United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

DIRECTIVE NUMBER: 9992.1

TITLE: Agreement with the Department of Energy -- Model Provisions for CERCLA Federal Facilities Agreements

APPROVAL DATE: May 27, 1988

EFFECTIVE DATE: May 27, 1988

ORIGINATING OFFICE: OWPE

☒ **FINAL**

☐ **DRAFT**

LEVEL OF DRAFT

- ☒ A — Signed by AA or DAA
- ☐ B — Signed by Office Director
- ☐ C — Review & Comment

REFERENCE (other documents):

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DIRECTIVE DIRECTIVE DI

EPA

United States Environmental Protection Agency
Washington, DC 20460

OSWER Directive Initiation Request

1. Directive Number: 9992.1

2. Originator Information

Name of Contact Person	Mail Code	Office	Telephone Code
Bernard (Chip) Landman	WH-527	Fed. Fac. Haz. Waste Compl. Office	382-2035

3. Title

Agreement with the Department of Energy --
Model Provisions for CERCLA Federal Facility Agreements

4. Summary of Directive (include brief statement of purpose)

Provides model language for inclusion in CERCLA Section 120 Agreements with the Department of Energy. CERCLA Section 120 Agreements should be utilized for NPL sites where CERCLA is selected as the lead remedial authority.

5. Keywords: Department of Energy; DOE; CERCLA Section 120; Federal Facility Agreement;

6a. Does This Directive Supersede Previous Directive(s)? [X] No [ ] Yes What directive (number, title)

b. Does It Supplement Previous Directive(s)? [X] No [ ] Yes What directive (number, title)

7. Draft Level

[ ] A – Signed by AA/DAA [ ] B – Signed by Office Director [ ] C – For Review & Comment [ ] D – In Development

8. Document to be distributed to States by Headquarters? [X] Yes [ ] No

This Request Meets OSWER Directives System Format Standards.

9. Signature of Lead Office Directives Coordinator	Date
10. Name and Title of Approving Official	Date

EPA Form 1315-17 (Rev. 5-87) Previous editions are obsolete.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 27 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPO

MEMORANDUM

SUBJECT: Agreement with the Department of Energy--
Model Provisions for CERCLA Federal Facility
Agreements

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I-X

I am pleased to transmit to you model language for key provisions of CERCLA Federal Facility Agreements with the Department of Energy (DOE). This language has been mutually agreed to by EPA and DOE Headquarters.

The attached provisions deal primarily with policy issues which required agreement between the two Agencies before site-specific agreements could be finalized. The attached language should be incorporated into the agreements you are now negotiating, and into future agreements, to insure national consistency in dealing with DOE facilities which involve CERCLA activities. Language in brackets indicates those areas which can be adjusted depending on site-specific considerations.

Please note that there are many other important parts of the agreements which the Region must negotiate, notably those sections dealing with the actual work that needs to be performed at each specific DOE site and the schedules to be met. Attached, therefore, is a generic table of contents which lists other important sections which are normally included in the agreements, but which do not require model language. Also, individual State concerns should be factored into each agreement, as it is highly desirable that States participate in Federal facility cleanups.

I hope these model provisions will help you in quickly concluding the negotiations you are currently conducting with DOE, and that such negotiations will now become more routine. If you have any questions about these provisions or their implementation, please contact Christopher Grundler, Director of the Federal Facilities Compliance Task Force, OWPE, at 475-9801. Task Force staff is available to support your negotiations, or to answer questions which may come up relating to the model provisions.

I look forward to working with you as we continue to work toward making Federal facility environmental compliance a model for others.

Attachments

cc: Lee Thomas, EPA
Jim Barnes, EPA
Ernest Baynard, DOE
Roger Marzulla, DOJ
Tom Adams, OECM
Lawrence Jensen, OGC
Jennifer Joy Wilson, OEA
Waste Management Division Directors

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION ___
AND THE
UNITED STATES DEPARTMENT OF ENERGY

IN THE MATTER OF:	)	
The U.S. Department of Energy's [NAME OF FACILITY]	)	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:

JURISDICTION

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

(i) The U.S. Environmental Protection Agency (U.S. 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/SARA or CERCLA) and [Sections 6001, 3008(h) and 3004(u) and (v) of] the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. [§§ 6961, 6928(h), 6924(u) and (v),] as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA)(hereinafter jointly referred to as RCRA/HSWA or RCRA) and Executive Order 12580;

(ii) U.S. EPA, Region ___, enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to Section 120(e)(2) of CERCLA/SARA, [Sections 6001, 3008(h) and 3004(u) and (v) of] RCRA and Executive Order 12580;

(iii) the DOE enters into those portions of this Agreement that relate to the RI/FS pursuant to Section 120(e)(1) of CERCLA, [Sections 6001, 3008(h) and 3004(u) and(v) of] RCRA, Executive Order 12580, the National Environmental Policy Act, 42 U.S.C. §4321, and the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. §2201;

(iv) the DOE enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to Section 120(e)(2) of CERCLA/SARA, [Sections 6001, 3004(u) and 3008(h) of] RCRA, Executive Order 12580 and the AEA.

