

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION II  
AND THE  
UNITED STATES ARMY CORPS OF ENGINEERS

IN THE MATTER OF:	)	
	)	
The U.S. ARMY CORPS OF ENGINEERS	)	FEDERAL FACILITY
	)	AGREEMENT UNDER
	)	CERCLA SECTION 120
MIDDLESEX SAMPLING PLANT	)	
MIDDLESEX, NEW JERSEY	)	Administrative
	)	Docket Number:
	)	CERCLA-02-2009-2040

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

## TABLE OF CONTENTS

<b>I. JURISDICTION</b>	1
<b>II. PURPOSE</b>	2
<b>III. DEFINITIONS</b>	3
<b>IV. PARTIES</b>	7
<b>V. FINDINGS</b>	7
<b>VI. DETERMINATIONS</b>	10
<b>VII. STATUTORY COMPLIANCE/RCRA-CERCLA INTEGRATION</b>	11
<b>VIII. CONSULTATION WITH USEPA</b>	12
<b>IX. ASSESSMENT AND SELECTION OF SUPPLEMENTAL RESPONSE ACTIONS</b>	17
<b>X. EMERGENCY REMOVAL ACTIONS</b>	18
<b>XI. RESOLUTION OF DISPUTES</b>	18
<b>XII. QUALITY ASSURANCE</b>	20
<b>XIII. SAMPLING AND DATA AND DOCUMENT AVAILABILITY</b>	21
<b>XIV. PROJECT MANAGERS</b>	22
<b>XV. ACCESS</b>	23
<b>XVI. ENFORCEABILITY</b>	24
<b>XVII. STIPULATED PENALTIES</b>	26
<b>XVIII. PERMITS</b>	27
<b>XIX. EXTENSIONS</b>	27
<b>XX. RESERVATION OF RIGHTS</b>	28
<b>XXI. OTHER CLAIMS</b>	29
<b>XXII. PUBLIC PARTICIPATION</b>	29
<b>XXIII. PUBLIC COMMENT</b>	31
<b>XXIV. FORCE MAJEURE</b>	32
<b>XXV. WORK TO BE PERFORMED</b>	32
<b>XXVI. PERIODIC REVIEW</b>	36
<b>XXVII. REPORTING</b>	37
<b>XXVIII. PROTECTED INFORMATION</b>	38
<b>XXIX. PRESERVATION OF RECORDS</b>	39
<b>XXX. AMENDMENT OF AGREEMENT</b>	39
<b>XXXI. NOTICE TO THE PARTIES</b>	39
<b>XXXII. EXEMPTIONS</b>	40
<b>XXXIII. TERMINATION AND SATISFACTION</b>	40
<b>XXXIV. OTHER PROVISIONS</b>	41
<b>XXXV. DEADLINES AND CONTENTS OF THE SITE MANAGEMENT PLAN</b>	41
<b>XXXVI. FUNDING</b>	44
<b>XXXVII. BUDGET DEVELOPMENT AND AMENDMENT OF PLAN</b>	44
<b>XXXVIII. EFFECTIVE DATE</b>	50
<b>XXXIX. AUTHORIZED SIGNATURES</b>	51

ATTACHMENT 1 - SITE DESCRIPTION

ATTACHMENT 2 - MIDDLESEX SAMPLING PLANT SITE MANAGEMENT PLAN

ATTACHMENT 3 – USACE/DOE MEMORANDUM OF UNDERSTANDING

## I. JURISDICTION

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

- A. The U.S. Environmental Protection Agency (USEPA), Region II, enters into those portions of this Agreement that relate to the remedial investigation/feasibility study (RI/FS) pursuant to Section 120(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9620(e)(2), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 (hereinafter jointly referred to as CERCLA/SARA or CERCLA) and Sections 6001, 3008(h) and 3004(u) and (v) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6961, 6928(h), 6924(u) and (v), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) (hereinafter jointly referred to as RCRA/HSWA or RCRA) and Executive Order 12580;
- B. USEPA, Region II, enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to Section 120(e)(2) of CERCLA/SARA, [Sections 6001, 3008(h) and 3004(u) and (v)]of RCRA and Executive Order 12580;
- C. The United States Army Corps of Engineers (USACE) enters into this Agreement pursuant to Section 120 of CERCLA, 42 U.S.C. §§ 9620 (e) (1), (2) ; Sections 6001, 3008(h) and 3004(u) and (v) of RCRA, 42 U.S.C. §§ 6961, 6928(h) and 6924(u) and (v); Executive Order 12580; the National Environmental Policy Act, 42 U.S.C. Section 4321; the FY 1998 Energy and Water Development Appropriations Act, Pub. L. 105-62, and subsequent consecutive Energy and Water Development Appropriations Acts. USACE has authority to enter into this Agreement pursuant to Article III, paragraph C.2 of the MEMORANDUM OF UNDERSTANDING BETWEEN THE U. S. DEPARTMENT OF ENERGY AND THE U.S. ARMY CORPS OF ENGINEERS REGARDING PROGRAM ADMINISTRATION AND EXECUTION OF THE FORMERLY UTILIZED SITES REMEDIAL ACTION PROGRAM (FUSRAP), executed on March 16 and 17, 1999.
- D. USACE is not entering into this Agreement under the Defense Environmental Restoration Program (DERP), 10 U.S.C. § 2701 *et seq.* Rather, pursuant to Public Law 106-60, Section 611 (September 29, 1999), USACE is conducting the investigation, remediation and maintenance of sites at Middlesex Sampling Plant (MSP) as a site formerly utilized by the Atomic Energy Commission (AEC) and the Department of Energy (DOE).

- E. The U.S. Department of Energy (DOE) enters this Agreement pursuant to the Energy and Water Development Appropriations Acts for Fiscal Years 1998, 1999, and 2000 (Public Laws 105-62, 105-245, and 106-60, respectively), CERCLA and the NCP, for the limited purposes of ensuring EPA and USACE access and performing periodic reviews in accordance with Part XXVI (Periodic Review) and long-term surveillance, operation and maintenance, including monitoring and enforcement of any institutional controls which may be selected as part of the remedy for areas associated with Atomic Energy Commission activity. DOE agrees that it shall be a successor to USACE for long-term surveillance, operation, and maintenance for those areas.

## **II. PURPOSE**

- A. The general purposes of this Agreement are to:
1. Ensure that the environmental impacts associated with past and present activities at the Middlesex Sampling Plant (MSP or “the Site”) are thoroughly investigated and appropriate remedial actions are taken as necessary to protect the public health, welfare, and the environment;
  2. Establish a procedural framework and schedule for developing, implementing and monitoring appropriate response actions at the Site in accordance with CERCLA/SARA, the National Contingency Plan (NCP), USEPA Superfund guidance and policy, RCRA, RCRA guidance and policy, and the FUSRAP statutory authorities cited in Paragraph C of Part I (Jurisdiction) of this Agreement; and
  3. Facilitate cooperation, exchange of information and participation between the USEPA and the USACE in such actions.
- B. Specifically, the purposes of this Agreement are to:
1. Identify Interim Remedial Action (IRA) and Final Remedial Action (FRA) alternatives which are appropriate at the Site. Alternatives shall be identified and USEPA will be notified as early as possible prior to the formal proposal of alternatives to USEPA pursuant to CERCLA/SARA. This process is designed to promote cooperation between the Parties in identifying IRA and FRA alternatives prior to selection;
  2. Establish requirements for the performance of an RI to determine fully the nature and extent of the threat to the public health or welfare or the environment caused by the release and threatened release of hazardous substances, pollutants or contaminants at the Site and to establish requirements for the performance of a FS for the Site to identify, evaluate and select alternatives for the appropriate remedial action(s) to prevent, mitigate, or abate the release or threatened release

of hazardous substances, pollutants or contaminants at the Site in accordance with CERCLA/SARA;

3. Identify the nature, objective and schedule of response actions to be taken at the Site. Response actions at the Site shall attain that degree of cleanup of hazardous substances, pollutants or contaminants mandated by CERCLA/SARA;
4. Implement the selected interim and final remedial action(s) in accordance with CERCLA and meet the requirements of Section 120(e)(2) of CERCLA for an interagency agreement between USEPA and the USACE;
5. Assure compliance, through this Agreement, with RCRA and other federal and state hazardous waste laws and regulations for matters covered herein;
6. Expedite the cleanup process to the extent consistent with protection of human health and the environment; and
7. Provide for operation and maintenance of and enforcement to ensure the protectiveness of, any remedial action selected and implemented pursuant to this Agreement. This operation and maintenance shall be consistent with the USACE/DOE Memorandum of Understanding (see Attachment 3).

### **III. DEFINITIONS**

Except as otherwise explicitly stated herein, terms used in this Agreement shall have the meaning defined in CERCLA, CERCLA/SARA and the NCP. As used in this Agreement, unless the context clearly requires some other meaning, the following definitions shall apply for purposes of this Agreement.

- A. “Agreement” means this Federal Facility Agreement and shall include all Attachments to this Agreement, and all reports, plans, notices, and other documents developed pursuant to this Agreement. All such Attachments and documents are an integral and enforceable part of this Agreement.
- B. “Army Corps of Engineers” or “U.S. Army Corps of Engineers” or “USACE” shall mean the U.S. Army Corps of Engineers, their employees, agents, successors and assigns.
- C. “ARAR” or “Applicable or Relevant and Appropriate Requirement” shall mean “legally applicable” or “relevant and appropriate” standards, requirements, criteria, or limitations as those terms are used in CERCLA 121(d), 42 U.S.C. § 9621(d) and the NCP.

- D. “Authorized representative” of USEPA shall mean any agents, employees or contractors who have been duly authorized by USEPA to perform some activity related to this Agreement. Similarly, “authorized representative” of USACE shall mean any agents, employees or contractors who have been duly authorized by USACE to perform some activity related to this Agreement.
- E. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, or any other amendments to these statutes.
- F. “Days” shall mean calendar days, unless business days are specified. Any submittal or written statement of dispute which under the terms of this Agreement would be due on a Saturday, Sunday, or Federal holiday shall be due on the following business day.
- G. “Deadlines” shall mean the Near Term Milestones specifically established for the current fiscal year under the Site Management Plan. Deadlines are subject to stipulated penalties in accordance with Part XVII (Stipulated Penalties).
- H. “Documents” or “records” shall mean any documents, writings, correspondence and all other tangible things on which information has been stored which relates to this Agreement or to any activities to be undertaken relating to this Agreement.
- I. “Emergency removal” or “emergency removal action” means a removal action taken because of an imminent and substantial endangerment to human health or the environment that requires implementation of a response action in such a timely manner that consultation with USEPA would be impractical.
- J. “Feasibility Study” or “FS” means those studies which fully evaluate and develop remedial action alternatives to prevent and/or mitigate the release or threat of release of hazardous substances, pollutants and contaminants at and from the Site.
- K. “Fiscal Year” shall mean the time period used by the United States Government for budget management and commences on October 1 and ends September 30th of the following calendar year.
- L. “Formerly Utilized Sites Remedial Action Program” or “FUSRAP” means the U.S. Army Corps of Engineers’ program to develop, identify, clean up, or otherwise control sites containing residual contamination from the nation’s early atomic energy program or from commercial operations that resulted in conditions Congress has authorized the USACE to remedy.

