER OF: The U.S. Department of the [DOD Component] [Name of Installation]	Federal Facility Agreement Under CERCLA Section 120 Administrative Docket Number:

Based on the information available to the Parties on the effective date of this FEDERAL FACILITY AGREEMENT (Agreement), and without trial or adjudication of any issues of fact or law, the Parties agree as follows:

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*DOD and EPA agree that it is extremely important that states participate in Federal facility cleanups by joining as a Party to these agreements. DOD and EPA have not attempted to negotiate on behalf of the states in developing these model provisions. DOD and EPA recognize that state concerns and issues must be addressed at site-specific negotiations and factored into this Agreement as appropriate.

I. JURISDICTION

1.1 Each Party is entering into this Agreement pursuant to the following authorities:

(a) The U.S. Environmental Protection Agency (EPA), Region ___, enters into those portions of this Agreement that relate to the remedial investigation/feasibility study (RI/FS) pursuant to Section 120(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9620(e)(1), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 (hereinafter jointly referred to as CERCLA) and [Sections 6001, 3008(h) and 3004(u) & (v) of] the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. [§§ 6961, 6928(h) and 6924(u) & (v)], as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), (hereinafter jointly referred to as RCRA) and Executive Order 12580;

(b) EPA, Region ___, enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to CERCLA § 120(e)(2), 42 U.S.C. § 9620(e)(2), [RCRA §§ 6001, 3008(h) and 3004(u) & (v), 42 U.S.C. §§ 6961, 6928(h) and 6924(u) & (v)] and Executive Order 12580;

(c) The [DOD Component] enters into those portions of this Agreement that relate to the RI/FS pursuant to CERCLA § 120(e)(1), 42 U.S.C. § 9620(e)(1), [RCRA §§ 6001, 3008(h) and 3004(u) & (v), 42 U.S.C. §§ 6961, 6928(h) and 6924(u) & (v)], Executive Order 12580, the National Environmental Policy Act, 42 U.S.C. § 4321, and the Defense Environmental Restoration program (DERP), 10 U.S.C. § 2701 et seq.; and

(d) The [DOD Component] enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to CERCLA § 120(e)(2), 42 U.S.C. § 9620(e)(2), [RCRA §§ 6001, 3004(u) and 3008(h), 42 U.S.C. §§ 6961, 6924(u) and 6928(h)], Executive Order 12580 and the DERP.

(e) The [State] enters into this agreement pursuant to CERCLA § 120(f), 42 U.S.C. § 9620(f); CERCLA § 121(f), 42 U.S.C. § 9621(f); RCRA § 3006, 42 U.S.C. § 6926; and [State law reference allowing State signatory official to enter into binding agreement].

II. PURPOSE

2.1 The general purposes of this Agreement are to:

(a) Ensure that the environmental impacts associated with past and present activities at the Site are thoroughly investigated and appropriate remedial action taken as necessary to protect the public health, welfare and the environment;

(b) Establish a procedural framework and schedule for developing, implementing and monitoring appropriate response actions at the Site in accordance with CERCLA, the NCP, Superfund guidance and policy, RCRA, RCRA guidance and policy; and,

(c) Facilitate cooperation, exchange of information and participation of the Parties in such actions.

2.2 Specifically, the purposes of this Agreement are to:

(a) Identify Interim Remedial Action (IRA) alternatives which are appropriate at the Site prior to the implementation of final remedial action(s) for the Site. IRA alternatives shall be identified and proposed to the Parties as early as possible prior to formal proposal of IRAs to EPA <u>and the State</u> pursuant to CERCLA. This process is designed to promote cooperation among the Parties in identifying IRA alternatives prior to selection of final IRAs.

(b) Establish requirements for the performance of a RI to determine fully the nature and extent of the threat to the public health or welfare or the environment caused by the release and threatened release of hazardous substances, pollutants or contaminants at the Site and to establish requirements for the performance of a FS for the Site to identify, evaluate, and select alternatives for the appropriate remedial action(s) to prevent, mitigate, or abate the release or threatened release of hazardous substances, pollutants contaminants at the Site in accordance with CERCLA.

(c) Identify the nature, objective and schedule of response actions to be taken at the Site. Response actions at the Site shall attain that degree of cleanup of hazardous substances, pollutants or contaminants mandated by CERCLA.

