

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
AND THE  
STATE OF WASHINGTON DEPARTMENT OF ECOLOGY**

IN THE MATTER OF:	)	
	)	
The U.S. Department of Energy,	)	HANFORD FEDERAL FACILITY
Richland Operations Office,	)	AGREEMENT AND CONSENT ORDER
Richland, Washington	)	
	)	EPA Docket Number: 1089-03-04-120
Respondent	)	Ecology Docket Number: 89-54

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

This Agreement is divided into five parts: Part One contains introductory provisions which apply to Parts Two, Three, Four, and Five: Part Two contains provisions governing hazardous waste treatment, storage and disposal (TSD), hazardous waste facility permitting, closure and post-closure activities; Part Three contains provisions governing remedial and corrective action activities; Part Four contains provisions which delineate in part the respective roles and interrelationships between EPA and Ecology, and between CERCLA and RCRA on the Hanford Site; and Part Five contains common provisions which apply to Parts Two, Three, and Four. CERCLA response actions and corrective actions under HSWA, before and after State authorization, shall be governed by Part Three of this Agreement. RCRA compliance, and TSD permitting, closure, and post closure care (except HSWA corrective action) shall be governed by Part Two of this Agreement.

This Agreement also consists of Attachment 1, a letter dated February 26, 1989 from the Department of Justice to the Department of Ecology, and Attachment 2, the Action Plan. In the event of any inconsistency between this Agreement and the attachments to this Agreement, this Agreement shall govern unless and until duly modified pursuant to Article XXXIX of this Agreement.

The Action Plan contains plans, procedures and implementing schedules. The Action Plan is an integral and enforceable part of this Agreement.

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## PART ONE INTRODUCTION

### ARTICLE I. JURISDICTION

1. The U.S. Environmental Protection Agency (EPA), Region 10, enters into this Agreement pursuant to Section 120(e) of the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), 42 U.S.C. Section 9620(e), 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) and (v) of the *Resource Conservation and Recovery Act* (RCRA), 42 U.S.C. Sections 6961, 6928(h), 6924(u) and (v), as amended by the *Hazardous and Solid Waste Amendments of 1984* (HSWA), Pub. L. 98-616 (hereinafter jointly referred to as RCRA) and Executive Order 12580.

2. Pursuant to Section 3006 of the *Resource Conservation and Recovery Act*, 42 U.S.C. Section 6926, EPA may authorize states to administer and enforce a state hazardous waste management program, in lieu of the federal hazardous waste management program. The State of Washington has received authorization from EPA to administer and enforce such a program within the State of Washington. The requirements of the federally authorized state program are equivalent to the requirements of the federal program set forth in Subtitle C of RCRA and its implementing regulations (excluding those portions of the federal program imposed pursuant to HSWA for which the State of Washington has not yet been authorized). The Department of Ecology (Ecology) is the state agency designated by RCW 70.105.130 to implement and enforce the provisions of the *Resource Conservation and Recovery Act* as amended.

3. The State of Washington, Department of Ecology (Ecology) enters into this Agreement pursuant to CERCLA, RCRA, Washington Hazardous Waste Management Act, Chapter 70.105 RCW, and pursuant to Ecology's authority to issue regulatory orders under RCW 70.105.095.

4. The Parties agree that the generation, treatment, storage, and disposal of hazardous waste is regulated by the State of Washington, Department of Ecology pursuant to Ch. 70.105 RCW, the State Hazardous Waste Management Act (HWMA), and regulations governing the management of hazardous wastes are contained at Ch. 173-303 WAC, and finally that pursuant to Section 6001 of RCRA, 42 U.S.C. Sec. 6961, the United States Department of Energy (DOE),

as a federal agency, must comply with the procedural and substantive requirements of such state law. DOE is a “person” as defined at RCW 70.105.010(7).

5. The U.S. Department of Energy (DOE) enters into this Agreement pursuant to Section 120(e) of CERCLA, Sections 6001, 3008(h), and 3004(u) and (v) of RCRA, Executive Orders 12580 (January 1987) and 12088 (Oct. 1978), and the *Atomic Energy Act of 1954*, as amended, 42 U.S.C. Section 2011 et seq. DOE agrees that it is bound by this Agreement and that its terms may be enforced against DOE pursuant to the terms of this Agreement or as otherwise provided by law. As stated in Section 1006 of RCRA, nothing in this Agreement shall be construed to require DOE to take any action pursuant to RCRA which is inconsistent with the requirements of the *Atomic Energy Act of 1954*, as amended. In the event DOE asserts that it cannot comply with any provision of this Agreement based on an alleged inconsistency between the requirements of this Agreement and the *Atomic Energy Act of 1954*, as amended, it shall provide the basis for the inconsistency assertion in writing. In the event Ecology disagrees with the assertions by DOE, Ecology reserves the right to seek judicial review, or take any other action provided by law in case of any such alleged inconsistency.

6. The Parties entered into this Agreement in anticipation that the Hanford Site would be placed on the National Priorities List (NPL), 40 CFR Part 300. The Hanford Site has been listed by EPA on the federal agency hazardous waste compliance docket under CERCLA Section 120, 53 FR 4280 (Feb. 12, 1988). Four subareas of the Hanford Site were proposed by EPA for addition to the NPL, 53 FR 23988 (June 24, 1988). [Note: The four areas of the Hanford Site were officially listed on the NPL on November 3, 1989 (54 FR 41015, October 4, 1989)]. One area, the 1100 Area, has since been remediated and deleted from the NPL (61 FR 51019, September 30, 1996). In addition, portions of the 100 Area underwent partial deletion (63 FR 36861, July 8, 1998). When the Hanford Site, or subareas of the Site, is placed on the NPL, Parts One, Three, Four, and Five of this Agreement shall also serve as the Interagency Agreement required by CERCLA Section 120(e). Parts One, Two, Four, and Five of this Agreement shall serve as the RCRA provisions governing compliance, permitting, closure and post-closure care of treatment, storage or disposal (TSD) Units. The Action Plan, at Appendix B, lists those TSD Groups or Units regulated by Ch. 70.105 RCW. As the categorization effort continues, TSD Units may be added to this list. DOE agrees that those TSD Units listed in

Appendix B of the Action Plan, and any additional TSD Units which are identified as TSD Units in the future are subject to the regulatory framework of Ch. 70.105 RCW pursuant to RCRA Section 6001. Ecology's authority over these TSD Units shall not be abrogated or affected by the nomination or ultimate inclusion of the Hanford Site on the NPL and such Units shall be regulated in accordance with this Agreement; provided, however, that with respect to conflicts between EPA and Ecology, Article XXVIII (RCRA/CERCLA Reservation of Rights) shall be controlling.

7. On April 13, 1993, the District Court for the Eastern District of Washington issued an Order Granting in Part and Denying in Part Motions to Dismiss claims of the plaintiffs in *Heart of America Northwest v. Westinghouse Hanford Company*, No. CY-92-144-AAM. The court concluded in its opinion that this Agreement embodies an integrated response action under Sections 120 and 104 of CERCLA, and that plaintiffs' claims consequently were barred by Section 113(h) of CERCLA. Plaintiffs did not seek to enforce this Agreement, but instead sought to impose requirements that were not part of this Agreement. Nothing in the court's opinion affects the enforceability of this Agreement. All parties reaffirm that this Agreement is enforceable in accordance with all its terms, reservations and applicable law.

## **ARTICLE II. PARTIES**

8. The Parties to this Agreement are EPA, Ecology, and DOE.

9. DOE shall provide a copy of this Agreement and relevant attachments to each of its prime contractors. A copy of this Agreement shall be made available to all other contractors and subcontractors retained to perform work under this Agreement. DOE shall provide notice of this Agreement to any successor in interest prior to any transfer of ownership or operation.

10. DOE shall notify EPA and Ecology of the identity and the scope of work of each of its prime contractors and their subcontractors to be used in carrying out the terms of this Agreement in advance of their involvement in such work. Upon request, DOE shall also provide the identity and work scope of any other contractors and subcontractors performing work under this Agreement. DOE shall take all necessary measures to assure that its contractors, subcontractors

and consultants performing work under this Agreement act in a manner consistent with the terms of this Agreement.

11. DOE agrees to undertake all actions required by the terms and conditions of this Agreement and not to contest state or EPA jurisdiction to execute this Agreement and enforce its requirements as provided herein.

12. This Article II shall not be construed as a promise to indemnify any person.

13. DOE remains obligated by this Agreement regardless of whether it carries out the terms through agents, contractors, and/or consultants. Such agents, contractors, and/or consultants shall be required to comply with the terms of this Agreement, but the Agreement shall be binding and enforceable only against the Parties to this Agreement.

### **ARTICLE III. PURPOSE**

14. The general purposes of this Agreement are to:

A. Ensure that the environmental impacts associated with past and present activities at the Hanford Site are thoroughly investigated and appropriate response action taken as necessary to protect the public health, welfare and the environment;

B. Provide a framework for permitting TSD Units, promote an orderly, effective investigation and cleanup of contamination at the Hanford Site, and avoid litigation between the Parties;

C. Ensure compliance with RCRA and the Washington Hazardous Waste Management Act (HWMA) (Ch. 70.105 RCW) for TSD Units including requirements covering permitting, compliance, closure, and post-closure care.

D. Establish a procedural framework and schedule for developing, prioritizing, implementing and monitoring appropriate response actions at the Hanford Site in accordance with CERCLA, the National Contingency Plan (NCP), 40 CFR Part 300, Superfund guidance and policy, RCRA, and RCRA guidance and policy;

E. Facilitate cooperation, exchange of information and the coordinated participation of the Parties in such actions; and

F. Minimize the duplication of analysis and documentation.

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

A. Identify TSD Units which require permits; establish schedules to achieve compliance with interim and final status requirements and to complete DOE's Part B permit application for such Units in accordance with the Action Plan; identify TSD Units which will undergo closure; close such Units in accordance with applicable laws and regulations; require post-closure care where necessary; and coordinate closure with any inter-connected remedial action at the Hanford Site.

B. Identify Interim Action (IA) alternatives which are appropriate at the Hanford Site prior to the implementation of final corrective and remedial actions under RCRA and CERCLA. IA alternatives shall be identified and proposed to the Parties as early as possible and prior to formal proposal, in accordance with the Action Plan. This process is designed to promote cooperation among the Parties in promptly identifying IA alternatives.

C. Establish requirements for the performance of investigations to determine the nature and extent of any threat to the public health or welfare or the environment caused by any release and threatened release of hazardous substances, pollutants or contaminants at Hanford and to establish requirements for the performance of studies for the Hanford Site to identify, evaluate, and select alternatives for the appropriate action(s) to prevent, mitigate, or abate the release or threatened release of hazardous substances, pollutants or contaminants at the Hanford Site in accordance with CERCLA and HSWA.

D. Identify the nature, objective and schedule of response actions to be taken at the Hanford Site. Response actions at Hanford shall attain that degree of cleanup of hazardous substances, pollutants or contaminants mandated by CERCLA (including applicable or relevant and appropriate state and federal requirements for remedial actions in accordance with Section 121 of CERCLA, 42 U.S.C. Sec. 9621), and HSWA.

E. Implement the selected interim and final remedial actions in accordance with CERCLA, and selected corrective actions in accordance with RCRA.

**ARTICLE IV. STATUTORY COMPLIANCE AND RCRA/CERCLA INTEGRATION AND COORDINATION**

16. Waste Management Units on the Hanford Site have been classified as either TSD units subject to Chapter 70.105 RCW or past-practice units subject to either CERCLA or CERCLA and the corrective action provisions of RCRA. Operable units have been formed which group multiple units for action in accordance with the Action Plan. Some units may be subject to and addressed by both Chapter 70.105 RCW and the corrective action requirements of RCRA, and CERCLA. Part Two of this Agreement sets forth DOE's obligation to obtain TSD permits, to close TSD Units, and otherwise comply with applicable RCRA requirements. Part Three of this Agreement sets forth DOE's obligations to satisfy CERCLA and HSWA corrective action.

17. In this comprehensive Agreement, the Parties intend to integrate DOE's CERCLA response obligations and RCRA corrective action obligations which relate to the release(s) of hazardous substances, hazardous wastes, pollutants and contaminants covered by this Agreement. Therefore, the Parties intend that activities covered by Part Three of this Agreement will achieve compliance with CERCLA, 42 U.S.C. Section 9601 et seq.; will satisfy the corrective action requirements of the HWMA, Sections 3004(u) and (v) of RCRA, 42 U.S.C. Section 6924(u) and (v), for a RCRA permit, and Section 3008(h), 42 U.S.C. Section 6928(h); and will meet or exceed all applicable or relevant and appropriate federal and state requirements to the extent required by Section 121 of CERCLA, 42 U.S.C. Section 9621. The Parties agree that with respect to releases covered by this Agreement, RCRA, RCW Chapters 70.105 and the Model Toxics Control Act (Initiative 97) as codified beginning March 1, 1989 (Chapter 70.105D RCW), shall be incorporated where appropriate as "applicable or relevant and appropriate requirements" pursuant to Section 121 of CERCLA.

18. The Parties agree that past-practice authority may provide the most efficient means for addressing groundwater contamination plumes originating from both TSD and past-practice units. However, in order to ensure that TSD units at Hanford are brought into compliance with RCRA and state hazardous waste regulations, Ecology intends, subject to Part Four of this



Agreement, that remedial actions that address TSD groundwater contamination, excluding situations where there is an imminent threat to the public health or environment, will meet or exceed the substantive requirements of RCRA.

19. Based on the foregoing, the Parties intend that any remedial or corrective action selected, implemented and completed under Part Three of this Agreement shall be protective of human health and the environment such that remediation of releases covered by this Agreement shall obviate the need for further remedial or corrective action. The Parties intend that such actions will address all aspects of contamination at units covered by the Action Plan so that no further action will be required under federal and state law. However, the Parties recognize and agree that remediation of groundwater contamination from TSD units at the Hanford Site may be managed either under Part Three of this Agreement, or under Part Two of this Agreement, in accordance with the Action Plan. Ecology reserves the right to enforce timely cleanup of TSD associated groundwater contamination as provided in Article XLVI (Reservation of Rights).