- M. “Land Use Controls” shall mean any restriction or administrative action, including engineering and institutional controls, arising from the need to reduce risk to human health and the environment.
- N. “Middlesex Sampling Plant” or “MSP” or “the Site” shall mean the 9.6-acre MSP facility which is located at 239 Mountain Avenue, in Middlesex, New Jersey, Middlesex County, New Jersey (see Attachment 1) and any other areas where a hazardous substance from the facility has been deposited, stored, disposed of, or placed, or otherwise come to be located. The Site is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. Section 9601(9).
- O. “Milestones” shall mean the dates established by the Parties in the Site Management Plan for the initiation or completion of Primary Actions and the submission of Primary Documents and Project End Dates. Milestones shall include Near Term Milestones, Out Year Milestones, Primary Actions, and Project End Dates.
- P. “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 et seq., and any amendments thereto.
- Q. “Near Term Milestones” shall mean the Milestones within the current fiscal year (FY), the next fiscal year or “budget year” (FY+1), and the year for which the budget is being developed or “planning year” (FY+2).
- R. “NJDEP” shall mean the New Jersey Department of Environmental Protection.
- S. “Out Year Milestones” shall mean the Milestones within those years occurring after the planning year until the completion of the cleanup or phase of the cleanup (FY+3 through Project End Date).
- T. “Paragraph” shall mean a portion of this Agreement identified by an Arabic numeral or an upper or lower case letter.
- U. “Part” shall mean a portion of this Agreement identified by a Roman numeral.
- V. “Parties” shall mean the United States Environmental Protection Agency (“USEPA”), the United States Army Corps of Engineers (“USACE”), and the United States Department of Energy (“DOE”) only for the purposes identified in Part I (E) (Jurisdiction) of this Agreement.
- W. “Plan,” unless the context indicates otherwise, shall refer to the Middlesex Sampling Plant Site Management Plan.



X. “Primary Actions” as used in these definitions shall mean those specified major, discrete actions that the Parties identify as such in the Plan. The Parties should identify all major, discrete actions for which there is sufficient information to be confident that the date for taking such action is implementable.

Y. “Project End Dates” shall mean the dates established by the Parties in the Plan for the completion of major portions of the cleanup or completion of the cleanup of the facility. The Parties recognize that, in many cases, a higher degree of flexibility is appropriate with Project End Dates due to uncertainties associated with establishing such dates.

Z. “Record of Decision” or “ROD” shall be the public document(s) in which the Parties select a remedial action to be implemented at the Site, or an Operable Unit in accordance with CERCLA Section 120(e)(4)(A), and include the bases for the selection of such remedy. The bases include information and technical analyses generated during the Remedial Investigation and Feasibility Study and consideration of public and State of New Jersey comments.

AA. “Remedial Action” shall have the meaning of that term as defined in Section 101(24) of CERCLA, 42 U.S.C § 9601(24).

BB. “Remedial Design” or “RD” means the technical analysis and procedures that follow the selection of a Remedial Action and that result in a detailed set of plans and specifications for implementation of the Remedial Action.

CC. “Remedial Investigation” or “RI” means those investigations conducted to fully determine the nature and extent of the release or threat of release of hazardous substances, pollutants or contaminants at the Site and to obtain all data needed to support the FS and the risk assessment.

DD. “Removal Actions” or “Removals” shall have the meaning of the term “removals” as that term is defined in Section 101(23) of CERCLA, 42 U.S.C. § 9601(23).

EE. “RCRA” shall mean the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., as amended by the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, and any other amendments to these statutes.

FF. “Submittal” shall mean every document, report, schedule, deliverable, work plan or any other item to be submitted by any Party to any other Party pursuant to this Agreement.

GG. “Target Dates” shall mean dates established for the completion and transmission of secondary documents. Target Dates are not subject to dispute resolution and they are not Milestones.

HH. “USEPA” or “EPA” shall mean the United States Environmental Protection Agency, its employees, agents and authorized representatives.

#### **IV. PARTIES**

The Parties to this Agreement are USEPA, USACE, and DOE only for the purposes identified in Part I (E) (Jurisdiction) of this Agreement. The terms of this Agreement shall be binding upon the USACE, USEPA, and DOE, and authorized representatives of any Party and upon their successors and assigns. USACE shall provide a copy of this Agreement to all contractors and subcontractors retained to perform work pursuant to this Agreement and to the present owner of any property which is not owned by the United States and upon which any work under this Agreement is to be performed. USACE or DOE shall be responsible for assuring that its contractors comply with the terms and conditions of this Agreement. This Agreement shall not establish precedent for non-FUSRAP Federal Facility Agreements entered into by the Army or other components of the Department of Defense pursuant to section 120 of CERCLA, 42 U.S.C. § 9620.

#### **V. FINDINGS**

For the purpose of this Agreement only, the following constitutes a summary of facts known to the Parties at the time and upon which this Agreement is based. None of the facts related herein shall be considered admissions by any Party with respect to any unrelated claims by a Party or by persons not a Party to this Agreement.

A. During the 1940s and 1950s, the Manhattan Engineer District (MED) and its immediate successor, the Atomic Energy Commission (AEC), conducted several programs involving research, development, processing, and production of uranium and thorium and the storing of their processing residues. Generally, sites that became contaminated during this early period of the nuclear program, and have since been converted to other use, were decontaminated or stabilized in accordance with the guidelines and survey methods then in existence.

B. However, radiological guidelines have since become more stringent. DOE established FUSRAP as a program in the late 1970s to perform remedial actions, after Congress appropriated funds for the Middlesex cleanup. The origins of FUSRAP date back to 1973, when the Atomic Energy Commission (AEC), a statutory predecessor to DOE, initiated a survey effort to identify former AEC-owned sites where low-activity radioactive contamination remained from the early years of the nation’s atomic energy program. When AEC was abolished in 1975, this investigatory effort became the responsibility of AEC’s successor, the Energy Research & Development Administration

(ERDA). On October 1, 1977, when ERDA was abolished, this effort was transferred to the newly-created DOE. In the late 1970s, this effort was incorporated into the new FUSRAP. Since its inception, FUSRAP included the survey of both former AEC-owned and other sites that were controlled or used, but never owned by the AEC, as well as the remediation of those sites, as appropriate.

C. The MSP facility was established in 1943 by MED to sample, store, test, and transfer ores containing uranium, thorium, and beryllium. United Lead Company operated the MSP under contract with MED to provide uranium assay analysis from 1943 to 1955. In 1946, MED was deactivated and MSP operations were continued under the AEC.

D. AEC terminated the contract for primary operations by United Lead Company at MSP in 1955. The MSP continued to be used for storage and limited sampling of thorium residues until 1967 when all operations were terminated. After decontamination of all the structures was completed, the AEC certified the Site for unrestricted use.

E. In 1968, AEC returned MSP to the General Services Administration which transferred the property to the Department of the Navy. The site served as a U.S. Marine Corps reserve training center from 1969 to 1979.

F. Changing radiological standards and release guidelines resulted in MSP being re-evaluated for residual contamination. Contamination above current guidelines was determined to be present on both MSP and surrounding land parcels, and the site was placed in DOE custody in 1980.

G. In 1980, DOE initiated a removal action to remediate contaminated vicinity properties (VP). These properties had become contaminated through the use of contaminated fill that was transported to these locations in 1947 or through normal wind and water erosion that transported radioactive materials. Removal activities at these properties were completed in 1981. Contaminated soils and debris were taken to the MSP, which created the VP interim storage pile.

H. In 1984 and 1986, DOE conducted a removal action to excavate radioactive wastes from the Middlesex Municipal Landfill (MML). This contaminated landfill material resulted from construction activities at the MSP in 1948 when excess soil from grading operations at MSP containing small amounts of pitchblende ore was taken to MML. This action was completed in 1986. Contaminated material was returned to MSP creating the MML interim storage pile.

- I. In 1995, DOE completed a characterization report for the MSP site. This report indicated that uranium, radium and thorium were present in onsite soils at levels above background. In addition uranium and radium were detected in groundwater from on-site wells exceeding background levels.
- J. In 1996, DOE initiated and completed a non-time-critical removal action to demolish the contaminated process building on the MSP and contaminated sediments in a drainage ditch immediately outside the site.
- K. With the Energy and Water Development Appropriations Act of 1998, Pub. L. 105-62 (October 17, 1997), Congress transferred responsibility for administration and execution of FUSRAP from DOE to USACE.
- L. In 1998, USACE conducted a non-time-critical removal action to address the MML interim storage pile. Approximately 33,000 cubic yards of contaminated materials were disposed of at an off-site facility. This action was completed in 1998.
- M. On September 29, 1998, USEPA proposed placing the MSP on the National Priorities List (“NPL”), and then on January 19, 1999, placed on MSP on the NPL (see 64 Fed. Reg. 2942).
- N. In 1999, USACE initiated a non-time critical removal action to address the VP interim storage pile. Approximately 35,679 cubic yards of contaminated material were disposed of at an off-site facility. This action was completed in November 1999.
- O. On March 17, 1999, USACE entered into a Memorandum of Understanding with DOE, which identified the respective rights and obligations of USACE and DOE with regard to FUSRAP. (Attachment 3).
- P. The two Operable Units identified at MSP are the Soils Operable Unit (“OU1”) and the Groundwater Operable Unit (“OU2”). These Operable Units were investigated separately. In July 2004, USACE completed the soils OU remedial investigation and identified semi-volatile organic compounds (SVOCs), lead, and radionuclides as contaminants of concern. In December 2004, USACE completed the groundwater OU remedial investigation and identified VOCs, SVOCs, metals, and radionuclides as contaminants of concern.
- Q. On September 28, 2005, USEPA signed the Soils Operable Unit (OU1) Record of Decision for the Site, which the USACE signed on August 19, 2005. A Groundwater Operable Unit (OU2) Remedial Investigation for the Site was completed on December 29, 2004.

R. USACE has completed the OU1 remedial work. A final site inspection for OU1 was conducted on July 28, 2008. The USACE submitted a draft Remedial Action Report for OU1 to USEPA in February 2009.

S. USACE's draft Feasibility Study and Proposed Remedial Action Plan for OU 2 recommended monitored natural attenuation (MNA) as the groundwater remedy. However, since current data do not yet support the subject remedy, USEPA is requiring that the USACE conduct at least two (2) more rounds of groundwater sampling and analysis. The second round of this sampling was completed in November 2008.

## **VI. DETERMINATIONS**

A. MSP constitutes a "facility" within the meaning of that term as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

B. USACE is a "person" within the meaning of that term as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

C. The contaminants of concern identified in the July 2004 soils RI and the May 2005 groundwater RI referred to in the Findings above are "hazardous substances" or "pollutants or contaminants" within the meaning of those terms as defined in Sections 101(14) and 101(33) of CERCLA, 42 U.S.C. § 9601(14) and (33).

D. Hazardous substances within the meaning of section 101(14) of CERCLA, 42 U.S.C. § 9601(14), have been released at MSP.

E. The releases of hazardous substances, pollutants, or contaminants in the soil and groundwater at the MSP (as noted in Part V (Findings) above) constitute a release into the environment as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

F. The potential future migration of hazardous substances into the groundwater and surface water at and under MSP constitutes a "threatened release of a hazardous substance from a facility" as that phrase is used in section 104(a) of CERCLA, 42 U.S.C. § 9604(a).

G. The actions to be taken pursuant to this Agreement are reasonable and necessary to protect the public health, welfare or the environment and are consistent with the NCP

H. The schedule for completing the actions required by this Agreement complies with the requirements of section 120(e) of CERCLA, 42 U.S.C § 9620(e).

I. MSP is a facility under the jurisdiction, custody, or control of the Department of Defense within the meaning of Executive Order 12580, 52 FR 2923, Jan. 29, 1987. The

USACE is authorized to act on behalf of the Secretary of Defense for all functions that are relevant to this Agreement delegated by the President through Executive Order 12580, and further delegated by the Secretary to the Chief of Engineers.

J. MSP is a facility under the jurisdiction of the Chief of Engineers and the USACE civil works program, and subject to USACE's FUSRAP.

## **VII. STATUTORY COMPLIANCE/RCRA-CERCLA INTEGRATION**

A. The Parties intend to integrate USACE'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 into this comprehensive Agreement. Therefore, the Parties intend that activities covered by this Agreement will be deemed to achieve compliance with CERCLA, 42 U.S.C. § 9601 *et seq.*; to satisfy the corrective action requirements of RCRA §§ 3004(u) & (v), 42 U.S.C. §§ 6924(u) & (v), for a RCRA permit, and RCRA § 3008(h), 42 U.S.C. § 6928(h), for interim status facilities; and to meet or exceed all applicable or relevant and appropriate Federal and State laws and regulations, to the extent required by CERCLA § 121, 42 U.S.C. § 9621.