(d) Implement the selected interim and final remedial action(s) in accordance with CERCLA and meet the requirements of CERCLA § 120(e)(2) for an interagency agreement between EPA and the [DOD Component].

(e) Assure compliance, through this Agreement, with

RCRA and other federal and state hazardous waste laws and regulations for matters covered herein.

(f) Coordinate response actions at the Site with the mission and support activities at [installation].

(g) Expedite the cleanup process [including, at site-specific negotiations, shortening the time frames specified in these model provisions] to the extent consistent with protection of human health and the environment.

(h) Provide [State] involvement in the initiation, development, and selection of remedial actions to be undertaken at [installation], including the review of all applicable data as it becomes available and the development of studies, reports, and action plans; and to identify and integrate State ARARs into the remedial action process.

III. STATUTORY COMPLIANCE/RCRA-CERCLA INTEGRATION

3.1 The Parties intend to integrate the [DOD Component]'s CERCLA response obligations and RCRA corrective action obligations which relate to the release(s) of hazardous substances, hazardous wastes, pollutants or contaminants covered by this Agreement into this comprehensive Agreement. Therefore, the Parties intend that activities covered by this Agreement will be deemed to achieve compliance with CERCLA, 42 U.S.C. § 9601 et seq.; to satisfy the corrective action requirements RCRA §§ 3004(u) & (v), 42 U.S.C. §§ 6924(u) & (v), for a RCRA permit, and RCRA § 3008(h), 42 U.S.C. § 6928(h), for interim status facilities; and to meet or exceed all applicable or relevant and appropriate Federal and State laws and regulations, to the extent required by CERCLA § 121, 42 U.S.C. § 9621.

3.2 Based upon the foregoing, the Parties intend that any remedial action selected, implemented and completed under this Agreement shall be deemed by the Parties to be protective of human health and the environment such that remediation of releases covered by this Agreement shall obviate the need for further corrective action under RCRA (i.e., no further corrective action shall be required). The Parties agree that with respect to releases of hazardous waste covered by this Agreement, RCRA shall be considered an applicable or relevant and appropriate requirement pursuant to CERCLA § 121.

3.3 The Parties recognize that the requirement to obtain permits for response actions undertaken pursuant to this Agreement shall be as provided for in CERCLA and the NCP. The Parties further recognize that ongoing hazardous waste management activities at the [installation] may require the issuance of permits under Federal and State laws. This Agreement does not affect the requirements, if any, to obtain such permits. However, if a permit is issued to the [DOD Component] for ongoing hazardous waste management activities at the Site, <u>the</u> EPA <u>and/or the State</u> shall reference and incorporate any appropriate provisions, including appropriate schedules (and the provision for extension of such schedules), of this Agreement into such permit. The Parties intend that the judicial review of any permit conditions which reference this Agreement shall, to the extent authorized by law, only be reviewed under the provisions of CERCLA.

3.4 Nothing in this Agreement shall alter the [DOD Component]'s authority with respect to removal actions conducted pursuant to CERCLA § 104, 42 U.S.C. § 9604.

IV. CONSULTATION WITH EPA AND THE STATE

Review and Comment Process for Draft and Final Documents

4.1 Applicability: The provisions of this Section establish the procedures that shall be used by the [DOD Component], the State, and EPA to provide the Parties with appropriate notice, review, comment, and response to comments regarding RI/FS and RD/RA documents, specified herein as either primary or secondary documents. In accordance with CERCLA § 120 and 10 U.S.C. § 2705, the [DOD Component] will normally be responsible for issuing primary and secondary documents to EPA and the State. As of the effective date of this Agreement, all draft and final reports for any deliverable document identified herein shall be prepared, distributed and subject to dispute in accordance with paragraphs 4.2 through 4.10 below. The designation of a document as "draft" or "final" is solely for purposes of consultation with EPA and the State in accordance with this Part. Such designation does not affect the obligation of the Parties to issue documents, which may be referred to herein as "final", to the public for review and comment as appropriate and as required by law.