20. Ecology will administer the HWMA, in accordance with this Agreement, including those provisions which have not yet been authorized under RCRA Section 3006 (42 U.S.C Sec. 6926). Ecology has received authorization from EPA to implement the corrective action provisions of RCRA pursuant to Section 3006 of RCRA, and shall administer and enforce such provisions in accordance with this Agreement. Ecology may enforce the RCRA corrective action requirements of the Agreement pursuant to Article X (Enforceability), and any disputes with DOE involving such corrective action requirements shall be resolved in accordance with Article VIII (Resolution of Disputes). Disputes arising under Part Two of this Agreement including provisions of the HWMA for which the State is not authorized shall be resolved in accordance with Article VIII (Resolution of Disputes). Any disputes between EPA and Ecology concerning Subtitle C RCRA requirements will be resolved in accordance with Part Four. EPA and Ecology agree that when permits are issued to DOE for hazardous waste management activities pursuant to Part Two of this Agreement, requirements relating to remedial action for hazardous waste management units under Part Three of this Agreement shall be the RCRA corrective action requirements for those units, whether that permit is administered by EPA or Ecology. EPA and Ecology shall reference and incorporate the appropriate provisions, including schedules (and the provision for extension of such schedules) of this Agreement into such permits.

21. 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. Sec. 9604, as provided by Executive Order 12580.

## **ARTICLE V. DEFINITIONS**

22. Except as noted below or otherwise explicitly stated, the appropriate definitions provided in CERCLA, RCRA, the NCP, Ch. 70.105 RCW and Ch. 173-303 WAC shall control the meaning of terms used in this Agreement. In addition:

A. "Action Plan" means the implementing document for this Agreement, which is set forth as Attachment 2 and by this reference incorporated into this Agreement. The term includes all amendments to that document, which the Parties anticipate will be made periodically.

B. "Additional Work" means any new or different work outside the originally agreed upon scope of work, which is determined pursuant to Article XXX (Additional Work).

C. "Agreement" means this document and includes all attachments, addenda and modifications to this document, which are required to be written and to be incorporated into or appended to this document.

D. "Applicable or Relevant and Appropriate Requirements" (ARAR) means any standard, requirement, criteria or limitation as provided in Section 121(d)(2) of CERCLA.

E. "Article" means a subdivision of this Agreement which is identified by a Roman numeral.

F. "Authorized Representative" is any person, including a contractor, who is specifically designated by a Party to have a defined capacity, including an advisory capacity.

G. "Days" mean calendar days, unless otherwise specified. Any submittal, written notice of position or written statement of dispute that would be due under the terms of this Agreement on a Saturday, Sunday or federal or state holiday shall be due on the following business day.

H. “Dispute Resolution” means the process for resolving disputes that arise under this Agreement.

I. “DOE” or “US DOE” means the United States Department of Energy, its employees and Authorized Representatives.

J. “Ecology” means the State of Washington Department of Ecology, its employees and Authorized Representatives.

K. “EPA” means the United States Environmental Protection Agency, its employees and Authorized Representatives.

L. “Hanford,” “Hanford Site,” or “Site” means the approximately 560 square miles in Southeastern Washington State (excluding leased land, State owned lands, and lands owned by the Bonneville Power Administration) which is owned by the United States and which is commonly known as the Hanford Reservation (see map at Figure 7-1 in the Action Plan). This definition is not intended to limit CERCLA or RCRA authority regarding hazardous wastes, substances, pollutants or contaminants which have migrated off the Hanford Site.

M. “Hazardous Substance” is defined in CERCLA Section 101(14).

N. “Hazardous Waste” are those wastes included in the definitions at RCRA Section 1004(5) and RCW 70.105.010(15).

O. “HWMA” shall mean the Hazardous Waste Management Act as codified at Ch. 70.105 RCW, and its implementing regulation at Ch. 173-303 *Washington Administrative Code*.

P. “HSWA” shall mean the Hazardous and Solid Waste Amendments of 1984, P.L. 98-616.

Q. “HSWA Corrective Action” means those corrective action requirements set forth in Sections 3004(u) and (v) and 3008(h) of RCRA; and, state equivalents.

R. “Lead regulatory agency” is that agency (EPA or Ecology) assigned regulatory oversight responsibility with respect to actions under this Agreement regarding a particular Operable Unit, TSD Unit/Group or Milestone pursuant to Section 5.6 of the Action Plan. The designation of a lead regulatory agency shall not change the jurisdictional authorities of the Parties.

S. “Radioactive Mixed Waste” or “Mixed Waste” is waste that contains both hazardous waste subject to RCRA and/or HWMA and radioactive waste subject to the *Atomic Energy Act of 1954*, as amended.

T. “Operable Unit” means a discrete portion of the Hanford Site, as identified in Section 3.0 of the Action Plan.

U. “Paragraph” means a numbered paragraph (including subparagraphs) of this Agreement.

V. “Part” means one of the five major divisions of this Agreement.

W. “RCRA” means the *Resource Conservation and Recovery Act*, 42 U.S.C. Section 6901 et seq., as amended. For purposes of this Agreement, “RCRA” also includes HWMA, Ch. 70.105 RCW.

X. “RCRA Permit” means a permit under RCRA and/or HWMA for treatment, storage or disposal of hazardous waste.

Y. “Timetables and deadlines” means major and interim milestones and all work and actions (not including target dates) as delineated in the Action Plan and supporting work plans (including performance of actions established pursuant to the Dispute Resolution procedures set forth in this Agreement).

Z. “TSD Group” means a grouping of TSD (treatment, storage or disposal) Units for the purpose of preparing and submitting a permit application and/or closure plan pursuant to the requirements under RCRA, as determined in the Action Plan.

AA. “TSD Unit” means a treatment, storage or disposal Unit which is required to be permitted and/or closed pursuant to RCRA requirements as determined in the Action Plan.

BB. “Waste Management Unit” means an individual location on the Hanford Site where waste has or may have been placed, either planned or unplanned, as identified in the Action Plan.

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## **PART TWO PERMITTING/CLOSURE OF TSD UNITS/GROUPS**

### **ARTICLE VI. FINDINGS AND DETERMINATIONS**

23. The following paragraphs of this Article constitute a summary of the facts upon which EPA and Ecology are proceeding for purposes of Part Two of this Agreement. None of the facts related herein shall be considered admissions by any Party. This Article contains findings by EPA and Ecology, and shall not be used by any person related or unrelated to this Agreement for purposes other than determining the basis of this Agreement.

A. In and/or before 1943, the United States acquired approximately 560 square miles of land, now known as the Hanford Reservation. The DOE and its predecessors have operated Hanford continuously since 1943, mainly for the production of special nuclear materials for the national defense.

B. On or about August 14, 1980, DOE submitted a Notice of Hazardous Waste Activity to EPA pursuant to Section 3010 of RCRA, identifying DOE as a generator, transporter and owner and operator of a TSD Facility. On or about November 1980, DOE submitted Part A of its permit application to EPA qualifying for interim status pursuant to Section 3005 of RCRA. DOE's Part A has been modified by DOE and submitted to EPA and/or Ecology on several occasions. A revised Part A application submitted on May 20, 1988, related to activities involving Mixed Waste.

C. DOE operates and has operated since November 19, 1980, a hazardous waste management facility engaged in the treatment, storage, and disposal of Hazardous Wastes which are subject to regulation under RCRA and/or the Washington State Hazardous Waste Management Act, Ch. 70.105 RCW.

D. Since the establishment of the Hanford Site in 1943, materials subsequently defined as Hazardous Substances, pollutants and contaminants by CERCLA, materials defined as Hazardous Waste and constituents by RCRA and/or Ch. 70.105 RCW, have been produced, and disposed of or released, at various locations at the Hanford Site, including TSD Units.

24. Based upon the Finding of Fact set forth in Paragraph 23, and the information available, and without admission by DOE, EPA and Ecology have determined the following:

A. Pursuant to Sec. 6001 of RCRA, 42 U.S.C. Section 6961, DOE is subject to and must comply with RCRA and the Washington State Hazardous Waste Management Act, Ch. 70.105 RCW.

B. The Hanford Site includes certain hazardous waste treatment, storage, and disposal Units authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. Sec. 6925(e), and is subject to the permit requirements of Section 3005 of RCRA.

C. Certain wastes and constituents at the Hanford Site are Hazardous Wastes or hazardous constituents as defined by Section 1004(5) of RCRA, 42 U.S.C. Sec. 6903(5), and 40 CFR Part 261. There are also Hazardous Wastes or hazardous constituents at the Hanford Site within the meaning of Ch. 70.105 RCW and WAC 173-303.

D. The Hanford Site constitutes a facility within the meaning of Sections 3004 and 3005 of RCRA, 42 U.S.C. Secs. 6924 and 6925, and RCW 70.105.

E. The DOE is the owner of the Hanford Site.

25. The submittals, actions, schedules, and other elements of work required or imposed by this Agreement are reasonable and necessary to protect the public health and welfare and the environment.

## **ARTICLE VII. WORK**

26. DOE agrees to perform the work described in this Article VII in accordance with the Action Plan. The Action Plan delineates the actions to be taken, schedules for such actions, and establishes the overall plan to conduct RCRA permitting and closures, and remedial or corrective action under CERCLA or RCRA. The Action Plan lists the Hanford TSD Units and TSD Groups which are subject to permitting and closure under this Agreement. Additional TSD Units may be listed as they are identified. Units listed in Appendix B of the Action Plan are subject to regulation under RCRA and Ch. 70.105 RCW. Ecology agrees to provide DOE with guidance



and timely response to requests for guidance to assist DOE in the performance of its work under Part Two of this Agreement.

27. DOE shall comply with RCRA Permit requirements for TSD Units specifically identified for permitting or closure by the Action Plan and shall submit permit applications in accordance with the Action Plan. EPA shall issue the HSWA provisions of such permits until such authority is delegated to Ecology pursuant to Section 3006 of RCRA. The lead regulatory agency shall review such permit applications in accordance with applicable law. The RCRA Permit, whether issued by Ecology and EPA, or Ecology alone after delegation of HSWA authority, shall reference the terms of this Agreement, and provide that compliance with this Agreement and corrective action permit conditions developed pursuant to this Agreement shall satisfy all substantive corrective action requirements of RCRA/HSWA.

28. DOE shall bring its facility into compliance with RCRA requirements specified in the Action Plan according to the schedule set forth therein. DOE shall comply with RCRA closure requirements under applicable regulations for those TSD Units specifically identified in the Action Plan. DOE shall implement closures in accordance with the Action Plan. Closures under this Article shall be regulated by Ecology under applicable law, but shall, as necessary, be coordinated with remedial action requirements of Part Three.

29. If Ecology determines that DOE is violating or has violated any RCRA requirement of this Agreement, and that formal enforcement action is appropriate, it will notify DOE in writing of the following: the facts of the violation(s); the regulation(s) or statute(s) violated; and Ecology's intention to take formal enforcement action; provided, however, that no such notice will necessarily be given for violations that Ecology considers egregious. The purpose of providing this notice is to allow DOE an opportunity to identify any facts it believes are erroneous. This notice shall be sent to the Director for DOE's Office of Environmental Management Division no later than seven (7) days before Ecology intends to take formal enforcement action. This notice (or the failure to give notice of violations that Ecology considers egregious) shall not be subject to Dispute Resolution under this Agreement. If Ecology takes formal enforcement action, the adequacy of the notice provided pursuant to this paragraph may

not be challenged in any appeal. For purposes of this paragraph, taking “formal enforcement action” means issuing an order and/or penalty under chapter 70.105 RCW.

### **ARTICLE VIII. RESOLUTION OF DISPUTES**

30. Except as otherwise specifically provided in this Agreement, if DOE objects to any Ecology disapproval, proposed modification, decision or determination made pursuant to Part Two of this Agreement (or Part Three requirements for which Ecology is the lead regulatory agency, except as provided in Article XXIV, Paragraph 89) it shall notify Ecology in writing of its objection within seven (7) days of receipt of such notice. Thereafter, DOE and Ecology shall make reasonable efforts to informally resolve disputes at the project manager level. These Dispute Resolution provisions shall not apply to Dangerous Waste permit actions which are otherwise subject to administrative or judicial appeal. These Dispute Resolution provisions shall not apply to enforcement actions which are otherwise subject to administrative or judicial appeal, except that these Dispute Resolution provisions shall apply in the event of the assessment of stipulated penalties under Article IX.

A. If resolution cannot be achieved at the project manager level within thirty (30) days of the receipt of DOE’s objection, the dispute may be elevated to the Interagency Management Integration Team (IAMIT). Prior to the expiration of the thirty (30) day period DOE shall submit a written statement of dispute to the IAMIT thereby elevating the dispute to the IAMIT for resolution. This statement shall set forth the nature of the dispute, DOE’s position on the dispute, supporting information and the history of the attempted resolution. The IAMIT will serve as a forum for resolution of disputes for which agreement has not been reached through informal Dispute Resolution. The Parties agree to utilize the Dispute Resolution process only in good faith and agree to expedite, to the extent possible, the Dispute Resolution process whenever it is used. Any challenge as to whether a dispute is raised in good faith shall be subject to the provisions of this Article and addressed as part of the underlying dispute.

B. The Ecology designated member of the IAMIT is the Program Manager for the Nuclear Waste Program. DOE’s designated member shall be the Assigned Executive Manager. Notice of any delegation of authority from a Party’s designated member on the IAMIT shall be provided to the other Party.

C. During the period preceding the submittal of the written statement to the IAMIT, the Parties may engage in informal Dispute Resolution among the project managers. During this informal Dispute Resolution period, the Parties may meet as many times as necessary to discuss and attempt resolution of the dispute.