PURPOSE

A. The general purposes of this Agreement are to:

(1) 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;

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

(3) facilitate cooperation, exchange of information and participation of the Parties in such actions.

B. Specifically, the purposes of this Agreement are to:

(1) 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 U.S. EPA pursuant to CERCLA/ SARA. This process is designed to promote cooperation among the Parties in identifying IRA alternatives prior to selection of final IRAs.

(2) 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 or contaminants at the Site in accordance with CERCLA/SARA.

(3) 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/SARA.

(4) Implement the selected interim and final remedial action(s) in accordance with CERCLA/SARA.

(5) Assure compliance with federal and state hazardous waste laws and regulations for matters covered by this Agreement.

STATUTORY COMPLIANCE/RCRA-CERCLA INTEGRATION

A. The Parties intend to integrate the DOE'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 of Sections 3004(u) and (v) of RCRA, 42 U.S.C. §6924(u) and (v), for a RCRA permit, and Section 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 Section 121 of CERCLA, 42 U.S.C. §9621.

B. 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. 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 Section 121 of CERCLA.

C. If a permit is issued to the DOE for on-going hazardous waste management activities at the Site, U.S. EPA 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.

D. Nothing in this Agreement shall alter the DOE's authority with respect to removal actions conducted pursuant to Section 104 of CERCLA, 42 U.S.C. §9604.

CONSULTATION WITH U.S. EPA

Review and Comment Process for Draft and Final Documents

A. Applicability:

The provisions of this Part establish the procedures that shall be used by the DOE and U.S. 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 Section 120 of CERCLA and 10 U.S.C. §2705, the DOE will normally be responsible for issuing primary and secondary documents to U.S. EPA. 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 B through J below.

The designation of a document as "draft" or "final" is solely for purposes of consultation with U.S. EPA 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.

B. General Process for RI/FS and RD/RA documents:

1. Primary documents include those reports that are major, discrete portions of RI/FS or RD/RA activities. Primary documents are initially issued by the DOE in draft subject to review and comment by U.S. EPA. Following receipt of comments on

a particular draft primary document, the DOE 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.

2. 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 DOE in draft subject to review and comment by U.S. EPA. Although the DOE 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.

C. Primary Reports:

1. The DOE shall complete and transmit draft reports for the following primary documents to J.S. 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, DOE and U.S. 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]

2. Only the draft final reports for the primary documents identified above shall be subject to dispute resolution. The DOE shall complete and transmit draft primary documents in accordance with the timetable and deadlines established in Part ___ of this agreement.

D. Secondary Documents:

1. The DOE shall complete and transmit draft reports for the following secondary documents to U.S. EPA 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]

2. Although U.S. EPA 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 B hereof. Target dates shall be established for the completion and transmission of draft secondary reports pursuant to Part _____ of this Agreement.

E. 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 C and D 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.

F. Identification and Determination of Potential ARARs:

1. 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. Draft ARAR determinations shall be prepared by the DOE in accordance with

Section 121(d)(2) of CERCLA, the NCP and pertinent guidance issued by U.S. EPA, which is not inconsistent with CERCLA and the NCP.

2. 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.

G. Review and Comment on Draft Reports:

1. The DOE shall complete and transmit each draft primary report to U.S. EPA on or before the corresponding deadline established for the issuance of the report. The DOE shall complete and transmit the draft secondary document in accordance with the target dates established for the issuance of such reports established pursuant to Part ____ of this Agreement.

2. 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 U.S. EPA 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 U.S. EPA. Comments by the U.S. EPA shall be provided with adequate

specificity so that the DOE 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 DOE, the U.S. EPA shall provide a copy of the cited authority or reference. In cases involving complex or unusually lengthy reports, U.S. EPA may extend the 30-day comment period for an additional 20 days by written notice to the DOE prior to the end of the 30-day period. On or before the close of the comment period, U.S. EPA shall transmit by next day mail their written comments to the DOE.

3. Representatives of the DOE shall make themselves readily available to U.S. EPA 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 DOE on the close of the comment period.

