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6 THE STATE OF NEVADA
7 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,
8 DIVISION OF ENVIRONMENTAL PROTECTION
9

10 AND

11 THE UNITED STATES DEPARTMENT OF ENERGY
12

13 AND
14

15 THE UNITED STATES DEPARTMENT OF DEFENSE
16

17 IN THE MATTER OF:
18

19 FEDERAL FACILITY AGREEMENT
20

21 AND
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23 CONSENT ORDER
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39 MARCH 15, 1996
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FEDERAL FACILITY AGREEMENT AND CONSENT ORDER

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1 INTRODUCTION
2

3 This Federal Facility Agreement and Consent Order (Agreement) is
4 made and entered into by and among the State of Nevada, acting by
5 and through the Department of Conservation and Natural Resources,
6 Division of Environmental Protection (NDEP), the United States
7 Department of Energy (DOE), and the United States Department of
8 Defense (DoD). The NDEP enters into this Agreement pursuant to its
9 statutory authority to protect the public health and the
10 environment.
11

12 The facilities for which DOE has assumed responsibility and which
13 are subject to this Agreement include the Nevada Test Site (NTS),
14 parts of the Tonopah Test Range, parts of the Nellis Air Force
15 Range, the Central Nevada Test Area, and the Project Shoal Area
16 (hereinafter collectively referred to as the facilities). DoD's
17 responsibilities are limited to those areas at the NTS where DoD
18 has conducted activities. The legal description of each facility
19 is provided in Appendix I, Description of Facilities.
20

21 The NTS as defined herein does not include those portions of Area
22 25 (see Appendix I, Description of Facilities, for area location)
23 being used to conduct activities under the Nuclear Waste Policy
24 Act. The parties agree to negotiate in good faith to address any
25 needed environmental restoration for contamination that predates
26 the enactment of the Nuclear Waste Policy Act within the areas
27 excluded from the definition of the NTS as identified in Appendix
28 I, Description of Facilities. This Agreement is not intended to
29 impact or limit the ongoing site characterization of the Yucca
30 Mountain site, which is proposed for spent nuclear fuel and high-
31 level radioactive waste disposal. The parties agree that any
32 activities undertaken by DOE or successor agencies to characterize
33 Yucca Mountain, or to construct, operate, or close a spent nuclear
34 fuel and high-level radioactive waste repository at Yucca Mountain
35 are specifically excluded from this Agreement.
36
37

38 PART I. PARTIES
39

40 I.1. The parties to this Agreement are persons as defined in
41 paragraph IV.34 and include the NDEP, DOE, and DoD. NDEP, DOE, and
42 DoD are referred to collectively herein as the parties (parties) to
43 this Agreement.
44

45 I.2. DOE and DoD shall provide notice of this Agreement
46 (including all appendices and any amendments) to every successor in
47 interest and to any successor agency prior to any transfer of
48 ownership or operation of the real property subject to this

1 Agreement. The provisions of this Agreement shall be binding on all
2 successors in interest and on any successor agency.

3
4 I.3. DOE and DoD shall be responsible for ensuring that their
5 respective contractors conduct their activities in conformance with
6 the requirements of this Agreement. Contractors of each party are
7 not considered parties to this Agreement.

8
9 I.3.a. DOE and DoD shall provide copies of this Agreement
10 to all their respective prime contractors presently
11 retained to perform work related to any part of this
12 Agreement within thirty (30) calendar days of execution of
13 this Agreement.

14
15 I.3.b. DOE and DoD shall provide copies of this Agreement
16 to all additional prime contractors retained to perform
17 work related to any part of this Agreement within ten (10)
18 calendar days following their retention.

19
20 I.3.c. Copies of this Agreement shall be made available
21 to all other contractors and subcontractors retained to
22 perform work under this Agreement.

23
24
25 **PART II. STATEMENT OF PURPOSE**

26
27 II.1. The purposes of this Agreement include, but are not
28 limited to:

29
30 II.1.a. Identifying sites of potential historic
31 contamination and implementing proposed corrective actions
32 based on public health and environmental considerations as
33 follows to:

34
35 II.1.a.i. Ensure that the impacts and potential
36 impacts at the facilities, as defined in paragraph
37 IV.26, associated with the releases or threatened
38 releases of hazardous substances, pollutants, solid
39 wastes, and/or hazardous wastes into the environment
40 and discharges and/or potential discharges of
41 pollutants into the waters of the state are thoroughly
42 investigated by DOE and/or DoD under the regulatory
43 authority and oversight of NDEP.

44
45 II.1.a.ii. Ensure that hazardous substances,
46 pollutants, solid wastes, and/or hazardous wastes
47 which have been, are, or may be discharged into waters
48 of the state or released into the environment at, on,

1 or from the facilities are subject to corrective
2 actions and closure requirements, under the oversight
3 of NDEP.
4

5 II.1.a.iii. Ensure that all elements of the
6 investigations and corrective actions provided for in
7 this Agreement consider public input.
8

9 II.1.b. Establishing specific sampling and monitoring
10 requirements, including drilling and subsurface sampling,
11 designed to:
12

13 II.1.b.i. Ensure the health and safety, at all
14 times, of NDEP personnel, site workers at the
15 facilities, and any members of the public present at
16 the facilities, including during corrective action
17 activities;
18

19 II.1.b.ii. Determine whether releases of
20 pollutants and/or hazardous wastes or potential
21 releases of pollutants and/or hazardous wastes are
22 migrating or potentially could migrate, and if so,
23 identify the constituents, their concentration(s), and
24 the nature and extent of that migration;
25

26 II.1.b.iii. Facilitate the undertaking of
27 appropriate corrective actions;
28

29 II.1.b.iv. Demonstrate that corrective actions
30 have achieved the degree of closure defined as
31 acceptable in the approved corrective action plan.
32

33 II.1.c. Providing all parties with sufficient information
34 to enable adequate evaluation of appropriate remedies by
35 specifying the radioactive and hazardous constituents for
36 each corrective action unit.
37

38 II.1.d. Ensuring that the parties work together in a
39 cooperative manner which enables cost effective corrective
40 action investigations and corrective actions and minimizes
41 the likelihood of litigation among the parties.
42

43 II.1.e. Substantially reducing the costs of cleanup
44 activities at the facilities through coordinated project
45 management, involvement of NDEP in DOE's and DoD's
46 planning and budgeting processes as set forth in Part XV,
47 Obligations of DOE and DoD, NDEP's oversight of cleanup,
48 efficient use of consultative approaches, and elimination

1 or streamlining of duplicative or unnecessary procedures.
2

3 II.1.f. Satisfying the corrective action requirements of
4 40 CFR 264.101 and Sections 3004(u) and 3004(v) of the
5 Resource Conservation and Recovery Act (RCRA) (42 U.S.C.
6 §6924 (u) & (v)) and through incorporation by reference
7 into DOE's RCRA permit number NEV HW009.
8

9 II.2. This Agreement is not intended to fulfill the Federal
10 Facility Compliance Act requirement for a compliance order
11 addressing the Land Disposal Restriction prohibition for mixed
12 wastes. Land disposal restricted mixed wastes generated as a
13 result of actions taken under this Agreement will be managed in
14 accordance with the Mutual Consent Agreement Between the State of
15 Nevada and the Department of Energy for the Storage of Low-Level
16 Land Disposal Restricted Mixed Waste signed on June 6, 1995, or
17 subsequent permitted treatment, storage, or disposal unit
18 operational requirements, including all applicable requirements of
19 the RCRA, 42 U.S.C. §6901 et seq. The Mutual Consent Agreement
20 covers storage of environmental restoration generated mixed waste,
21 and schedules for treatment of environmental restoration-generated
22 land disposal restricted mixed waste will be established and
23 enforced in accordance with the Mutual Consent Agreement and not as
24 part of this Agreement.
25

26
27 **PART III. LEGAL AUTHORITY**
28

29 III.1. DOE enters into this Agreement pursuant to Section
30 120(a)(4) of the Comprehensive Environmental Response, Compensation
31 and Liability Act (CERCLA), 42 U.S.C. §9620(a)(4); Sections 6001
32 and 3004(u) and 3004(v) of RCRA, 42 U.S.C. §6901 et seq.; the
33 Atomic Energy Act, 42 U.S.C. §2011 et seq.; and Executive Order
34 12580 "Superfund Implementation."
35

36 III.2. DoD enters into this Agreement pursuant to Section 120 of
37 CERCLA, 42 U.S.C. §9620; Sections 6001 and 3004(u) and 3004(v) of
38 RCRA, 42 U.S.C. §6901 et seq.; Executive Order 12580, "Superfund
39 Implementation"; the National Contingency Plan; Section 311 (c) of
40 the Federal Water Pollution Control Act, 33 U.S.C. §1321; and the
41 Defense Environmental Restoration Program, 10 U.S.C. §2701.
42