D. Following elevation of a dispute to the IAMIT, the IAMIT shall have twenty-one (21) days to unanimously resolve the dispute. If the IAMIT is unable to unanimously agree on a resolution of the dispute, the Director of Ecology shall make a final written decision or written determination no more than thirty-five (35) days after submission of the written statement of the dispute to the IAMIT. Upon request and prior to resolution of the dispute, Ecology's Deputy Director shall meet with the Deputy Manager of U.S. Department of Energy, Richland Operations Office (DOE-RL) or Deputy Manager of the U.S. Department of Energy, Office of River Protection (DOE-ORP) to discuss the matter. Any such meeting shall not extend the deadline by which the Director of Ecology shall make a final decision or determination. All Parties agree that this final decision or determination shall be deemed to have been decided as an adjudicative proceeding and that DOE may challenge Ecology's final decision or determination as provided by and subject to the standards contained in Ch. 34.05 RCW. If DOE objects to the decision or determination, DOE may file an appeal, at DOE's discretion, in either the Pollution Control Hearing Board (PCHB) or in the courts. If DOE elects to file an appeal from the decision directly in the courts, Ecology agrees that it will not raise an argument that initial jurisdiction of the matter should lie with the PCHB. For all disputes requiring a final decision or determination by the Director of Ecology, Ecology shall prepare an agency record in accordance with RCW 34.05.476. The agency record for review of such final decision or determination shall consist of the following documents: (1) the Ecology disapproval that DOE disputes; (2) the written notice of objection initiating the dispute; (3) the written statement of dispute, including all attachments; (4) any correspondence between project managers concerning the dispute; (5) IAMIT meeting minutes concerning the dispute, with attachments; (6) all other documents identified by Ecology as being considered before the final decision or determination and used as a basis for the decision or determination; (7) the Director of Ecology's final written decision or determination; and (8) this Agreement. The agency record shall constitute the basis for judicial

review regarding the director's final decision or determination in accordance with RCW 34.05.558.

E. Any deadline in the Dispute Resolution process may be extended with the consent of Ecology and DOE.

F. The pendency of any dispute under this Article shall not affect DOE's responsibility for timely performance of the work required by this Agreement, except that, when DOE has delivered a signed change request to Ecology ninety (90) days or more in advance of when a milestone or other enforceable schedule or deadline under this Agreement is due and Ecology's action on the change request has been disputed under this Article, the time period for completion of work directly affected by such dispute shall be extended for at least a period of time equal to the actual time taken to resolve any good faith dispute beyond seventy-four (74) days. In accordance with the procedures specified in Section 12 of the Action Plan, the Parties may agree to extend or postpone any milestone or other enforceable schedule or deadline under this Agreement during the pendency of any dispute. All elements of the work required by this Agreement which are not directly affected by the dispute shall continue and be completed in accordance with this Agreement.

G. In the event that Ecology assesses stipulated penalties under Article IX and DOE disputes the matter under this Article VIII, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of the Agreement. In the event that DOE does not prevail on the disputed issue, stipulated penalties may be assessed and shall be paid as provided in Article IX.

H. When Dispute Resolution is in progress, work affected by the dispute will immediately be discontinued if the Ecology project manager requests in writing that such work be stopped because, in Ecology's opinion, such work is inadequate or defective, and such inadequacy or defect is likely to yield an adverse affect on human health and environment, or is likely to have a substantial adverse affect on the remedy selection or implementation process.

To the extent possible, Ecology shall give DOE prior notification that a work stoppage request is forthcoming. After stoppage of work, if DOE believes that the work stoppage is inappropriate, DOE may meet with Ecology to discuss the work stoppage. Within fourteen (14) days of this meeting, the Ecology project manager will issue a final written decision with respect to the stoppage. Upon receipt of this final written decision of the Ecology project manager, DOE may initiate Dispute Resolution at the IAMIT level.

I. DOE shall abide by all terms and conditions of a final resolution of any dispute. Within twenty-one (21) days of the final resolution of any dispute under this Article, or under any appeal action, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule or procedure(s) and proceed to implement this Agreement according to the amended plan, schedule or procedure(s). DOE shall notify Ecology as to the action(s) taken to comply with the final resolution of a dispute.

J. Under the applicable portions of the Action Plan attached to this Agreement, Ecology will make final written decisions or determinations regarding compliance with Ch. 70.105 RCW. Disputes regarding these decisions or determinations shall be resolved utilizing the procedures described above, except as otherwise specifically provided in this Agreement. Ecology will also be making certain decisions and determinations as lead regulatory agency at certain CERCLA units pursuant to the Action Plan. Disputes involving Ecology's CERCLA decisions or determinations shall be resolved utilizing the Dispute Resolution process in Part Two, Article VIII except as otherwise provided in Part Four.

K. When DOE submits RCRA Permit applications, closure plans, and post-closure plans required under Ch. 70.105 RCW which are deficient, Ecology, as appropriate, may respond with a Notice of Deficiency (NOD) documenting revisions necessary for compliance, or may, in the event the submission is found by Ecology to be not in good faith or to contain significant deficiencies, assess stipulated penalties in accordance with Article IX. In the event that NOD(s) are issued, the first two NODs on any submittal shall not be subject to the formal Dispute Resolution process. Any subsequent NOD may be so subject. Ecology and DOE may agree, however, to subject any NOD to Dispute Resolution.

L. In computing any period of time prescribed in this Dispute Resolution process, the day a document is received shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which case the period runs until the end of the next day that is neither a Saturday, Sunday nor a legal holiday.

#### **ARTICLE IX. STIPULATED DANGEROUS WASTE PENALTIES**

31. In the event that DOE fails to submit a Primary Document pursuant to the appropriate timetable or deadline or fails to comply with a term or condition of Part Two of this Agreement or Part Three Corrective Action requirements including milestones, Ecology may assess a stipulated penalty against DOE. A stipulated penalty may be assessed in an amount up to \$5,000 for the first week (or part thereof), and up to \$10,000 for each additional week (or part thereof) for which a failure set forth in this Paragraph occurs.

If the failure in question is not already subject to Dispute Resolution at the time such assessment is received, DOE shall have seven (7) days after receipt of the assessment to invoke Dispute Resolution on the question of whether the failure did in fact occur. DOE shall not be liable for the stipulated penalty assessed by Ecology 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 on DOE's failure to comply.

32. The annual reports required by Section 120(e)(5) of CERCLA shall include, with respect to each final assessment of a stipulated penalty against DOE 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.

33. Stipulated penalties assessed pursuant to this Article shall be payable to the Hazardous Waste Control and Elimination account of the State Treasury.

34. All funds collected by the State from DOE penalties under this Agreement shall be used by the State as provided by the Federal Facility Compliance Act, Section 102(c) (42 U.S.C Sec. 6961(c)).

35. In no event shall this Article give rise to a stipulated penalty in excess of the amount set forth in RCRA Section 3008.

36. This Section shall not affect DOE's ability to request an extension of a timetable, deadline, or schedule pursuant to any Section of this Agreement. No penalty shall be assessed for a violation of a timetable, deadline or schedule caused by an event of force majeure as defined under Article XLVII (Force Majeure).

37. Nothing in this Agreement shall be construed to render an employee or authorized representative of DOE personally liable for the payment of any stipulated penalty assessed pursuant to this Article.

38. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of Ecology to seek any remedies or sanctions available by virtue of DOE's violation of this Agreement or, for matters not specifically addressed by this Agreement, of the statutes and regulations upon which it is based, including but not limited to penalties, pursuant to Ch. 70.105 RCW; provided, however, that the assessment of stipulated penalties shall preclude Ecology from seeking any other penalty payments from DOE under Ch. 70.105 RCW for the same violations.

#### **ARTICLE X. ENFORCEABILITY**

39. In the event DOE or Ecology fails to comply with the RCRA provisions of this Agreement, the other Party may initiate judicial enforcement of the Agreement. In enforcing the

RCRA provisions of this Agreement, a Party may seek injunctive relief, specific performance, sanctions or other relief available under applicable law. DOE and Ecology, prior to seeking enforcement, shall utilize the Dispute Resolution procedures of Article VIII, except as provided in Article XLVI (Reservation of Rights).

40. Part Two, enforceable major and interim milestones, and other RCRA provisions of this Agreement including those related to statutory requirements, regulations, permits, closure plans, or corrective action, including record keeping and reporting shall be enforceable by citizen suits under Section 7002(a)(1)(A) of RCRA, including actions by the State of Washington, Ecology or other state agencies. DOE agrees that the State or one of its agencies is a “person” within the meaning of Section 7002(a) of RCRA.

41. The Parties agree that the RCRA provisions set forth in this Agreement which address record keeping, reporting, enforceable milestones (excluding target dates), regulations, permits, closure plans, or corrective action are RCRA statutory requirements and are thus enforceable by the Parties.

#### **ARTICLE XI. SCHEDULE**

42. A. Tank waste remediation milestones will be established in accordance with Section 11.8 of the Action Plan.

B. Except as provided above, specific major and interim milestones, as agreed to by the Parties, are set forth in the Action Plan.

#### **ARTICLE XII. COMMON TERMS**

43. The provisions of Parts Four, and Five, Articles XXIII through LII below, apply to this Part Two and are incorporated herein by reference.



## **PART THREE      REMEDIAL AND CORRECTIVE ACTIONS**

### **ARTICLE XIII. FINDINGS AND DETERMINATIONS**

44. The following paragraphs of this Article constitute a summary of the facts upon which EPA and Ecology are proceeding for purposes of Part Three of this Agreement. None of the facts related herein shall be considered admissions by any Party. This Article contains findings by EPA and Ecology, and shall not be used by any person related or unrelated to this Agreement for purposes other than determining the basis of this Agreement.

A. In and/or before 1943, the United States acquired approximately 560 square miles of land, now known as the Hanford Site. The DOE and its predecessors have operated Hanford continuously since 1943, mainly for the production of special nuclear materials for the national defense.

B. Since the establishment of the Hanford Site in 1943, materials subsequently defined as hazardous substances, pollutants and contaminants by CERCLA, materials defined as hazardous waste and constituents by RCRA and/or Ch. 70.105 RCW, have been produced, and disposed of, or released, at various locations at the Hanford Site, including TSD Units.

C. Certain hazardous substances, contaminants, pollutants, hazardous wastes and constituents remain on and under the Hanford Site, and have been detected in groundwater and surface water at the Hanford Site.

D. Groundwater, surface water and air pathways provide routes for the migration of Hazardous Substances, pollutants, contaminants, and Hazardous Wastes and constituents from the Hanford Site into the environment.

E. An estimated five billion cubic yards of solid and dilute liquid wastes, which include hazardous substances, mixed waste, and hazardous waste and constituents have been disposed of at the Hanford Site. Significant above-background concentrations of hazardous substances, including chromium, strontium-90, tritium, iodine-129, uranium, cyanide, carbon tetrachloride, nitrates, and technetium-99 have been detected in the groundwater (unconfined

aquifer) at the Hanford Site. These materials have toxic, carcinogenic, mutagenic, or teratogenic effects on humans and other life forms.

F. The Hanford Site is adjacent to the Columbia River. Approximately 80,000 people use groundwater and surface water obtained within three miles of the Hanford Site for drinking. This same water is used to irrigate approximately 1,000 acres.

G. The migration of such materials presents a threat to the public health, welfare and the environment.

H. On or about September 14, 1987, DOE voluntarily undertook and provided to EPA information and data on the Hanford Site, which supported nomination of four aggregate areas on the Hanford Site for inclusion on the NPL, pursuant to CERCLA. EPA, by letter dated April 22, 1988, deemed this information and data to be the functional equivalent of a Site Preliminary Assessment and Site Investigation (PA/SI). EPA subsequently placed the Hanford Site on the Federal Agency Hazardous Waste Compliance Docket, 52 Fed. Reg. 4280 (February 12, 1988). On June 24, 1988, EPA proposed inclusion of four subareas of the Hanford Site on the NPL.

45. Based on the Findings of Fact set forth in Paragraph 44, and the information available, and without admission by DOE, EPA and Ecology have determined the following:

A. DOE is a person as defined in Section 101(a) of CERCLA, 42 U.S.C. Sec. 9601(a).

B. The DOE Hanford Site located in Washington State constitutes a facility within the meaning of 42 U.S.C. Sec. 9601(9).

C. Hazardous Substances, and pollutants or contaminants within the meaning of 42 U.S.C. Secs. 9601(14) and (33) and 9604(a)(2) have been disposed of or released at the Hanford Site.

D. There have been releases and there continue to be releases and threatened releases of Hazardous Substances, and pollutants or contaminants into the environment within the meaning of 42 U.S.C. Secs. 9601(22), 9604, 9606 and 9607 at and from the Hanford Site.

E. With respect to those releases and threatened releases, DOE is a responsible person within the meaning of 42 U.S.C. Sec. 9607.

F. The Hanford Site includes certain hazardous waste treatment, storage, and disposal Units authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. Sec. 6925(e), and Ch. 70.105 RCW and 173-303 WAC, which are subject to the permit requirements of RCRA.

G. Certain wastes and constituents at the Hanford Site are Hazardous Wastes or hazardous constituents thereof as defined by Section 1004(5) of RCRA, 42 U.S.C. Sec. 6903(5) and 40 CFR Part 261. There are also Hazardous Wastes or hazardous constituents at the Hanford Site within the meaning of Ch. 70.105 RCW and 173-303 WAC.

H. There is or has been a release of Hazardous Wastes and/or hazardous constituents into the environment from the Hanford Site.

I. The Hanford Site constitutes a facility within the meaning of Sections 3004 and 3005 of RCRA, 42 U.S.C. Secs. 6924 and 6925, and RCW 70.105.

J. The DOE is the owner of the Hanford Site.

K. The submittals, actions, schedules, and other elements of work required or imposed by this Agreement are reasonable and necessary to protect the public health and welfare and the environment.

#### **ARTICLE XIV. WORK**

46. DOE agrees to perform the work described in this Article XIV in accordance with the Action Plan. EPA and Ecology agree to provide DOE with guidance and timely response to requests for guidance to assist DOE in its performance of work under Part Three of this Agreement. Ecology will administer RCRA Subtitle C corrective action provisions in

accordance with this Agreement and issue all future modifications to the corrective action portion of the TSD permit. The selection of remedial or corrective action shall be governed by Part Three of this Agreement. Disputes between DOE and Ecology arising under this Part concerning RCRA corrective action shall be resolved in accordance with Article VIII (Resolution of Disputes). Work undertaken at those operable units designated under the Action Plan as RCRA-CERCLA past-practice units is subject to both RCRA Corrective Action and CERCLA requirements including, but not limited to the provisions of Article IX, Article X, Article XX and Article XXI.