4.2 General Process for RI/FS and RD/RA documents:

(a) Primary documents include those reports that are major, discrete portions of RI/FS or RD/RA activities. Primary documents are initially issued by the [DOD Component] in draft subject to review and comment by EPA. Following receipt of comments on a particular draft primary document, the [DOD Component] will respond to the comments received and issue a draft final primary document subject to dispute resolution. The draft final primary document will become the final primary document either 30 days after the period established for review of a draft final document if dispute resolution is not invoked or as modified by decision of the dispute resolution process.

(b) Secondary documents include those reports that are discrete portions of the primary documents and are typically input or feeder documents. Secondary documents are issued by the [DOD Component] in draft subject to review and comment by U.S. EPA and the State. Although the [DOD Component] will respond to comments received, the draft secondary documents may be finalized in the context of the corresponding primary documents. A secondary document may be disputed at the time the corresponding draft final primary document is issued.

4.3 Primary Reports:

(a) The [DOD Component] shall complete and transmit draft reports for the following primary documents to EPA for

review and comment in accordance with the provisions of this Part:

[Note: The list set forth below represents potential primary documents and the type of information that typically would be generated during a CERCLA cleanup at an NPL site. This list, and the list below of secondary documents, includes discrete portions of the RI/FS or RD/RA and are subject to change in accordance with the NCP, [DOD Component] and EPA guidance, and site specific requirements. In practice, the documents will also vary with scope and nature of the project, and may either be combined or broken out into separate volumes.]

(1) [Scope of Work]

(2) [RI/FS Work Plan, including Sampling and Analysis Plan and QAPP]

(3) [Risk Assessment]

(4) [RI Report]

(5) [Initial Screening of Alternatives]

(6) [FS Report]

(7) [Proposed Plan]

(8) [Record of Decision]

(9) [Remedial Design]

(10) [Remedial Action Work Plan]

(b) Only the draft final reports for the primary documents identified above shall be subject to dispute resolution. The [DOD Component] shall complete and transmit draft primary documents in accordance with the timetable and deadlines established in Section ___ of this Agreement.

4.4 Secondary documents:

(a) The [DOD Component] shall complete and transmit draft reports for the following secondary documents to EPA <u>and the State</u> for review and comment in accordance with the provisions of this Part:

(1) [Initial Remedial Action / Data Quality Objectives]

(2) [Site Characterization Summary]

(3) [Detailed Analysis of Alternatives]

(4) [Post-screening Investigation Work Plan]

(5) [Treatability Studies]

(6) [Sampling and Data Results]

(b) Although EPA and the State may comment on the draft reports for the secondary documents listed above, such documents shall not be subject to dispute resolution except as provided by paragraph 4.2 hereof. Target dates shall be established for the completion and transmission of draft secondary reports pursuant to Section ___ of this Agreement.

4.5 Meetings of the Project Managers on Development of Reports: The Project Managers shall meet approximately every [30] days, except as otherwise agreed by the Parties, to review and discuss the progress of work being performed at the site on the primary and secondary documents. Prior to preparing any draft report specified in paragraphs 4.3 and 4.4 above, the Project Managers shall meet to discuss the report results in an effort to reach a common understanding, to the maximum extent practicable, with respect to the results to be presented in the draft report.

4.6 Identification and Determination of Potential ARARs:

(a) For those primary reports or secondary documents that consist of or include ARAR determinations, prior to the issuance of a draft report, the Project Managers shall meet to identify and propose, to the best of their ability, all potential ARARs pertinent to the report being addressed. At that time, [State] shall identify all potential State ARARs as required by CERCLA § 121(d)(2)(A)(ii), 42 U.S.C. § 9621(d)(2)(A)(ii) which are pertinent to the report being addressed. Draft ARAR determinations shall be prepared by the [DOD Component] in accordance with CERCLA § 121(d)(2), the NCP and pertinent guidance issued by EPA, which is not inconsistent with CERCLA and the NCP.

(b) In identifying potential ARARs, the Parties recognize that actual ARARs can be identified only on a site-specific basis and that ARARs depend on the specific hazardous substances, pollutants and contaminants at a site, the particular actions proposed as a remedy and the characteristics of a site. The Parties recognize that ARAR identification is

necessarily an iterative process and that potential ARARs must be re-examined throughout the RI/FS process until a ROD is issued.