43 III.3. The parties enter into this Agreement pursuant to their
44 applicable authorities and responsibilities, including the Solid
45 Waste Disposal Act, which includes both RCRA and the Hazardous and
46 Solid Waste Act; Chapters 444, 445, and 459 of the Nevada Revised
47 Statutes (NRS) including the Nevada Water Pollution Control Law,
48 NRS 445A.300 et seq., the Nevada Hazardous Waste Law, NRS 459.400

1 et seq., Chapters 444, 445, and 459 of the Nevada Administrative
2 Code (NAC), the Nevada Administrative Procedure Act, NRS Chapter
3 233B, as these laws may be amended from time to time, and all other
4 applicable provisions of state and federal law. NDEP specifically
5 retains all of its hazardous waste and clean water authorities and
6 legal rights, both substantive and procedural, both under the
7 authorities delegated by the U.S. Environmental Protection Agency,
8 and under its own laws and regulations as well. DOE does not waive
9 any claim of jurisdiction over matters which may be reserved to DOE
10 by law, including the Atomic Energy Act, 42 U.S.C. §2011 et seq.
11

12 III.4. To the extent not inconsistent with federal law, the laws
13 of the state of Nevada shall be applied when interpreting and
14 construing this Agreement. Compliance with the terms and
15 conditions of this Agreement does not relieve DOE or DoD of any
16 responsibility for complying with all applicable federal and state
17 laws and regulations.
18

19
20 **PART IV. DEFINITIONS**

21
22 IV.1. Except as noted in Part IV of this Agreement, the
23 definitions provided in RCRA, the Nevada Water Pollution Control
24 Law, NRS 445.131 et seq., the Nevada Hazardous Waste Law, NRS
25 459.400 et seq., and their implementing regulations, as
26 appropriate, shall control the meanings of the terms contained in
27 this Agreement.
28

29 IV.2. "Administrator" shall have the meaning given in NRS
30 445.134.
31

32 IV.3. "Agreement" shall refer to this Federal Facility Agreement
33 and Consent Order (FFACO) and includes all attachments, addenda,
34 appendices, amendments, and modifications.
35

36 IV.4. "Agreement coordinator" shall refer to the individual
37 designated by each party to this Agreement responsible for the
38 overall implementation of the Agreement.
39

40 IV.5. "Authorized representative(s)" shall include a party's
41 contractor(s) or agent(s) acting in specifically designated or
42 defined capacities.
43

44 IV.6. "Central Nevada Test Area" shall mean the property so
45 described in Appendix I, Description of Facilities.
46

47 IV.7. "Clean closure" shall mean the removal of pollutants,
48 hazardous wastes, and solid wastes released into the environment or

1 discharged and/or having the potential of being discharged into
2 waters of the state in accordance with corrective action plans.

3
4 IV.8. "Closure in place" shall mean the stabilization or
5 isolation of pollutants, hazardous wastes, and solid wastes, with
6 or without partial treatment, removal activities, and/or post-
7 closure monitoring, in accordance with corrective action plans.

8
9 IV.9. "Community Advisory Board" shall mean that formally
10 constituted and chartered board created under the Federal Advisory
11 Committee Act established to provide site-specific recommendations
12 for environmental restoration and waste management activities on
13 the facilities.

14
15 IV.10. "Contaminant" shall have the meaning given in NRS
16 445A.325. DOE asserts that this definition is subject to Part III,
17 Legal Authority.

18
19 IV.11. "Corrective action" shall mean an action or series of
20 actions taken to correct deficiencies in the disposal or
21 containment of pollutants, hazardous wastes, and solid wastes to
22 prevent releases and/or potential releases into the environment or
23 discharges and/or potential discharges of such materials into
24 waters of the state in accordance with the approved corrective
25 action plan. A corrective action may range from no action to clean
26 closure.

27
28 IV.12. "Corrective action coordinator(s)" shall mean the
29 individual(s) responsible for overseeing daily activities required
30 by this Agreement.

31
32 IV.13. "Corrective action decision document" (CADD) shall mean a
33 document that describes the corrective action that is selected as
34 the result of investigation activities and the rationale for its
35 selection. The rationale consists of an analysis of the possible
36 alternatives and may reflect a decision ranging from no action to
37 clean closure.

38
39 IV.14. "Corrective action investigation" (CAI) shall mean an
40 investigation conducted by DOE and/or DoD to gather data sufficient
41 to characterize the nature, extent, and rate of migration or
42 potential rate of migration from releases or discharges of
43 pollutants or contaminants and/or potential releases or discharges
44 from corrective action units identified at the facilities.

45
46
47 IV.15. "Corrective action investigation plan" (CAIP) shall mean
48 a document that provides or references all of the specific

1 information for planning investigation activities associated with
2 corrective action units or corrective action sites. A CAIP may
3 reference information in the optional CAU work plan or other
4 applicable documents. If a CAU work plan is not developed, then
5 the CAIP must include or reference all of the management,
6 technical, quality assurance, health and safety, public
7 involvement, field sampling, and waste management information
8 needed to conduct the investigations in compliance with established
9 procedures and protocols.

10
11 IV.16. "Corrective action plan" (CAP) shall mean a plan which is
12 prepared when the corrective action decision document requires a
13 corrective action.

14
15 IV.17. "Corrective action sites" (CASS) shall refer to the sites
16 potentially requiring corrective action(s) and may include solid
17 waste management units, or individual disposal or release sites.

18
19 IV.18. "Corrective action unit" (CAU) shall mean one or more
20 corrective action sites grouped geographically, by technical
21 similarity, agency responsibility, or for other appropriate
22 reasons, for purposes of determining corrective actions.

23
24 IV.19. "Corrective action unit work plan" (CAU work plan) shall
25 mean an optional planning document that provides information for a
26 CAU or a collection of CAUs where significant commonality exists.
27 This plan may be developed to eliminate redundant CAU documentation
28 and may contain management, technical, quality assurance, health
29 and safety, public involvement, field sampling, and waste
30 management information. This common information will be referenced
31 in the appropriate CAIPs.

32
33 IV.20. "Days" shall mean calendar days unless business days are
34 specified. Any submittal that, under the terms of this Agreement,
35 would be due on a Saturday, Sunday, or state of Nevada or federal
36 holiday shall be due on the following business day.

37
38 IV.21. "Deadline" shall mean the date by which an enforceable
39 milestone established by this Agreement or other actions or
40 activities specifically identified in this Agreement shall be met.
41 Stipulated penalties may be assessed for failure to meet an
42 established deadline.

43
44 IV.22. "Department of Defense" (DoD) shall mean the Office of the
45 Secretary of Defense, Defense Nuclear Agency and/or any predecessor
46 or successor agency(ies) and/or their authorized representatives so
47 designated in writing.
48

- 1 IV.23. "Department of Energy" (DOE) shall mean the U.S.
2 Department of Energy and/or any predecessor or successor
3 agency(ies) and/or their authorized representatives.
4
- 5 IV.24. "Due date" shall mean the date by which a nonenforceable
6 milestone is due.
7
- 8 IV.25. "Enforceable milestone" shall mean a milestone which is
9 enforceable and for which a deadline has been assigned.
10
- 11 IV.26. "Facilities" shall include the Nevada Test Site (NTS),
12 parts of the Tonopah Test Range, parts of the Nellis Air Force
13 Range, the Central Nevada Test Area, and the Project Shoal Area.
14 The NTS as defined herein does not include those areas being used
15 to conduct activities under the Nuclear Waste Policy Act.
16
- 17 IV.27. "Fiscal year" (FY) shall mean the federal fiscal year
18 unless otherwise specified.
19
- 20 IV.28. "Hazardous substance" shall have the meaning given in
21 CERCLA §101, 42 U.S.C. §9601(14), and NRS 459.429. DOE asserts
22 that this definition is subject to Part III, Legal Authority.
23
- 24 IV.29. "Hazardous waste" shall have the meaning given in
25 42 U.S.C. §6903(5) and NRS 459.430.
26
- 27 IV.30. "Milestone" shall mean an important or critical event,
28 goal, task, and/or activity that must occur in order to achieve the
29 objective(s) for that corrective action unit.
30
- 31 IV.31. "Mixed waste" shall have the meaning given in 42 U.S.C.
32 §6903 (41).
33
- 34 IV.32. "Nellis Air Force Range" shall mean the property so
35 described in Appendix I, Description of Facilities.
36
- 37 IV.33. "Nevada Test Site" (NTS) shall mean the property so
38 described in Appendix I, Description of Facilities.
39
- 40 IV.34. "Parties" shall mean the parties named in Part I, Parties,
41 to this Agreement.
42
- 43 IV.35. "Person" for the purposes of this Agreement shall include
44 DOE, DoD, and NDEP within the definitions of "person" contained in
45 the Nevada Water Pollution Control Law, NRS 445A.300 et seq., and
46 the Nevada Hazardous Waste Law, NRS 459.400 et seq.
47
- 48 IV.36. "Pollutant" shall have the meaning given in NRS 445A.400.

1 DOE asserts that this definition is subject to Part III, Legal
2 Authority.

3
4 IV.37. "Project Shoal Area" shall refer to the locality so
5 described in Appendix I, Description of Facilities.