47. Interim Response Actions. DOE agrees that it shall develop and implement Interim Response Actions (IRAs) at operable units being managed under CERCLA corrective action authority, as required by the lead regulatory agency, and as set forth in Chapter 7.0 of the Action Plan. The IRAs shall be consistent with the purposes set forth in Article III (Purpose) of this Agreement. In the event of dispute by DOE, the final selection of the interim response action(s) shall be made by the lead regulatory agency, and shall not be subject to dispute by the Parties. IRAs shall, to the greatest extent practicable, attain ARARs and be consistent with and contribute to the efficient performance of final response actions. A dispute arising under this Article on any matter other than final selection of an IRA shall be resolved pursuant to Article VIII where Ecology is the lead regulatory agency and Article XVI where EPA is the lead regulatory agency, except as provided elsewhere in this Agreement.

48. Interim Measures. DOE agrees that it shall develop and implement Interim Measures (IMs) at operable units being managed under RCRA corrective action authority, as required by Ecology, and as set forth in Chapter 7.0 of the Action Plan. The IMs shall be consistent with the purposes set forth in Article III (Purpose) of this Agreement. IMs shall to the greatest extent practicable be consistent with and contribute to efficient performance of corrective actions. A dispute arising under this paragraph shall be resolved pursuant to Article VIII.

49. RCRA Facility Assessments. DOE agrees it shall develop, implement and report upon RCRA Facility Assessments (RFAs) which comply with applicable requirements of RCRA, the RCRA regulations, and pertinent written guidance and established written EPA and Ecology policy, and which are in accordance with the requirements and time schedules set forth in the

Action Plan. Such assessment may be done for an entire Operable Unit, or individual Waste Management Units within an Operable Unit.

50. Remedial Investigations. DOE agrees it shall develop, implement and report upon remedial investigations (RIs) which comply with applicable requirements of CERCLA, the NCP, and pertinent written guidance and established written EPA policy, and which is in accordance with the requirements and time schedules set forth in the Action Plan.

51. RCRA Facility Investigations. DOE agrees it shall develop, implement and report upon RCRA facility investigations (RFIs) which comply with applicable requirements of RCRA, the RCRA regulations, and pertinent written guidance and established written EPA and Ecology policy, and which is in accordance with the requirements and time schedules set forth in the Action Plan.

52. Feasibility Studies. DOE agrees it shall design, propose, undertake and report upon feasibility studies (FSs) which comply with applicable requirements of CERCLA, the NCP, and relevant guidance and established EPA policy, and which is in accordance with the requirements and time schedules set forth in the Action Plan.

53. Corrective Measures Studies. DOE agrees it shall design, propose, undertake and report upon corrective measure studies (CMSs) which comply with applicable requirements of RCRA, the RCRA regulations, and relevant written guidance and established written EPA and Ecology policy, and which is in accordance with the requirements and time schedules set forth in the Action Plan.

54. Remedial and Corrective Actions. DOE shall develop and submit its proposed remedial action (or corrective action) alternative following completion and approval of an RI and FS (or RCRA RFI and CMS), in accordance with the requirements and schedules set forth in the Action Plan. If Ecology is the lead regulatory agency, it will recommend the CERCLA remedial action(s) it deems appropriate to EPA. The EPA Administrator, in consultation with the DOE and Ecology, shall make final selection of the CERCLA remedial action(s), which shall not be subject to dispute. In accordance with the Action Plan, Ecology in consultation with DOE shall select the RCRA corrective action(s). The final selection of RCRA corrective action(s) by

Ecology shall be final and not subject to dispute. Notwithstanding this Article, or any other Article of this Agreement, the State may seek judicial review of an interim or final remedial action in accordance with Sections 113 and 121 of CERCLA, 42 U.S.C. Secs. 9613 and 9621.

55. Implementation of Remedial and Corrective Actions. Following final selection, DOE shall design, propose and submit to the lead regulatory agency, a detailed plan for implementation of each selected remedial action(s) and RCRA corrective action(s), which shall include operations and maintenance plans, appropriate timetables and schedules. Following review and approval by the lead regulatory agency, DOE shall implement the remedial action(s) and RCRA corrective action(s) in accordance with the requirements and time schedules set forth in the Action Plan to this Agreement. A dispute arising under this Article on any matter other than EPA's final selection of a remedial action shall be resolved pursuant to Article VIII where Ecology is the lead regulatory agency and Article XVI where EPA is the lead regulatory agency.

56. All work described above, whether labeled "remedial action" or "corrective action," and whether performed pursuant to CERCLA and an RI/FS or the RCRA/HSWA equivalent shall be governed by this Part Three. CERCLA remedial action and, as appropriate, HSWA corrective action shall meet ARARs in accordance with CERCLA Section 121.

57. Notwithstanding any part of this Agreement, Ecology may obtain judicial review of any final decision of EPA on selection of a final remedial action at any Operable Unit pursuant to Section 113 of CERCLA. Ecology also reserves the right to obtain judicial review of any ARAR determination pursuant to Section 121 of CERCLA.

#### **ARTICLE XV. REVIEW OF DOCUMENTS**

58. The provisions of Section 9.0 of the Action Plan establish the procedures that shall be used by DOE, EPA, and Ecology to provide the Parties with appropriate notice, review, comment and response to comments regarding RI/FS, Remedial Design and Remedial Action (RD/RA) documents (or RCRA Corrective Action equivalent) specified as either Primary or Secondary Documents in the Action Plan. All primary documents shall be subject to Dispute Resolution in accordance with Article VIII where Ecology is the lead regulatory agency and Article XVI where EPA is the lead regulatory agency. Secondary documents are not subject to

Dispute Resolution. In accordance with Section 120 of CERCLA, DOE will be responsible for issuing primary and secondary documents to the lead regulatory agency. The lead regulatory agency shall be responsible for consolidating comments and providing responses to DOE on all required submittals for the Operable Units for which it is the designated lead regulatory agency. No guidance, suggestions, or comments by Ecology or EPA will be construed as relieving DOE of its obligation to obtain formal approval required by Part Three of this Agreement.

#### **ARTICLE XVI. RESOLUTION OF DISPUTES**

59. If a dispute arises under Part Three of this Agreement with respect to a matter for which EPA is the lead regulatory agency, or as specifically set forth elsewhere in this Agreement, the procedures of this Article shall apply. These procedures shall not apply, however, where otherwise specifically excluded. EPA and DOE shall make reasonable efforts to informally resolve disputes. Except as provided in Paragraph 46, if resolution cannot be achieved informally, the procedures of this Article shall be implemented to resolve a dispute. These Dispute Resolution provisions shall not apply to RCRA permit actions which are otherwise subject to administrative or judicial appeal. These Dispute Resolution provisions shall not apply to enforcement actions which are otherwise subject to administrative or judicial appeal, except that these Dispute Resolution provisions shall apply in the event of the assessment of stipulated penalties.

A. Within thirty (30) days after: (1) the period established for review of a primary document pursuant to Article XV (Review of Documents), or (2) any action which leads to or generates a dispute, the disputing Party shall submit to the IAMIT a written statement setting forth the nature of the dispute, the work affected by the dispute, the disputing Party's position with respect to the dispute, the information the disputing Party is relying upon to support its position, and a description of all steps taken to resolve the dispute.

B. Prior to issuance of a written statement of dispute, the disputing Party shall engage the other Party in informal Dispute Resolution among the project managers. During this informal Dispute Resolution period the EPA and DOE shall meet as many times as 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 IAMIT within the thirty (30) days specified in subparagraph A above, thereby elevating the dispute to the IAMIT for resolution.

D. The IAMIT will serve as a forum for resolution of disputes for which agreement has not been reached through informal dispute resolution. The EPA representative on the IAMIT is the Program Manager, Hanford Project Office of EPA Region 10. DOE's representative on the IAMIT will be the Assigned Executive Manager. Written notice of any delegation of authority from a Party's designated representative on the IAMIT shall be provided to the other Party pursuant to the procedures of Article XXXIII (Notification).

E. Following elevation of a dispute to the IAMIT, the IAMIT shall have twenty-one (21) days to unanimously resolve the dispute and issue a written decision. If the IAMIT is unable to unanimously resolve the dispute within this twenty-one 21-day period, the written statement of dispute shall be forwarded by the disputing Party within seven (7) days 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 IAMIT. EPA's representative on the SEC is the Director, Office of Environmental Clean Up of EPA Region 10. DOE's representative on the SEC is the DOE Richland Operations Office Deputy Manager. The SEC members shall, as appropriate, confer, meet and exert their best efforts to resolve the dispute. The SEC shall have twenty-one (21) days to unanimously resolve the dispute.

G. If unanimous resolution of the dispute is not reached within twenty-one (21) days, EPA's Regional Administrator shall issue a final written decision resolving the dispute within fourteen (14) days. This authority can not be delegated. The time for issuing a final decision may be extended by EPA upon notice to the other Parties.

H. Within fourteen (14) days of the Regional Administrator's issuance of the final written decision on the dispute, DOE may request that the Administrator of EPA resolve the dispute if the Secretary of Energy determines that the decision of the Regional Administrator has



significant national policy implications. The request must be in writing, and must identify the basis for the determination by the Secretary that the decision has significant national policy implications. If no such request is made within the fourteen (14) day period, DOE shall be deemed to have agreed with the Regional Administrator's written decision. If such a request is made, the Administrator will review and resolve the dispute in accordance with applicable law and regulations within twenty-one (21) days. Upon request and prior to resolving the dispute, the Administrator may meet and confer with the DOE to discuss the issues under dispute. The Administrator shall provide five (5) days advance notice of such meeting. Upon resolution, the Administrator shall provide a written final decision setting forth resolution of the dispute. The duties of the EPA Administrator and Secretary of Energy set forth in this Article XVI shall not be delegated.

I. The pendency of any dispute under this Part shall not affect DOE's responsibility for timely performance of the work required by this Agreement, except that, when DOE has delivered a change request to EPA one hundred seven (107) days or more in advance of when a milestone or other enforcement schedule or deadline under this Agreement is due and EPA's action on the change request has been disputed under this Article, the time period for completion of work directly 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 beyond ninety-three (93) days. In accordance with the procedures specified in Section 12 of the Action Plan, the Parties may agree to extend or postpone any milestone or other enforceable schedule or deadline under this Agreement during the pendency of any dispute. All elements of the work required by this Agreement which are not directly affected by the dispute shall continue and be completed in accordance with this Agreement.

J. In the event that EPA assesses stipulated penalties under Article XX (Stipulated Penalties) and DOE disputes the matter under this Article XVI, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of the Agreement. In the event that Energy does not prevail on the disputed issue, stipulated penalties may be assessed and shall be paid as provided in Article XX (Stipulated Penalties).

K. When Dispute Resolution is in progress, work affected by the dispute will immediately be discontinued if the EPA project manager requests in writing that such work be stopped because, in EPA's opinion, such work is inadequate or defective, and such inadequacy or defect is likely to yield an adverse affect on human health and environment, or is likely to have a substantial adverse affect on the remedy selection or implementation process. To the extent possible, EPA shall give DOE prior notification that a work stoppage request is forthcoming. After stoppage of work, if DOE believes that the work stoppage is inappropriate, DOE may meet with the EPA to discuss the work stoppage. Within fourteen (14) days of this meeting, the EPA project manager will issue a final written decision with respect to the stoppage. Upon receipt of this final written decision of the EPA project manager, DOE may initiate Dispute Resolution at the IAMIT level.

L. Within twenty-one (21) days of resolution of any dispute, 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.

M. Resolution of a dispute pursuant to this Article constitutes final resolution of the dispute and all Parties shall abide by all terms and conditions of such final resolution.

N. Any deadline in the dispute resolution process may be extended with the consent of DOE and EPA.

O. In computing any period of time prescribed in this dispute resolution process, the day a document is received shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which case the period runs until the end of the next day that is neither a Saturday, Sunday nor a legal holiday.

P. If a dispute arises under Part Three of this Agreement with DOE with respect to a matter for which Ecology is the lead regulatory agency and relating to an operable unit designated under the Action Plan as a RCRA-CERCLA past-practice operable unit, the dispute will be resolved as follows:

1. If there is a dispute on the selection of a CERCLA remedial action and a RCRA Corrective Action, dispute resolution processes will run concurrently under Article VIII with respect to the RCRA Corrective Action decision, and this Article and Article XXIV, Paragraph 89 with respect to selection of the CERCLA remedial action.

2. For all other disputes with DOE the matter will be resolved in accordance with Article VIII.

#### **ARTICLE XVII. SCHEDULE**

60. DOE shall commence Remedial Investigations (RIs) and Feasibility Studies (FSs) for one Operable Unit of each subarea of the Hanford Site included on the NPL within six (6) months after such listing on the NPL. Schedules for such RIs and FSs, are set forth in the Action Plan. The Parties agree that this phased schedule satisfies Section 120(e)(1) of CERCLA. RI/FS schedules for each Operable Unit will be published by the lead regulatory agency, as provided in Section 120(e)(1) of CERCLA.

61. DOE shall commence remedial action within fifteen (15) months after completion of the RI/FS (including EPA selection of the remedy) for the first priority Operable Unit, in accordance with Section 120(e)(2) of CERCLA and the schedule in the Action Plan. DOE shall complete the remedial action as expeditiously as possible, as required by CERCLA Section 120(e)(3). In accordance with the schedule(s) in the Action Plan, subsequent remedial action at other operable units shall follow and be completed as expeditiously as possible as subsequent RI/FSs are completed and approved. The Parties agree that this phased schedule satisfies Section 120(e)(2) and (3) of CERCLA.

62. Specific major and interim milestones and schedules, as agreed to by the Parties, are set forth in the Action Plan.

#### **ARTICLE XVIII. PERMITS**

63. The Parties recognize that under CERCLA Secs. 121(d) and 121(e)(1), and the NCP, portions of the response actions called for by this Agreement and conducted entirely on the Hanford Site are exempted from the procedural requirement to obtain federal, state, or local

permits, but must satisfy all the applicable or relevant and appropriate federal and state standards, requirements, criteria or limitations which would have been included in any such permit.

64. When DOE proposes a response action to be conducted entirely on the Hanford Site, which in the absence of CERCLA Sec. 121(e)(1) and the NCP would require a federal or state permit, DOE shall include in the submittal:

- A. Identification of each permit which would otherwise be required;
- B. Identification of the standards, requirements, criteria, or limitations which would have had to have been met to obtain each such permit;
- C. Explanation of how the response action proposed will meet the standards, requirements, criteria or limitations identified in Subparagraph B immediately above.

