Agreements for NPL Sites – Interim Guidance Material

THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-8000

April 18, 1988

MEMORANDUM FOR:

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

SUBJECT: Agreements for NPL Sites – Interim Guidance Material

Our efforts to develop model provisions with the Environmental Protection Agency for agreements that cover cleanup of our NPL sites are likely to continue for some time. Until we reach an agreement with HQ/EPA, Service components should continue to seek locally negotiated agreements with EPA regions and states. With this in mind, I recommend that Service representatives use the draft model provisions and the other guidance that are attached. Component representatives and my staff prepared them during the last three months. They represent the Department's position on language for agreement provisions and on what is a responsible way to manage our working relationship with EPA and the States.

These draft provisions and the guidance are compromise solutions to the most contentious issues that we have faced for NPL site cleanup. However, this does not mean all the other provisions that EPA has proposed for DoD consideration or that we have agreed to in specific instances in the past are acceptable. We have felt that the other issues can be best worked out at the field level. Several of them may need a lot of attention by your negotiators. Please alert them to this.

It is my hope that in the near future we can complete the work remaining on this effort with EPA and give better assistance to individual installations. In the meantime, I trust this interim guidance will be helpful in reaching locally negotiated agreements for cleanups.

M. J. Carricato, CAPT, CEC, USN
Acting Deputy Assistant Secretary of Defense
(Environment)

Attachment

Interim Guidance on Selected Clauses

19 April 1988

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [ ]
AND THE
[State Agency]
AND THE
UNITED STATES [DoD Component]

IN THE MATTER OF:

The U.S. Department of the [DoD Component]
[Name of Facility]
Administrative Docket Number:

FEDERAL FACILITY AGREEMENT UNDER CERCLA 120

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Based on the information available to the Parties on the effective date of this Federal Facility Agreement Under CERCLA (Agreement), and without trial or adjudication of any issues of fact or law, the Parties agree as follows.

1. PURPOSE

1. The general purposes of this Agreement are to:

    1. Ensure that the environmental impacts associated with past and present activities at the NPL site (the Site) are thoroughly investigated and that appropriate remedial action is taken as necessary to protect the public health and the environment;

2. Establish a procedural framework and schedule for developing, implementing and monitoring appropriate response actions at the Site in accordance with CERCLA, the NCP, and CERCLA guidance and policy; and,

3. Facilitate cooperation, exchange of information and participation of the Parties in such actions.

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

1. Identify interim remedial action (IRA) alternatives which are appropriate at the Site prior to the implementation of final remedial actions for the Site. IRA alternatives shall be identified and proposed to the Parties as early as possible prior to final selection of IRAs pursuant to CERCLA. This process is designed to promote cooperation among the Parties.

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

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

4. Implement the selected interim and final remedial action in accordance with CERCLA, and, to the extent identified in pertinent sections herein., meet the requirements of CERCLA S 120(e)(2), 42 U.S.C. 9620(e)(2), for an interagency agreement between EPA and the [DoD Component].

5. Assure compliance, through CERCLA, with RCRA and other federal and state hazardous waste laws and regulations for matters covered by this Agreement. Section _, Statutory Compliance, sets forth in detail how this purpose is achieved.

6. Execute response actions at the Site without degradation of the [DoD Component]'s ability to carry out its mission and support activities at [installation].

2. JURISDICTION

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

    1. The EPA enters into those portions of this Agreement that relate to the RI/FS pursuant to CERCLA §120(e)(1), 42 U.S.C. §9620(e)(1), [and §§6001, 3004(u) and (v), and 3008(h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6961, 6924(u) and (v), and 6928(h)];

    2. The EPA enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to CERCLA §120(e)(2) and RCRA §§6001, 3004(u) and (v), and 3008(h);

    3. The [DoD Component] enters into those portions of this Agreement that relate to the RI/FS pursuant to CERCLA, [RCRA §§6001, 3004(u) and (v),.and 3008(h)), the Defense Environmental Restoration Program (DERP), 10 U.S.C. §2701 et. seq., and Executive order 12580;