6
7 IV.38. "RCRA" shall mean the Resource Conservation and Recovery
8 Act of 1976, Public Law 94-580, 42 U.S.C. Section 6901 et seq., as
9 amended by the Hazardous and Solid Waste Amendments of 1984,
10 P.L. 98-616, as amended by the Federal Facility Compliance Act of
11 1992, P.L. 102-386, and any other amendments thereto.

12
13 IV.39. "RCRA Permit" shall mean a permit issued by NDEP for
14 hazardous waste treatment, storage, and/or disposal units
15 including, as required, post-closure monitoring of such units.

16
17 IV.40. "Release" (including past releases) shall have the meaning
18 given in NAC 459.9526 and NAC 445A.345.2 as related to constituents
19 identified in NAC 445A.347.2.

20
21 IV.41. "Solid waste" shall have the meaning given in 42 U.S.C.
22 §6903 (27) and NRS 444.490.

23
24 IV.42. "State of Nevada Department of Conservation and Natural
25 Resources, Division of Environmental Protection" (NDEP) shall have
26 the meaning given in NRS 445A.350 and NAC 444.576.

27
28 IV.43. "Submittal" shall mean every document, report, schedule
29 deliverable, work plan, or other written item to be provided to
30 NDEP pursuant to this Agreement.

31
32 IV.44. "Timeframe" shall mean an interval of time over which some
33 action is planned to occur, with or without reference to a
34 beginning or ending date.

35
36 IV.45. "Tonopah Test Range" shall mean the property so described
37 in Appendix I, Description of Facilities.

38
39 IV.46. "Waters of the state" shall have the meaning given in
40 NRS 445A.415.

41
42
43 **PART V. DESCRIPTION OF APPENDICES**

44
45 V.1. Appendices I-VI are incorporated by reference into this
46 Agreement. Any ambiguity resulting from different language used in
47 an appendix versus the body of this Agreement shall be resolved in
48 favor of terms and conditions found in the body of this Agreement.

1 V.2. Appendix I, "Description of Facilities," contains the
2 descriptions of each of the facilities covered by this Agreement.

3
4 V.3. Appendix II, "Corrective Action Sites/Units," contains a
5 list of all CAUs which have been identified to date and which have
6 not yet been transferred to subsequent appendices or CASSs which
7 have not yet been grouped into CAUs. A CAU shall consist of one or
8 more CASSs, and each CAS in each CAU will be identified. New
9 CASSs/CAUs identified by any of the parties shall be added to
10 Appendix II on a quarterly basis. CAUs shall be grouped in
11 categories and subcategories in accordance with Appendix VI,
12 Corrective Action Strategy. The CAU categories may include:

13
14 V.3.a. Industrial sites;

15
16 V.3.b. Underground test areas;

17
18 V.3.c. Contaminated soil sites; and

19
20 V.3.d. Offsites.

21
22 V.4. Appendix III, "Corrective Action Investigations/Corrective
23 Actions," shall list those CAUs that have been identified and
24 prioritized for CAIs and/or for corrective actions as described in
25 Part XII, Corrective Action Investigations/Corrective Actions.
26 This appendix shall also contain CAU milestones with associated due
27 dates and deadlines.

28
29 V.5. Appendix IV, "Closed Corrective Action Units," shall list
30 those CAUs for which all corrective actions have been completed and
31 approved by NDEP in accordance with Part XII, Corrective Action
32 Investigations/Corrective Actions.

33
34 V.6. Appendix V, "Public Involvement Plan," is described in
35 Part XVII, Public Involvement. A draft of this appendix shall be
36 submitted within 60 days of the effective date of the Agreement.

37
38 V.7. Appendix VI, "Corrective Action Strategy," contains the
39 process for implementing corrective actions pursuant to this
40 Agreement. Processes described in greater detail in Appendix VI,
41 Corrective Action Strategy, than in the body of this Agreement may
42 be in addition to those described herein but shall not be in
43 conflict with the provisions contained in the body of this
44 Agreement.

45
46
47
48

1 PART VI. ENFORCEABILITY/RESERVATION OF RIGHTS

2
3 VI.1. Except as described in paragraph VI.2 and paragraph
4 VIII.6, compliance with the terms and conditions of this Agreement
5 shall stand in lieu of any administrative or judicial remedies that
6 may be taken for matters covered by this Agreement.

7
8 VI.2. NDEP reserves the right to bring any enforcement action
9 against DOE and/or DoD for noncompliance with the terms and
10 conditions of this Agreement, including actions for the sole
11 purpose of compelling completion of a deficient activity whether or
12 not stipulated penalties are sought.

13
14 VI.3. For all matters outside the scope of this Agreement, NDEP,
15 within the scope of its authority, reserves the right to bring
16 enforcement actions against any person.

17
18 VI.4. DOE and DoD intend to be legally bound by this Agreement
19 and agree that the terms and conditions of this Agreement are
20 enforceable as provided herein. DOE and DoD consent to NDEP's
21 jurisdiction for the purpose of executing and enforcing the terms
22 and conditions of this Agreement.

23
24 VI.5. Nothing in this Agreement shall be construed to affect any
25 criminal investigations or criminal liability of any person(s) for
26 activities at any of the facilities described in Appendix I,
27 Description of Facilities.

28
29 VI.6. Nothing in this Agreement shall constitute, or be
30 construed as a release from any claim, cause of action, or demand
31 in law or equity against any individual, firm, partnership, or
32 corporation not directly identified in this Agreement for any
33 liability it may have arising out of, or relating in any way, to
34 the generation, storage, treatment, handling, transportation,
35 release, or disposal of any hazardous substances, hazardous wastes,
36 solid waste or pollutants, found at, taken to, or taken from, any
37 of the facilities that are the subject of this Agreement.

38
39 VI.7. The parties reserve their appeal rights as set forth in
40 Part IX, Informal Dispute Resolution and Appeal Procedure.

41
42 VI.8. In the event of administrative or judicial action, all
43 parties reserve all rights, claims, and defenses available under
44 law.

45
46
47
48

1 PART VII. PROGRESS REPORTS

2
3 VII.1. Following the effective date of this Agreement, DOE and
4 DoD shall, on or before the 30th calendar day following the end of
5 each calendar quarter, submit a written or electronic progress
6 report to NDEP that describes the actions taken during the calendar
7 quarter just ended. This information will serve as a partial basis
8 for the discussions at the quarterly meetings discussed in
9 paragraph XII.4.

10
11 VII.2. Each progress report shall include:

12
13 VII.2.a. Sufficient detail to clearly and accurately
14 convey to NDEP the manner and extent to which the
15 requirements and schedules set forth in the work plans and
16 other terms and conditions of this Agreement are being
17 met;

18
19 VII.2.b. Any known cost and schedule variances exceeding
20 the established thresholds will be reported along with the
21 cause of the variances and any actions which may be
22 implemented to correct the variances;

23
24 VII.2.c. Actions and issues of concern, where additional
25 communication is necessary.

26
27 VII.3. DOE and/or DoD shall, within sixty (60) calendar days of
28 NDEP's request, which is hereby established as the deadline for
29 this activity, provide NDEP with budgets and costs for activities
30 covered by this Agreement.

31
32 VII.4. DOE and DoD shall include in their quarterly reports a
33 three-month advance schedule outlining field activities (including
34 the field activities of their respective contractors,
35 subcontractors, operators, and agents), proposed to be implemented
36 under this Agreement. A more detailed schedule shall be provided
37 to NDEP on a bi-weekly basis, and shall provide the specific dates
38 for conducting these activities for the subsequent two-week period,
39 thereby enabling NDEP to select those activities it deems
40 appropriate to observe.

41
42 VII.5. The National Defense Authorization Act for 1994, 42 U.S.C.
43 §7274k, (P.L. 103-160, Section 3153) requires DOE to prepare and
44 submit an annual environmental restoration report. DOE shall
45 submit to NDEP a copy of the portions of that report that define
46 the conditions or otherwise relate to the activities being
47 undertaken by the DOE Nevada Operations Office within thirty (30)
48 calendar days of the report's submittal to Congress.

1 VII.6. Quarterly meetings will be held in part to discuss any
2 issues raised in or by the quarterly progress reports. These
3 meetings will also serve to initiate the prioritization discussions
4 identified in Part XII, Corrective Action Investigations/Corrective
5 Actions. Parties will attempt to resolve issues during the
6 quarterly meetings. Resolution of issues will be documented, and
7 unresolved issues will be discussed at or before the next quarterly
8 meeting.

9
10 VII.7. Parties may meet at times other than the quarterly
11 meetings as required, for example if there are events, such as
12 changes in available funding, that might affect milestones,
13 especially if those milestones are in the current fiscal year.

14
15
16 **PART VIII. STIPULATED PENALTIES**

17
18 VIII.1. Stipulated penalties shall be incurred by DOE and/or DoD
19 in the event that DOE and/or DoD fails to meet an established
20 deadline.