4.7 Review and Comment on Draft Reports:

(a) The [DOD Component] shall complete and transmit each draft primary report to EPA and the State on or before the corresponding deadline established for the issuance of the report. The [DOD Component] shall complete and transmit the draft secondary document in accordance with the target dates established for the issuance of such reports established pursuant to Section ___ of this Agreement.

(b) Unless the Parties mutually agree to another time period, all draft reports shall be subject to a 30-day period for review and comment. Review of any document by the EPA and the State may concern all aspects of the report (including completeness) and should include, but is not limited to, technical evaluation of any aspect of the document, and consistency with CERCLA, the NCP and any pertinent guidance or policy promulgated by the EPA. Comments by the EPA and the State shall be provided with adequate specificity so that the [DOD Component] may respond to the comment and, if appropriate, make changes to the draft report. Comments shall refer to any pertinent sources of authority or references upon which the comments are based, and, upon request of the [DOD Component], the EPA and the State shall provide a copy of the cited authority or reference. In cases involving complex or unusually lengthy reports, EPA and the State may extend the 30-day comment period for an additional 20 days by written notice to the [DOD Component] prior to the end of the 30-day period. On or before the close of the comment period, EPA and the State shall transmit by next day mail their written comments to the [DOD Component].

(c) Representatives of the [DOD Component] shall make themselves readily available to EPA and the State during the comment period for purposes of informally responding to questions and comments on draft reports. Oral comments made during such discussions need not be the subject of a written response by the [DOD Component] on the close of the comment period.

(d) In commenting on a draft report which contains a proposed ARAR determination, EPA-or the State shall include a reasoned statement of whether they object to any portion of the proposed ARAR determination. To the extent that EPA or the State does object, it shall explain the bases for its objection in detail and shall identify any ARARs which it believes were not properly addressed in the proposed ARAR determination.

(e) Following the close of the comment period for a draft report, the [DOD Component] shall give full consideration

to all written comments on the draft report submitted during the comment period. Within 30 days of the close of the comment period on a draft secondary report, the [DOD Component] shall transmit to EPA and the State its written response to comments received within the comment period. Within 30 days of the close of the comment period in a draft primary report, the [DOD Component] shall transmit to EPA and the State a draft final primary report, which shall include the [DOD Component]'s response to all written comments, received within the comment period. While the resulting draft final report shall be the responsibility of the [DOD Component], it shall be the product of consensus to the maximum extent possible.

(f) The [DOD Component] may extend the 30-day period for either responding to comments in a draft report or for issuing the draft final primary report for an additional 20 days by providing notice to EPA and the State. In appropriate circumstances, this time period may be further extended in accordance with Section ___ hereof.

4.8 Availability of Dispute Resolution for Draft Final Primary Documents:

(a) Dispute resolution shall be available to the Parties for draft final primary reports as set forth in Section ___.

(b) When dispute resolution is invoked on a draft primary report, work may be stopped in accordance with the procedures set forth in Section ___ regarding dispute resolution.

4.9 Finalization of Reports: The draft final primary report shall serve as the final primary report if no party invokes dispute resolution regarding the document or, if invoked, at completion of the dispute resolution process should the [DOD Component]'s position be sustained. If the [DOD Component]'s determination is not sustained in the dispute resolution process, the [DOD Component] shall prepare, within not more than 35 days, a revision of the draft final report which conforms to the results of dispute resolution. In appropriate circumstances, the time period for this revision period may be extended in accordance with Section ___ hereof.

4.10 Subsequent Modifications of Final Reports: Following finalization of any primary report pursuant to paragraph 4.9 above, EPA, the State, or the [DOD Component] may seek to modify the report, including seeking additional field work, pilot studies, computer modeling or other supporting technical work, only as provided in subparagraphs (a) and (b) below.

(a) EPA, the State, or the [DOD Component] may seek to modify a report after finalization if it determines, based on

new information (i.e., information that became available, or conditions that became known, after the report was finalized) that the requested modification is necessary. EPA, the State, or the [DOD Component] may seek such a modification by submitting a concise written request to the Project Manager of the other Party. The request shall specify the nature of the requested modification and how the request is based on new information.