65. Upon the request of DOE, the lead regulatory agency will provide its position with respect to Subparagraphs 64 B and C above in a timely manner.

66. This Article is not intended to relieve DOE from any applicable requirements, including Section 121(d)(3) of CERCLA, for the shipment or movement of a hazardous waste or substance off the Hanford Site. DOE shall obtain all permits and comply with applicable federal, state or local laws for such shipments. DOE shall submit timely applications and requests for such permits and approvals. Disposal of hazardous substances off the Hanford Site shall comply with DOE's Policy on Off-Site Transportation, Storage and Disposal of Nonradioactive Hazardous Waste dated June 24, 1986, or as subsequently amended, and the EPA Off-Site Response Action Policy dated May 6, 1985, 50 Federal Register 45933 (November 5, 1985), as amended by EPA's November 13, 1987 "Revised Procedures for Planning and Implementing Off-Site Response Actions," and as subsequently amended, to the extent required by CERCLA.

67. DOE shall notify the lead regulatory agency in writing of any permits required for off-Hanford activities related to this Agreement as soon as DOE-RL becomes aware of the requirement. Upon request, DOE shall provide the lead regulatory agency with copies of all such permit applications and other documents related to the permit process.

68. If a permit which is necessary for implementation of off-Hanford activities of this Agreement is not issued, or is issued or renewed in a manner which is materially inconsistent with the requirements of this Agreement, DOE shall notify the lead regulatory agency of its intention to propose modifications to this Agreement to comply with the permit (or lack thereof). Notification by DOE of its intention to propose modifications shall be submitted within seven (7) calendar days of receipt by DOE of notification that: (1) a permit will not be issued; (2) a permit has been issued or reissued; (3) a final determination with respect to any appeal related to the issuance of a permit has been entered. Within thirty (30) days from the date it submits its notice of intention to propose modifications, DOE shall submit to the lead regulatory agency its proposed modifications to this Agreement with an explanation of its reasons in support thereof.

69. The lead regulatory agency shall review DOE's proposed modifications to this Agreement pursuant to this Article. If DOE submits proposed modifications prior to a final determination of any appeal taken on a permit needed to implement this Agreement, the lead regulatory agency may elect to delay review of the proposed modifications until after such final determination is entered. If the lead regulatory agency elects to delay review, DOE shall continue implementation of this Agreement as provided in the following paragraph.

70. During any appeal of any permit required to implement this Agreement or during review of any of DOE's proposed modifications as provided in the preceding paragraph, DOE shall continue to implement those portions of this Agreement which can be reasonably implemented pending final resolution of the permit issue(s).

#### **ARTICLE XIX. RECOVERY OF EPA CERCLA RESPONSE COSTS**

71. EPA and DOE agree to amend this section at a later date in accordance with any subsequent resolution of the currently contested issue of EPA cost reimbursement.

#### **ARTICLE XX. STIPULATED PENALTIES**

72. In the event that DOE fails to submit a CERCLA primary document pursuant to the appropriate timetable or deadline in accordance with Part Three of this Agreement, or fails to comply with a term or condition of Part Three of this Agreement which relates to an interim or

final remedial action, including milestones associated with the development, implementation and completion of an RI or FS, EPA may assess a stipulated penalty against DOE. If Ecology determines that DOE has failed in a manner as set forth above for which it is the lead regulatory agency, Ecology may identify stipulated penalties to EPA and, unless it is a disputed matter under Paragraph 73, these penalties shall be assessed in accordance with this Article.

A stipulated penalty may be assessed in an amount up to \$5,000 for the first week (or part thereof), and up to \$10,000 for each additional week (or part thereof) for which a failure set forth in this paragraph occurs.

73. Upon determining that DOE has failed in a manner set forth in Paragraph 72 the lead regulatory agency shall notify DOE in writing. If the failure in question is not or has not already been subject to Dispute Resolution either under Part Two or Part Three at the time notice of the assessment of stipulated penalties is received, DOE shall have fifteen (15) days to invoke Dispute Resolution under Part Three on the question of whether the failure did in fact occur. In the event Ecology is the lead regulatory agency the Ecology project manager and the Ecology IAMIT and SEC members shall participate in the Part Three Dispute Resolution process. DOE 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 on DOE's failure to comply.

74. The annual reports required by Section 120(e)(5) of CERCLA shall include, with respect to each final assessment of a stipulated penalty against DOE 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.

75. Stipulated penalties assessed pursuant to this Article for violations of CERCLA requirements shall be payable to the Hazardous Substances Response Trust Fund from funds authorized and appropriated for that specific purpose.

76. RESERVED

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

78. This Article shall not affect DOE's ability to obtain an extension of a timetable, deadline or schedule pursuant to Article XL and in accordance with Section 12.0 of the Action Plan.

79. Nothing in this Agreement shall be construed to render an employee or Authorized Representative of DOE personally liable for the payment of any stipulated penalty assessed pursuant to this Article.

80. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any remedies or sanctions available by virtue of DOE's violation of this Agreement or, for matters not specifically addressed by this Agreement, of the statutes and regulations upon which it is based, including but not limited to penalties, pursuant to CERCLA and RCRA; provided, however, that the assessment of stipulated penalties shall preclude EPA from seeking any other penalty payments from DOE under RCRA or CERCLA for the same violations.

#### **ARTICLE XXI. ENFORCEABILITY**

81. The Parties agree that compliance with the terms of this Agreement, including all timetables and deadlines associated with this Agreement shall be construed as compliance with CERCLA Section 120(e)(3).

82. 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 or is incorporated into Part Three of this Agreement (with the exception of any such obligations which are imposed solely pursuant to Subtitle C of RCRA and are not determined by EPA to be ARARs) is enforceable by any person pursuant to CERCLA Section 310, and any violation of such standard, regulation, condition, requirement or order will be subject to civil penalties under CERCLA Secs. 310(c) and 109;

B. All timetables or deadlines, associated with the development, implementation and completion of an RI or FS, shall be enforceable by any person pursuant to CERCLA Section 310 and any violation of such timetables or deadlines will be subject to civil penalties under CERCLA Secs. 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 Section 310 and any violation of such terms or conditions will be subject to civil penalties under CERCLA Secs. 310(c) and 109; and

D. Any final resolution of a dispute pursuant to Article XVI (Resolution of Disputes) which establishes a term, condition, timetable, deadline or schedule shall be enforceable by any person pursuant to CERCLA Section 310(c) and any violation of such term, condition, timetable, deadline or schedule will be subject to civil penalties under CERCLA Secs. 310(c) and 109.

83. 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 RCRA or CERCLA, including CERCLA Section 113(h).

84. The Parties agree that all Parties shall have the right to enforce the terms of this Agreement in accordance with its provisions.



**ARTICLE XXII. COMMON TERMS**

85. The provisions of Parts Four and Five, Articles XXIII through LII below, apply to this Part Three and are incorporated herein by reference.

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## **PART FOUR INTEGRATION OF EPA AND ECOLOGY RESPONSIBILITIES**

### **ARTICLE XXIII. RCRA/CERCLA INTERFACE**

86. Part Two of this Agreement requires DOE to carry out RCRA TSD work under the direction and authority of Ecology. Part Three of this Agreement requires DOE to carry out investigations and cleanup of past-practice units through the CERCLA process under the authority of EPA, or through the RCRA Corrective Action process under the authority of Ecology. This Part Four establishes the framework for EPA and Ecology to resolve certain disputes that may arise concerning the respective responsibilities of the two regulatory agencies.

87. EPA and Ecology recognize that there is a potential for the two regulatory agencies to impose conflicting requirements upon DOE, due to the complexities of the Hanford Site (where RCRA TSDs, and past-practice units may be in close proximity to each other) and due to the overlap between the respective authorities of the two regulatory agencies. EPA and Ecology intend to carry out their responsibilities so as to minimize the potential for any such conflicts. Except as otherwise specified in Appendices C and D, either EPA or Ecology shall be lead regulatory agency for oversight of DOE's work for all operable units, TSD groups/units or milestones covered by this Agreement.

### **ARTICLE XXIV. LEAD REGULATORY AGENCY AND REGULATORY APPROACH DECISIONS**

88A. The designation of lead regulatory agency and regulatory process for each operable unit, TSD group/unit or milestone shall be made through the change process in Section 12.0 of the Action Plan. EPA and Ecology have joint authority to determine the choice of lead regulatory agency and regulatory process, in consultation with DOE, and DOE shall not dispute such joint determinations.

B. If the EPA and Ecology cannot agree on the choice of lead agency and/or regulatory process for any operable unit, TSD group/unit or milestone, then the issue shall enter the dispute resolution process as provided in Article XXVI. If, following such dispute resolution process, EPA and Ecology cannot agree, then the releases and units that are the subject of the dispute shall be considered a matter which Ecology, EPA, and DOE have chosen not to address

under this Agreement, and all Parties reserve all rights and authorities with respect to such matters.

89. Except as otherwise specified in Appendices C and D, either EPA or Ecology will serve as lead regulatory agency for each operable unit, TSD group/unit and milestone, and the non lead regulatory agency will generally not be involved. EPA and Ecology will enter into an Memorandum of Understanding (MOU) which will describe the circumstances when the lead regulatory agency and non-lead agency will interact and coordinate activities. These include instances where:

- A. The lead regulatory agency has requested the assistance or involvement of the non lead agency;
- B. Ecology lacks legal authority to approve or require action, such as approval of a CERCLA remedial action;
- C. The non lead agency has a mandatory legal obligation or duty, such as under a permit;
- D. EPA is the lead regulatory agency, and Ecology concurrence is sought for a CERCLA Remedial Action.

Any disputes between EPA and Ecology concerning RCRA matters that cannot be resolved in accordance with the MOU, may be referred by either EPA or Ecology to dispute resolution under Article XXVI. In the event that EPA and Ecology cannot agree on the selection of CERCLA remedial action where Ecology is the lead regulatory agency, DOE will be notified and the dispute will be elevated to the IAMIT and resolved in accordance with Article XVI. For such disputes, the IAMIT and SEC will include the Ecology representatives designated in Article VIII. In the event the matter is elevated to the Administrator for resolution, Ecology will be notified and invited to participate in any meeting with DOE to discuss the issues under dispute.

**ARTICLE XXV. PHYSICALLY INCONSISTENT ACTIONS**

90. EPA and Ecology intend that neither regulatory agency shall direct actions to be taken at the Hanford Site that are physically inconsistent with other actions directed by either regulatory agency at the Site. This provision applies to any actions required to be taken at the site under RCRA or CERCLA. For the purposes of this Agreement, Physically Inconsistent Action shall mean any action which, if implemented, would reduce the overall effectiveness of other response actions. The setting of priorities for action based on budgetary considerations shall not be used as a factor in determining the presence of physical inconsistency. The provisions of this Article are independent of and do not modify or otherwise affect the provisions of Article XXVIII (RCRA/CERCLA Reservation of Rights).

91. In the event of a dispute between EPA and Ecology over an issue of physical inconsistency, either Party may refer such dispute to the dispute resolution process at Article XXVI. In resolving a dispute concerning a possible physical inconsistency, the parties shall attempt to resolve the dispute in such a way as to promote timely cleanup and benefit to the net overall environmental quality of the Hanford Site.

If at the conclusion of that dispute resolution process, the Parties have not agreed on a resolution of the dispute, then the releases and activities that are the subject of the dispute shall be considered a matter which the Parties have chosen not to address under this Agreement, and the Parties reserve all rights and authorities with respect to such matters.

**ARTICLE XXVI. DISPUTE RESOLUTION**

92. Except as otherwise provided in Paragraph 89, Resolution of Dispute between Ecology and EPA shall be resolved in the following manner:

A. On discovery of any dispute between Ecology and EPA, each regulatory agency's project managers shall make reasonable efforts to informally resolve such disputes. If informal resolution cannot be achieved, the disputing Party shall submit a written statement of dispute setting forth the nature of the dispute, the disputing Party's position with respect to the dispute, and the information relied upon to support its position to the IAMIT as described below. Receipt of such a statement by the IAMIT shall constitute formal elevation of the dispute in question to

the IAMIT. At such time as the disputing Party submits a statement of dispute to the IAMIT, a copy shall be sent to DOE. The IAMIT will serve as a forum for resolution of disputes for which agreement has not been reached through informal dispute resolution. Ecology and EPA agree to utilize the dispute resolution process only in good faith and agree to expedite, to the extent possible, the Dispute Resolution process whenever it is used.

B. The Ecology designated representative of the IAMIT is the Program Manager for Nuclear Waste. EPA's designated representative of the IAMIT is the Program Manager, Hanford Project Office of EPA's Region 10. Following elevation of a dispute to the IAMIT, the IAMIT shall have twenty one (21) days to unanimously resolve the dispute. Any successful resolution shall be documented within an additional twenty one (21) days by a jointly signed determination outlining the resolution reached. At such time, a copy of such documentation shall be sent to DOE. If the IAMIT is unable to unanimously agree on a resolution, the members shall forward pertinent information and their respective recommendations to the SEC for resolution.

C. The Ecology designated member of the SEC is the Deputy Director. EPA's designated member of the SEC is the Director, Office of Environmental Clean Up of EPA Region 10. The SEC will serve as the forum for resolution of disputes for which agreement has not been reached by the IAMIT. The SEC members shall, as appropriate, confer, meet and exert their best efforts to resolve the dispute. The DOE-RL Deputy Manager shall meet with the SEC to assist in resolving the dispute. The SEC shall have twenty one (21) days to unanimously resolve the dispute. Any successful resolution shall be documented, within an additional twenty one (21) days, by a jointly signed determination outlining the resolution reached. At such time, a copy of such documentation shall be sent to DOE.

D. Throughout the above dispute resolution process, EPA and Ecology shall consult, as appropriate, with DOE in order to facilitate resolution of disputes.

93. If disputes are not resolved pursuant to this Article, such disputes shall be subject to Article XXVIII.

94. The pendency of any dispute under this Part shall not affect DOE's responsibility for timely performance of the work required by this Agreement, except that the time period for

completion of work directly 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 directly affected by the dispute shall continue and be completed in accordance with this Agreement.