21
22 VIII.2. In the event DOE or DoD fails to meet an established
23 deadline contained herein, NDEP may assess a stipulated penalty in
24 the amount of \$5,000.00 per week for the first week or part thereof
25 of such failure, \$10,000.00 per week for the following week or part
26 thereof of such failure, and \$15,000.00 per week for the third and
27 each succeeding week for which the failure to meet an established
28 deadline occurs.

29
30 VIII.3 NDEP shall notify DOE and/or DoD in writing of any alleged
31 failure to meet an established deadline.

32
33 VIII.3.a. If NDEP's written notice of a missed deadline
34 cites that the specified deadline was not met, evidence
35 supporting any alleged defense must be submitted to NDEP
36 within thirty (30) calendar days from the date of receipt
37 of NDEP's written notice unless otherwise agreed. No
38 penalty shall be assessed if NDEP accepts the DOE's and/or
39 DoD's defense. If NDEP rejects the defense, DOE and/or
40 DoD shall be assessed the stipulated penalty from the date
41 of the missed deadline, and DOE and/or DoD may initiate
42 the appeal procedure in accordance with paragraph IX.2 of
43 this Agreement.

44
45 VIII.3.b. If a milestone for which a deadline has been
46 established is construed by NDEP to be substantially
47 deficient, and therefore not complete, NDEP shall issue a
48 written Notice of Deficiency to DOE and/or DoD that cites

1 the alleged deficiencies. If DOE and/or DoD accept(s)
2 NDEP's position, DOE and/or DoD shall, within twenty-one
3 (21) calendar days of receipt of the Notice of Deficiency
4 or such longer time period as specified by NDEP, correct
5 the deficiencies and resubmit or otherwise complete the
6 milestone for which the deadline was established. Any
7 stipulated penalty(ies) connected to failure to meet the
8 established deadline shall begin upon DOE's and/or DoD's
9 receipt of the Notice of Deficiency. The penalty(ies)
10 shall accrue during such twenty-one (21) calendar days, or
11 otherwise specified period, and may, at NDEP's discretion,
12 be waived unless the resubmitted deliverable or completed
13 milestone is determined by NDEP to remain substantially
14 deficient. If DOE and/or DoD is aggrieved by either
15 NDEP's original or subsequent determination of substantial
16 deficiency, DOE and/or DoD may initiate the appeal
17 procedure in accordance with paragraph IX.2.
18

19 VIII.4. Stipulated penalties will continue to accrue and may be
20 assessed at NDEP's discretion during pursuit of remedies contained
21 in Part IX, Informal Dispute Resolution and Appeal Procedure,
22 except accrual of such penalties shall be suspended during any
23 period of time in excess of fourteen (14) calendar days required by
24 NDEP to render its decision under paragraph VIII.3. DOE and/or DoD
25 are responsible for stipulated penalties only for the time
26 ultimately determined to be deficient, and stipulated penalties are
27 to be paid within thirty (30) days of a final determination of
28 deficiency unless the parties agree to a different schedule.
29

30 VIII.5. The provisions of this Part shall not affect DOE's and/or
31 DoD's ability to petition NDEP for an extension of a deadline as
32 appropriate as set forth in Part X, Extensions.
33

34 VIII.6. Stipulated penalties for failure to meet established
35 deadlines contained herein are in lieu of statutory penalties
36 otherwise available under the law. For statutory or regulatory
37 violations for actions for which deadlines are not established or
38 outside the scope of this Agreement, all remedies available to NDEP
39 may be invoked while DOE and DoD reserve their authority to use all
40 available defenses.
41

42 VIII.7. Payment of any stipulated penalty does not relieve DOE
43 and/or DoD of any other requirements imposed by this Agreement.
44

45 VIII.8. Any failure of DOE to remit a stipulated penalty within
46 thirty (30) calendar days after the stipulated penalty is due and
47 payable, unless the affected parties agree to a different payment
48 schedule, shall, to the extent allowed by law, cause the addition

1 of interest on the unpaid balance compounded daily at a rate equal
2 to the rate of interest fixed for 1-year United States treasury
3 bills on the date of the commencement of the action, as reported in
4 the "Federal Reserve Bulletin" published by the Board of Governors
5 of the Federal Reserve System or other commonly used business or
6 financial publication. In the event payment of interest is not
7 allowed by law, DOE shall, to the satisfaction of NDEP, establish
8 the basis of this position.

9
10 VIII.9. NDEP's position is that the DoD is required to pay
11 interest in accordance with paragraph VIII.8. DoD's position is
12 that absent express Congressional authorization the United States
13 is immune from paying interest. If, however, a court of proper
14 jurisdiction holds that the DoD is required to pay interest,
15 interest shall be paid in accordance with paragraph VIII.8.

16
17 VIII.10. Stipulated penalties that are due and payable shall be
18 paid to the state of Nevada, Division of Environmental Protection.

19
20
21 **PART IX. INFORMAL DISPUTE RESOLUTION AND APPEAL PROCEDURE**

22
23 IX.1. All parties to this Agreement shall make reasonable
24 efforts to informally resolve outstanding issues and/or disputes.
25 During the informal dispute resolution process, the parties shall
26 meet as many times as necessary to discuss and attempt resolution
27 of the dispute. If resolution at the agreement coordinator level
28 cannot be reached, efforts may be elevated to immediate supervisors
29 of the agreement coordinators or, if necessary, to the agency
30 executive level. If resolution cannot be achieved informally, the
31 appeal procedures of this Part may be implemented.

32
33 IX.2. In the event DOE and/or DoD are aggrieved by a written
34 determination by the NDEP agreement coordinator or his designee,
35 DOE and/or DoD may appeal the matter as follows:

36
37 IX.2.a. Within fifteen (15) calendar days following DOE
38 and/or DoD receipt of the NDEP determination being
39 appealed, DOE and/or DoD shall request an informal
40 administrative hearing. Seven calendar days prior to the
41 informal administrative hearing, DOE and/or DoD shall
42 provide NDEP with a witness list, list of exhibits, and
43 summary of evidence intended to be presented. The informal
44 administrative hearing shall be held in the NDEP offices
45 within thirty (30) calendar days of the request, unless
46 otherwise agreed. Following the informal administrative
47 hearing, the NDEP administrator shall issue the final
48 decision.

1 IX.2.b. If the informal administrative hearing fails to
2 resolve the issue, DOE and/or DoD may, within twenty (20)
3 calendar days following receipt of the NDEP
4 administrator's final decision, appeal the administrator's
5 decision to the Nevada State Environmental Commission
6 (SEC). An appeal is made by filing SEC Form #3 with the
7 Secretary of the SEC. SEC Form #3 will be enclosed with
8 the decision document referenced in paragraph IX.2.a.
9

10 IX.2.c. A hearing before the SEC shall be conducted within
11 twenty (20) calendar days pursuant to the Nevada
12 Administrative Procedure Act, NRS 233B.010 et seq. and the
13 Rules of Practice and Procedure of the SEC, NAC 445B.875
14 through 445B.897.
15

16 IX.3. Any of the parties may appeal the final decision of the
17 SEC as provided for in paragraph IX.2.c by filing a petition for
18 judicial review pursuant to NRS 233B.010 et seq.
19
20

21 **PART X. EXTENSIONS**
22

23 X.1. NDEP shall grant a reasonable extension of a deadline upon
24 receipt of a timely written request from DOE and/or DoD and when
25 NDEP determines that good cause exists for the requested extension.
26 Any request for extension shall specify:
27

28 X.1.a. The deadline that is sought to be extended;
29

30 X.1.b. The length of the extension sought;
31

32 X.1.c. The good cause(s) for the extension; and
33

34 X.1.d. Any and all related schedule(s) or deadline(s)
35 that would be affected if the extension were granted.
36

37 X.2. Good cause may exist for an extension for:
38

39 X.2.a. An event included in Part XXII, Force Majeure;
40

41 X.2.b. A delay caused by, or likely to be caused by, the
42 granting of an extension in regard to another deadline or
43 milestone;
44

45 X.2.c. Any event or series of events mutually agreed to
46 by DOE and/or DoD and NDEP as constituting good cause.
47

48 X.3. NDEP, in writing, shall grant or deny a written request

1 for an extension within thirty (30) calendar days from the date of
2 receipt of the written request.

3
4 X.4. NDEP may grant the extension for less time than originally
5 requested if it determines that the shorter extension is reasonable
6 in light of the good cause.

7
8 X.5. If NDEP denies the requested extension, or approves an
9 extension but modifies the length of time requested for the
10 extension, it will include in its written statement of denial or
11 modification an explanation of the basis for its decision.

12
13
14 **PART XI. AMENDMENTS AND MODIFICATIONS**

15
16 XI.1. Amendments to this Agreement may be proposed by any of the
17 parties.

18
19 XI.2. Amendments may be proposed for the following reasons,
20 among others:

21
22 XI.2.a. To assure that this Agreement remains consistent
23 with applicable laws and regulations;

24
25 XI.2.b. To assure that this Agreement is consistent with
26 changed circumstances.