B. Based upon the foregoing, the Parties intend that any remedial action selected, implemented, and completed under this Agreement shall be deemed by the Parties to be protective of human health and the environment such that remediation of releases covered by this Agreement shall obviate the need for further corrective action under RCRA (*i.e.*, no further corrective action shall be required). The Parties agree that with respect to releases of hazardous waste covered by this Agreement, RCRA shall be considered an applicable or relevant and appropriate requirement pursuant to CERCLA § 121, 42 U.S.C. § 9621.

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

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

## VIII. CONSULTATION WITH USEPA

### Review and Comment Process for Draft and Final Documents

#### A. Applicability:

1. The provisions of this Part establish the procedures that shall be used by USACE and USEPA to provide the Parties with appropriate notice, review, comment, and response to comments regarding RI/FS and RD/RA documents, specified herein as either primary or secondary documents. In accordance with section 120 of CERCLA, the USACE will normally be responsible for issuing primary and secondary documents to USEPA. As of the effective date of this Agreement, all draft and final reports for any deliverable document identified herein shall be prepared, distributed and subject to dispute in accordance with Paragraphs B through J below.
2. The designation of a document as “draft” or “draft final” is solely for purposes of consultation with USEPA in accordance with this Part. Such designation does not affect the obligation of the Parties to issue documents, which may be referred to herein as “final,” to the public for review and comment as appropriate and as required by law.

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

1. Primary documents include those reports that are major, discrete portions of RI/FS or RD/RA activities. Primary documents are initially issued by USACE in draft subject to review and comment by USEPA. Following receipt of comments on a particular draft primary document, USACE 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 thirty (30) days after the period established for review of a draft final document if dispute resolution is not invoked or as modified by decision of the dispute resolution process.
2. Secondary documents include those reports that are discrete portions of the primary documents and are typically input or feeder documents. Secondary documents are issued by USACE in draft subject to review and comment by USEPA. Although USACE will respond to comments received, the draft secondary documents may be finalized in the context of the corresponding primary documents. A secondary document may be disputed at the time the corresponding draft final primary document is issued.

#### C. Primary Reports:

1. USACE shall complete and transmit draft reports for the following primary documents to USEPA for review and comment in accordance with the provisions of this Part:

- (a) RI/FS Work Plan(s), including Sampling and Analysis Plan(s) and QAPP(s)
- (b) Baseline Risk Assessment(s)
- (c) RI Report(s)
- (d) FS Report(s)
- (e) Proposed Plan(s)
- (f) Record of Decision(s)
- (g) Remedial Design(s)
- (h) Remedial Action Work Plan(s)
- (i) Remedial Action Completion Report(s), including amended and final
- (j) Site Management Plan (and any amendments thereto)
- (k) Site-Screening Process Work Plan(s) and Site-Screening Process Report(s), including Radiation Screening Work Plan(s) and Radiation Screening Report(s)

2. Only the draft final reports for the primary documents identified above shall be subject to dispute resolution in accordance with Part XI (Resolution of Disputes) of this Agreement. USACE shall complete and transmit draft primary documents in accordance with the timetable and deadlines established in Part XXXV (Deadlines and Contents of the Site Management Plan) of this Agreement.

D. Secondary Documents:

1. USACE shall complete and transmit draft reports for the following secondary documents to USEPA for review and comment in accordance with the provisions of this Part:

- (a) Treatability Studies
- (b) Validated Sampling and Data Results



(c) Operation & Maintenance Plan(s)

(d) Health and Safety Plan(s)

2. Although USEPA may comment on the draft reports for the secondary documents listed above, such documents shall not be subject to dispute resolution except as provided by Paragraph B hereof. Target dates shall be established for the completion and transmission of draft secondary reports pursuant to Part XXXV (Deadlines and Contents of the Site Management Plan) of this Agreement.

E. Meetings of the Project Managers on Development of Reports:

The Project Managers shall meet in person or via teleconference approximately every thirty (30) days, except as otherwise agreed by the Parties, to review and discuss the progress of work being performed at the Site on the primary and secondary documents. Prior to preparing any draft report specified in Paragraphs C and D above, the Project Managers shall meet to discuss the report results in an effort to reach a common understanding, to the maximum extent practicable, with respect to the results to be presented in the draft report.

F. Identification and Determination of Potential ARARs:

1. For those primary reports or secondary documents that consist of or include ARAR determinations, prior to the issuance of a draft report, the Project Managers shall meet to identify and propose, to the best of their ability, all potential ARARs pertinent to the report being addressed. Draft ARAR determinations shall be prepared by USACE in accordance with Section 121(d)(2) of CERCLA, the NCP and pertinent guidance issued by USEPA, which is not inconsistent with CERCLA and the NCP.

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

G. Review and Comment on Draft Reports:

1. USACE shall complete and transmit each draft primary report to USEPA on or before the corresponding deadline established for the issuance of the report. USACE shall complete and transmit the draft secondary document in accordance with the target dates established for the issuance of such reports established

pursuant to Part XXXV (Deadlines and Contents of the Site Management Plan) of this Agreement.

2. Unless the Parties mutually agree to another time period, all draft reports shall be subject to a 45-day period for review and comment. Review of any document by USEPA 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 USEPA guidance or policy promulgated by USEPA. Comments by USEPA shall be provided with adequate specificity so that USACE 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 USACE, USEPA shall provide a copy of the cited authority or reference. In cases involving complex or unusually lengthy reports, USEPA may extend the 45-day comment period for an additional 20 (twenty) days by written notice to USACE prior to the end of the 45-day period. On or before the close of the comment period, USEPA shall transmit its written comments to USACE.
3. Representatives of USACE shall make themselves readily available to USEPA 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 USACE on the close of the comment period.
4. In commenting on a draft report which contains a proposed ARAR determination, USEPA shall include a reasoned statement of whether it objects to any portion of the proposed ARAR determination. To the extent that USEPA does object, it shall explain the bases for its objection in detail and shall identify any ARARs that it believes were not properly addressed in the proposed ARAR determination.
5. Following the close of the comment period for a draft report, USACE shall give full consideration to all written comments on the draft report submitted during the comment period. Within thirty (30) days of the close of the comment period on a draft secondary report, the USACE shall transmit to USEPA 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, USACE shall transmit to USEPA a draft final primary report, which shall include USACE's response to all written comments, received within the comment period. While the resulting draft final report shall be the responsibility of USACE, it shall be the product of consensus to the maximum extent possible.
6. USACE 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 written notice to USEPA prior to the end of the 30-day period. In appropriate circumstances, this time period may be further extended in accordance with Part XIX (Extensions) hereof.

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

1. Dispute resolution shall be available to the Parties for draft final primary reports as set forth in Part XI (Resolution of Disputes).
2. When dispute resolution is invoked on a draft final primary report, work may be stopped in accordance with the procedures set forth in Part XI (Resolution of Disputes).

I. Finalization of Reports:

The draft final primary report shall serve as the final primary report if no party invokes dispute resolution regarding the document or, if invoked, at completion of the dispute resolution process should USACE's position be sustained. If USACE's determination is not sustained in the dispute resolution process, USACE shall prepare, within not more than 35 days, a revision of the draft final report which conforms to the results of dispute resolution. In appropriate circumstances, the time period for this revision period may be extended in accordance with Part XIX (Extensions) hereof.

J. Subsequent Modifications of Final Reports:

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

1. USEPA or USACE 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. USEPA or USACE may seek such a modification by submitting a concise written request to the Project Manager of the other Party. The request shall specify the nature of the requested modification and how the request is based on new information.
2. In the event that a consensus is not reached by the Project Managers on the need for a modification, either USEPA or USACE may invoke dispute resolution to determine if such modification shall be conducted. Modification of a report shall be required only upon a showing that: (1) the requested modification is based on significant new information, and (2) the requested modification could be of significant assistance in evaluating impacts on the public health or the

environment, in evaluating the selection of remedial alternatives, or in protecting human health and the environment.

3. Nothing in this Subpart shall alter USEPA's ability to request the performance of additional work that was not contemplated by this Agreement. USACE's obligation to perform such work must be established by either a modification of a report or document or by amendment to this Agreement.

## **IX. ASSESSMENT AND SELECTION OF SUPPLEMENTAL RESPONSE ACTIONS**

A. The Parties recognize that subsequent to finalization of a ROD, a need may arise for one or more supplemental response actions to remedy continuing or additional releases or threats of releases of hazardous substances, pollutants or contaminants from the Site. If such a release or threat of release presents an immediate threat to human health and the environment, it shall be addressed pursuant to Part X (Emergency Removal Actions). If such a release or threat of release does not present an immediate threat to human health or the environment, it shall be addressed pursuant to Paragraphs B through E below.

B. A supplemental response action shall be undertaken only when:

1. A determination is made that as a result of the release or threat of release of a hazardous substance, pollutant or contaminant at or from the Site, an additional response action is necessary and appropriate to assure the protection of human health and the environment; and

2. Either of the following conditions is met for any determination made pursuant to subparagraph (1) above:

(a) For supplemental response actions proposed after finalization of a ROD, but prior to USEPA certification, the determination must be based upon conditions that were unknown at the time of finalization of a ROD or based upon information received in whole or in part by USEPA following finalization of the ROD; or

(b) For supplemental response actions proposed after USEPA certification, the determination must be based upon conditions that were unknown at the time of USEPA certification or based upon information received in whole or in part by USEPA following USEPA certification.

C. If, after finalization of a ROD, either Party concludes that a supplemental response action is necessary, based on the criteria set forth in Paragraph B above, such Party shall promptly notify the other of its conclusion in writing. The Project Managers shall confer and attempt to reach consensus on the need for such action within forty-five (45) days of the receipt of such notice. If within that 45-day period, the Project Managers have failed to reach consensus, either Party may notify the other Party in writing that it intends to invoke dispute resolution. If the Project Managers are still unable to reach consensus

within fourteen (14) days of the issuance of such notice, the question of the need for the supplemental response action shall be resolved through dispute resolution.

D. If the Project Managers agree or if it is determined through dispute resolution that a supplemental response action is needed based on the criteria set forth in Paragraph B above, the USACE shall propose a Deadline or submittal of the Supplemental Work Plan and a Schedule for the Performance of the Work thereunder to the USEPA

E. After finalization of a Supplemental Work Plan, USACE shall conduct a supplemental RI/FS. Following finalization of the supplemental RI/FS, USACE shall follow the procedures described in Paragraphs B.2 and C of Part XXV (Work To Be Performed).

## **X. EMERGENCY REMOVAL ACTIONS**

A. Notwithstanding any other provision of this Agreement, USACE retains the right, consistent with Executive Order 12580; to conduct such emergency removal actions as may be necessary to alleviate immediate threats to human health or the environment from the release or threat of release of hazardous substances, pollutants or contaminants at or from the MSP. Such actions may be conducted at any time, either before or after the issuance of a ROD.

B. USACE shall provide USEPA with oral notice as soon as possible and written notice within forty-eight (48) hours after USACE determines that an emergency removal action is necessary. In addition, within seven (7) days of initiating such an action USACE shall provide written notice to USEPA explaining why such action is or was necessary. Such notice shall state whether, and to what extent, the emergency removal action varied from the description of the action in the written notice provided pursuant to the second sentence of this paragraph and provide any other information required by CERCLA or the NCP. Promptly thereafter, USACE shall provide USEPA with the written bases (factual, technical, and scientific) for such action and any available documents supporting such action. Within thirty (30) days of completion of an emergency removal action, USACE shall notify USEPA in writing that the emergency removal action has been implemented and furnish USEPA with an action memorandum.

## **XI. RESOLUTION OF DISPUTES**

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

B. Within thirty (30) days after: (1) issuance of a draft final Primary Document pursuant to Section VIII – CONSULTATION WITH USEPA; or (2) any action that leads

to or generates a dispute, the disputing Party shall submit to the DRC a written statement of dispute setting forth the nature of the dispute, the Work affected by the dispute, the disputing Party's position with respect to the dispute and the technical, legal or factual information the disputing Party is relying upon to support its position.