**ARTICLE XXVII. OTHER DISPUTES AND EPA OVERSIGHT**

95. If there are other disputes between Ecology and EPA concerning overlaps between Part Two and Part Three of this Agreement, Ecology and EPA shall use the dispute resolution process in Article XXVI to resolve such disputes.

96. The provisions of this Agreement do not eliminate EPA's responsibility for oversight of Ecology's exercise of its authorized RCRA authorities. In carrying out any such oversight, EPA shall follow the statutory and regulatory procedures for such oversight and the provisions of this Agreement, including, as appropriate, the Dispute Resolution process in Article XXVI.

**ARTICLE XXVIII. RCRA/CERCLA RESERVATION OF RIGHTS**

97. If EPA and Ecology are unable to resolve jointly any dispute arising under this Part, then each regulatory agency reserves its rights to impose its requirements directly on DOE, to defend the basis for those requirements, and to challenge the other regulatory agency's conflicting requirements. In such event, DOE reserves its right to raise any defenses available.

98. EPA and Ecology each reserve its right after utilizing the Dispute Resolution process in Part Four, to seek judicial review of a proposed decision or action taken with respect to corrective or remedial actions at any given operable unit on the grounds that either EPA or Ecology claims that such proposed decision or action conflicts with its respective laws governing protection of human health and/or the environment. It is the understanding of the Parties that this reservation is intended to provide for challenges where the adequacy of protection of human health and the environment or the means of achieving such protection is at issue.

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## PART FIVE COMMON PROVISIONS

### **ARTICLE XXIX. RECOVERY OF STATE COSTS**

99. DOE agrees to reimburse Ecology for all of its costs related to the implementation of this Agreement as provided below:

A. Reimbursement of Department of Ecology RCRA Costs:

1. DOE agrees to pay to the appropriate account of the Treasury of the State of Washington, all reasonable fees and other service charges which would be payable by any person managing hazardous and/or radioactive mixed waste under applicable Washington law, including the mixed waste management fee assessed pursuant to RCW 70.105.280 and chapter 173-328 WAC. Program elements or activities for which the mixed waste management fee may be assessed include (a) office, staff, and staff support for the purposes of facility or unit permit development, review, and issuance, and (b) actions taken to determine and ensure compliance with the state's hazardous waste management act, as detailed in WAC 173-328-040. In the event DOE disputes any fees or service charges by Ecology, DOE may contest the disputed fees or service charges in accordance with the appeal procedures provided under applicable law.

2. Ecology shall provide DOE-RL by July 15 of each year a preliminary billing statement reflecting the fee to be assessed to DOE-RL for the upcoming twelve-month period, by quarter, beginning July 1. Ecology shall, prior to September 15, notify DOE-RL of actual adjustments arising from the previous twelve-month period's cost performance against amounts paid by DOE-RL in response to the previous October's billing statement. Ecology shall after October 1 send DOE-RL a final billing statement which identifies the mixed waste management fee costs assessed to DOE-RL for the twelve-month period beginning the previous July 1. Ecology shall provide an itemization of changes from the preliminary statement to aid DOE-RL in their review of the final billing statement. DOE-RL shall promptly pay this billing.

3. Ecology shall by July 31 of each year provide DOE-RL a forecast of planned waste management fees chargeable to DOE-RL. The forecasts shall be annual projections for a period of seven federal fiscal years beginning the previous October 1. Such forecasts shall

include supporting information which explains significant annual changes in proposed funding requirements. The Parties acknowledge that these forecasts are estimates and that actual fees may differ from the forecasts.

B. Reimbursement of Department of Ecology CERCLA Costs:

1. DOE agrees to reimburse Ecology for its CERCLA costs directly related to implementation of this Agreement up to the amount authorized through a yearly grant by DOE to Ecology.

2. By July 1, Ecology shall submit to DOE a proposed workscope and estimates of cost to be incurred relating to CERCLA work to be performed under this Agreement by Ecology for the upcoming period October 1 to September 30. DOE shall respond, in writing, with questions regarding this proposal, no later than August 1. The two Parties shall work diligently toward completion of grant negotiations leading to placement of award by October 1. DOE shall award grant funds to Ecology for the upcoming budget period from October 1, to September 30, in the amount consistent with the negotiated funding. In the event of delay in congressional appropriation and Continuing Resolution, funding under this grant shall be in incremental amounts. Initial funding of 70 percent of the negotiated amount for the grant period will be provided upon receipt of an Office of Management and Budget (OMB) funding allotment. Total approved funding shall be provided to Ecology within 30 days after receipt by DOE-RL of the final Financial Status Report from Ecology for the previous grant period. All CERCLA costs incurred by Ecology shall be costs directly related to this Agreement and costs not inconsistent with CERCLA and the NCP.

3. In the event that DOE contends that any costs incurred were not directly related to the implementation of this Agreement or were incurred in a manner inconsistent with CERCLA or the NCP, DOE may challenge the costs allowable under the grant to Ecology. If unresolved, Ecology's demand, and DOE's challenge, may be resolved through the appeals procedures set forth in 10 CFR Part 600 and 10 CFR Part 1024.

4. DOE shall not be responsible for reimbursing Ecology for any costs actually incurred in excess of the amount authorized each budget period in the grant award.

5. Ecology shall by July 31 of each year provide DOE-RL a forecast of planned CERCLA grant funding requirements. The forecasts shall be annual projections for a period of seven federal fiscal years beginning the previous October 1. Such forecasts shall include supporting information which explains significant annual changes in proposed funding requirements. The Parties acknowledge that these forecasts are estimates, and that actual grant requests may differ from the forecasts.

C. Reimbursement of other Department of Ecology Costs:

1. DOE agrees to pay justifiable costs incurred by Ecology in the implementation of this Agreement which are not covered by payments made pursuant to subparagraphs A and B above.

2. For such costs that may be recouped through the assessment of a fee, other than a mixed waste fee, DOE agrees to pay the fee assessed in the time permitted by law. In the event DOE disputes any fees assessed by Ecology, DOE may contest the disputed fees in accordance with the appeal procedures provided under applicable law.

3. For costs such as those costs related to Public Involvement, Emergency Preparedness Planning and oversight of Environmental Monitoring that may not be recouped through the assessment of a fee, DOE agrees to reimburse Ecology through a yearly grant. On an annual basis, Ecology shall submit to DOE a proposed cost estimate for work and services, not otherwise covered by subparagraphs A, or B, above, to be performed by the State in the implementation of this Agreement during the upcoming federal fiscal year. Subsequent to review by DOE, DOE shall issue funds to Ecology in an amount consistent with the estimated approved workscope and costs.

4. Ecology shall by January 31 of each year provide DOE-RL a forecast of planned funding requirements for other grants or fees not identified in subparagraphs A and B above. The forecasts shall be in the form of annual projections for a period of seven federal fiscal years beginning the previous October 1. Such forecasts shall include supporting information which explains significant annual changes in proposed funding requirements.

D. Report, Records, and Accounts:

1. Ecology agrees to keep records and books of account, in accordance with generally accepted accounting principles and practices, covering DOE's payment of funds and Ecology's use of such funds under subparagraphs B and C.3 above.

2. Ecology will provide to DOE within 30 days after the end of each quarter and 90 days after the end of each state fiscal year, a Financial Status Report (SF 269, short form) showing the expenditure of DOE funds provided pursuant to subparagraphs B and C.3 above.

3. DOE shall at all reasonable times be afforded access to books and records and to related correspondence, receipts, voucher, memoranda, and other data reflecting the use of DOE funds provided pursuant to subparagraphs B and C.3 above. Ecology shall preserve such books and papers in accordance with the retention requirements referenced in subparagraph D.4 below.

4. The Comptroller General of the United States or any of his or her duly authorized representatives shall, until the expiration of 3 years after the payment of funds pursuant to subparagraphs B or C.3 above, have access to and the right to examine any directly pertinent books, documents, papers, and records of the State involving transactions covered by subparagraphs B or C.3 above.

5. Expenditures of funds received pursuant to subparagraphs B or C.3 above are subject to the requirements of the Single Audit Act of 1984 (P.L. 98-502) and Office of Management and Budget Circular A-128 (Audits of State and Local Governments).

6. Nothing herein shall be deemed to preclude an audit by the General Accounting Office of any funds received pursuant to subparagraph B or C.3 above.

100. Ecology's performance of its obligations under this Agreement shall be excused if its justifiable costs are not paid as required by this Article.

**ARTICLE XXX. ADDITIONAL WORK OR MODIFICATION TO WORK**

101. In the event that additional work, or modification to work, including remedial investigatory work and/or engineering evaluation, is necessary to accomplish the objectives of

this Agreement, notification and description to such additional work or modification to work shall be provided to DOE. DOE will evaluate the request and notify the requesting Party within thirty (30) days of receipt of such request of its intent and ability to perform such work, including the impact such additional work will have on budgets and schedules. If DOE does not agree that such additional work is required by this Agreement or if DOE asserts such additional work is otherwise inappropriate, the matter shall be resolved in accordance with the Dispute Resolution procedures of Part Two or Part Three of this Agreement, as appropriate. Minor field changes, as set forth in the Action Plan, are not subject to this Article. Extensions of schedules may be provided pursuant to Article XL and Section 12.0 of the Action Plan.

102. Any additional work or modification to work determined to be necessary by DOE shall be proposed to the lead regulatory agency by DOE and will be subject to review in accordance with the appropriate Dispute Resolution procedures of Part Two or Part Three of this Agreement, as appropriate, prior to initiation.

103. If any additional work or modification to work will adversely affect work schedules or will require significant revisions to an approved schedule, the lead regulatory agency project manager shall be immediately notified of the situation followed by a written explanation within seven (7) days of the initial notification. Requests for extensions of schedule(s) shall be evaluated in accordance with Article XL.

#### **ARTICLE XXXI. QUALITY ASSURANCE**

104. All response work performed pursuant to this Agreement shall be done under the direction and supervision or in consultation with, as necessary, a qualified engineer, hydrogeologist, or other expert, with experience and expertise in hazardous waste management, hazardous waste site investigation, cleanup, and monitoring.

105. Throughout all sample collection, preservation, transportation, and analyses activities required to implement this Agreement, DOE shall use procedures for quality assurance (QA), and for quality control (QC), in accordance with approved EPA methods, including subsequent amendments to such procedures. The DOE shall use methods and analytical protocols for the parameters of concern in the media of interest within detection and

quantification limits in accordance with both QA/QC procedures and data quality objectives approved in the work plan, RCRA closure plan or RCRA permit. The lead regulatory agency may require that DOE submit detailed information to demonstrate that any of its laboratories are qualified to conduct the work. The DOE shall assure that the lead regulatory agency (including contractor personnel) has access to laboratory personnel, equipment and records related to sample collection, transportation, and analysis.

#### **ARTICLE XXXII. CREATION OF DANGER**

106. If any Party determines that activities conducted pursuant to this Agreement are creating a danger to the health or welfare of the people on the Hanford Site or in the surrounding area or to the environment, that Party may require or order the work to stop. Any such work stoppage or stop work order shall be expeditiously reviewed by DOE and the affected lead regulatory agency(s). Any dispute or nonconcurrence shall be immediately referred to the IAMIT level of the appropriate Dispute Resolution process.

107. If the affected Parties concur in the work stoppage, DOE's obligations shall be suspended and the time periods for performance of that work, as well as the time period for any other work dependent upon the work which was stopped, shall be extended, pursuant to Section 12.0 of the Action Plan of this Agreement, for such period of time equivalent to the time in which work was stopped, or as agreed to by the Parties.

#### **ARTICLE XXXIII. NOTIFICATION**

108. Unless otherwise specified, any report or submittal provided by DOE pursuant to a schedule or deadline identified in or developed under this Agreement (including the Action Plan) shall be sent by electronic mail (email) to the email addresses of the lead regulatory agency project manager and their correspondence control. Such emails as referenced in this paragraph shall be sent with delivery receipt requested. The receipt date will be the date and time that a report or submittal is delivered. For reports or submittals that are too big to be sent via email to the respective agency's correspondence control, DOE will place these reports or submittals on a file transfer protocol (FTP) site and send an email to the lead regulatory agency project manager and their correspondence control noting the date/time stamp. The receipt date will be the date

and time the FTP notification email is received by the lead regulatory agency's correspondence control. In the alternative, reports or submittals pursuant to a schedule or deadline may also be sent by mail or plant mail, in lieu of email, to the lead regulatory agency's project manager or correspondence control noting the date the report or submittal was sent. The receipt date of reports or submittals sent by plant mail shall be the date stamped upon receipt by the lead regulatory agency project manager or correspondence control.

109. Documents sent to the DOE by EPA or Ecology which require a response or activity by DOE pursuant to this Agreement (including the Action Plan) shall be sent by email or hand delivered as required to the address of the DOE project manager and their correspondence control. Such emails as referenced in this paragraph shall be sent with delivery receipt requested. The receipt date will be the date and time that a report or submittal is delivered. For reports or submittals that are too big to be sent via email, the report or submittal will be placed on a FTP site and an email will be sent to the DOE project manager with delivery receipt requested.

**ARTICLE XXXIV. RESERVED**

110. Reserved

**ARTICLE XXXV. SAMPLING AND DATA/DOCUMENT AVAILABILITY**

111. The DOE shall transmit the results of laboratory analytical data and non-laboratory data collected pursuant to this Agreement to the lead regulatory agency in an expeditious manner, as specified in Section 9.6 of the Action Plan.

112. DOE shall notify the lead regulatory agency not less than five (5) days in advance of any well drilling, sample collection, or other monitoring activity conducted pursuant to this Agreement.

**ARTICLE XXXVI. RETENTION OF RECORDS**

113. Each Party to this Agreement shall preserve for a minimum of ten (10) years after termination of this Agreement and in accordance with agency retention requirements, all of the

records in its or its contractors possession related to sampling, analysis, investigations, and monitoring conducted in accordance with this Agreement. Administrative record copies may be a copy of the original document. After this ten year period, DOE shall notify the EPA and Ecology at least forty-five (45) days prior to destruction or disposal of any such records. Upon request, the Parties shall make such records or true copies available, to the other Parties subject to Article XLV (Classified and Confidential Information).