27
28 XI.3. This Agreement shall not be modified unless such
29 modification is in writing and signed by all affected parties.
30 Changes to Appendix V, Public Involvement Plan, and the movement of
31 CAUs between appendices as specified in Part V, Description of
32 Appendices, and as specified in Part XII, Corrective Action
33 Investigations/ Corrective Actions, shall not be considered
34 modifications of this Agreement.

35
36
37 **PART XII. CORRECTIVE ACTION INVESTIGATIONS/CORRECTIVE ACTIONS**

38
39 XII.1. Within sixty (60) calendar days following the signing of
40 this Agreement by the last party to do so, the parties shall meet
41 to review Appendices II-IV and concur on the classification of all
42 presently identified CAUs to insure all known CAUs are placed in
43 the appropriate appendix, and where appropriate, due dates and
44 deadlines established for existing and proposed activities.
45 Following this initial meeting, the quarterly meeting process
46 outlined in paragraphs XII.3 and XII.4 will begin.

47
48 XII.2. Appendix III, Corrective Action Investigations/Corrective

1 Actions, will initially reflect current prioritization of CAUs
2 based on previous discussions with NDEP and/or the Community
3 Advisory Board in developing the budgets and priorities for FY 96
4 and FY 97. Following the initial prioritization, new CAUs will be
5 prioritized based on assessment of risk, as well as agency,
6 regulator, and stakeholder input (including the Community Advisory
7 Board), according to the process described in Appendix VI,
8 Corrective Action Strategy.

9
10 XII.3. The parties shall review and update Appendices II through
11 IV as required at quarterly meetings. The appendices shall be
12 updated at each meeting to:

13
14 XII.3.a. Add newly identified sites to Appendix II,
15 Corrective Action Sites/Units;

16
17 XII.3.b. Incorporate any approved schedule changes to the
18 milestones in Appendix III, Corrective Action
19 Investigations/Corrective Actions. Move CAUs from
20 Appendix III, Corrective Action Investigations/Corrective
21 Actions, to Appendix IV, Closed Corrective Action Units,
22 after NDEP has issued a notice or notices of completion.

23
24 XII.4. Following the transfer of a CAU from Appendix II,
25 Corrective Action Sites/Units, to Appendix III, Corrective Action
26 Investigations/Corrective Actions milestones, associated due dates
27 and deadlines may be proposed by DOE and/or DoD but shall be
28 established by NDEP according to the following quarterly meeting
29 schedule listed in paragraphs XII.4.a through XII.4.c. Except as
30 noted in paragraph XII.5, deadlines may be established for the
31 submittal of work plans, CADDs, CAPs, and completion of corrective
32 actions within the FY+2 planning window. For those work plans,
33 CADDs, CAPs, and corrective actions for which completion may fall
34 outside the planning window (FY+2), interim deadlines may be
35 established within the FY+2 planning window. All deadlines other
36 than those set forth explicitly in this Agreement shall be
37 established pursuant to paragraphs XII.4 and XII.5.

38
39 XII.4.a. During the quarterly meeting held during the
40 fiscal year first quarter, the parties shall review and
41 reconsider established priorities, milestones, and
42 associated due dates and deadlines for the current fiscal
43 year, taking into consideration the Approved Funding
44 Program and the factors listed in section 1.3 of Appendix
45 VI, Corrective Action Strategy. If the parties cannot
46 agree on deadlines, then Part IX, Informal Dispute
47 Resolution and Appeal Procedure, may be invoked.

1 XII.4.b. During the quarterly meeting held during the
2 fiscal year second quarter, the parties shall initiate the
3 process to establish priorities, milestones, and
4 associated due dates for CAUs for FY+2. At this meeting,
5 DOE will propose CAU milestones for target and planning
6 funding levels, as appropriate. DOE may choose to develop
7 milestones above the target funding level, but shall
8 identify which proposed milestones are above the target
9 case. NDEP, under its authority, may establish deadlines
10 for any milestones for DOE and DoD activities subsequent
11 to the prioritization process established in Appendix VI,
12 Corrective Action Strategy. DoD asserts it is not able to
13 commit to these FY+2 enforceable dates. Prioritized CAUs
14 with their associated milestones, due dates, and/or
15 deadlines shall be listed in Appendix III, Corrective
16 Action Investigations/Corrective Actions. Parties reserve
17 the right to invoke paragraph IX.1 if an issue is not
18 resolved. Subsequent to this meeting, input on the
19 proposed priorities will be sought from the public and the
20 Community Advisory Board. DOE and DoD, in cooperation
21 with NDEP, will develop a final prioritization of CAUs for
22 CAIs and corrective actions with the setting of deadlines
23 by NDEP by March 15.

24
25 XII.4.c. During the quarterly meeting held during the
26 fiscal year fourth quarter, the parties shall review and
27 reconsider established priorities, milestones, and
28 associated due dates and deadlines for CAUs considering
29 factors established in Appendix VI, Corrective Action
30 Strategy, and the President's budget for FY+1. Parties
31 reserve the right to invoke paragraph IX.1 if an issue is
32 not resolved.

33
34 XII.5. One (1) milestone, with an associated due date or
35 deadline, beyond FY+2 will be established for the completion of
36 UGTA. In addition, at any one time, one (1) other milestone, with
37 an associated due date or deadline, besides the completion
38 milestone can be established for UGTA beyond the FY+2 window. Once
39 this other milestone moves into the FY+2 window, an additional
40 milestone beyond FY+2 can be established such that two outyear
41 milestones (one of which is the completion milestone) can always
42 exist for UGTA. These milestones, established beyond the FY+2
43 window, will be based on assumptions used for planning and
44 understandings of the CAUs at the time of their establishment. If
45 the assumptions or understandings change, the milestones may be
46 reevaluated. The parties recognize that current assumptions, as
47 stated in Appendix VI, Corrective Action Strategy, are preliminary
48 and may change as additional technical information is acquired.

1 XII.6. The timeframes for submittals, activities, and tasks shall
2 be established in the appropriate planning documents and may be
3 bounded by the deadlines established in Appendix III, Corrective
4 Action Investigations/Corrective Actions.

5
6 XII.7. Once a CAI has been completed, DOE or DoD shall submit a
7 CADD, which includes evaluation of alternatives, to NDEP for its
8 evaluation. Prior to approving proposed actions, NDEP may seek
9 public comment which includes input from the Community Advisory
10 Board. If a corrective action is required, a CAP will be prepared
11 to guide the subsequent corrective action.

12
13 XII.8. NDEP shall, within thirty (30) calendar days of receipt of
14 a submittal, unless otherwise specified in this Agreement, provide:

15
16 XII.8.a. Approval, with or without comments on the
17 submittal;

18
19 XII.8.b. Disapproval with comments; or

20
21 XII.8.c. A timeframe within which NDEP's review will be
22 completed.

23
24 XII.9. Upon completion and NDEP approval of the corrective
25 actions, Notices of Completion shall be transmitted to DOE and/or
26 DoD as appropriate and the CAU will move to Appendix IV, Closed
27 Corrective Action Units. Appendix IV will also identify which CASS
28 or CAUs require long-term monitoring.

29
30
31 **PART XIII. SAMPLING AND DATA/DOCUMENT AVAILABILITY**

32
33 XIII.1. The timeframes for the initial availability of any
34 quality-assured results from sampling and monitoring shall be
35 identified in the CAU plans and CAP schedules for each CAU. DOE
36 and/or DoD shall make available existing quality-assured data from
37 sampling, tests, and other activities generated pursuant to this
38 Agreement within thirty (30) calendar days following a request.
39 This requirement is hereby established as the deadline pursuant to
40 this Agreement. NDEP may request all sampling data (including raw
41 data), to be incorporated into the submittal.

42
43 XIII.2. NDEP, at its request, shall be provided split or duplicate
44 samples of all samples collected by DOE and/or DoD pursuant to this
45 Agreement. NDEP shall provide, upon request of any party's
46 corrective action coordinators, split or duplicate samples of all
47 samples collected by NDEP pursuant to this Agreement. Any party
48 requesting split or duplicate samples from another party shall

1 provide its own sample container(s) at the time of the sampling
2 event and is responsible for the management and analysis of any
3 such samples.