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

D. The Dispute Resolution Committee (DRC) will serve as a forum for resolution of disputes for which agreement has not been reached through informal dispute resolution. The Parties shall each designate one individual and an alternate to serve on the DRC. The individuals designated to serve on the DRC shall be employed at the policy level (Senior Executive Service (SES) or equivalent) or be delegated the authority to participate on the DRC for the purposes of dispute resolution under this Agreement. USEPA's representative on the DRC is the Emergency & Remedial Response Division Director of USEPA's Region II. USACE designated member is the District Engineer, U.S. Army Engineer District, New York. Written notice of any delegation of authority from the Party's designated representative on the DRC shall be provided to all other Parties pursuant to the procedures of Section XIV – PROJECT MANAGERS.

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

F. The SEC will serve as the forum for resolution of disputes for which agreement has not been reached by the DRC. EPA's representative on the SEC is the Regional Administrator of EPA Region II (EPA Regional Administrator). USACE's representative on the SEC is the Division Engineer, U.S. Army Engineer Division, North Atlantic ("USACE Division Engineer"). The SEC members shall, as appropriate, confer, meet and exert their best efforts to resolve the dispute and issue a written decision signed by all Parties. If unanimous resolution of the dispute is not reached within twenty-one (21) days, the EPA Regional Administrator shall issue a written position on the dispute. The Assistant Secretary of the Army (Civil Works) may, within fourteen (14) days of the Regional Administrator's issuance of USEPA's position, issue a written notice elevating the dispute to the Administrator of USEPA for resolution in accordance with all applicable laws and procedures. In the event that USACE elects not to elevate the dispute to the Administrator within the designated fourteen (14) day escalation period, the party shall be deemed to have agreed with the Regional Administrator's written position with respect to

the dispute.

G. Upon elevation of a dispute to the Administrator of USEPA pursuant to Subsection XI.F, the Administrator will review and resolve the dispute within twenty-one (21) days. Upon request, and prior to resolving the dispute, the USEPA Administrator shall meet and confer with the Assistant Secretary of the Army (Civil Works) to discuss the issue(s) under dispute. Upon resolution, the Administrator shall provide the Army with a written final decision setting forth resolution of the dispute. The duties of the Administrator set forth in this Section shall not be delegated.

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

I. When dispute resolution is in progress, Work affected by the dispute will immediately be discontinued if the Emergency & Response Division Director for USEPA's Region II requests, in writing, that Work related to the dispute be stopped because, in USEPA's opinion, such Work is inadequate or defective, and such inadequacy or defect is likely to yield an adverse effect on human health or the environment, or is likely to have a substantial adverse effect on the remedy selection or implementation process. To the extent possible, the Party seeking a Work stoppage shall consult with the other Party prior to initiating a Work stoppage request. After stoppage of Work, if a Party believes that the Work stoppage is inappropriate or may have potential significant adverse impacts, the Party may meet with the Party ordering a Work stoppage to discuss the Work stoppage. Following this meeting, and further consideration of the issues, the USEPA Division Director will issue, in writing, a final decision with respect to the Work stoppage. The final written decision of the USEPA Division Director may immediately be subjected to formal dispute resolution. Such dispute may be brought directly to either the DRC or the SEC, at the discretion of the Party requesting dispute resolution.

J. Within twenty-one (21) days of resolution of a dispute pursuant to the procedures specified in this Section, USACE shall incorporate the resolution and final determination into the appropriate plan, Schedule, or procedures and proceed to implement this Agreement according to the amended plan, Schedule, or procedures.

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

## **XII. QUALITY ASSURANCE**

A. USACE shall use quality assurance, quality control (QA/QC) and chain of custody procedures throughout all field investigation, sample collection and laboratory analysis activities. USACE has developed a site specific Quality Assurance Project Plan (QAPP) for the MSP site. The QAPP was prepared consistent with applicable USEPA guidance. Future Quality Assurance Plans shall be prepared in accordance with applicable USEPA Guidance, including the Uniform Federal Policy for Quality Assurance Project Plans (March 2005).

B. In order to provide for quality assurance and maintain quality control regarding all field work and samples collected pursuant to this Agreement, USACE shall submit all protocols to be used for sampling and analysis to USEPA for review and comment. USACE shall also ensure that any laboratory used for analysis is a participant in a quality assurance/quality control program that is consistent with USEPA guidance.

C. USACE shall also ensure that appropriate USEPA personnel or their authorized representatives will be allowed access to any laboratory used by USACE in implementing this Agreement. Such access shall be for the purpose of validating sample analyses, protocols and procedures required by the Remedial Investigation and Quality Assurance Project Plan. USACE shall ensure that lab audits are conducted as appropriate, and results of audits are provided as requested to USEPA.

### **XIII. SAMPLING AND DATA AND DOCUMENT AVAILABILITY**

A. USACE shall make all sampling results, test results and other data generated through the implementation of this Agreement available to USEPA within thirty (30) days of receipt of such results. This includes, but is not limited to, sampling of all areas known or suspected to have been contaminated by hazardous substances, and any water supply wells and systems, included in the remedial investigation. If quality assurance is not completed within thirty (30) days of receipt of results, USACE shall submit summarized raw data or results within the thirty-day period and quality assured data or results shall be submitted immediately upon receipt by USACE. USEPA will similarly make available to USACE the results of sampling, tests or other data or documents generated by USEPA.

B. At the request of USEPA, USACE shall allow split or duplicate samples of all samples to be taken by USEPA or its authorized representatives of any samples collected by USACE pursuant to the implementation of this Agreement. USACE shall notify USEPA not less than fourteen (14) days in advance of any scheduled sample collection activity. If it is not possible to provide fourteen (14) business days advance notice, USACE shall provide as much notice as possible that samples will be collected. USEPA will, to the best of its ability, make the quality-assured results of all sampling, test, or other data available to USACE within thirty (30) days of receipt of such results.



C. If preliminary analysis indicates that an imminent or substantial endangerment to human health or the environment may exist, the Project Managers shall be immediately notified.

#### **XIV. PROJECT MANAGERS**

A. The following individuals are designated as the Project Managers for the respective Party:

1. For USACE: Allen D. Roos  
Project Manager  
U.S. Army Corps of Engineers  
26 Federal Plaza  
New York, New York 10278

2. For USEPA: Helen Shannon  
Project Manager  
U.S. Environmental Protection Agency, Region II  
Emergency and Remedial Response Division  
290 Broadway,  
New York, New York 10007-1866

B. Either Party may change its designated Project Manager by notifying the other Party, in writing, within five (5) days of the change. To the maximum extent possible, communications between the Parties concerning the terms and conditions of this Agreement shall be directed through the Project Managers as set forth in Part XXXI (Notice to the Parties) of this Agreement. Each Project Manager shall be responsible for assuring that all communications from the other Project Manager are appropriately disseminated and processed by the entities which the Project Managers represent.

C. Subject to the limitations set forth in Part XV (Access), the USEPA Project Manager shall have the authority to: (1) take samples and/or obtain split samples of any USACE samples collected at the Site relating to this Agreement and ensure that work is performed properly, pursuant to USEPA protocols as well as pursuant to the Attachments and plans incorporated into this Agreement; (2) observe all activities performed pursuant to this Agreement, take photographs and make such other reports on the progress of the work as the Project Manager deems appropriate; (3) review records, files and documents relevant to this Agreement.

D. At the request of the USACE Project Manager, USEPA similarly shall allow the USACE to take split or duplicate samples of samples collected by USEPA.

E. The USEPA Project Manager shall have the authority to recommend and request minor field modifications to the work to be performed pursuant to this Agreement, or in techniques, procedures or design utilized in carrying out this Agreement, which are

necessary to the completion of the work. Any minor field modifications proposed under this Part must be approved orally by the USEPA Project Manager and the USACE Project Manager to be effective. If agreement cannot be reached between USACE and USEPA on any proposed additional work or modification to work, the dispute resolution procedures as set forth in Part XI (Resolution of Disputes) may be used in addition to this Part. The parties recognize that the USEPA Project Manager does not have authority to direct USACE contractors, and that standard contract change order procedures as set forth in the Federal Acquisition Regulations, the Engineering Federal Acquisition Regulation Supplement, the Army Federal Acquisition Regulations and the Defense Federal Acquisition Regulations shall apply.

F. Within ten (10) business days following an agreement for any minor field modification made pursuant to this Part, the Party who requested the modification shall prepare a memorandum detailing the modification and the reasons therefore and shall provide a copy of the memorandum to the other Project Manager.

G. The Project Manager for the USACE, or his/her representative(s), shall be physically present on the Site or reasonably available to supervise all work performed at MSP during implementation of the work performed pursuant to this Agreement. The Project Manager, or his/her representatives, for USACE shall be available to USEPA for the pendency of this Agreement. The USEPA Project Manager need not be present at the Site and his/her absence from the Site shall not be cause for work stoppage.

H. It is expected that the Project Managers will meet or communicate, as agreed to between the Project Managers, approximately every thirty (30) days to discuss issues relating to the performance of work under this Agreement. In addition, Project Managers may also meet informally as necessary.

## **XV. ACCESS**

A. USACE shall provide access to USEPA or its authorized representatives, to all property upon which activities are being conducted or have been conducted pursuant to this Agreement. USEPA, and its authorized representatives, shall be able to enter and move freely about such property at all reasonable times for the purposes related to activities conducted pursuant to this Agreement, including, among other things, the following:

1. inspecting and copying records, files, photographs, operating logs, contracts and other documents relevant to implementation of this Agreement;
2. reviewing the progress of USACE, its response action contractors or lessees in implementing this Agreement;

3. collecting such samples and conducting such tests as USEPA determines are necessary or desirable to monitor compliance with the terms of this Agreement or to protect the public health, welfare, or the environment;
4. reviewing and/or verifying the data submitted to USEPA by USACE;
5. using sound, optical, or other types of recording equipment to record activities that have been or are being conducted pursuant to this Agreement; or
6. observing the performance of any or all sampling, testing, response action, removals, remedial actions, pilot studies or any other actions taken at MSP pursuant to the terms of this Agreement.

B. To the extent that activities pursuant to this Agreement must be carried out on other than DOE/MSP property, USACE shall use its best efforts to obtain access agreements from the owners which shall provide reasonable access for USEPA and its representatives. In the event that USACE is unable to obtain such access agreements, USACE shall promptly notify USEPA. USACE shall honor all requests for access at reasonable times by USEPA conditioned upon presentation of proper credentials and evidence of proper safety training to USACE.

C. USACE shall provide an authorized escort whenever USEPA requires access to restricted areas of the MSP, or parcels for which Rights-of-Entry have been obtained, for purposes consistent with the provisions of this Agreement. USEPA shall provide reasonable notice to the USACE Project Manager of dates and proposed site inspections. USEPA shall not use any camera, sound recording or other electronic recording device at the MSP without the permission of the USACE Project Manager. USACE shall not unreasonably withhold such permission.

D. The rights to access by USEPA, granted in Paragraph A of this Part, shall be consistent with those regulations as may be necessary to protect national security. Upon denying any aspect of access USACE shall provide an explanation within forty-eight (48) hours of the reason for the denial and provide a recommendation for accommodating the requested access in an alternate manner. The Parties agree that this Agreement is subject to CERCLA § 120(j), 42 U.S.C. § 9620(j), regarding the issuance of Site Specific Presidential Orders as may be necessary to protect national security.