4. In commenting on a draft report which contains a proposed ARAR determination, U.S. EPA shall include a reasoned statement of whether they object to any portion of the proposed ARAR determination. To the extent that U.S. EPA 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.

5. Following the close of the comment period for a draft report, the DOE 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 DOE shall transmit to U.S. EPA its written response to comments received within the comment period. Within 30 days of the close of the comment period on a draft primary report, the DOE shall transmit to U.S. EPA a draft final primary report, which shall include the DOE's response to all written comments, received within the comment period. While the resulting draft final report shall be the responsibility of the DOE, it shall be the product of consensus to the maximum extent possible.

6. The DOE may extend the 30-day period for either responding to comments on a draft report or for issuing the draft final primary report for an additional 20 days by providing notice to U.S. EPA. In appropriate circumstances, this time period may be further extended in accordance with Part ____ hereof.

H. Availability of Dispute Resolution for Draft Final Primary Documents:

1. Dispute resolution shall be available to the Parties for draft final primary reports as set forth in Part ___.

2. When dispute resolution is invoked on a draft primary report, work may be stopped in accordance with the procedures set forth in Part ____ regarding dispute resolution.

I. 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 DOE's position be sustained. If the DOE's determination is not sustained in the dispute resolution process, the DOE 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 Part ____ hereof.

J. Subsequent Modifications of Final Reports:

Following finalization of any primary report pursuant to Paragraph I above, U.S. EPA or the DOE may seek to modify the report, including seeking additional field work, pilot studies, computer modeling or other supporting technical work, only as provided in Paragraphs 1 and 2 below.

1. U.S. EPA or the DOE 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. U.S. EPA or the DOE 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.

2. In the event that a consensus is not reached by the Project Managers on the need for a modification, either U.S. EPA or the DOE 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.

3. Nothing in this Subpart shall alter U.S. EPA's ability to request the performance of additional work pursuant to Part ___ of this Agreement (Additional Work) which does not constitute modification of a final document.

RESOLUTION OF DISPUTES

Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement, the procedures of this Part 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 Part shall be implemented to resolve a dispute.

A. Within thirty (30) days after: (1) the period established for review of a draft final primary document pursuant to Part ___ (Review of Submittals) of this Agreement, or (2) any action which leads to or generates a dispute, the disputing Party shall submit to the other Party 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 information the disputing Party is relying upon to support its position.

B. 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.

C. If agreement cannot be reached on any issue within the informal dispute resolution period, the disputing Party shall forward the written statement of dispute to the Dispute Resolution Committee (DRC) thereby elevating the dispute to the DRC for resolution.

D. 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 U.S. EPA representative on the DRC is the Waste Management Division Director of U.S. EPA's Region ___. The DOE's designated member is the [DOE 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 Part ___ (Notices).

E. 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.

F. The SEC will serve as the forum for resolution of disputes for which agreement has not been reached by the DRC. The U.S. EPA representative on the SEC is the Regional Administrator of U.S. EPA's Region ___. The DOE's representative on the SEC is the DOE Operations Manager. 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, U.S. EPA's Regional Administrator shall issue a written position on the dispute. The DOE may, within twenty-one (21) days of the Regional Administrator's issuance of U.S. EPA's position, issue a written notice elevating the dispute to the Administrator of U.S. EPA for resolution in accordance with all applicable laws and procedures. In the event that the DOE elects not to elevate the dispute to the Administrator within the designated twenty-one (21) day escalation period, the DOE shall be deemed to have agreed with Regional Administrator's written position with respect to the dispute.

G. Upon escalation of a dispute to the Administrator of U.S. EPA pursuant to Subpart F, the Administrator will review and resolve the dispute within twenty-one (21) days. Upon request, and prior to resolving the dispute, the U.S. EPA Administrator shall meet and confer with the Secretary of the DOE to discuss the issue(s) under dispute. Upon resolution, the Administrator

shall provide the DOE with a written final decision setting forth resolution of the dispute.

H. The pendency of any dispute under this Part shall not affect the DOE'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.

I. When dispute resolution is in progress, work affected by the dispute will immediately be discontinued if the Hazardous Waste Division Director for U.S. EPA's Region ___ requests, in writing, that work related to the dispute be stopped because, in U.S. 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, U.S. EPA shall give the DOE prior notification that a work stoppage request is forthcoming. After stoppage of work, if the DOE believes that the work stoppage is inappropriate or may have potential significant adverse impacts, the DOE 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 DOE.

J. Within twenty-one (21) days of resolution of a dispute pursuant to the procedures specified in this Part, the DOE 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.