(b) In the event that a consensus is not reached by the Project Managers on the need for a modification, either EPA, the State, or the [DOD Component] may invoke dispute resolution to determine if such modification shall be conducted. Modification of a report shall be required only upon a showing that:

(1) The requested modification is based on significant new information; and

(2) The requested modification could be of significant assistance in evaluating impacts on the public health or the environment, in evaluating the selection of remedial alternatives, or in protecting human health and the environment.

(c) Nothing in this section shall alter EPA's or the State's ability to request the performance of additional work which was not contemplated by this Agreement. The [DOD Component]'s obligation to perform such work must be established by either a modification of a report or document or by amendment to this Agreement.

V. RESOLUTION OF DISPUTES

5.1 Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement, the procedures of this Section shall apply. All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or immediate supervisor level. If resolution cannot be achieved informally, the procedures of this Section shall be implemented to resolve a dispute.

5.2 Within thirty (30) days after: (1) the period established for review of a draft final primary document pursuant to Section ___ (Review of Submittals) of this Agreement, or (2) any action which leads to or generates a dispute, the disputing Party shall submit to the DRC a written statement of dispute setting forth the nature of the dispute, the work affected by the dispute, the disputing Party's position with respect to the dispute and the technical, legal or factual information the disputing Party is relying upon to support its position.

5.3 Prior to any Party's issuance of a written statement of dispute, the disputing Party shall engage the other Party in informal dispute resolution among the Project Managers and/or their immediate supervisors. During this informal dispute resolution period the Parties shall meet as many times as are necessary to discuss and attempt resolution of the dispute.

5.4 The DRC will serve as a forum for resolution of disputes for which agreement has not been reached through informal dispute resolution. The Parties shall each designate one individual and an alternate to serve on the DRC. The individuals designated to serve on the DRC shall be employed at the policy level (SES or equivalent) or be delegated the authority to participate on the DRC for the purposes of dispute resolution under this Agreement. The EPA representative on the DRC is the Waste Management Division Director of EPA Region ___. The State's designated member is the [State equivalent]. The [DOD Component]'s designated member is the [DOD Component equivalent]. Written notice of any delegation of authority from a Party's designated representative on the DRC shall be provided to all other Parties pursuant to the procedures of Section ___ (Notices).

5.5 Following elevation of a dispute to the DRC, the DRC shall have twenty-one (21) days to unanimously resolve the dispute and issue a written decision. If the DRC is unable to unanimously resolve the dispute within this twenty-one (21) day period the written statement of dispute shall be forwarded to the Senior Executive Committee (SEC) for resolution, within seven (7) days after the close of the twenty-one (21) day resolution period.

5.6 The SEC will serve as the forum for resolution of disputes for which agreement has not been reached by the DRC. The EPA representative on the SEC is the Regional Administrator of EPA Region ___. The State's designated member is the [State equivalent]. The [DoD Component]'s representative on the SEC is the [DOD Component equivalent]. The SEC members shall, as appropriate, confer, meet and exert their best efforts to resolve the dispute and issue a written decision. If unanimous resolution of the dispute is not reached within twenty-one (21) days, the EPA Regional Administrator shall issue a written position on the dispute. The [DOD Component] may, within fourteen (14) days of the Regional Administrator's issuance of EPA's position, issue a written notice elevating the dispute to the Administrator of EPA for resolution in accordance with all applicable laws and procedures. In the event that the [DOD Component] elects not to elevate the dispute to the Administrator within the designated fourteen (14 day escalation period, the [DOD Component] shall be deemed to have agreed with Regional Administrator's written position with respect to the dispute.

5.7 Upon escalation of a dispute to the Administrator of EPA pursuant to paragraph 5.6 above, the Administrator will review and resolve the dispute within twenty-one (21) days. Upon request, and prior to resolving the dispute, the EPA Administrator shall meet and confer with the [DOD Component]'s Secretariat Representative to discuss the issue(s) under dispute. Upon resolution, the Administrator shall provide the [DOD Component] with a written final decision setting forth resolution of the dispute. The duties of the Administrator set forth in this Section shall not be delegated.