E. All Parties with access to the MSP pursuant to this Part shall comply with all applicable health and safety plans.

## **XVI. ENFORCEABILITY**

A. The Parties agree that:

1. Upon the effective date of this Agreement, any standard, regulation, condition, requirement or order which has become effective under CERCLA and is incorporated into this Agreement is enforceable by any person pursuant to section 310 of CERCLA, and any violation of such standard, regulation, condition, requirement or order will be subject to civil penalties under sections 310(c) and 109 of CERCLA;
  2. All timetables or deadlines associated with the RI/FS shall be enforceable by any person pursuant to section 310 of CERCLA, and any violation of such timetables or deadlines will be subject to civil penalties under sections 310(c) and 109 of CERCLA;
  3. All terms and conditions of this Agreement which relate to interim or final remedial actions, including corresponding timetables, deadlines or schedules, and all work associated with the interim or final remedial actions, shall be enforceable by any person pursuant to section 310(c) of CERCLA, and any violation of such terms or conditions will be subject to civil penalties under sections 310(c) and 109 of CERCLA; and
  4. Any final resolution of a dispute pursuant to Part XI (Resolution of Disputes) of this Agreement which establishes a term, condition, timetable, deadline or schedule shall be enforceable by any person pursuant to section 310(c) of CERCLA, and any violation of such term, condition, timetable, deadline or schedule will be subject to civil penalties under sections 310(c) and 109 of CERCLA.
  5. Nothing in this Agreement shall be construed as a restriction or waiver of any rights USEPA may have under CERCLA, including but not limited to any rights under sections 113 and 310, 42 U.S.C. §§ 9613 and 9659. USACE does not waive any rights it may have under CERCLA section 120, SARA Section 211, 10 U.S.C. 2701 et seq., and Executive Order 12580.
  6. The Parties agree to exhaust their rights under Part XI (Resolution of Disputes) prior to exercising any rights to judicial review that they may have.
- B. Nothing in this Agreement shall be construed as authorizing any person to seek judicial review of any action or work where review is barred by any provision of CERCLA, including section 113(h) of CERCLA.
- C. The Parties agree that both Parties shall have the right to enforce the terms of this Agreement.

## **XVII. STIPULATED PENALTIES**

A. In the event that USACE fails to submit a primary document, as described in Part VIII (Consultation with USEPA), to USEPA pursuant to the appropriate timetable or deadline in accordance with the requirements of this Agreement, or fails to comply with a term or condition of this Agreement which relates to an interim or final remedial action, USEPA may assess a stipulated penalty against USACE. A stipulated penalty may be assessed in an amount not to exceed \$5,000 for the first week (or part thereof), and \$10,000 for each additional week (or part thereof) for which a failure set forth in this paragraph occurs.

B. Upon determining that USACE has failed in a manner set forth in Paragraph A above, USEPA shall so notify USACE in writing. If the failure in question is not already subject to dispute resolution at the time such notice is received, USACE shall have fifteen (15) days after receipt of the notice to invoke dispute resolution on the question of whether the failure did in fact occur. USACE shall not be liable for the stipulated penalty assessed by USEPA if the failure is determined, through the dispute resolution process, not to have occurred. No assessment of a stipulated penalty shall be final until the conclusion of dispute resolution procedures related to the assessment of the stipulated penalty.

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

1. The facility responsible for the failure;
2. A statement of the facts and circumstances giving rise to the failure;
3. A statement of any administrative or other corrective action taken at the relevant facility, or a statement of why such measures were determined to be inappropriate;
4. A statement of any additional action taken by or at the facility to prevent recurrence of the same type of failure; and
5. The total dollar amount of the stipulated penalty assessed for the particular failure.

D. Stipulated penalties assessed pursuant to this Part shall be payable to the Hazardous Substances Response Trust Fund only in the manner and to the extent expressly provided for in Acts authorizing funds for, and appropriations to, USACE for the FUSRAP for this purpose.

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

F. This Part shall not affect the USACE's ability to obtain an extension of a timetable, deadline or schedule pursuant to Part XIX (Extensions) of this Agreement.

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

### **XVIII. PERMITS**

The Parties recognize that under sections 121(e)(1) of CERCLA, 42 U.S.C. § 9621(e)(1), and the NCP, portions of the response actions called for by this Agreement and conducted entirely on-site are exempt from the procedural requirement to obtain Federal, State, or local permits. "On-site" is defined in the NCP as "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." (40 C.F.R. Part 300.5.) All such activities must, however, satisfy all substantive requirements of the applicable or relevant and appropriate federal and state standards, requirements, criteria, or limitations which would have been included in any such permit.

### **XIX. EXTENSIONS**

A. Either a timetable and deadline or a schedule shall be extended upon receipt of a timely request for extension and when good cause exists for the requested extension. Any request for extension by the USACE 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 which would be affected if the extension were granted.

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

1. An event of Force Majeure, as defined in Part XXIV (Force Majeure);
2. A delay caused by another party's failure to meet any requirement of this agreement;
3. A delay caused by the good faith invocation of dispute resolution or the initiation of judicial action;

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

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

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

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

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

F. Within seven days of receipt of a statement of non-concurrence with the requested extension, the USACE may invoke dispute resolution.

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

## **XX. RESERVATION OF RIGHTS**

A. Notwithstanding anything in this Agreement, USEPA may initiate any administrative, legal or equitable remedies available to it in the event that: (1) conditions previously unknown or undetected by USEPA arise or are discovered at the Site; or (2) USEPA receives additional information not previously available concerning the premises which they employed in reaching this Agreement; or (3) the implementation of the requirements of this Agreement are no longer protective of public health and the environment; or (4) USACE fails to meet any of its obligations under this Agreement or

(5) USACE fails or refuses to comply with any applicable requirement of CERCLA or RCRA or State laws or related regulations; or (6) USACE, its officers, employees, contractors, or agents falsify information, reports, or data, or make a false representation or statement in a record, report, or document relating to the release of hazardous materials at the Site, and this information affects the determination of whether an RA is protective of human health and the environment. For purposes of this paragraph, conditions at the Site and information known to USEPA shall include only those conditions and information known as of the date of the relevant response action decision document.

B. USACE reserves the right to raise or assert any defense, whether procedural or substantive, in law or equity, or to raise any issue to jurisdiction or standing of any Party, or any other matter in any proceeding related to this Agreement, which USACE might otherwise be entitled to raise or assert where those rights are not inconsistent with the provisions of this Agreement, CERCLA, or the NCP.

C. USEPA reserves such rights as it may have to undertake response actions to address the release or threat of release of hazardous substances at or from the Site at any time and, to the extent permitted by law, to seek reimbursement from USACE thereafter for costs incurred.

D. USEPA shall not be held as a party to any contract entered into by USACE to implement the requirements of this Agreement.

## **XXI. OTHER CLAIMS**

A. Subject to Part VII (Statutory Compliance/RCRA-CERCLA Integration), nothing in this Agreement shall restrict USEPA from taking any action under CERCLA, RCRA, state law or other environmental statutes for any matter not specifically part of the work performed pursuant to this Agreement.

B. Nothing in this Agreement shall constitute or be construed as a release from any claim, cause of action or demand in law or equity 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 the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the MSP.

## **XXII. PUBLIC PARTICIPATION**

A. In accordance with section 117 of CERCLA, 42 U.S.C. 9617, before adoption of any plan for remedial action pursuant to this Agreement, USACE shall:

1. Publish in a local newspaper, or newspapers of general circulation, a notice and brief analysis of the Proposed Plan, including an explanation of the Proposed Plan and alternatives considered;



2. Make such Plan available to the public; and
3. Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility regarding the Proposed Plan and any proposed findings under section 121(d)(4) of CERCLA, 42 U.S.C. 9621(d)(4).

B. Before commencement of any remedial action, USACE shall publish a notice of the Record of Decision adopted and shall make available to the public, the Plan, a discussion of any significant changes and the reasons for the changes in the Proposed Plan, a response to each significant comment, criticism, and new data submitted during the public comment on the proposed plan.

C. USACE shall develop and implement a Community Relations Plan (CRP) which responds to the need for an interactive relationship with all interested community elements, regarding activities and elements of work undertaken by USACE. The CRP shall recognize the need for public information meetings to be held during RI/FS and RD/RA activities. USEPA may request that USACE hold a public information meeting at any time during the RI/FS and RD/RA activities. USACE agrees to develop and implement a CRP in a manner consistent with section 117 of CERCLA, the NCP, EPA guidelines set forth in USEPA's Community Relations Handbook, and any modifications thereto.

D. As part of its Community Relations activities, USACE shall maintain a mailing list of interested and affected individuals. USEPA will submit the name of requester for site information to USACE. USACE shall add the name of the requestor to the mailing list. USACE shall provide USEPA with annual updates of the mailing list.

E. Except for USEPA press releases regarding enforcement actions, any Party issuing a formal press release to the media regarding any of the work required by this Agreement shall advise the other Party of such press release and the content thereof at least two business days before the issuance of such press release and of any subsequent changes prior to release.

F. Within thirty days of the Effective Date of this Agreement, USACE shall establish and maintain an Administrative Record, which will include an index of all documents contained therein. The Administrative Record shall be established and maintained at the New York offices of the USACE, in accordance with the National Contingency Plan Section 300.805(a), 40 C.F.R. 300.805(a). The Administrative Record shall also be maintained at or near the Site in accordance with the National Contingency Plan Section 300.805(a), 40 C.F.R. 300.805(a). The Administrative Record developed by USACE shall be routinely updated and copies of documents included within the Administrative Record shall be provided to USEPA on at least a quarterly basis beginning with the first quarter following the effective date of this Agreement. USACE shall maintain a current index of

the documents in the Administrative Record and shall provide the USEPA copies of the current index on at least a quarterly basis beginning with the first quarter following the effective date of this Agreement. USEPA shall make the final determination on whether a document is appropriate for inclusion in the Administrative Record.

G. The Parties agree to comply with all relevant EPA Policy and Guidance on community relations programs and the public participation requirements of CERCLA, the NCP, and other applicable laws and regulations.

### **XXIII. PUBLIC COMMENT**

A. This Agreement shall be subject to public comment as follows: Within 15 days after the date the Regional Administrator of USEPA, Region II, executes this Agreement, USEPA shall announce the availability of this Agreement to the public for their review and comment. USEPA shall accept comments from the public for 45 days after such announcement. After the 45-day public comment period expires, the Parties shall review all such comments. Within 30 days after the expiration of the public comment period the Parties shall decide that either:

1. the Agreement shall be made effective without any modifications; or
2. the Agreement shall be modified prior to being made effective.

B. If the Parties decide that the Agreement shall be made effective without any modifications, USEPA shall transmit a copy of the signed Agreement to USACE and USDOE and USEPA shall notify the USACE and USDOE in writing that the Agreement is effective. The effective date of the Agreement shall be the date of that letter from USEPA to USACE and USDOE.

C. If the Parties agree that modifications are needed and agree upon the modifications and amend the Agreement by mutual consent within 60 days after the expiration of the public comment period, USEPA will determine whether the modified Agreement requires additional public notice and comment pursuant to any provision of CERCLA. If USEPA determines that no additional notice and comment are required, USEPA shall transmit a copy of the modified Agreement to USACE and USDOE and shall notify the USACE and USDOE in writing that the modified Agreement is effective. The effective date of the Agreement shall be the date of that letter from USEPA to the USACE and USDOE. If the Parties amend the Agreement within this 60-day period and if USEPA concludes that such modifications require that the public receive additional opportunity for notice and comment, such additional notice and comment will be provided consistent with the provisions stated in Paragraph A above

## **XXIV. FORCE MAJEURE**

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

## **XXV. WORK TO BE PERFORMED**

### General

1. It is hereby agreed by the Parties that USACE shall conduct each of the following activities in accordance with the schedules set forth in the Site Management Plan pursuant to Part XXXV (Deadlines and Contents of Site Management Plan) of this Agreement.
2. The Parties recognize that background information exists and must be reviewed prior to developing the Work Plans required by this Agreement. It is the intent of the Parties to this Agreement that Work done and data generated prior to the Effective Date of this Agreement be retained and utilized as elements of any RI/FS to the extent feasible.
  - A. Remedial Investigation and Feasibility Study
    1. RIs shall be conducted in accordance with the requirements and Schedules set forth in the approved RI/FS Work Plan(s) and Site Management Plan. RIs shall meet the purposes set forth in Section II – PURPOSE, of this Agreement. A Baseline Risk Assessment shall be a component of the RIs. Final Site clean-up level criteria will only be determined following completion of the Baseline Risk Assessment.
    2. The RI shall be coordinated with the FS such that both activities are completed in a timely and cost effective manner.