    4. The [DoD Component] enters into those portions of this Agreement that relate to interim remedial actions and final. remedial actions pursuant to CERCLA §120(e) (2), [RCRA §§6001, 3004 (u) and (v), and 3008 (h)], DERP, and Executive Order 12580; and

    5. [State] enters into this Agreement pursuant to…

3. CONSULTATION WITH EPA AND STATE AGENCIES

1. Applicability: The provisions of this section establish the procedures that shall be used by the [DoD Component], the EPA, and [State] to provide for appropriate notice, review, comment, and response to comments regarding RI/FS and RD/RA documents, specified herein as either primary or secondary documents. In accordance with CERCLA §120 and 10 U.S.C. §2705, the [DoD Component] will normally be responsible for issuing primary and secondary documents to the other Parties, however, these procedures apply to any Party that may issue any portion of a primary or secondary document. As of the effective date of this Agreement, all draft and final reports for any deliverable document identified herein shall be prepared in accordance with paragraphs 3.2 through 3.10 below.

2. General Process for RI/FS and RD/RA Documents:

    1. Primary documents includes those reports that are major, discrete portions of RI/FS or RD/RA activities. Primary documents are issued initially in draft subject to review and comment by the Parties. Following receipt of comments on a particular draft primary document, the [DoD Component] will respond to the comments received and issue a draft final primary document subject to dispute resolution. The draft

final primary document will become the final primary document either 15 days after issuance if dispute resolution is not invoked or as modified by decision of the dispute resolution process.

2. Secondary documents includes those reports that are discrete portions of the primary documents and are typically input or feeder documents. Secondary documents are issued in draft subject to review and comment by the Parties. Although the [DoD Component] will respond to comments received, the draft secondary documents will be finalized in the context of the corresponding primary documents. A secondary document may be disputed at the time the corresponding draft final primary document is issued.

3. Primary Reports:

1. The [DoD Component] shall transmit draft reports for the following primary documents to the Parties for review and comment in accordance with the provisions of this section:

[Note: The list set forth below represents potential primary documents and the type of information that typically would be generated during a CERCLA cleanup at an NPL site. This list, and the list in paragraph 3.4 (a) below of secondary documents, includes appropriate discrete portions of the RI/FS or RD/RA that may vary in accordance with the NCP, DoD Component or EPA guidance, and site specific requirements. In practice, the documents will also vary with scope and nature of the project, and may either be combined or broken out into separate volumes.]

1. [Scope of Work]
2. [RI/FS Work Plan]
3. [Risk Assessment]
4. [RI Report]
5. [Initial Screening of Alternatives]
6. [FS Report]
7. [Remedial Design]
8. [Remedial Action Work Plan]

2. Only the draft final reports for the primary documents listed above shall be subject to dispute resolution. The [DoD Component] shall prepare primary documents in accordance with the timetable and deadline set forth in Appendix ___ of this Agreement.

4. Secondary Documents:

1. The [DoD Component] shall transmit draft reports for the following secondary documents to the Parties for review and comment in accordance with the provisions of this section:

    1. [Initial Remedial Action / Remedial Quality Objectives]
    2. [Site Characterization Summary]
    3. [Detailed Analysis of Alternatives]
    4. [Post-screening Investigation Work Plan]
    5. [Treatability Studies]
    6. [Sampling and Data Results]

2. Although the draft reports for the secondary documents listed above are subject to review and comment by EPA and [State], such documents shall not be subject to dispute resolution. The [DoD Component] shall establish and notify the Parties of the target dates for the issuance of draft secondary reports.