5.8 The pendency of any dispute under this Section shall not affect the [DOD Component]'s responsibility for timely performance of the work required by this Agreement, except that the time period for completion of work affected by such dispute shall be extended for a period of time usually not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein. All elements of the work required by this Agreement which are not affected by the dispute shall continue and be completed in accordance with the applicable schedule.

5.9 When dispute resolution is in progress, work affected by the dispute will immediately be discontinued if the Hazardous Waste Division Director for EPA Region ___ requests, in writing, that work related to the dispute be stopped because, in EPA's opinion, such work is inadequate or defective, and such inadequacy or defect is likely to yield an adverse effect on human health or the environment, or is likely to have a substantial adverse effect on the remedy selection or implementation process. To the extent possible, EPA shall consult with the [DOD Component] prior to initiating a work

stoppage request. After stoppage of work, if the [DOD Component] believes that the work stoppage is inappropriate or may have potential significant adverse impacts, the [DOD Component] may meet with the Division Director to discuss the work stoppage. Following this meeting, and further consideration of the issues, the Division Director will issue, in writing, a final decision with respect to the work stoppage. The final written decision of the Division Director may immediately be subjected to formal dispute resolution. Such dispute may be brought directly to the either the DRC or the SEC, at the discretion of the [DOD Component].

5.10 Within twenty-one (21) days of resolution of a dispute pursuant to the procedures specified in this Part, the [DOD Component] shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Agreement according to the amended plan, schedule or procedures.

5.11 Resolution of a dispute pursuant to this Section of the Agreement constitutes a final resolution of any dispute arising under this Agreement. All Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Section of this Agreement.

VI. ENFORCEABILITY

6.1 The Parties agree that:

(a) Upon the effective date of this Agreement, any standard, regulation, condition, requirement or order which has become effective under CERCLA and is incorporated into this Agreement is enforceable by any person pursuant to CERCLA § 310, and any violation of such standard, regulation, condition, requirement or order will be subject to civil penalties under CERCLA §§ 310(c) and 109;

(b) All timetables or deadlines associated with the RI/FS shall be enforceable by any person pursuant to CERCLA § 310, and any violation of such timetables or deadlines will be subject to civil penalties under CERCLA §§ 310(c) and 109;

(c) All terms and conditions of this Agreement which relate to interim or final remedial actions, including corresponding timetables, deadlines or schedules, and all work associated with the interim or final remedial actions, shall be enforceable by any person pursuant to CERCLA § 310(c), and any violation of such terms or conditions will be subject to civil penalties under CERCLA §§ 310(c) and 109; and

(d) Any final resolution of a dispute pursuant to Section ___ of this Agreement which establishes a term, condition, timetable, deadline or schedule shall be enforceable by any person pursuant to CERCLA § 310(c), and any violation of such term, condition, timetable, deadline or schedule will be subject to civil penalties under CERCLA §§ 310(c) and 109.

6.2 Nothing in this Agreement shall be construed as authorizing any person to seek judicial review of any action or work where review is barred by any provision of CERCLA, including CERCLA § 113(h).

6.3 The Parties agree that all Parties shall have the right to enforce the terms of this Agreement.

VII. STIPULATED PENALTIES

7.1 In the event that the [DOD Component] fails to submit a primary document (i.e., Scope of Work, RI/FS Work Plan, Risk Assessment, RI Report, Initial Screening of Alternatives, FS Report, Proposed Plan, Record of Decision, Remedial Design, Remedial Action Work Plan) to EPA pursuant to the appropriate timetable or deadline in accordance with the requirements of this Agreement, or fails to comply with a term or condition of this Agreement which relates to an interim or final remedial action, EPA may assess a stipulated penalty against the [DOD Component]. A stipulated penalty may be assessed in an amount not to exceed $5,000 for the first week (or part thereof), and $10,000 for each additional week (or part thereof) for which a failure set forth in this paragraph occurs.

7.2 Upon determining that the [DOD Component] has failed in a manner set forth in paragraph 7.1, EPA shall so notify the [DOD Component] in writing. If the failure in question is not already subject to dispute resolution at the time such notice is received, the [DOD Component] shall have fifteen (5) days after receipt of the notice to invoke dispute resolution on the question of whether the failure did in fact occur. The [DoD Component] shall not be liable for the stipulated penalty assessed by EPA if the failure is determined, through the dispute resolution process, not to have occurred. No assessment of a stipulated penalty shall be final until the conclusion of dispute resolution procedures related to the assessment of the stipulated penalty.