B. Remedial Action Selection

1. Upon approval of any FS Report by USEPA, USACE shall, after consultation with USEPA pursuant to Part VIII (Consultation with EPA) publish the proposed plan for public review and comment in accordance with the public participation requirements of Part XXII (Public Participation) of this Agreement.
2. USACE shall submit its draft ROD to EPA within 90 days following the close of the public comment period, including any extensions, on the Proposed Plan. The draft ROD will include a Responsiveness Summary, in accordance with applicable EPA Guidance. Pursuant to CERCLA section 120(e)(4)(A), 42 U.S.C. section 9620(e)(4)(A), EPA and USACE shall make the final selection of the remedial action(s).
3. USACE shall commence substantial continuous physical onsite remedial action at the Site within 15 months of receipt of written notice of final approval of any ROD by USEPA.
4. USACE shall implement the remedial action in accordance with the provisions, time schedule, standards and specifications set forth in the approved Remedial Action Work Plan.
5. Prior to commencement of any remedial action, USACE shall provide for public participation in accordance with Part XXII (Public Participation) of this Agreement.

C. Remedial Design and Remedial Action

1. The SMP shall include a Target Date for submission of any preliminary RDs and a Deadline for the Draft RD, which documents shall be prepared in accordance with this Agreement and applicable Guidance issued by USEPA, including the EPA-Navy *Principles and Procedures for Specifying, Monitoring and Enforcement of Land Use Controls and Other Post-ROD Actions* (October 2003) and as may be amended by agreement of the USEPA and the Navy and as accepted by the Army.
2. The RD shall provide the appropriate plans and specifications describing the intended remedial construction and shall include provisions necessary to ensure that the RA will achieve ARARs and performance standards identified in the ROD. The RD shall describe short and long-term implementation actions, and responsibilities for the actions, to ensure long-term viability of the remedy, which may include both Land Use Controls

and an engineered portion (e.g., landfill caps, treatment systems) of the remedy. The term “implementation actions” includes all actions to implement, operate, maintain, and enforce the remedy.

3. The Remedial Action (RA) Work Plan(s) shall at a minimum contain a Schedule for the completion of the Remedial Action, a Health and Safety Plan, a Sampling and Analysis Plan, and a Quality Assurance Project Plan, Remedial Action Specifications, Erosion Control and Sedimentation Plan, Decontamination Plan, Remedial Action Contingency Plan, and provisions for operation and maintenance, if necessary. The Schedule contained in the final RA Work Plan(s) will be immediately incorporated in the Site Management Plan.
  4. Any RA shall be completed in accordance with the approved final RD and RA Work Plan.
  5. Following the completion of the RA for each OU, USACE shall submit to the USEPA the Remedial Action Completion Report (RACR), in accordance with the Schedule in the SMP. The RACR shall document the cleanup activities that took place at the OU, and that performance standards specified in the ROD have been met. The RACR shall outline in detail, and provide an explanation for, any activities that were not conducted in accordance with the final RD or RA Work Plan(s). In the event that any remedial action is a Long-Term Response Action (LTRA), a RACR shall be prepared when the physical construction of the system is complete and the unit is operating as designed. Such RACR shall be amended and finalized when the LTRA performance standards specified in the ROD are achieved.
  6. USEPA and USACE have committed to streamlining procedures and documentation for post-ROD activities.
- A. Construction Completion/Remedial Action/USEPA Certification
1. Construction Completion USACE agrees that it shall submit to USEPA information required to document completion of physical construction of the remedial action for all OUs within 30 days of completing physical construction at the Site as part of the final amended Remedial Action Completion Report. This information must satisfy the NCP and provide a schedule for any remaining activities necessary to reach Site completion. The information will also address any Periodic Review requirements.
  2. Remedial Action

(a) When USACE determines that remedial actions have been completed, it shall document this event by amending the final RACR and submitting to USEPA for review. The information provided therein shall document compliance with statutory requirements and provide a consolidated record of all remedial activities for all OUs at the Site. For a Site to be eligible for completion, the following criteria must be met:

(i) Performance standards specific in all RODs have been met, and all cleanup actions and other measures identified in the RODS have been successfully implemented.

(ii) The constructed remedies are operational and performing according to engineering specifications.

(iii) All OUs are protective of human health and the environment.

(iv) The only remaining activities, if any, at the Site are operation and maintenance activities (which may include long-term monitoring).

(b) Information provided shall summarize work at the entire Site (*i.e.*, all OUs). The Remedial Action Completion Report for each OU, including the final OU, is required to document that Work was performed according to design specification. Information amended to the final Remedial Action Completion Report to indicate remedial action completion shall include a discussion regarding any operation and maintenance requirements and/or land use restrictions.

### 3. USEPA Certification

(a) Information provided for remedial action completion shall be signed by USACE's signatory authority or designee certifying that remedial activities have been completed in full satisfaction of the requirements of this Agreement and shall include a request for USEPA certification of remedial action completion at the Site. Within 90 days of the receipt of a request for USEPA certification, USEPA shall advise USACE in writing that:

(i) USEPA certifies that the remedial action has been completed in accordance with this Agreement; or

(ii) USEPA denies USACE's request for certification, stating in full the basis for its denial.

(b) If USEPA denies USACE's request for certification that the remedial action has been completed in accordance with this Agreement, USACE may invoke dispute resolution pursuant to Part XI (Resolution of Disputes) of this Agreement within 28 days of receipt of the written denial of certification of determination that additional work is necessary.

(c) If the denial of certification is upheld through the dispute resolution process, USEPA shall describe the additional work needed to bring the remedial action into compliance with the requirements of this Agreement and USACE will perform the additional work. After performing such additional work, USACE shall resubmit a request for certification to USEPA. USEPA shall then grant or deny certification pursuant to the process set forth in this paragraph and the previous paragraph.

(d) If the denial of certification is not upheld, then USEPA shall issue the requested certification within 28 days of resolution of the dispute.

(e) If dispute resolution is not invoked, or if a denial of certification is upheld through dispute resolution, USACE shall, in the next draft Amended Site Management Plan submitted after receipt of the written denial of certification or dispute resolution finding, propose a Deadline for the submittal of a draft Supplemental Work Plan. The draft Supplemental Work Plan shall contain a Schedule for completion of the additional Work required. This Schedule, once approved, will be incorporated in the Site Management Plan. After performing the additional Work, USACE may resubmit a request for certification to USEPA as outlined in this Paragraph. USEPA may then grant or deny certification pursuant to the process set forth in this Paragraph.

## **XXVI. PERIODIC REVIEW**

A. Consistent with section 121(c) of CERCLA, 42 U.S.C. § 9621(c), section 300.430(f)(4)(ii) of the NCP, and in accordance with this Agreement, if the selected remedial action results in any hazardous substance, pollutants or contaminants remaining at the Site at levels above that allowing for unlimited use and unrestricted exposure, the Parties shall review the remedial action for each Operable Unit at least every five (5) years after the initiation of the remedial action to assure that human health and the environment are being protected by the remedial action being implemented. As part of this review, USACE (or DOE in accordance with the "Memorandum of Understanding Between the U.S. Department of Energy and The U.S. Army Corps of Engineers Regarding Program Administration and Execution of the Formerly Utilized Sites Remedial Action Program (FUSRAP)," dated 17 March 1999, Attachment 3) shall report the findings of the review to USEPA upon its completion. DOE agrees that it shall be a successor to USACE for long-term surveillance, operation and maintenance for the limited purposes of performing

periodic reviews in accordance with Part XXVI (Periodic Review) and long-term surveillance, operation and maintenance, including monitoring and enforcement of any institutional controls which may be selected as part of the remedy for areas associated with AEC activity. This report, the Periodic Review Assessment Report, shall be submitted to EPA for review and comment. Target Dates shall be established for the completion and transmission of the Periodic Review Assessment Report pursuant to Section XXXV – DEADLINES AND CONTENTS OF SITE MANAGEMENT PLAN.

B. If upon such review it is the conclusion of any of the Parties that additional action or modification of remedial action is appropriate at the Site in accordance with sections 104 or 106 of CERCLA, 42 U.S.C. §§ 9604 or 9606, USACE shall implement such additional or modified action in accordance with Section XXV – WORK TO BE PERFORMED.

C. Any dispute by the Parties regarding the need for or the scope of additional action or modification to a remedial action shall be resolved under Section XI –RESOLUTION OF DISPUTES, enforceable hereunder.

D. Any additional action or modification agreed upon pursuant to this Section shall be made a part of this Agreement.

E. EPA reserves the right to exercise any available authority to seek the performance of additional work that arises from a Periodic Review, pursuant to applicable law.

F. The assessment and selection of any additional response actions determined necessary as a result of a Periodic Review shall be in accordance with Section IX – ASSESSMENT AND SELECTION OF SUPPLEMENTAL RESPONSE ACTIONS Except for emergency response actions, which shall be governed by Section X – EMERGENCY REMOVAL ACTIONS, such response actions shall be implemented as a supplemental response action in accordance with Paragraphs D and E of Section IX – ASSESSMENT AND SELECTION OF SUPPLEMENTAL RESPONSE ACTIONS.

## **XXVII. REPORTING**

A. Quarterly Reports: USACE agrees it shall submit to USEPA quarterly written progress reports throughout the course of the activities required by this Agreement, which shall include, at a minimum, the following:

1. A description of the actions which USACE has taken during the previous quarter to implement the requirements and time schedules of this Agreement;
2. A description of all actions scheduled for completion during the quarter that were not completed along with a statement indicating why such actions were not completed and an anticipated completion date;



3. Identification of any anticipated delays in meeting time schedules, the reasons for the delay and actions taken to prevent or mitigate the delay;
  4. Copies of all quality-assured data and sampling and test results and all other laboratory deliverables in accordance with Part XIII (Sampling and Data/Document Availability) of this Agreement.
  5. A description of the actions which are scheduled for the following quarter.
- B. These quarterly reports shall be due on or before the thirtieth (30<sup>th</sup>) day of the month following the quarter for which the report is submitted.
- C. USEPA reserves the right to make reasonable requests for raw data and all other laboratory deliverables at any time.

### **XXVIII. PROTECTED INFORMATION**

- A. Either Party may assert a confidentiality claim covering all or part of any information submitted to either Party pursuant to this Agreement, provided such claim is allowed by section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in section 104(e)(7)(F) of CERCLA shall not be claimed as confidential. Such a claim may be made by placing on or attaching to the information at the time it is submitted to the other Party, a cover sheet, stamped or typed legend or other suitable form of notice employing language such as “privileged” or “confidential.” Allegedly confidential portions of otherwise non-confidential documents should be clearly identified and may be submitted separately to facilitate identification and handling by the other Party. If confidential treatment is sought only until a certain date or occurrence of a certain event, the notice should so state.
- B. If no such claim accompanies the information when it is received by the receiving Party, the information may be made available to the public without further notice to the submitting Party.
- C. When a request to USEPA seeks records in its possession that were submitted and claimed as confidential by USACE, USEPA will either:
1. Refer the request to USACE, which will take responsibility for responding to the request; or
  2. Notify USACE and provide USACE with an opportunity to object to the release of the requested document. USEPA agrees that USACE’s release determination will be controlling on USEPA’s use, release or sharing of the USACE-provided materials. For each document that USACE determines should not be released pursuant to this subparagraph, USACE shall provide the date,

author(s), addressee(s), subject, the privilege or grounds claimed, and the factual basis for assertion of the privilege. USEPA will maintain the information determined to be confidential by USACE in accordance with 40 C.F.R. Part 2.

- D. USACE shall not withhold any physical, sampling, monitoring, or analytical data.