5. Meetings of the Project Managers on Development of Reports: The Project Managers shall meet approximately every [30] days, except as otherwise agreed by the Parties, to review and discuss the progress of work being performed at the Site on the primary and secondary documents. Prior to preparing any draft report specified in paragraphs 3.3 and 3.4 above, the Project Managers shall meet to discuss the report results in an effort to reach a common understanding, to the maximum extent practicable, with respect to the results to be presented in the draft report.

6. Identification and Determination of Potential ARARs:

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

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

must be re-examined throughout the RI/FS process until a ROD is issued.

7. Review and Comment on Draft Reports:

1. The [DoD Component] shall transmit each draft primary report to the other Parties on or before the corresponding deadline established for the issuance of the report. The [DoD Component] shall transmit the draft secondary documents in accordance with the target dates established for issuance of such reports.

2. Unless the Parties mutually agree to another time period, all draft reports shall be subject to a 30-day period for review and comment. Review of any document by EPA and [State] may concern all aspects of the report (including completeness) and should include, but is not limited to, technical evaluation of any aspect of the document, and consistency with CERCLA, the NCP and any pertinent guidance or policy promulgated by EPA.

   Comments by EPA and [State] shall be provided with adequate specificity so that the [DoD Component] may respond to the comment and, if appropriate, make changes to the draft report. Comments shall refer to any pertinent sources of authority or references upon which the comments are based, and, upon request of the [DoD Component], the commenting Party shall provide a copy of the cited authority or reference. In cases involving complex or unusually lengthy reports, a Party may extend the 30-day comment period for an additional 20 days by written notice to the [DoD Component] prior to the end of the 30-day period. On or before the close of the comment period, the Parties shall transmit by next day mail their written comments to the [DoD Component].

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

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

5. Following the close of the comment period for a draft report, the [DoD Component] shall give full consideration to all written comments on the draft report submitted

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

6. The [DoD Component] may extend the 30-day period for either responding to comments on a draft report or for issuing the draft final primary report for an additional 20 days by providing notice to the other Parties. In appropriate circumstances, this time period may be further extended in accordance with Section ___ hereof.

8. Availability of Dispute Resolution for Draft Final Reports:

    1. Dispute resolution shall be available to the Parties only for draft final primary reports. Within 14 days of receipt of a draft final report, any Party may raise any aspect of it (including any secondary document or ARAR determination required for that report) to dispute resolution.

    2. When dispute resolution is invoked on a draft primary report, work may continue in accordance with the procedures set forth in Section _, Dispute Resolution.

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

10. Subsequent Modifications of Reports: Following finalization of any primary report pursuant to paragraph 3.9 above, a Party may seek to modify the report, including seeking additional field work, pilot studies, computer modeling or other supporting technical work, only as provided below:

    1. A Party may seek to modify a report after finalization if it determines, based on new information (i.e., information that became available, or conditions that became known, after the report was finalized) that the requested modification is necessary.

A Party may seek such a modification by submitting a concise written request to the Project Managers. The request shall specify the nature of the requested modification and how the request is based on new information.

2. In the event that a consensus is not reached by the Project Managers on the need for a modification, any Party may invoke dispute resolution to determine if such modification shall be conducted. Modification of a report shall be required only upon a showing that: (1) the requested modification is based on new information, and (2) the requested modification would be of significant assistance in evaluating impacts on public health and the environment, in evaluating the selection of remedial alternatives, and in protecting human health and the environment.

4. PERMITS

1. The Parties recognize that under CERCLA §§121(d) and (e)(1), 42 U.S.C. § 9621(d) and (e)(1), and the NCP, portions of the response actions called for by this Agreement and conducted entirely on the Site, whether on or off [name of installation], are exempted from the procedural requirement to obtain a federal, state, or local permit, but must satisfy permitting standards, requirements, criteria, or limitations which otherwise qualify as ARARs.