7.3 The annual reports required by CERCLA § 120(e)(5) shall include, with respect to each final assessment of a stipulated penalty against the [DOD Component] under this Agreement, each of the following:

(a) The facility responsible for the failure;

(b) A statement of the facts and circumstances giving rise to the failure;

(c) A statement of any administrative or other corrective action taken at the relevant facility, or a statement of why such measures were determined to be inappropriate;

(d) A statement of any additional action taken by or at the facility to prevent recurrence of the same type of failure; and

(e) The total dollar amount of the stipulated penalty assessed for the particular failure.

7.4 Stipulated penalties assessed pursuant to this Section shall be payable to the Hazardous Substances Response Trust Fund only in the manner and to the extent expressly provided for in Acts authorizing funds for, and appropriations to, the DOD.

7.5 In no event shall this Section give rise to a stipulated penalty in excess of the amount set forth in CERCLA § 109.

7.6 This Section shall not affect the [DOD Component]'s ability to obtain an extension of a timetable, deadline or schedule pursuant to Section ____ of this Agreement.

7.7 Nothing in this Agreement shall be construed to render any officer or employee of the [DOD Component] personally liable for the payment of any stipulated penalty assessed pursuant to this Part.

VIII. DEADLINES

[This model provision assumes no investigatory work is in progress at the site and no schedules have been previously established for study work. The degree of specificity and completeness of the deadlines contained herein shall be based upon information possessed at the time of development of the site-specific agreement.]

8.1 The following deadlines have been established, in conjunction with the State, for the submittal of draft primary documents pursuant to this Agreement:

(a) [Scope of Work]

8.2 Within twenty-one (21) days of the effective date of this Agreement, the [DOD Component] shall propose deadlines for completion of the following draft primary documents:

(a) [RI/FS Work Plan, including Sampling and Analysis Plan and QAPP]

(b) [Risk Assessment]

(c) [RI Report]

(d) [Initial Screening of Alternatives]

(e) [FS Report]

(f) [Proposed Plan]

(g) [Record of Decision]

Within fifteen (15) days of receipt, EPA, in conjunction with the State, shall review and provide comments to the [DOD Component] regarding the proposed deadlines. Within fifteen (15) days following receipt of the comments the [DOD Component] shall, as appropriate, make revisions and reissue the proposal. The Parties shall meet as necessary to discuss and finalize the proposed deadlines. If the Parties agree on proposed deadlines, the finalized deadlines shall be incorporated into the appropriate Work Plans. If the Parties fail to agree within thirty (30) days on the proposed deadlines, the matter shall immediately be submitted for dispute resolution pursuant to Section of this Agreement. The final deadlines established pursuant to this paragraph shall be published by EPA, in conjunction with the State.

8.3 Within twenty-one (21) days of issuance of the Record of Decision, the [DOD Component] shall propose deadlines for completion of the following draft primary documents:

(a) [Remedial Design]

(b) [Remedial Action Work Plan]

These deadlines shall be proposed, finalized and published utilizing the same procedures set forth in paragraph 8.2 above.

8.4 The deadlines set forth in this Part, or to be established as set forth in this Part, may be extended pursuant to Section ___ of this Agreement. The Parties recognize that one possible basis for extension of the deadlines for completion of the Remedial Investigation and Feasibility Study Reports is the identification of significant new Site conditions during the performance of the remedial investigation.

IX. EXTENSIONS

9.1 Either a timetable and deadline or a schedule shall be extended upon receipt of a timely request for extension and when good cause exists for the requested extension. Any request for extension by the [DOD Component] shall be submitted in writing and shall specify:

(a) The timetable and deadline or the schedule that is sought to be extended;

(b) The length of the extension sought;

(c) The good cause(s) for the extension; and

(d) Any related timetable and deadline or schedule that would be affected if the extension were granted.

9.2 Good cause exists for an extension when sought in regard to:

(a) An event of force majeure;

(b) A delay caused by another party's failure to meet any requirement of this Agreement;

(c) A delay caused by the good faith invocation of dispute resolution or the initiation of judicial action;

(d) A delay caused, or which is likely to be caused, by the grant of an extension in regard to another timetable and deadline or schedule; and

(e) Any other event or series of events mutually agreed to by the Parties as constituting good cause.