4
5 XIII.3. NDEP may inspect and have copies provided, subject to
6 restrictions relating to classification and other applicable
7 privileges, any and all records, files, photographs, documents, and
8 other writings (including sampling and monitoring data), pertaining
9 to work undertaken, or planned to be undertaken, pursuant to this
10 Agreement. Originals shall remain in the custody of DOE, DoD, and
11 their respective contractors.
12
13

14 **PART XIV. ACCESS**

15
16 XIV.1. Subject to DOE and/or DoD security requirements,
17 applicable health and safety plans, and health and safety officers'
18 instructions, NDEP personnel, with appropriate safety and security
19 clearances, shall have authority to enter CAU work sites and DOE
20 and DoD locations during normal business hours with or without
21 advance notification. Following notification of DOE and/or DoD,
22 NDEP shall to the extent authorized by law have authority to enter
23 contractor locations to review applicable records and information.
24 Access may be sought for the following purposes among others:
25

26 XIV.1.a. Inspection of records, operating logs,
27 contracts, and other documents related to implementation
28 of this Agreement;

29
30 XIV.1.b. Reviewing the progress of DOE and/or DoD in
31 implementing the terms and conditions of this Agreement;

32
33 XIV.1.c. Verification of data related to implementation
34 of this Agreement; and

35
36 XIV.1.d. Observation of Agreement-related work in
37 progress.
38

39 XIV.2. Escorts of NDEP personnel to restricted areas where work
40 is ongoing at a CAU shall not be required where facility/locality-
41 specific security, health, and safety requirements are understood
42 and adhered to by the unescorted NDEP personnel. Unescorted NDEP
43 personnel shall sign a release of liability before undertaking any
44 unescorted visit of a restricted site.
45

46 XIV.3. No reasonable access shall be denied NDEP personnel with
47 appropriate certifications and clearances on Agreement-related
48 business. If access is denied, the stated reasons for any denial

1 of access to NDEP personnel to any of the facilities or to any of
2 the localities of any of the CAUs shall be provided to NDEP within
3 one (1) business day.
4

5 XIV.4. To the extent that compliance with this Agreement requires
6 access to property administered or owned by parties other than DOE,
7 such as the Air Force, other federal entities, and private parties,
8 DOE shall use the maximum extent of its influence and authority to
9 obtain access agreements for DOE, NDEP, and the authorized
10 employees and contractors of each of the parties. DOE shall
11 provide a certified copy of any such signed access agreements to
12 NDEP within ten (10) calendar days of DOE receipt of the document.
13 As appropriate, DOE may negotiate the inclusion of such access
14 agreements as provisions to existing Memoranda of Understanding
15 with other federal entities. Activities conducted under this
16 Agreement on Air Force-administered lands will be scheduled on a
17 non-interference basis with ongoing Air Force activities.
18

19 XIV.5. With respect to non-DOE property upon which monitoring
20 wells, pumping wells, treatment units, or other related systems are
21 to be located, DOE shall use its best efforts to obtain access
22 agreements that provide:
23

24 XIV.5.a. That no conveyance of title, easement, or other
25 interest in the property shall be consummated without
26 provisions for the continued operation of such wells,
27 treatment units, or other Agreement-related action on the
28 property;
29

30 XIV.5.b. That owners of any property where monitoring
31 wells, pumping wells, treatment units, or other
32 installations are located shall notify DOE by certified
33 mail, at least ninety (90) calendar days prior to any
34 conveyance, of the property owner's intent to convey any
35 interest in the property;
36

37 XIV.5.c. That DOE shall notify NDEP of the provisions
38 made for the continued operation of the monitoring wells,
39 treatment units, or other systems installed pursuant to
40 this Agreement;
41

42 XIV.5.d. DOE shall provide NDEP with a certified copy of
43 each agreement for the continued operation of any
44 monitoring wells, treatment units, or other systems
45 installed pursuant to this Agreement within ten (10)
46 calendar days of the receipt of the final agreement.
47
48

1 PART XV. OBLIGATIONS OF DOE AND DoD

2
3 XV.1. DOE and DoD shall take all necessary steps as set forth in
4 paragraphs XV.8 through XV.11 to obtain timely funding to meet
5 their obligations under this Agreement through consultation with
6 the parties and the submission of timely budget requests.

7
8 XV.2. Such obligations include, but are not limited to, updates
9 to Appendix II, Corrective Action Sites/Units, the corrective
10 action investigation/corrective action activities identified in
11 Appendix III, any monitoring required pursuant to Appendix IV, the
12 Public Involvement Plan activities required pursuant to Appendix V,
13 and support of NDEP's administrative and regulatory activities to
14 be performed in conjunction with oversight of corrective action
15 activities required by this Agreement.

16
17 XV.3. The base obligation of DOE and DoD required for NDEP to
18 oversee activities related to this Agreement shall be determined by
19 NDEP on a yearly basis, and transmitted to DOE and DoD in a timely
20 manner prior to the start of each state fiscal year as authorized
21 by NRS 459.565 and NDEP implementing policy and procedure(s). In
22 addition, NDEP shall at the same time transmit estimates of its
23 base obligations for the four succeeding out years to assist DOE
24 and/or DoD in their respective long-range planning. In accordance
25 with sections XV.4 and XV.5, DOE and DoD agree to pay fees and
26 service charges, consistent with §6001 of RCRA (42 U.S.C. §6961),
27 at a rate which would be assessed for similar activities on any
28 person for which NDEP provides oversight of corrective action
29 activities under applicable state law. If the parties disagree on
30 the fees and service charges, Part IX, Informal Dispute Resolution
31 and Appeal Procedure, may be invoked.

32
33 XV.4 On an annual basis, NDEP shall submit its estimated fee(s)
34 for its obligations to be incurred to DOE. DOE shall in turn,
35 within thirty (30) calendar days after October 1 of each year
36 unless otherwise agreed, make a deposit with NDEP sufficient to
37 meet that obligation for NDEP oversight of DOE activities.

38
39 XV.5. Reimbursement of costs/fees associated with services/
40 oversight of DoD's corrective action investigation and/or
41 corrective action activities shall be recoverable by NDEP through
42 the Defense/State Memorandum of Agreement and Cooperative Agreement
43 (DSMOA/CA). These services/oversight and accounting procedures,
44 including procedures for NDEP reimbursement, will be in accordance
45 with the DSMOA/CA. In the event that the DSMOA/CA Program is
46 modified, altered, ended or it fails to meet services/oversight
47 costs/fees, DoD shall remain liable for payment of these costs/fees
48 with appropriated Defense Environmental Restoration Act (DERA)

1 funds.

2
3 XV.6. NDEP's estimate of its regulatory oversight obligational
4 requirements for each successive year shall take into account any
5 projected differences between the previous year's estimated
6 obligational requirements and the actual regulatory oversight
7 obligations incurred by NDEP that year and will be submitted on or
8 before April 1 of each year to the appropriate party. By
9 September 1 of each year, all reconciliation for the prior state FY
10 will have been accomplished.

11
12 XV.7. In accordance with the DOE and/or DoD's respective rules
13 and policies applicable to the release of budgetary/contracting
14 information in effect at the time of the signing of this Agreement,
15 DOE and DoD shall make the scope of work and the budgets to be used
16 in implementing the terms of this Agreement available to NDEP.
17 Submittal of the scope of work and budgets will occur in
18 conjunction with the establishment of milestones and priorities as
19 identified in Part XII, Corrective Action Investigations/Corrective
20 Actions. Upon request by NDEP and in accordance with applicable
21 restrictions, DOE and DoD shall also provide to NDEP the identity,
22 scope of work, and Agreement-related restoration budgets of any
23 entity or agency performing work related to this Agreement.

24
25 XV.8. Prior to the annual submission of DOE/NV's and DoD/NV's
26 budget requests to their respective Headquarters, DOE for its FY+2
27 budget, and DoD for its five-year planning budget, NDEP shall be
28 given the following:

29
30 XV.8.a. Briefings on the proposed budget requests for
31 environmental management for the facilities, any
32 supporting documents, and target funding levels for
33 environmental management for the facilities, including an
34 assessment of any impacts on this Agreement.

35
36 XV.8.b. The opportunity to review, comment, and make
37 recommendations on the priorities and budget request.

38
39 XV.9. DOE shall, to the extent it deems appropriate, revise its
40 FY+2 budget requests and supporting documents to address or resolve
41 NDEP's comments and recommendations prior to transmittal to the
42 Headquarters. DOE shall forward to its Headquarters in its budget
43 requests any comments not fully resolved to the satisfaction of all
44 parties and any additional activities identified by NDEP along with
45 the projected budget requirements for such activities.

46
47 XV.10. DOE Headquarters shall forward to the Office of Management
48 and Budget for consideration, its FY+2 budget requests along with

1 any unresolved comments and additional activities with related
2 budget requirements identified by NDEP pursuant to paragraph XV.9.

3
4 XV.11. In accordance with established Department of Defense
5 policy as of the date of the signing of this Agreement, DoD
6 Headquarters shall forward its FY+2 restoration budget requests,
7 which will identify activities mandated by regulatory
8 considerations to the Deputy Under Secretary of Defense,
9 Environmental Security (DUSD)(ES) for consideration. DUSD(ES) is
10 responsible for consolidating Defense Agency submissions and
11 forwarding this along with all other Defense Service requests to
12 the Under Secretary of Defense Comptroller for incorporation into
13 the President's Budget Request.

14
15 XV.12. NDEP agrees not to release confidential budget information
16 to anyone prior to submission by the President of his Budget
17 Request to Congress, unless authorized by DOE or required to do so
18 by court order. DOE may seek to intervene in any proceeding
19 brought to compel or enjoin release of this information. If
20 allowed to intervene, DOE shall assert its interest in and the
21 legal basis for maintaining the confidentiality of this
22 information.