2. The [DoD Component] shall notify the other Parties when it becomes aware of any permits required for off site activities. The EPA, State and any of its political subdivisions shall, upon request, promptly issue such permits as are needed in furtherance of actions under this Agreement and consistent with its terms. If a permit necessary for implementation of this Agreement is not issued, or is issued or renewed in a manner which is materially inconsistent with the requirements of this Agreement, the Parties shall meet to consider modification of this Agreement that is necessary either to obtain a permit or to conform to an issued permit.

3. During any appeal of any permit required to implement. this Agreement or during review of any Party's proposed modifications as provided above, all Parties shall continue to implement those portions of this Agreement which can reasonably be implemented pending final resolution of the permit issue(s). However, as to work which cannot be so implemented, any corresponding timetable, deadlines, and schedule will be automatically extended until all necessary permits are issued or the need for the permit is eliminated. Additional extensions may be granted for good cause under Section____, Extensions.

5. RESOLUTION OF DISPUTES

1. Any Party may invoke Dispute Resolution under the terms of this Agreement. Only the following matters are subject to Dispute Resolution.

    1. Draft final primary documents within 14 days of transmittal to the Parties pursuant to Section _, Consultation.

    2. Denial of a request for extension within 14 days of receipt of a statement of nonconcurrence pursuant to Section ___, Extensions.

    3. Actions taken by a Party which are inconsistent with Section___ , Statutory Compliance. Such disputes must be brought within a reasonable time, but in no case more than 28 days after the disputing Party becomes aware of the action.

    4. Failure of any Party to perform in accordance with the terms of a final primary document. Such disputes must be brought within a reasonable time, but in no case more than 28 days after the disputing Party becomes aware of the failure. Dispute Resolution shall be invoked by giving notice as provided, in paragraph 5.3 below.

2. The following forums are established for the resolution of disputes:

    1. The Project Managers shall seek to resolve all disputes on an informal basis prior to forwarding them to the Dispute Resolution Committee.

    2. The Dispute Resolution Committee (DRC) will serve as the appellate forum for resolution of disputes that are not resolved at the Project Manager level. The membership of this committee shall include the Waste Management Division Director of EPA Region _, [comparable [DoD Component] representative], and [comparable state representative].

    3. The Senior Executive Committee (SEC) will serve as the appellate forum for resolution of disputes that are not resolved at the DRC level. The membership of this committee shall include [the Assistant Administrator for Solid Waste and Emergency Response of the EPA or the Regional Administrator of EPA Region _], the [DoD Component secretariat representative], and the [comparable state official]. Appeals from the SEC will be to the EPA Administrator.

3. A Party shall initiate Dispute Resolution by advising the other Project Managers through a written notice of dispute. All notices under this section shall include:

    1. A concise statement of the issue in dispute,

2. Any appropriate technical, legal, or factual basis for the disputing Party's position,

3. An identification of any activities affected by the dispute which the disputing Party believes should not proceed during dispute resolution.

4. Upon receipt of the notice set forth in paragraph 5.3 above, the Project Managers shall use their best efforts to resolve the dispute by a concurrence of all Parties within the next 14 days. If the dispute is not resolved, the decision of the [DoD Component] shall be implemented unless a Party elevates the dispute to the DRC within 7 days after the close of the 14-day resolution period.

5. Following the elevation of a dispute from the Project Managers, the DRC shall meet and attempt to resolve within the next 21 days. If the dispute is not resolved by concurrence of all the Parties, the dispute shall be elevated to the SEC after the close of the 21-day resolution period.

6. Following the elevation of a dispute from the DRC, the SEC shall meet and attempt to resolve the dispute by a concurrence of all Parties within the next 21 days. If the dispute is not resolved, the decision of the EPA shall be implemented unless a Party elevates the dispute to the EPA Administrator within 7 days after the close of the 21-day resolution period.

7. A dispute that is not resolved by the SEC may be elevated to the EPA Administrator by any Party. Upon request and prior to making a final decision, the Administrator shall meet and confer with [DoD Component counterpart] to discuss the issues under dispute. The Administrator shall resolve the dispute by issuing a written decision to the Parties within 21 days after its elevation. The duties of Administrator set forth in this paragraph shall not be delegated.