9.3 Absent agreement of the Parties with respect to the existence of good cause, the [DOD Component] may seek and obtain determination through the dispute resolution process that good cause exists.

9.4 Within seven days of receipt of a request for an extension of a timetable and deadline or a schedule, EPA <u>or the State</u> shall advise the [DOD Component] in writing of its respective position on the request. Any failure by EPA <u>or the State</u> to respond within the 7-day period shall be deemed to constitute concurrence in the request for extension. If EPA <u>or the State</u> does not concur in the requested extension, it shall include in its statement of nonconcurrence an explanation of the basis for its position.

9.5 If there is consensus among the Parties that the requested extension is warranted, the [DOD Component] shall extend the affected timetable and deadline or schedule accordingly. If there is no consensus among the Parties as to whether all or part of the requested extension is warranted, the timetable and deadline or schedule shall not be extended except in accordance with determination resulting from the dispute resolution process.

9.6 Within seven days of receipt of a statement of nonconcurrence with the requested extension, the [DOD Component] may invoke dispute resolution.

9.7 A timely and good faith request for an extension shall toll any assessment of stipulated penalties or application for judicial enforcement of the affected timetable and deadline or schedule until a decision is reached on whether the requested extension will be approved. If dispute resolution is invoked and the requested extension is denied, stipulated penalties may be assessed and may accrue from the date of the original timetable, deadline or schedule. Following the grant of an extension, an assessment of stipulated penalties or an application for judicial enforcement may be sought only to compel compliance with the timetable and deadline or schedule as most recently extended.

X. FORCE MAJEURE

10.1 A Force Majeure shall mean any event arising from causes beyond the control of a Party that causes a delay in or prevents the performance of any obligation under this Agreement, including, but not limited to, acts of God; fire; war; insurrection; civil disturbance; explosion; unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance; adverse weather conditions that could not be reasonably anticipated; unusual delay in transportation; restraint by court order or order of public authority; inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses due to action r inaction of any governmental agency or authority other than the [DOD Component]; delays caused by compliance with applicable statutes or regulations governing contracting., procurement or acquisition procedures, despite the exercise of reasonable diligence; and insufficient availability of appropriated funds, if the [DOD Component] shall have made timely request for such funds as part of the budgetary process as set forth in Section ___ (Funding) of this Agreement. A Force Majeure shall also include any strike or other labor dispute, whether or not within the control of the Parties affected thereby. Force Majeure shall not include increased costs or expenses of Response Actions, whether or not anticipated at the time such Response Actions were initiated.

XI. FUNDING

11.1 It is the expectation of the Parties to this Agreement that all obligations of the [DOD Component] arising under this Agreement will be fully funded. The [DOD Component] agrees to seek sufficient funding through the DOD budgetary process to fulfill its obligations under this Agreement.

11.2 In accordance with CERCLA § 120(e)(5)(B), 42 U.S.C. § 9620(e)(5)(B), the [DOD Component] shall include in its annual report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement.

11.3 Any requirement for the payment or obligation of funds, including stipulated penalties, by the [DOD Component] established by the terms of this Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in Violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

11.4 If appropriated funds are not available to fulfill the [DOD Component]'s obligations under this Agreement, EPA <u>and the State</u> reserve the right to initiate an action against any other person, or to take any response action, which would be appropriate absent this Agreement.

11.5 Funds authorized and appropriated annually by Congress under the "Environmental Restoration, Defense" appropriation in the Department of Defense Appropriation Act and allocated by the DASD(E) to the [DOD Component] will be the source of funds for activities required by this Agreement consistent with Section 211 of SARA, 10 U.S.C. Chapter 160. However, should the Environmental Restoration, Defense appropriation be inadequate in any year to meet the total [DOD Component] CERCLA implementation requirements, the DOD shall employ and the [DOD Component] shall follow a standardized DOD prioritization process which allocates that year's appropriations in a manner which maximizes the protection of human health and the environment. A standardized DOD prioritization model shall be developed and utilized with the assistance of EPA and the states.