23
24 XV.13. DOE and DoD will provide to NDEP sections of the
25 President's Budget Request to Congress pertaining to the
26 facilities' environmental restoration programs in a timely manner
27 after submittal by the President to Congress. DOE and DoD shall
28 notify NDEP of any differences between the proposed budget requests
29 submitted in accordance with paragraph XV.9 and the actual requests
30 included in the President's Budget Request to Congress.

31
32 XV.14. If funding has been requested as described in paragraphs
33 XV.8 through XV.11 and in the event that the U.S. Congress has
34 failed to appropriate the funds so requested for Agreement
35 milestones, the parties shall review the level of presently
36 available appropriated funds and the estimated cost of meeting all
37 obligations and requirements under this Agreement. DOE and/or DoD
38 shall transmit to NDEP for its review a proposed alternate schedule
39 and level of activities to satisfy the terms and conditions of this
40 Agreement. If agreement cannot be reached on an alternate schedule
41 and if NDEP does not approve a modified alternate schedule and
42 level of activity, should DOE and/or DoD choose to appeal, the
43 appeal procedure contained in paragraph IX.2 will be followed.

44
45 XV.15. If DOE and/or DoD fail to comply with the terms of this
46 Agreement (including payment of NDEP oversight costs), NDEP may
47 pursue all available remedies to ensure performance and compliance.

1 PART XVI. NOTIFICATION AND AGENCY COORDINATION

2
3 XVI.1. Documents shall be sent to NDEP in a manner designed to be
4 received by the date due in either the Carson City or Las Vegas
5 office. Formal requests by any party to this Agreement of any
6 other party to this Agreement shall be in writing.
7

8 XVI.2. Unless otherwise specified by written notice to the
9 agreement coordinators of DOE and DoD, any report, document, or
10 submittal provided to NDEP, pursuant to a milestone or deadline
11 identified in or developed under the provisions of this Agreement,
12 shall be sent to:

13
14 Chief
15 Bureau of Federal Facilities
16 Division of Environmental Protection
17 333 West Nye Lane
18 Carson City, Nevada 89710
19

20 with an additional copy provided concurrently to:

21
22 Bureau of Federal Facilities
23 Division of Environmental Protection
24 555 E. Washington, Suite 4300
25 Las Vegas, Nevada 89101
26

27 XVI.3. Unless otherwise specified by written notice from DOE to
28 the agreement coordinators of the other parties, documents sent to
29 DOE relating to this Agreement shall be sent to:

30
31 Director, Environmental Restoration Division
32 U.S. Department of Energy
33 Nevada Operations Office
34 P. O. Box 98518
35 Las Vegas, Nevada 89193-8518
36

37 with an additional copy provided concurrently to:

38
39 Director, Environmental Protection Division
40 U. S. Department of Energy
41 Nevada Operations Office
42 P. O. Box 98518
43 Las Vegas, Nevada 89193-8518
44

45 XVI.4. Documents sent to DoD shall be sent to the attention of
46 the DoD agreement coordinator as follows, unless DoD specifies
47 otherwise by written notice to the corrective action coordinators
48 of the other parties:

1 Chief, Technical Compliance Division
2 Defense Nuclear Agency
3 Field Command, Nevada Operations Office
4 P.O. Box 208
5 Mercury, Nevada 89023
6

7 with an additional copy provided concurrently to:

8
9 Director, Environmental Protection Division
10 U.S. Department of Energy
11 Nevada Operations Office
12 P. O. Box 98518
13 Las Vegas, Nevada 89193-8518
14

15 XVI.5. Within thirty (30) calendar days of the effective date of
16 this Agreement, the parties shall notify each other in writing of
17 the names and addresses of their respective agreement coordinators
18 and corrective action coordinators and their designees who shall be
19 the usual day-to-day points of contact for DOE and DoD
20 respectively.

21
22 XVI.6. Each corrective action coordinator shall be responsible
23 for overseeing the day-to-day implementation of the provisions of
24 this Agreement for his/her respective party.

25
26 XVI.7. Each agreement coordinator works with the party's
27 corrective action coordinator(s) and shall be responsible for
28 assuring that all communications from the other parties are
29 appropriately disseminated and processed within his/her own
30 organization.

31
32 XVI.8. Changes in any of the parties' Agreement coordinators or
33 corrective action coordinators and their designees shall be
34 followed by written notification to the other parties within ten
35 (10) calendar days following the change(s).

36
37 XVI.9. The NDEP corrective action coordinator and his/her
38 designees shall have the authority to, among other things:

39
40 XVI.9.a. Take, or cause to be taken, samples, duplicate
41 samples, split samples, and/or sub-samples of samples
42 collected by DOE and/or DoD;

43
44 XVI.9.b. Ensure, so far as possible, that field and
45 laboratory work are performed pursuant to NDEP-approved
46 CAI work plans;

47
48 XVI.9.c. Observe, and/or cause to be observed, all

1 activities performed pursuant to this Agreement; take
2 and/or cause to be taken, photographs consistent with
3 security restrictions, for which purpose DOE consents that
4 DOE "Q" clearances, photographer's permits/official
5 photographer designations shall be issued to qualified
6 NDEP personnel as required by NDEP for this purpose;
7

8 XVI.9.d. Review and/or cause to be reviewed, all records,
9 files, and documents relevant to this Agreement, with the
10 determination as to what constitutes relevance made by
11 NDEP.
12

13 XVI.10. The DOE and/or DoD corrective action coordinators and
14 their representatives may implement modifications to the field work
15 to be performed pursuant to an approved work plan and will notify
16 NDEP of such action. This does not relieve either DOE or DoD of
17 their respective requirements to meet the performance objectives of
18 the approved work plan.
19

20
21 **PART XVII. PUBLIC INVOLVEMENT**
22

23 XVII.1. Appendix V, Public Involvement Plan, shall contain a
24 mechanism for continually providing information and for actively
25 seeking public input (including input from the Community Advisory
26 Board), concerning DOE and DoD activities undertaken pursuant to
27 this Agreement.
28

29 XVII.2. The Public Involvement Plan's objectives include, among
30 others:
31

32 XVII.2.a. Identifying and considering the public's
33 concerns, needs, and values prior to making decisions;
34

35 XVII.2.b. Providing an outline of activities and materials
36 which offer accurate, timely, and understandable
37 information to stakeholders (including the general
38 public);
39

40 XVII.2.c. Fulfilling all applicable state and federal
41 regulatory requirements regarding public involvement;
42

43 XVII.2.d. Planning public involvement activities to
44 reflect current schedules and priorities contained in this
45 Agreement.
46

47 XVII.3. At a minimum, public reading rooms shall be located within
48 the two major population centers in the state, one in the north and

1 one in the south. Based on continuing public input, the parties
2 shall annually evaluate the need for additional public reading
3 rooms.

4
5 XVII.4. The public reading rooms shall contain the following, when
6 prepared:

7
8 XVII.4.a. CAI work plans and reports;

9
10 XVII.4.b. Corrective action work plans and reports;

11
12 XVII.4.c. CADDs;

13
14 XVII.4.d. Health assessments;

15
16 XVII.4.e. Risk assessments;

17
18 XVII.4.f. Comments and information submitted by the
19 public;

20
21 XVII.4.g. National Environmental Policy Act documents;

22
23 XVII.4.h. Public Involvement Plan;

24
25 XVII.4.i. Public notices;

26
27 XVII.4.j. This Agreement;

28
29 XVII.4.k. RCRA Permit for NTS;

30
31 XVII.4.l. DOE/NDEP Mutual Consent Agreement; and

32
33 XVII.4.m. Index of the environmental restoration documents
34 in the public reading room and information on how to
35 acquire further environmental restoration information from
36 NDEP, DOE, or DoD.

37
38
39 **PART XVIII. RETENTION OF RECORDS**

40
41 XVIII.1. DOE and DoD shall establish and maintain a compilation
42 of all work plans, data reports, numerical models, numerical model
43 results, monitoring results, and other writings generated pursuant
44 to this Agreement in accordance with DOE and DoD records retention
45 procedures.

46
47 XVIII.2. Such information shall be available to NDEP upon
48 request and will form part of the basis for information to be

1 included in the NDEP's Administrative Record, which includes, but
2 is not limited to, those documents cited in paragraph XVII.4. NDEP
3 shall maintain the Administrative Record in accordance with the
4 requirements of NRS Chapter 239.