8. Statements made in the course of Dispute Resolution and documents prepared solely for use in Dispute Resolution shall be considered statements made in furtherance of settlement and entitled to the protection afforded such statements and documents by the Federal Rules of Evidence. Persons who participate in Dispute Resolution shall not be subject to deposition or other discovery concerning statements made during, in preparation for, or in connection with Dispute Resolution.

9. The pendency of any dispute shall not affect the responsibility of any Party to continue its involvement in the assessment, selection, and implementation of response actions to the extent that such actions are not subject to the dispute or are not materially and substantially related to such dispute. However, the time period for completion of work affected by such dispute shall be automatically extended for a period of time equal to the delay caused by resolution of the dispute in accordance with the process set forth in this

section. An additional extension may be granted for good cause under the provisions of Section ___, Extensions.

10. When Dispute Resolution is invoked, work may go forward where: (1) the disputing Party does not identify such work in the notice of dispute, or (2) it is determined through Dispute Resolution that such work may go forward pending the resolution of the dispute. If the Parties disagree as to whether work should stop regarding any matter subject to Dispute Resolution, the Waste Management Division Director, EPA Region ___, shall resolve the question after meeting with the [DoD Component] to discuss the potential for environmental harm caused by continuing work as well as the cost of stopping work. If the Division Director determines that all or part of the work affected by the dispute should stop during the pendency of the dispute, the [DoD Component shall discontinue implementing those portions of the work upon receipt of a written determination by the Division Director that:

    1. The work is inadequate or defective, and

    2. Such inadequacy or defect is likely to yield an adverse effect on human health or the environment, or is likely to have a substantial adverse effect on the remedy selection or implementation process.

11. All Parties will immediately implement any final determination of Dispute Resolution. Modification of documents, if required, will be done in accordance with Section ___, Consultation. Resolution of a dispute pursuant to this Section constitutes a final resolution of any dispute arising under this Agreement and is binding on all the Parties.

6. EXTENSIONS

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

    1. The timetable and deadline or the schedule that is sought to be extended;

    2. The length of the extension sought;

    3. The good cause(s) for the extension; and

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

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

    1. An event of force majeure;

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

    3. A delay caused by the invocation of dispute resolution or the initiation of judicial action;

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

    5. Any other event or series of events mutually agreed to by the Parties as constituting good cause, or, absent agreement, of the determination resulting from dispute resolution is that good cause exists.

3. Within seven days of receipt of a request for an extension of a timetable and deadline or a schedule, each Party shall advise the [DoD Component] in writing of its respective position on the request. The failure of a Party to respond within the seven-day period shall be deemed to constitute concurrence in the request for extension. If a Party does not concur in the requested extension, it shall include in its statement of nonconcurrence an explanation of the basis for its position.

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

5. Within 14 days of receipt of one or more statements of nonconcurrence in the requested extension, the [DoD Component] may invoke dispute resolution.

6. A timely request for an extension shall toll 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. Following the grant of an extension, an application for judicial enforcement may be sought only to compel compliance with the timetable and deadline or schedule as most recently extended.

7. "Force majeure" means any event arising from causes beyond the control of the [DoD Component] which causes a delay in or prevents the performance of any obligation under this Agreement. 'Force majeure' includes but is not limited to: acts of God; fire; war;

insurrection; civil disturbance; explosion; unanticipated breakage or accident to machinery, equipment, or lines of pipe, despite diligent maintenance; adverse weather conditions which could not be reasonably anticipated; unusual delay in transportation; earthquake; restraint by court order or order of public authority; inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses as a result of the action or inaction of any governmental agency or authority other than the [DoD Component]; delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence; and insufficient availability of appropriated funds if the [DoD Component] shall have made timely request for such funds as part of the budgetary process. "Force majeure" also includes any strike or labor dispute, whether or not within the control of the [DoD Component], but shall not include increased costs or expenses of response actions, whether or not anticipated at the time such response actions were initiated.