K. Resolution of a dispute pursuant to this Part of the Agreement constitutes a final resolution of any dispute arising under this Agreement. The DOE shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Part of this Agreement.

ENFORCEABILITY

A. The Parties agree that:

(1) 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 Section 310 of CERCLA, and any violation of such standard, regulation, condition, requirement or order will be subject to civil penalties under Sections 310(c) and 109 of CERCLA; and

(2) all timetables or deadlines associated with the development, implementation and completion of the RI/FS shall be enforceable by any person pursuant to Section 310 of CERCLA, and any violation of such timetables or deadlines will be subject to civil penalties under Sections 310(c) and 109 of CERCLA;

(3) 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 Section 310(c) of CERCLA, and any violation of such terms or conditions will be subject to civil penalties under Sections 310(c) and 109 of CERCLA; and

(4) any final resolution of a dispute pursuant to Part ___ of this Agreement which establishes a term, condition, timetable, deadline or schedule shall be enforceable by any

person pursuant to Section 310(c) of CERCLA, and any violation of such term, condition, timetable, deadline or schedule will be subject to civil penalties under Sections 310(c) and 109 of CERCLA.

B. 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 Section 113(h) of CERCLA.

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

STIPULATED PENALTIES

A. In the event that the DOE 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 U.S. 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, U.S. EPA may assess a stipulated penalty against the DOE. 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.

B. Upon determining that the DOE has failed in a manner set forth in Paragraph A, U.S. EPA shall so notify the DOE in writing. If the failure in question is not already subject to dispute resolution at the time such notice is received, the DOE shall have fifteen (15) days after receipt of the notice to invoke dispute resolution on the question of whether the failure did in fact occur. The DOE shall not be liable for the stipulated penalty assessed by U.S. 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.

C. The annual reports required by Section 120(e)(5) of CERCLA shall include, with respect to each final assessment of a stipulated penalty against the DOE under this Agreement, each of the following:

1. The facility responsible for the failure;
2. A statement of the facts and circumstances giving rise to the failure;
3. 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;
4. A statement of any additional action taken by or at the facility to prevent recurrence of the same type of failure; and
5. The total dollar amount of the stipulated penalty assessed for the particular failure.

D. Stipulated penalties assessed pursuant to this Part shall be payable to the Hazardous Substances Response Trust Fund from funds authorized and appropriated for that specific purpose.

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

F. This Part shall not affect the DOE's ability to obtain an extension of a timetable, deadline or schedule pursuant to Part ____ of this Agreement.

G. Nothing in this Agreement shall be construed to render any officer or employee of the DOE personally liable for the payment of any stipulated penalty assessed pursuant to this Part.

EXTENSIONS

A. 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 DOE shall be submitted in writing and shall specify:

1. The timetable and deadline or the schedule that is sought to be extended;
2. The length of the extension sought;
3. The good cause(s) for the extension; and
4. Any related timetable and deadline or schedule that would be affected if the extension were granted.

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

1. An event of force majeure;
2. A delay caused by another party's failure to meet any requirement of this agreement;
3. A delay caused by the good faith invocation of dispute resolution or the initiation of judicial action;
4. 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
5. Any other event or series of events mutually agreed to by the Parties as constituting good cause.

C. Absent agreement of the Parties with respect to the existence of good cause, the DOE may seek and obtain a determination through the dispute resolution process that good cause exists.

D. Within seven days of receipt of a request for an extension of a timetable and deadline or a schedule, U.S. EPA shall advise the DOE in writing of its respective position on the request. Any failure by U.S. EPA to respond within the 7-day period shall be deemed to constitute concurrence in the request for extension. If U.S. EPA does not concur in the requested extension, it shall include in its statement of nonconcurrence an explanation of the basis for its position.

E. If there is consensus among the Parties that the requested extension is warranted, the DOE 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.

F. Within seven days of receipt of a statement of nonconcurrence with the requested extension, the DOE may invoke dispute resolution.

G. 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.

FORCE MAJEURE

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 or inaction of any governmental agency or authority other than the DOE; 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 DOE shall have made timely request for such funds as part of the budgetary process as set forth in Part ___ (Funding) of his 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.

FUNDING

It is the expectation of the Parties to this Agreement that all obligations of the DOE arising under this Agreement will be fully funded. The DOE shall take all necessary steps and make efforts to obtain timely funding to meet its obligations under this Agreement.

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

Any requirement for the payment or obligation of funds, including stipulated penalties, by the DOE 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.

If appropriated funds are not available to fulfill the DOE's obligations under this Agreement, U.S. EPA and the State reserve the right to initiate any other action which would be appropriate absent this Agreement.

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