5
6 XVIII.3. DOE and DoD shall notify NDEP at least one hundred
7 eighty (180) calendar days prior to the proposed destruction or
8 disposal of any documents or records described in this part.
9

10
11 **PART XIX. CONVEYANCE OF TITLE**

12
13 XIX.1. No conveyance of title, easement, or other interest in any
14 of the facilities on which any containment system, treatment
15 system, monitoring system, or other construct is installed or
16 implemented or may be installed or implemented pursuant to this
17 Agreement, shall be consummated by DOE and/or DoD and/or any
18 contractor and/or subcontractor to DOE and/or DoD respectively,
19 without provision for continued maintenance of any such system or
20 other response action(s).
21

22 XIX.2. At least one hundred twenty (120) calendar days prior to
23 any such proposed conveyance, DOE and/or DoD shall notify NDEP of
24 the provisions made for the continued operation and maintenance of
25 any system(s) installed or implemented pursuant to this Agreement.
26
27

28 **PART XX. SEVERABILITY**

29
30 XX.1. If any provision of this Agreement (which may include any
31 activity conducted pursuant to this Agreement) is ruled invalid,
32 unenforceable, unlawful, or unconstitutional by a court of
33 competent jurisdiction, the remainder of this Agreement (including
34 other activities taken thereunder) shall not be affected by such
35 ruling.
36
37

38 **PART XXI. CLASSIFIED AND CONFIDENTIAL INFORMATION**

39
40 XXI.1. Personnel designated by NDEP as requiring DOE "Q"
41 clearances who have subsequently been issued such "Q" clearances by
42 the DOE shall be eligible for access to classified information on
43 a "need to know" basis. Only responsible DOE/DoD officials, with
44 the authority to do so, may make the determination of the "need to
45 know." Recipients of the information are responsible for
46 protecting all classified information to which they have access or
47 custody. DOE and/or DoD shall provide within ten (10) business
48 days of such refusal a written response to NDEP requests for

1 information related to the Agreement for which they have determined
2 that a "need to know" is not justified. This requirement is hereby
3 established as a deadline. The response shall be complete and
4 specific as to the information that is nondisclosable.
5

6 XXI.2. Analytical data and the results of numerical modeling,
7 with the exception of data and modeling results determined to be
8 classified for reasons of National Security, shall not be claimed
9 as nondisclosable.

10
11 XXI.3. Those data, documents, records, or files that are
12 nondisclosable pursuant to applicable privileges and laws including
13 the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act
14 of 1972, 5 U.S.C. §552(a), unless expressly authorized for release
15 by the originating party, shall be handled in accordance with those
16 provisions of law and any implementing regulations. Upon
17 submission of reports, letters, or other Agreement-related writings
18 to NDEP, DOE or DoD shall identify any materials determined by DOE
19 or DoD to be exempt from public disclosure pursuant to the Freedom
20 of Information Act and to the extent required by state law, such
21 materials shall be handled as exempt from public disclosure by
22 NDEP. NDEP will notify the appropriate party within 30 days of its
23 intent to release the information should a determination to release
24 the information be made.
25
26

27 **PART XXII. FORCE MAJEURE**

28
29 XXII.1. A Force Majeure shall mean an event arising from
30 unforeseeable factor(s) that is (are) beyond the control of DOE
31 and/or DoD and/or their respective contractors, subcontractors,
32 and/or operators, which causes delay, or prevents the performance
33 of any task specified under this Agreement. Force Majeure may
34 include:
35

36 XXII.1.a. Adverse weather conditions, natural disasters,
37 or events that affect the site or non-site locations,
38 preventing or delaying the transportation or delivery of
39 materials or the availability of labor, that could not
40 reasonably be anticipated;

41
42 XXII.1.b. Unanticipated breakage or accident to machinery,
43 equipment, or lines of pipe despite reasonably diligent
44 maintenance;

45
46 XXII.1.c. Restraint by court order or order of public
47 authority;
48

1 XXII.1.d. Inability to obtain, consistent with statutory
2 requirements and after exercise of reasonable diligence,
3 any necessary authorizations, approvals, permits, or
4 licenses due to action or inaction of any governmental
5 agency or authority other than the DOE or DoD;
6

7 XXII.1.e. Delays caused by compliance with applicable
8 statutes or regulations governing contracting, procurement
9 or acquisition procedures, despite the exercise of
10 reasonable diligence; and
11

12 XXII.1.f. Any strike or other labor dispute not within the
13 control of the parties thereby affected.
14

15 XXII.2. DOE and DoD assert that their ability to meet
16 obligations under this Agreement is subject to the Anti-Deficiency
17 Act, 31 U.S.C. §1341, such that unavailability of funding provides
18 a defense pursuant to this Part. Nothing in this Agreement shall
19 be construed to require a DOE or DoD official to violate the Anti-
20 Deficiency Act. NDEP does not recognize that the Anti-Deficiency
21 Act constitutes a Force Majeure or in any way constitutes a defense
22 or an excuse for failure to comply with the terms and conditions of
23 this Agreement and applicable state and federal laws and
24 requirements. Nothing in this Agreement shall be construed to
25 authorize a DOE or DoD official to violate environmental laws and
26 regulations.
27

28 XXII.3. DOE and/or DoD shall bear the burden of establishing
29 that a delay was caused by an unforeseen or unexpected event or
30 occurrence; that the event was beyond the control of DOE and/or
31 DoD; that the event could not have been avoided or overcome by due
32 diligence; and that the event delayed or prevented performance by
33 a date or in the manner required by this Agreement.
34

35 XXII.4. To assert a claim of Force Majeure, DOE and/or DoD
36 shall provide verbal notification to the state agreement
37 coordinator after DOE and/or DoD becomes aware of the effect of the
38 event on DOE's and/or DoD's ability to perform the obligations of
39 the Agreement creating the claim of Force Majeure, followed by
40 written confirmation. Failure to assert a claim of Force Majeure
41 shall constitute a waiver of DOE's and/or DoD's right to dispute
42 any denial of an extension request or assessment of stipulated
43 penalties on the basis of the event giving rise to the alleged
44 Force Majeure.
45

46 XXII.5. NDEP shall transmit to DOE and/or DoD its written
47 acceptance, acceptance in part, or rejection of DOE's and/or DoD's
48 claim of Force Majeure within fourteen (14) calendar days of

1 receipt of the written notice of claim. If DOE and/or DoD disagree
2 with NDEP's rejection on such claim, the dispute resolution and
3 appeal process contained in Part IX, Informal Dispute Resolution
4 and Appeal Procedure, may be initiated. For disputes on Force
5 Majeure issues, if the dispute is not resolved during the dispute
6 resolution process set forth in paragraph IX.2, the parties agree
7 that the DOE and DoD may seek judicial review of the decision of
8 the SEC in Federal District Court for Nevada.
9

10
11 **PART XXIII. MUTUALITY TO DRAFT OF AGREEMENT**
12

13 XXIII.1. All terms of this Agreement have been negotiated and
14 mutually drafted by the parties hereto, including consultation with
15 and review by counsel.
16

17
18 **PART XXIV. EFFECTIVE DATE OF AGREEMENT**
19

20 XXIV.1. The effective date of this Agreement shall be the date on
21 which the last party to do so becomes a signatory to this
22 Agreement.
23

24
25 **PART XXV. DURATION/TERMINATION**
26

27 XXV.1. Upon satisfactory completion, as determined by NDEP, of a
28 given milestone in Appendix III, Corrective Action
29 Investigations/Corrective Actions, NDEP shall issue a Notice of
30 Completion to DOE and/or DoD for completion of enforceable
31 milestones.
32

33 XXV.2. When a corrective action has been carried out in
34 accordance with the CAP NDEP will issue a Notice of Completion to
35 DOE and/or DoD as appropriate. Following the issuance of a Notice
36 of Completion, the CAU for which the corrective action was carried
37 out shall be listed in Appendix IV, Closed Corrective Action Units,
38 with the list of related CASS.
39

40 XXV.3. When all the terms and conditions of this Agreement shall
41 be considered, by NDEP, to have been satisfied by DOE and/or DoD,
42 including satisfactory completion of corrective actions for all
43 CAUs identified for and during the tenure of this Agreement,
44 written notice of the same will be forwarded from NDEP to DOE
45 and/or DoD and such written notice will terminate this Agreement.
46
47
48

1 **PART XXVI. MERGER AND INTEGRATION**

2
3 XXVI.1. This Agreement merges all prior written and oral
4 communications among the parties concerning this Agreement and
5 contains the final and complete agreement reached by the parties
6 unless subsequently amended in accordance with Part XI, Amendments
7 and Modifications.
8
9

10 **PART XXVII. SIGNATORIES**

11
12 XXVII.1. The undersigned representatives certify that they are
13 fully authorized to enter into this Agreement and to execute and
14 legally bind their respective parties hereto.
15
16

17 FOR THE STATE OF NEVADA:

18
19
20 BY:

21 L. H. Dodgion
22 L. H. Dodgion, Administrator
23 Nevada Division of Environmental Protection
24

25 3/26/96
26 Date

25 FOR THE DEPARTMENT OF ENERGY:

26
27
28 BY:

29 Terry A. Vaeth
30 Terry A. Vaeth, Acting Manager
31 Nevada Operations Office
32

33 4/4/96
34 Date

33 FOR THE DEPARTMENT OF DEFENSE

34
35
36 BY:

37 Paul Kaminski
38 Under Secretary of Defense (Acquisition & Technology)
39
40
41
42
43
44
45
46
47
48

Date