114. DOE agrees it shall establish and maintain an administrative record at or near Hanford in accordance with CERCLA Sec. 113(k). The administrative record shall be established and maintained in accordance with current and future EPA policy and guidelines. A copy of each document placed in the administrative record will be provided to the lead regulatory agency.

#### **ARTICLE XXXVII. ACCESS**

115. Without limitation on any authority conferred on either agency by law, EPA, Ecology and/or their Authorized Representatives, shall have authority to enter the Hanford Site at all reasonable time for the purposes of, among other things: (1) inspecting records, operating logs, contracts and other documents relevant to implementation of this Agreement, subject to Article XLV (Classified and Confidential Information); (2) reviewing the progress of DOE or its response action contractors in implementing this Agreement; (3) conducting such tests as the Ecology and the EPA project managers deem necessary; and (4) verifying the data submitted to EPA and Ecology by DOE. DOE shall honor all requests for access by EPA and Ecology, conditioned only upon presentation of proper credentials, conformance with Hanford Site safety and security requirement, and shall be conducted in a manner minimizing interference with any operations at Hanford. Any denial of consent to access must be justified in writing within fourteen (14) days of such denial, and arrangements shall be made for access to the facility or area in question as soon as practicable. DOE reserves the right to require EPA and Ecology personnel or representatives to be accompanied by an escort while on the Hanford Site. Escorts shall be provided in a timely manner.

116. To the extent that this Agreement requires access to property not owned and controlled by DOE, DOE shall exercise its authorities to obtain access pursuant to Section 104(e)



of CERCLA. DOE shall use its best efforts to obtain signed access agreements for itself, its contractors and agents, and EPA and Ecology and their contractors and agents, from the present owners or lessees in advance of the date such activities are scheduled to commence. DOE shall provide EPA and Ecology with copies of such agreements. With respect to non-DOE property upon which monitoring wells, pumping wells, treatment facilities, or other response actions are to be located, DOE shall use its best efforts to obtain access agreements that: provide that no conveyance of title, easement, or other interest in the property shall be consummated without provisions for the continued operation of such wells, treatment facilities, or other response actions on the property; and provide that the owners of any property where monitoring wells, pumping wells, treatment facilities or other response actions are located shall notify DOE, Ecology, and EPA by certified mail, at least thirty (30) days prior to any conveyance, of the property owner's intent to convey any interest in the property and of the provisions made for the continued operation of the monitoring wells, treatment facilities, or other response actions installed pursuant to this Agreement.

#### **ARTICLE XXXVIII. FIVE-YEAR REVIEW**

117. Consistent with CERCLA Sec. 121(c), and in accordance with this Agreement, DOE agrees that the lead regulatory agency may review remedial action(s) for Operable Unit(s) that allow hazardous substances, pollutants or contaminants to remain onsite, no less often than every five (5) years after the initiation of the final remedial action for such Operable Unit to assure that human health and the environment are being protected by the remedial action being implemented. If upon such review it is the judgment of the lead regulatory agency, that additional action or modification of the remedial action is appropriate in accordance with CERCLA Sec. 104 or 106, the lead regulatory agency may require DOE to implement such additional or modified work pursuant to Article XXX (Additional Work).

#### **ARTICLE XXXIX. MODIFICATION OF AGREEMENT**

118. Procedures for modifying this Agreement are contained in Section 12 of the Action Plan.

**ARTICLE XL. GOOD CAUSE FOR EXTENSIONS**

119. Either a timetable and deadline or a schedule shall be modified upon receipt of a timely request for extension and when good cause exists for the requested extension.

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

A. An event of force majeure as defined in Article XLVII (Force Majeure), subject to Ecology's reservation in Paragraph 147.

B. A delay caused by another Party's failure to meet any requirement of this Agreement;

C. A delay caused by the invocation of Dispute Resolution to the extent provided by paragraph 30(F) and paragraph 59(I) or judicial order.

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.

121. Absent agreement of the lead regulatory agency with respect to the existence of good cause, DOE may seek and obtain a determination through the Dispute Resolution process that good cause exists.

122. Reserved

123. If there is consensus among the DOE and lead regulatory agency(s) that the requested extension is warranted, DOE shall extend the affected timetable and deadline or schedule accordingly. If there is no consensus among the DOE and the lead regulatory agency(s) as to whether all or part of the requested extension is warranted, the timetable and deadline or schedule shall not be modified except in accordance with the determination resulting from the Dispute Resolution process.

124. Within seven (7) days of receipt of one or more statements of nonconcurrency with the requested extension, or such other time period as agreed to by the DOE and the lead regulatory agency(s) in writing, DOE may invoke the Dispute Resolution process.

125. A timely and good faith request for an extension, in accordance with the procedures of Section 12.0 of the Action Plan, shall toll any assessment of stipulated penalties pursuant to Article XX (Stipulated Penalties) or any 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 pursuant to Article XX (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 pursuant to Article XX (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 modified.

#### **ARTICLE XLI. CONVEYANCE OF TITLE**

126. No conveyance of title, easement or other interest in the Hanford Site on which any containment system, treatment system, monitoring system or other response action(s) is installed or implemented pursuant to this Agreement shall be consummated by DOE without provision for continued maintenance of any such system or other response action(s). At least thirty (30) days prior to any conveyance, DOE shall notify EPA and Ecology of the provisions made for the continued operation and maintenance of any response action(s) or system installed or implemented pursuant to this Agreement.

#### **ARTICLE XLII. PUBLIC PARTICIPATION**

127. The Parties agree that this Agreement and any subsequent proposed remedial action alternative(s) and subsequent plan(s) for remedial or corrective action or permitting/closure action at the Hanford Site arising out of this Agreement shall comply with the administrative record and, public participation requirements of CERCLA, including CERCLA Secs. 117 and 113(k), the NCP, and EPA guidance on public participation and administrative records, or the public participation requirements of RCRA and Ch. 70.105 RCW.

128. DOE shall develop and implement a Community Relations Plan, now known as the Public Involvement Plan (PIP) which responds to the need for an interactive relationship with all interested community elements, both on and off Hanford, regarding activities and elements of work undertaken by DOE under this Agreement. DOE agrees to develop and implement the PIP in a manner consistent with CERCLA Sec. 117, the NCP, EPA guidelines set forth in EPA's Community Relations Handbook, and any modifications thereto, and the public participation requirements of RCRA and Ch. 70.105 RCW. The PIP is subject to the review and approval by EPA and Ecology under Article XV (Review of Documents).

129. The public participation requirements of this Agreement shall be implemented so as to meet the public participation requirements applicable to RCRA permits under 40 CFR Part 124 and RCRA Sec. 7004.

#### **ARTICLE XLIII. DURATION/TERMINATION**

130. Upon satisfactory completion of the remedial or corrective action phase as described in Section 7 of the Action Plan for a given Operable Unit, the lead regulatory agency shall issue a Notice of Completion to DOE for that Operable Unit. At the discretion of the lead regulatory agency, a Notice of Completion may be issued for completion of a portion of the remedial or corrective action for an Operable Unit.

131. This Agreement shall terminate when DOE has satisfactorily completed all work pursuant to this Agreement and the Action Plan or when the Parties unanimously agree to termination.

132. The Parties agree that due to the long-term commitments contained in this Agreement, this Agreement will be reviewed by the Parties five (5) years from the date of execution of this Agreement, and at the conclusion of every five (5) year period thereafter. The purpose of this review will be to determine (1) whether there has been substantial compliance with the terms of the Agreement and, (2) the need to modify the Agreement. This review will be made by a committee composed of representatives from each Party. Modifications to the Agreement will be made in accordance with Section 12.0 of the Action Plan. If the Parties do not unanimously agree that there has been substantial compliance with the

terms of the Agreement, EPA and Ecology reserve the right to withdraw from the Agreement; provided, however, that all Parties shall comply with all provisions of this Agreement from the effective date of the Agreement to the date of the withdrawal. Further provided, however, that no Party may base its withdrawal from this Agreement on its own substantial noncompliance with this Agreement. Regardless of any Party's withdrawal under this paragraph, all parties shall comply with all provisions of this Agreement as they relate to operable units where a remedial investigation or RCRA facility investigation workplan has already been approved, unless the Parties agree otherwise. Any Party withdrawing from this Agreement shall notify the other Parties in writing.

#### **ARTICLE XLIV. SEVERABILITY**

133. If any provision of this Agreement is ruled invalid, illegal or unconstitutional, the remainder of the Agreement shall not be affected by such ruling.

#### **ARTICLE XLV. CLASSIFIED AND CONFIDENTIAL INFORMATION**

134. Notwithstanding any provision of this Agreement, all requirements of the *Atomic Energy Act of 1954*, as amended, and all Executive Orders concerning the handling of unclassified controlled nuclear information, restricted data and national security information, including "need to know" requirements, shall be applicable to any access to information or facilities covered under the provisions of this Agreement. EPA and Ecology reserve their right to seek to otherwise obtain access to such information or facilities when it is denied, in accordance with applicable law.

135. Any Party may assert on its own behalf or on behalf of a contractor, subcontractor or consultant, a business confidentiality claim or privilege covering all or any part of the information requested by this Agreement, pursuant to 42 U.S.C. Sec. 9604 and state law. Analytical data shall not be claimed as business confidential. Parties are not required to provide legally privileged information. At the time any information is furnished which is claimed to be business confidential, all Parties shall afford it the maximum protection allowed by law. If no claim of business confidentiality accompanies the information, it may be made available to the public without further notice.

**ARTICLE XLVI. RESERVATION OF RIGHTS**

136. The Parties have determined that the activities to be performed under this Agreement are in the public interest. EPA and Ecology agree that compliance with this Agreement shall stand in lieu of any administrative and judicial remedies against DOE and its contractors, which are available to EPA and Ecology regarding the currently known release or threatened release of hazardous substances, hazardous wastes, pollutants or contaminants at the Hanford Site which are the subject of the activities being performed by DOE under Articles VII (Work) and XIV (Work). Provided, that nothing in this Agreement, except as provided in paragraphs 38 and 80 on stipulated penalties, shall preclude EPA or Ecology from the direct exercise of (without employing dispute resolution) any administrative or judicial remedies available to them under the following circumstances:

A. In the event or upon the discovery of a violation of, or noncompliance with this Agreement, or any provision of CERCLA, RCRA or Ch. 70.105 RCW, not addressed by this Agreement.

B. Any discharge or release of hazardous waste which the Parties choose not to address under this Agreement.

C. Upon discovery of new information regarding hazardous substances or hazardous waste management, including but not limited to, information regarding releases of hazardous waste or hazardous substances to the environment which the Parties choose not to address under this Agreement.

D. Upon Ecology's or EPA's determination that action beyond the terms of this Agreement is necessary to abate an imminent and substantial endangerment to the public health or welfare or the environment.

137. In the event of any action by EPA or Ecology under Paragraph 136 to address matters not covered in this Agreement, DOE reserves all rights and defenses available under law. In the event of any action by EPA or Ecology under Paragraph 136 to address matters covered in this Agreement, DOE reserves all rights and defenses specified in this Agreement.

138. Except as otherwise expressly provided herein, nothing in this Agreement shall constitute or be construed as a bar or release from any claim, cause of action or demand in law or equity by or against any person, firm, partnership or corporation not a signatory to this Agreement for any liability it may have arising out of or relating in any way to this Agreement or the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, hazardous constituents, pollutants, or contaminants found at, taken to, or taken from the Hanford Site.

139. If EPA and Ecology are in dispute concerning any matter addressed in Part Four, and are unable to resolve such dispute after pursuing dispute resolution pursuant to the dispute resolution procedures set forth in Part Four, the releases or actions which are the subject of the dispute shall be deemed matters which are not addressed under this Agreement. Thereafter, EPA, Ecology, and DOE may take any action with regard to such matters which would be appropriate in the absence of this Agreement, and each party reserves its rights to assert and defend its respective legal position in connection with any such actions.

140. EPA and Ecology shall not be held as a Party to any contract entered into by DOE to implement the requirements of this Agreement.

141. For matters within the scope of this Agreement, Ecology, and EPA reserve the right to bring any enforcement action against DOE's contractors, subcontractors and/or operators, if DOE fails to comply with this Agreement. For matters outside the scope of this Agreement, Ecology and EPA reserve the right to bring any enforcement action against DOE's contractors, subcontractors and/or operators, regardless of DOE's compliance with this Agreement.

142. This Agreement shall not be construed to limit in any way the right provided by law to the public or any citizen to obtain information about the work to be performed under this Agreement or to sue or intervene in any action to enforce state or federal law.

143. Except as provided herein, DOE is not released from any liability which it may have pursuant to any provisions of state and federal law, including any claim for damages for liability to destruction of, or loss of natural resources.

144. This Agreement shall not restrict EPA and/or Ecology from taking any legal or response action for any matter not specifically part of the work covered by this Agreement.

**ARTICLE XLVII. FORCE MAJEURE**

145. 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:

- A. acts of God, fire, war, insurrection, civil disturbance, or explosion;
- B. unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance;
- C. adverse weather conditions that could not be reasonably anticipated, or unusual delay in transportation;
- D. restraint by court order or order of public authority;
- E. 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 DOE;
- F. delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence; and
- G. insufficient availability of appropriated funds, if DOE shall have made timely request for such funds as part of the budgetary process as set forth in Article XLVIII (Cost, Schedule, Scope, Integration, Planning and Reporting) of this Agreement.

146. 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 cost or expenses of response actions, whether or not anticipated at the time such response actions were initiated.



147. DOE and Ecology agree that Subparagraph B (entirely), Subparagraph C (“delay in transportation”), Subparagraph D (“order of public authority”), Subparagraph E (“at reasonable cost”), and Subparagraph G (entirely), of Paragraph 145 do not create any presumptions that such events arise from causes beyond the control of a Party. Ecology specifically reserves the right to withhold its concurrence to any extensions which are based on such events pursuant to the terms of Article XL, or to contend that such events do not constitute Force Majeure in any action to enforce this Agreement.