8. "Timetable and Deadlines" means the dates which are established pursuant to this Agreement for completion or preparation of RI/FS documents. "Deadline" shall be the time limitation applicable to a discrete and significant portion of the RI/FS for which a "Deadline" has been specifically established. "Timetable" shall be the collective term for all the "Deadlines" established for the RI/FS.

9. "Schedule" means the time limitations established for the completion of remedial actions at the Site.

7. EXEMPTIONS

1. The obligation of the [DoD Component] to comply with the provisions of this Agreement may be relieved by: (1) a Presidential order or exemption issued pursuant to the provisions of CERCLA §120(j) (1), 42 U.S.C. §9620(j) (1) or RCRA §6001, 42 U.S.C. §6961; (2) the order of an appropriate court; (3) the dispute resolution process of Section___ of this Agreement; (4) any work stoppage brought about by a determination by the [DoD Component] that activities at the Site may create a present danger to public health or welfare or to the environment; or (5) the unavailability of appropriated funds as provided in Section ___, Funding.

2. Notwithstanding any other provisions of this Agreement, the [DoD Component] reserves the right to take any action affecting [installation] that is not consistent with this Agreement, including use of [installation] for any purpose, upon the occurrence of either of the following events:

    1. A determination by the President that such action is of paramount importance; or

2. A determination by the United States Secretary of Defense or by the United States Secretary of the [DoD Component] that such action is necessary and in the interest of national defense.

8. STATUTORY COMPLIANCE

1. The Parties intend that activities conducted under this Agreement will be deemed to achieve compliance with CERCLA, 42 U.S.C. §9601 et seq.; to satisfy the corrective action requirements of RCRA §§3004 (u) and 3004 (v), 42 U.S.C. §§6924 (u) and §6924 (v), for a RCRA permit, and RCRA §3008 (h), 42 U.S.C. §6928 (h), for interim status facilities; and requirements of all applicable State laws and regulations. Any final remedy completed under this Agreement shall be deemed by the parties to be protective of human health and the environment and the Site shall not be subject to further corrective action by virtue of its status as a solid waste management unit under RCRA. RCRA requirements shall be considered potential ARARs in accordance with CERCLA 121. At the time a permit is issued to the [DoD Component] for ongoing hazardous waste management activities at [installation], EPA [and the State] shall reference and incorporate any appropriate provisions, including appropriate timetables and deadlines or schedules (and the provision for extension of such timetables and deadlines or schedules), of this Agreement into such permit. The Parties intend that the review of any permit conditions which reference this Agreement shall, unless otherwise prohibited by law, only be reviewed under the provisions of CERCLA. Nothing in this Agreement shall alter the provisions of CERCLA. Nothing in this Agreement shall alter the [DoD Component]'s authority with respect to removal actions conducted pursuant to CERCLA §104, 42 U.S.C. §9604.

2. The provisions of this Agreement contained in Section ___, Enforceability, shall be in lieu of any additional authority of EPA [and State] under RCRA for actions conducted under this Agreement and nothing in this Agreement shall be construed as consent by the [DoD Component] to a RCRA §3008 (h) order issued by EPA.

3. The Parties recognize that, as is covered in more detail in Section ___, Permits, no Federal, State, or local permit shall be required for the portion of any action conducted in accordance with this Agreement entirely on-site. For the purposes of this Agreement, "Site" shall mean the areal extent of contamination and all suitable areas in proximity to the contamination necessary for implementation of the response action. The Parties recognize that activities off-site and ongoing operations not covered by this Agreement may require the issuance of permits under Federal and State laws. This Agreement does not affect the requirements, if any, to obtain such permits.

4. It is the intent of the Parties to ensure that the environmental impacts associated with response actions at the Site are thoroughly investigated and that the provisions contained herein regarding public environment and the selection of a final remedial action are

appropriate and protective of human health and the environment.