### **XXIX. PRESERVATION OF RECORDS**

Despite any document retention policy to the contrary, the Parties shall preserve, during the pendency of this Agreement and for a minimum of seven years after its termination, all records and documents in their possession which relate to the actions carried out pursuant to this Agreement. After this seven-year period, each Party shall notify the other at least 30 days prior to destruction of any such documents. Upon request by either Party, the requested Party shall make available such records or copies of any such records, unless withholding is authorized and determined appropriate by law.

### **XXX. AMENDMENT OF AGREEMENT**

A. This Agreement may be amended or modified solely upon written consent of the Parties. Any and all modifications to this Agreement must be in writing which is executed by duly authorized official(s) of USACE, USDOE, and USEPA.

B. USEPA will be the last signatory to execute all modifications to this Agreement.

C. The effective date of all modifications to this Agreement shall be the date on which it is executed by USEPA, unless otherwise explicitly stated in any modification.

D. No written or oral advice, guidance, suggestions or informal comments by USEPA regarding reports, plans, specifications, schedules, any other writing submitted by the USACE or on any other matter relating to this Agreement will be construed as modifying this Agreement or as relieving the USACE any of its obligations under this Agreement, including the need to obtain approvals as may be required by this Agreement.

**XXXI. NOTICE TO THE PARTIES.** Unless otherwise specified, any report or Submittal provided pursuant to a schedule or deadline identified in or developed under this Agreement shall be sent by commercial overnight delivery service; certified mail or next day mail, return receipt requested; or hand delivered; or sent via facsimile transmission with hard copy to follow. All time periods specified in Part VIII (Consultation with USEPA) for review and/or comment of any primary or secondary document by any Party under this Agreement shall commence on the date any such document is received by that Party.

B. Notice to the individual Parties shall be provided under this Agreement to the following addresses:

1. For USACE: Allen D. Roos  
Project Manager  
U.S. Army Corps of Engineers  
26 Federal Plaza  
New York, New York 10278
  
2. For USEPA: Helen Shannon  
Project Manager  
U.S. Environmental Protection Agency, Region II  
Emergency and Remedial Response Division  
290 Broadway  
New York, New York 10007-1866

Unless otherwise requested, all routine correspondences may be hand delivered or sent via regular mail to the above-named persons.

C. It is the responsibility of the Project Managers who are identified above to assure that all documents relating to this Agreement are disseminated to all relevant agents and employees of their respective agencies, as needed to facilitate the actions required by this Agreement.

D. Written notice by USEPA to the Project Manager for USACE will be deemed notification to USACE for any matters relating to this Agreement unless otherwise stated in this Agreement.

E. Written notice by the USACE to the Project Manager for USEPA will be deemed notification to USEPA for any matters relating to this Agreement unless otherwise stated in this Agreement.

## **XXXII. EXEMPTIONS**

A. The obligation of USACE to comply with the provisions of this Agreement may be relieved by:

1. Presidential order of exemption issued pursuant to the provisions of CERCLA section 120 (j)(1), 42 U.S.C. § 9620(j)(1), RCRA Section 6001, 42 U.S.C. § 6961; or
  
2. The order of an appropriate court.

## **XXXIII. TERMINATION AND SATISFACTION**

A. The provisions of this Agreement shall be deemed satisfied upon agreement of the Parties that the USACE has completed its obligations under the terms of this Agreement. Following USEPA certification of the remedial actions at the Site pursuant to Paragraph 3

of Part XXV (Work To Be Performed), any Party may propose in writing the termination of this Agreement upon a showing that the objectives of this Agreement have been satisfied. A Party opposing termination of this Agreement shall serve its objection upon the proposing Party within thirty (30) days of receipt of the proposal. Without prejudice to the USACE's obligation for periodic review under Part XXVI (Periodic Review), no Party shall unreasonably withhold or delay termination of this Agreement.

B. The obligations and objectives of this Agreement, except for the continuing obligations specified below, shall be deemed satisfied and terminated upon receipt by the USACE of written notice from USEPA, that the USACE has demonstrated that all the requirements of this Agreement have been satisfied.

C. Any disputes arising from this Termination and Satisfaction process shall be resolved pursuant to the provisions of Part XI (Resolution of Disputes) of this Agreement.

D. This Part shall not affect the Parties' obligations pursuant to Part XXIX (Preservation of Records) or Part XXVI (Periodic Review) of this Agreement. In no event will this Agreement terminate prior to the USACE's completion of the Work required by this Agreement.

#### **XXXIV. OTHER PROVISIONS**

A. Nothing contained in this Agreement shall constitute an admission of any liability by the USACE for any matters contained herein nor shall anything in this Agreement constitute an admission by USACE with respect to any finding of fact or any legal determination noted herein.

B. Nothing contained in this Agreement shall affect any right, claim, interest, defense or cause of action which USEPA or USACE may have at present or which may arise in the future against any other entity which is not a signatory to this Agreement.

C. Nothing herein shall affect the right of USEPA to issue any Order or initiate any action against any entity which is not a party to this Agreement.

D. All work performed pursuant to this Agreement shall be performed in accordance with all applicable federal and state laws and regulations.

E. All work performed pursuant to this Agreement shall comply with all provisions of CERCLA, the NCP, and any other applicable or relevant and appropriate federal or state law or regulation.

F. USEPA shall not be a party to any contract entered into by USACE or any agents of the USACE for any matters relating to this Agreement.

#### **XXXV. DEADLINES AND CONTENTS OF THE SITE MANAGEMENT PLAN**

A. This Agreement establishes a process for creating the Plan. The MSP Site Management Plan (the Plan) is attached to this Agreement as Attachment 2. USACE shall submit an amendment to the Plan in conformance with this Agreement within 30 days of the effective date of the Agreement. The Plan and each annual Amendment to the Plan shall be Primary Documents. Milestones established in the Plan or established in a final Amendment to the Plan remain unchanged unless otherwise agreed to by the Parties or unless directed to be changed pursuant to the agreed dispute resolution process set out in Part XI (Resolution of Disputes). In addition, if an activity is fully funded in the current FY, Milestones associated with the performance of work and submittal of Primary Documents associated with such activity (even if they extend beyond the current FY) shall be enforceable.

B. The Plan includes proposed actions for CERCLA responses and outlines all response activities and associated documentation to be undertaken at the facility. The Plan (will) incorporate(s) all existing Milestones contained in approved Work Plans, and all Milestones approved in future Work Plans immediately become incorporated into the Plan.

C. Milestones in the Plan reflect the priorities agreed to by the Parties through a priority setting process. Site activities have been prioritized by weighing and balancing a variety of factors including, but not limited to: (i) the risks for the Site; (ii) current, planned, or potential uses of the facility; (iii) ecological impacts; (iv) impacts on human health; (v) intrinsic and future value of affected resources; (vi) cost effectiveness of the proposed activities; (vii) environmental justice considerations; (viii) regulatory requirements; and (ix) actual and anticipated funding levels. While Milestones should not be driven by budget targets, such targets should be considered when setting Milestones. Furthermore, in setting and modifying Milestones, the Parties agree to make good faith efforts to accommodate federal fiscal constraints, which include budget targets established by the USACE.

D. The Plan and its annual Amendments include:

1. A description of actions necessary to mitigate any immediate threat to human health or the environment;
2. A listing of all currently identified Site Screening Areas (SSAs) (if applicable), IRAs, Supplemental Response Actions, Operable Units (including Accelerated Operable Units (AOUs)), Time-Critical and Non-Time Critical Removal Actions covered or identified pursuant to this Agreement, and Remedial Actions covered or identified pursuant to this Agreement;
3. Activities and schedules for response actions covered by the Plan, including at a minimum:

- Identification of any Primary Actions;
- All Deadlines;
- All Near Term Milestones;
- All Out Year Milestones;
- All Target dates;
- Schedule for initiation of RDs, IRAs, non-time critical removal actions, and initiation of other planned response action(s) covered by this Agreement; and
- All Project End Dates.

E. USACE shall submit an Amendment to the Plan on an annual basis as provided in Part XXXVII (Budget Development and Amendment of Plan) of this Agreement. All Amendments to the Plan shall conform to all of the requirements set forth in this Part.

F. The Milestones established in accordance with this Part and Part XXXVII (Budget Development and Amendment of Plan) of this Agreement, remain the same unless otherwise agreed by the Parties, or unless changed in accordance with the dispute resolution procedures set out in Paragraphs D.2 and F.1 of Part XXXVII (Budget Development and Amendment of Plan). The Parties recognize that possible bases for requests for changes or extensions of the Milestones include, but are not limited to:

1. The identification of significant new site conditions at the Site;
2. The reprioritization of activities under this Agreement caused by changing priorities or new site conditions elsewhere in USACE
3. The reprioritization of activities under this Agreement caused by budget adjustments (e.g., rescissions, inflation adjustments, and reduced Congressional appropriations)
4. An event of Force Majeure as described in Part XXIV (Force Majeure);
5. A delay caused by another party's failure to meet any requirement of this Agreement;
6. A delay caused by the good faith invocation of dispute resolution or the initiation of judicial action;
7. 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

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

G. The Deadlines established in the Plan and its Amendments shall be published by USACE.

### **XXXVI. FUNDING**

A. It is the expectation of the Parties to this Agreement that all obligations of USACE arising under this Agreement will be fully funded. USACE agrees to seek sufficient funding through its budgetary process to fulfill its obligations under this Agreement.

B. In accordance with CERCLA section 120(e)(5)(B), 42 U.S.C. § 9620(e)(5)(B), USACE shall submit to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement.

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

D. If appropriated funds are not available to fulfill USACE's obligations under this Agreement, USEPA reserves the right to initiate an action against any other person, or to take any response action, which would be appropriate absent this Agreement.

E. Funds authorized and appropriated annually by Congress under the FUSRAP Appropriation in the Energy and Water Development Appropriations Acts will be the source of funds for activities required by this Agreement. However, should the FUSRAP Appropriation in the Energy and Water Development Appropriations Acts be inadequate in any year to meet the total USACE implementation requirements under this Agreement, USACE will, after consulting with USEPA, and discussing the inadequacy with the members of the public interested in the action in accordance with Part XXXVII (Budget Development and Amendment to the Site Management Plan), prioritize and allocate that year's appropriation.

### **XXXVII. BUDGET DEVELOPMENT AND AMENDMENT OF PLAN**

A. USACE as a federal agency is subject to federal fiscal controls. A planning, programming, and budgeting process (budget process) is used to review total requirements for USACE/FUSRAP projects and make appropriate adjustments to outyear budgets. The Parties recognize that the budget process is a multi-year process. The Parties also agree that all Parties

should be involved in the full cycle of budget development activities as specified in this Agreement. Further, the Parties agree that each Party should consider the factors listed in Paragraph C of Part XXXV (Deadlines and Contents of Site Management Plan), including federal fiscal constraints, as well as each of the other factors, in their priority-setting decisions. Initial efforts to close any gap between cleanup needs and funding availability shall be focused on the identification and implementation of cost savings.

**B. Facility-Specific Budget Building.** In order to promote effective involvement by the Parties in the budget development process, the Parties will meet at the Project Manager level in person or by phone for the purpose of (1) discussing the outyear budget controls; (2) developing a list of requirements/Work to be performed by FUSRAP at the Site for inclusion in USACE's budget process; and, (3) participating in development of USACE's submission to the President's proposed budget, based on budget decisions for the year currently under consideration. In May of each FY, unless the Parties agree to a different time frame, the Parties will meet, at the Project Manager level to discuss the budget controls. This consultation must occur at least 10 days prior to USACE's initial budget submission to USACE's Headquarters. In the event that the Project Managers cannot agree on funding levels required to perform all Work outlined in the Plan, the Parties agree to make reasonable efforts to informally resolve these disagreements, either at the immediate or secondary supervisor level; this would also include discussions, as necessary, with USACE's Headquarters. If agreement cannot be reached informally within a reasonable period of time, USACE shall resolve the disagreement, if possible with the concurrence of all Parties, and notify each Party. If all Parties do not concur in the resolution, USACE will forward to USACE Headquarters its budget request with the views of the Parties not in agreement and also inform USACE Headquarters of the possibility of future enforcement action should the money requested not be sufficient to perform the Work subject to disagreement. In addition, if USACE's budget submission relating to the terms and conditions of this Agreement does not include sufficient funds to complete all Work in the existing Plan, such budget submission shall include supplemental reports that fully disclose the Work required by the existing Plan, but not included in the budget request due to fiscal controls (e.g., a projected budget shortfall). These supplemental reports shall accompany the cleanup budget that USACE submits through its higher Headquarters levels until the budget shortfall has been satisfied. If the budget shortfall is not satisfied, the supplemental reports shall be included in USACE's budget submission to the USACE Comptroller. The Assistant Secretary of the Army (Civil Works) shall receive information copies of any supplemental reports submitted to the USACE Comptroller.