**ARTICLE XLVIII. COST, SCHEDULE, SCOPE, INTEGRATION, PLANNING AND REPORTING**

148. DOE shall take all necessary steps to integrate Hanford programs and to obtain timely funding in order to fully meet its obligations under this Agreement. This shall be accomplished in the following manner:

A. In its annual budget request, DOE shall include estimated funding levels required to achieve full compliance with this Agreement.

B. In the process of formulating its annual budget request, DOE may be subject to target funding guidance directed by the OMB. When DOE’s target budget case differs from its full compliance funding case, the Parties agree to attempt to reach agreement regarding workscope, priorities, schedules/milestones, and Activity Data Sheet (ADS) funding levels required to accomplish the purpose of the Agreement, provided satisfactory progress has been made in controlling costs in accordance with the cost efficiency initiatives. These discussions shall be conducted before DOE-RL submits its annual budget request and supporting ADSs to DOE Headquarters (DOE-HQ) under signature of the DOE-RL manager.

C. DOE-RL will submit its budget request with detailed ADSs, identifying both target and compliance funding levels, to DOE-HQ and identify any unresolved issues raised by Ecology and EPA. If these issues are not subsequently resolved prior to DOE’s submission of its budget request to OMB, DOE-HQ will also identify these issues and the funding required for compliance to OMB.

D. In determining the workscope, priorities, and schedules, the Parties shall consider the values expressed by the Hanford stakeholders.

E. The Parties recognize that successful implementation of this Agreement is dependent upon the prudent use of resources, and that resource requirements and constraints should be considered during the work planning, budget formulation, and budget execution process. To ensure the development of responsible budget requests, consistent with the requirements of this Agreement and applicable federal/state statutes, the Parties will work cooperatively and in good faith.

149. The purpose of this paragraph is to establish a mechanism that will help assure adequate progress toward meeting the requirements of this Agreement. It provides for communication and consultation on work scope, priorities, schedules/milestones, and cost/funding matters. It further provides a means for performance measurement and for early identification of problems which could jeopardize compliance with the schedules and milestones of the Agreement.

A. Within two weeks after DOE Headquarters (DOE-HQ) issuance of Environmental Management planning and/or budget guidance, including target level funding guidance, to the Richland Operations Office (DOE-RL), DOE-RL shall provide a copy of it to Ecology and EPA along with a preliminary assessment of its impacts. DOE-RL shall also provide a copy of its initial contractor budget guidance to Ecology and EPA within two weeks after issuance.

B. EPA and Ecology agree not to release confidential budget information to any other entities prior to submission by the President of his budget request to Congress, unless authorized by DOE or required to do so by court order. DOE shall seek to intervene in any proceeding brought to compel or enjoin the release of this information. If allowed to intervene, DOE shall assert its interest in, and the legal basis for, maintaining the confidentiality of this information.

C. As soon as possible after DOE-HQ issuance of its initial planning guidance but no later than two weeks prior to DOE-RL's submission of its budget request and supporting Activity Data Sheets to DOE-HQ, Ecology and EPA shall be given: 1) a management level briefing at the

ADS level on the budget, including an integrated sitewide assessment of impacts on the requirements of this Agreement; and 2) the opportunity to review, comment and make integrated recommendations on that budget request, including workscope, priorities, schedules/milestones, and five year target and compliance cost/funding projections. DOE-RL shall, to the extent it deems appropriate, revise its budget request and ADSs, including workscope, to address or resolve Ecology and EPA comments prior to transmittal to DOE-HQ. DOE-RL shall notify DOE-HQ in its budget request of any comments not fully resolved to the satisfaction of all Parties, and shall identify full compliance funding levels.

D. Within 30 days after the President's submission of the budget to Congress, DOE-RL shall brief Ecology and EPA on the President's budget request at the ADS level detail. At this briefing, DOE-RL shall notify Ecology and EPA of any differences between the target and compliance case workscope and cost/funding levels submitted in accordance with subparagraph C. above, and the actual workscope and funding levels included in the President's budget request to Congress. DOE-RL shall also provide Ecology and EPA its assessment of the impacts such differences may have on DOE's ability to meet milestones or satisfy other requirements of this Agreement.

E. DOE shall notify and discuss with Ecology and EPA, prior to transmittal to OMB, any budget amendment, supplemental appropriation request or reprogramming request and any corresponding impacts upon the workscope, and schedules, and DOE's ability to meet milestones or other requirements of this Agreement with and without the amendment, supplemental appropriation or reprogramming request.

F. Within 30 days after congressional budget appropriation, DOE-RL shall brief Ecology and EPA on the budget appropriation and subsequent funding allocations for the new fiscal year at ADS level detail. If there is a delay in congressional appropriation after the start of the fiscal year, DOE-RL shall inform Ecology and EPA of any congressional continuing resolution action, and the potential impacts, if any, on progress to achieve milestones and other requirements of the Agreement. Ecology and EPA will be given timely opportunity to review and comment on these budget appropriation and funding allocation actions, and to make recommendations for reallocation of available funds.

G. If the congressional budget appropriation differs from the funding levels required to comply with any milestones or other requirements of the Agreement, DOE-RL shall take whatever action is appropriate under the Agreement. Such action may include submitting a change request in accordance with the Action Plan, Section 12.0 entitled Changes to the Agreement. The Parties shall attempt to reach agreement on adjustments in workscope or milestones consistent with the congressional appropriation which will minimize impacts on the requirements of this Agreement. If agreement cannot be reached, Ecology and EPA reserve the right to take appropriate action as provided for in this Agreement.

H. Ecology, DOE, and EPA Executive Managers shall meet periodically throughout the budget execution year to discuss the status of projects to be funded for the current fiscal year, the integration of programs, and events that have affected, or may affect milestones or activity within such milestones.

I. In order to ensure continuing, effective and timely interface between DOE, Ecology and EPA regarding work scope planning/scheduling, program integration, budget/funding, current year performance status, milestone tracking, and notification of problem areas, DOE shall, unless otherwise agreed to, provide the following, or their equivalent, to EPA and Ecology:

1. Annual Multi-Year Program Plans, including ADS level funding projections, as soon as possible after their development;
2. Annual Fiscal Year Work Plans, including ADS level funding profiles, as soon as possible after start of each fiscal year;
3. The monthly Approved Funding Plan (AFP), at ADS level detail, within two weeks following the start of each month;
4. Monthly Site Management System (SMS) reports shall be provided to EPA and Ecology to identify: any anticipated delays in meeting time schedules, the reason(s) for such delay and actions taken to prevent or mitigate the delay, and any potential problems that may result in a departure from the requirements and time schedules. In accomplishing this, the SMS

reports shall, as a minimum, include for each program: monthly and cumulative budget, actual monthly and cumulative costs, performance measurement information including explanations of cost/schedule variances, progress in achievement of milestones, and notification of problems and program/project delays. The appropriate contractor program managers shall sign the monthly SMS report. The signature block shall contain the statement: “The information contained within this report is complete and accurate to the best of my knowledge.” At the monthly milestone review meetings, the appropriate DOE project managers will provide DOE’s assessment of milestone progress and the extent to which DOE agrees or disagrees with the preceding month’s SMS report. The assessment will be documented in meeting minutes signed by DOE and the lead regulatory agency. With regard to these assessments, signature of the minutes by Ecology and EPA shall indicate only that the assessment information was provided by DOE. The monthly SMS report shall also be placed in the Public Information Repositories as identified in Section 10.2 of the Action Plan.

5. Upon request, EPA and Ecology shall be provided access to available information below the ADS level of detail.

J. During the budget execution year, DOE-RL shall notify Ecology and EPA of any proposed action to internally reallocate funding at ADS levels, if such an action significantly affects workscope and schedules.

K. Within 30 days following the completion of DOE’s annual midyear management review (approximately April-May of each year), DOE-RL shall brief Ecology and EPA on any decisions that significantly affect milestones under this Agreement.

L. As soon as possible following the end of each federal fiscal year, DOE-RL shall provide to EPA and Ecology the fiscal year-end SMS report, and a summary briefing on the amount of funds that have been obligated and spent during the fiscal year ended and the work that has been performed. This summary shall include, at ADS level detail, actual versus planned expenditures for the fiscal year end; a summary of carryover amounts including those available for expenditures in the following budget execution year; and summaries/information explaining the extent of work planned versus work completed or performed during the year.

M. The three parties agree to inform and involve the public and stakeholders at key stages of integrated (cross programmatic) decision making, and at key stages of budget formulation and execution consistent with the Interim Report of the Federal Facilities Environmental Restoration Dialogue Committee. The process for informing and involving the public and stakeholders will be developed and included in the Agreement CRP.

N. The participation by Ecology and EPA in DOE's planning and budget formulation and execution process shall not affect DOE's authority over its budgets and funding level submission.

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

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

152. EPA and DOE agree that any requirement for the payment or obligation of funds, including stipulated penalties under Article XX (Stipulated Penalties) of this Agreement, by 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. Sec. 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.

153. If appropriated funds are not available to fulfill DOE's obligations under this Agreement, the Parties shall attempt to agree upon appropriate adjustments to the workscope or milestones which require the payment or obligation of such funds. If no agreement can be reached then Ecology and DOE agree that in any action by Ecology to enforce any provision of this Agreement, DOE may raise as a defense that its failure or delay was caused by the unavailability of appropriated funds. Ecology disagrees that lack of appropriations or funding is a valid defense. However, DOE and Ecology agree and stipulate that it is premature at this time

to raise and adjudicate the existence of such a defense. Acceptance of this Paragraph 153 does not constitute a waiver by DOE that its obligations under this Agreement are subject to the provisions of the Anti-Deficiency Act, 31 U.S.C. Sec. 1341.

#### **ARTICLE XLIX. INCLUSION OF NONREGULATED NUCLEAR MATERIALS**

154. The Parties recognize that with the close of the cold war the DOE is reassessing current management practices to ensure sound management and compliance with applicable requirements of a wide range of nuclear materials and chemicals nationwide. Many of these materials in inventory, such as surplus nuclear materials, may no longer be needed for their original purposes and have no clearly identified future use. This recognition, coupled with the Parties recognition that effective management of all Hanford cleanup and waste management activities demands a fully coordinated approach (See Agreement milestone M-33-00), has resulted in agreement to include management of nuclear materials that are not currently regulated under RCRA or CERCLA (nonregulated nuclear materials) within this Agreement.

155. Target dates pertaining to nonregulated nuclear materials are identified within this Agreement by the prefix “MX”, e.g., MX-00-00T. Inclusion and management of such nonregulated nuclear materials shall be pursuant to Section 12 of the Action Plan. The Parties recognize and agree that inclusion in this Agreement of target dates pertaining to management of nonregulated nuclear materials confers no regulatory authority over these materials to Ecology or EPA. The Parties recognize and agree however, that work schedules associated with non regulated nuclear materials may impact DOEs’ ability to comply with the requirements of this Agreement. DOE agrees that delays in nonregulated nuclear material(s) projects will not excuse or constitute a defense with regard to any failure to comply with regulated Agreement activities (e.g., milestones).

#### **ARTICLE L. COMPLIANCE WITH APPLICABLE LAWS**

156. All actions required to be taken pursuant to this Agreement shall be taken in accordance with the requirements of all applicable federal and state laws and regulations. All Parties acknowledge that such compliance may impact schedules to be performed under this

Agreement. Extensions of schedules shall be granted for good cause as provided in Article XL and in accordance with the procedures specified in Section 12.0 of the Action Plan.

157. In any judicial challenge arising under this Agreement the court shall apply the law in effect at the time of the challenge, including any amendments to RCRA or CERCLA enacted after entry of this agreement. Where the law governing this agreement has been amended or clarified, any provision of this agreement which is inconsistent with such amendment or clarification shall be modified to conform to such change or clarification.

#### **ARTICLE LI. EFFECTIVE DATE**

158. This Agreement is effective upon signature by all Parties.

#### **ARTICLE LII. ATTACHMENT 1**

Attachment 1 to this Agreement is a letter dated February 26, 1989, from Donald Carr, Acting Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, to Christine Gregoire, Director, Department of Ecology. This letter sets forth the Department of Justice's position on the enforceability of this Agreement.

#### **IT IS SO AGREED:**

Each undersigned representative of a Party certifies that he or she is fully authorized to enter into this Agreement and to legally bind such Party to this Agreement.<sup>1</sup>

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<sup>1</sup> The first amendment to the Agreement was signed in August 1990, by: Thomas P. Dunne, Acting Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; Edward S. Goldberg, Acting for John D. Wagoner, Manager, Richland Operations Office, for the U.S. Department of Energy; and, Christine O. Gregoire, Director, for the Washington State Department of Ecology.

The second amendment to the Agreement was signed in September 1991, by: Dana A. Rasmussen, Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; John D. Wagoner, Manager, Richland Operations Office, for the U.S. Department of Energy; and Christine O. Gregoire, Director, for the Washington State Department of Ecology.

The third amendment to the Agreement was signed in August 1992, by: Dana A. Rasmussen, Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; John D. Wagoner, Manager, Richland Operations Office, for the U.S. Department of Energy; and Chuck Clarke, Director, for the Washington State Department of Ecology.



THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

THE UNITED STATES DEPARTMENT OF ENERGY:

THE WASHINGTON STATE DEPARTMENT OF ECOLOGY

The Hanford Federal Facility Agreement and Consent Order signed May 15, 1989, was originally executed by: Robie G. Russel, Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; Michael J. Lawrence, Manager, Richland Operations Office, for the U.S. Department of Energy; and, Christine O. Gregoire, Director, for the Washington State Department of Ecology.

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The fourth amendment to the Agreement was signed in January 1994, by: Gerald Emison, Acting Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; John D. Wagoner, Manager, Richland Operations Office, for the U.S. Department of Energy; and Mary Riveland, Director, for the Washington State Department of Ecology.

The fifth amendment to the Agreement was signed in July 1995, by: Charles Findley acting for Charles Clarke Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; Ronald Izatt acting for John Wagoner, Manager, Richland Operations Office, for the U.S. Department of Energy; and Terry Husseman acting for Mary Riveland, Director, for the Washington State Department of Ecology.

The sixth amendment to the Agreement was signed in February 1996, by: Charles Clarke, Regional Administrator, Region 10, for the U.S. Environmental Protection Agency; John Wagoner, Manager, Richland Operations office, for the U.S. Department of Energy; and Mary Riveland, Director, for the Washington State Department of Ecology.

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