9. ENFORCEABILITY

1. The Parties agree that all Parties hereto shall have the right to enforce this Agreement.

2. The Parties further agree that, upon the effective date of this Agreement, the following provisions of this Agreement are enforceable by any person to the extent provided by CERCLA §310 and violations of these provisions may further be subject to civil penalties to the extent provided by CERCLA §310(c) and §109:

    1. Any standard, regulation, condition, requirement or order which has become effective under CERCLA and is incorporated into this Agreement;

    2. Any timetable and deadlines, as defined in Section ___, established pursuant to the terms of this Agreement for completion of the RI/FS; and

    3. All terms and conditions of this Agreement relating to the implementation and completion of selected interim and final remedial actions.

3. Nothing in this Agreement shall be construed as authorizing any person to seek judicial review of any action of the [DoD Component] or EPA in contravention of CERCLA § 310 (d) & (e) and §113 (h), 42 U.S.C. 9659 (d) & (e) and 9613 (h).

10. FUNDING

1. Funds authorized and appropriated annually by Congress under the "Environmental Restoration, Defense" appropriation in the Department of Defense Appropriation Act and allocated by the DASD (E) to the [DoD Component] will be the source of funds for activities required by this Agreement consistent with SARA §211, 10 U.S.C. chapter 160. The [DoD Component] agrees to seek sufficient DERA funding through the DoD budgetary process to fulfill its obligations under this Agreement.

2. It is the expectation of the Parties that the activities contemplated by this Agreement will be fully funded. However, should the Environmental Restoration, Defense appropriation be inadequate in any year to meet the total [DoD Component] CERCLA implementation requirements, the DoD shall employ and the [DoD Component] shall follow a standardized DoD prioritization process which allocates that year's appropriations in a manner which maximizes the protection of human health and the environment. The Defense Site Remediation Priority Model shall be developed and utilized with the assistance of EPA and the states.

3. In accordance with CERCLA §120(e)(5)(B), 42 U.S.C. §9620, the [DoD Component] shall annually provide Congress with the specific cost estimates and budgetary proposals involved in this Agreement. The timetable and deadlines or schedule for completing the requirements of this Agreement shall be adjusted as necessary to accommodate any funding shortfall.

4. Nothing in this Agreement shall be construed to require the [DoD Component] to obligate funds in violation of the Anti-Deficiency Act, 31 U.S.C. §1341.

Guidance for Setting a Timetable and Deadlines for Federal Facility Agreements Under CERCLA

During recent negotiations for CERCLA agreements with EPA, the setting of a timetable and deadlines for the RI/FS process have become an issue. We have agreed with EPA that "primary documents" are the only ones for which deadlines can be established and that the timetable for the RI/FS will consist of the deadlines for the primary documents. Primary documents are defined in the "Consultation with EPA and State Authorities" Section of the Agreements. However, because remedial investigations and feasibility studies are scientific/engineering research processes to discover the unknown site parameters, it is usually impossible to predict with certainty when all of these studies will be completed. Therefore, service components should not feel compelled to agree to meet deadlines for initiation or completion of projects for which the "deadline" in question may be known at the outset to be clearly beyond their control. They should try to establish reasonable measures of pace and progress for deadlines that are set.

An example of an unacceptable deadline would be to agree to a delivery date for a Remedial Investigation (RI) final report: when commonly during this problem investigation (discovery) phase of the project the completion is often quite unpredictable. An example of an acceptable deadline would be one for the submittal of the RI workplans. As another good deadline example, we could agree to provide a list of preliminary cleanup options in a set time after the RI final report is completed. Also, we could agree to a deadline that establishes a point where a decision can be made on when a study will be done because of the data we will have collected by the decision point.

Individual installations are the best judge of what deadlines they can meet and should work with EPA creatively to establish them so as show how we plan to proceed but not promise what we cannot deliver.