**C. USACE Budget for CleanUp Activities.** USACE shall forward to the other Parties documentation of the budget requests (and any supplemental reports) for the Site, as submitted by USACE to USACE Headquarters, within 14 days after the submittal of such documentation to USACE Headquarters. If USACE proposes a budget request relating to the terms and conditions of this Agreement that impacts other installations,



discussions with other affected EPA Regions and states regarding the proposed budget request need to take place.

**D. Amended Plan**

1. No later than June 15 of each year after the initial adoption of the Plan, USACE shall submit to USEPA a draft Amendment to the Plan. Prior to proposing changes to Milestones in its annual Amendment to the Plan, USACE will first offer to meet with USEPA to discuss the proposed changes. The Parties will attempt to agree on Milestones before USACE submits its annual Amendment by June 15, but failure to agree on such proposed changes does not modify the June 15 date, unless agreed by both the Parties. Any proposed extensions or other changes to Milestones must be explained in a cover letter to the Draft Amendment to the Plan. The Draft Amendment to the Plan should reflect any agreements made by the Parties during the budget development process outlined in this Part. Resolution of any disagreement over adjustment of Milestones pursuant to this Part shall be resolved pursuant to Paragraph D.2 of Part XXXVII (Budget Development and Amendment of Plan).

2. The Parties shall meet in person or by telephone as necessary to discuss the draft Amendment to the Plan. The Parties shall use the consultation process contained in Part VIII (Consultation with USEPA), except that none of the Parties will have the right to use the extension provisions provided therein. Accordingly, comments on the draft Amendment will be due to USACE no later than thirty (30) days after receipt by USEPA of the draft Amendment. If USEPA provides comments and is not satisfied with the draft Amendment during this comment period, the Parties shall meet to discuss the comments within fifteen (15) days of the USACE's receipt of comments on the Draft Amendment. The Draft Final Amendment to the Plan will be due from USACE no later than 30 days after the end of the USEPA comment period. During this second thirty-day time period, USACE will, as appropriate, make revisions and re-issue a revised draft, herein referred to as the Draft Final Amendment. To the extent that Part VIII (Consultation with USEPA), contains time periods differing from these thirty-day periods, this Part will control for consultation on the Amendment to the Plan.

a. If USACE proposes, in the Draft Final Amendment to the Plan, modifications of Milestones to which USEPA has not agreed, those proposed modifications shall be treated as a request by USACE for an extension. Milestones may be extended during the Plan review process by following Paragraphs D and F of Part XXXVII (Budget Development and Amendment of the Plan). All other extensions will be governed by Part XIX (Extensions). The time period for USEPA to respond to the request for extension will begin on the date USEPA receives the Draft Final Amendment to the Plan, and USEPA shall advise USACE in writing of its position on the request within thirty (30) days. If USEPA approves of

USACE's draft final Amendment, the document shall then await finalization in accordance with Paragraphs D and F of Part XXXVII (Budget Development and Amendment of the Plan). If USEPA denies the request for extension, then USACE may amend the Plan in conformance with USEPA comments or seek and obtain a determination through the dispute resolution process established in Part XI (Resolution of Disputes), within 21 days of receipt of notice of denial. Within 21 days of the conclusion of the dispute resolution process, the USACE shall revise and reissue, as necessary, the Draft Final Amendment to the Plan. If USEPA initiates a formal request for a modification to the Plan to which the USACE does not agree, USEPA may initiate dispute resolution as provided in Part XI (Resolution of Disputes) with respect to such proposed modification. In resolving a dispute, the persons or person resolving the dispute shall give full consideration to the bases for changes or extensions of the Milestones referred to in Paragraph F of Part XXXV (Deadlines and Contents of Site Management Plan) asserted to be present, and the facts and arguments of each of the Parties.

b. Notwithstanding Paragraph D.2.a of Part XXXVII (Budget Development and Amendment of the Plan ), if USACE proposes, in the Draft Final Amendment to the Plan, modifications of Project End Dates which are intended to reflect the time needed for implementing the remedy selected in a Record of Decision but to which USEPA has not agreed, those proposed modifications shall not be treated as a request by USACE for an extension, but consistent with Part XI (Resolution of Disputes), USEPA may initiate dispute resolution with respect to such Project End Date.

c. In any dispute under this Part, the time periods for the standard dispute resolution process contained in Part XI (Resolution of Disputes), shall be reduced by half in regard to such dispute, unless the Parties agree to dispute directly to the Senior Executive Committee (SEC) level.

d. USACE shall finalize the Draft Final Amendment as a Final Amendment to the Plan consistent with the mutual consent of the Parties, or in the absence of mutual consent, in accordance with the final decision of the dispute resolution process. The Draft Final Amendment to the Plan shall not become final until 21 days after the USACE receives official notification of Congress's authorization and appropriation of funds if funding is sufficient to complete work in the draft Final Plan or, in the event of a funding shortfall, following the procedures in the following sub-Part, "Resolving Appropriations Shortfalls." However, upon approval of the draft final Amendment or conclusion of the dispute resolution process, the Parties shall implement the Plan while awaiting official notification of Congress's authorization and appropriation.

E. Although the State is not a Party to this Agreement, it shall nevertheless be entitled to participate in the consultation process for the Amendment to the Plan as if it were a Party; however, this shall not include a right to dispute resolution.

**F. Resolving Appropriations Shortfalls**

1. After authorization and appropriation of funds by Congress and within 21 days after USACE has received official notification of USACE's/FUSRAP allocation based on the current year's budget, USACE shall determine if planned work (as outlined in the Draft Final Amendment to the Plan) can be accomplished with the allocated funds.

(a) If the allocated funds are sufficient to complete all planned work for that fiscal year and there are no changes required to the Draft Final Amendment to the Plan, USACE shall forward a letter to the other Parties indicating that the Draft Final Amendment to the Plan has become the Final Amendment to the Plan.

(b) If USACE determines within the 21-day period specified above that the allocated funds are not sufficient to accomplish the planned work for the Site (an appropriations short-fall), USACE shall immediately notify USEPA in writing. The Project Managers shall meet within 30 days to determine if planned work (as outlined in the Draft Final Amendment to the Plan) can be accomplished through:

- i) re-scoping or rescheduling activities in a manner that does not cause previously agreed upon Near Term Milestones and Out Year Milestones to be missed; or
- ii) developing and implementing new cost-saving measures.

If, during this thirty-day discussion period, the Parties determine that rescoping or implementing cost-saving measures are not sufficient to offset the appropriations short-fall such that Near Term Milestones, Out Year Milestones, and Project End Dates should be modified, the Parties shall discuss these changes and develop modified Milestones. Such modifications shall be based on the prioritization process discussed in Paragraph C of Part XXXV (Deadlines and Contents of Site Management Plan) and shall be specifically identified by the USACE. USACE shall submit a new Draft Final Amendment to the Plan to the other Parties within 30 days of the end of the 30-day discussion period. In preparing the revised Draft Final Amendment to the Plan, USACE shall give full consideration to USEPA input during the 30-day discussion period. If the USEPA concurs with the modifications made to the Draft Final Amendment to the Plan, USEPA shall notify USACE and the revised Draft Final Amendment shall become the final

Amendment. In the case of modifications of Milestones due to appropriations shortfalls, those proposed modifications shall, for purposes of dispute resolution, be treated as a request by USACE for an extension, which request is treated as having been made on the date that USEPA receives the new Draft Final Plan or Draft Final Amendment to the Plan. USEPA shall advise the USACE in writing of their respective positions on the request within twenty-one (21) days. USACE may seek and obtain a determination through the dispute resolution process established in Part XI (Resolution of Disputes). USACE may invoke dispute resolution within fourteen (14) days of receipt of a statement of non-concurrence with the requested extension. In any dispute concerning modifications under this Part, the Parties will submit the dispute directly to the SEC level, unless the Parties agree to utilize the standard dispute resolution process, in which case the time periods for the dispute resolution process contained in Part XI (Resolution of Disputes), shall be reduced by half in regard to such dispute. Within twenty-one (21) days after the conclusion of the dispute resolution process, USACE shall revise and reissue, as necessary, the final Amendment to the Plan.

2. It is understood by all Parties that USACE will work with representatives of USEPA to reach consensus on the reprioritization of work made necessary by any annual appropriations shortfalls or other circumstances as described in this Part.

**G. Public Participation:** In addition to any other provision for public participation contained in this Agreement and as required by CERCLA, the development of the Plan, including its annual Amendments, shall include opportunity for participation by members of the public interested in this action. USACE must ensure that the opportunity for such public participation is timely; but this Paragraph K shall not be subject to Part XVII (Stipulated Penalties).

1. The Parties will meet, after seeking the views of the general public in the vicinity of the site, and determine the most effective means to provide for participation by members of the public interested in this action and the development of the Plan and its annual Amendments. The “members of the public interested in this action” may be represented by inclusion of a restoration advisory board or technical review committee, if they exist for the MSP, or by other appropriate means.

2. USACE shall provide timely notification under Paragraph F of Part XXXVII (Budget Development and Amendment of Site Management Plan) to the members of the public interested in this action.

3. USACE shall provide opportunity for discussion under Paragraphs B, D.2, and F of Part XXXVII (Budget Development and Amendment of Site Management Plan) to the members of the public interested in this action.

4. USACE shall ensure that public participation provided for in this Part complies with Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.

#### **XXXVIII. EFFECTIVE DATE**

This Agreement is effective upon issuance of a notice to USACE and USDOE by USEPA in accordance with Part XXIII (Public Comment).

## AUTHORIZED SIGNATURES

Each undersigned representative of a Party certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party to this Agreement. This Agreement shall apply to and be binding on USEPA, USACE, and only for purposes identified in Part I(E) (Jurisdiction) of this Agreement, DOE.

IT IS SO AGREED:

By: \_\_\_\_\_  
Peter A. DeLuca  
Colonel, U.S. Army  
Division Engineer

\_\_\_\_\_ Date

By: \_\_\_\_\_  
David W. Geiser, Acting Director  
Office of Legacy Management  
U.S. Department of Energy

\_\_\_\_\_ Date

By: \_\_\_\_\_  
George Pavlou  
Acting Regional Administrator  
U.S. Environmental Protection Agency,  
Region II


\_\_\_\_\_ Date

[ SEE ATTACHED SIGNATURE PAGES ]

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Peter A. DeLuca  
Colonel, Corps of Engineers  
Division Engineer

24 SEP 09  
Date

By: \_\_\_\_\_  
Michael W. Owen, Director  
Office of Legacy Management  
U.S. Department of Energy

\_\_\_\_\_  
Date

By: \_\_\_\_\_  
George Pavlou  
Acting Regional Administrator  
U.S. Environmental Protection Agency,  
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Division Engineer

By:  \_\_\_\_\_ Date 8/3/09  
David W. Geiser, Acting Director  
Office of Legacy Management  
U.S. Department of Energy

By: \_\_\_\_\_ Date \_\_\_\_\_  
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U.S. Department of Energy

By:  \_\_\_\_\_ Date 9/30/09  
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Region II