



Feb 10, 1999

Dear Addressees:

The Environmental Protection Agency (EPA) and the Department of Defense (DoD) are pleased to announce that we have successfully concluded negotiations for model funding language to be included in new Federal Facility Agreements (FFAs). The new model language both supplements the existing model FFA language issued in 1988 and, in regard to the 1988 Deadlines and Funding sections, provides substitute provisions. The agreement implements principles from the 1996 Federal Facilities Environmental Restoration Dialogue Committee (FFERDC) Report. The Committee was an advisory committee federally chartered by the EPA. Participants included individuals from the United States Departments of Agriculture, Defense, Energy, and the Interior, state, tribal, and local governments and numerous other nationally, regionally, and locally based environmental, community, environmental justice, and labor organizations.

Generally, the recommendations in the FFERDC Report sought to improve the process of making decisions and setting priorities for cleanup and Federal facilities. It recommended setting cleanup priorities in advance of and during the federal budget building process and addressed how to allocate funding shortfalls in the event of insufficient appropriations when cost savings cannot close the gap between cleanup needs and funding availability.

The negotiated language carries out these recommendations by providing a process to address prioritization, schedule setting, and development of budgets to achieve those schedules. When the money available, despite cost savings, is insufficient to accomplish all cleanup work, the DoD Component seeks the regulators' approval for a change in the agreed-upon milestone, and the regulators consider fiscal constraints. The Parties must agree prior to any change to a milestone, except that in the absence of agreement the issue is subject to dispute resolution.

The new model agreement language seeks to make the budget process more open, to reflect the parties' commitment to achieving expeditious cleanup. Along with the unchanged portions of the 1988 model language, this new model language should be included in all future cleanup agreements between EPA and DoD. If you have any questions about the language, please call Ms. Mary Kay Lynch at (202) 564-2574 or Col. Dan Benton at (703) 692-9107.

Sincerely,

Craig Hooks, Director
Federal Facilities Enforcement Office

Karla Perri, Deputy Under Secretary
of Defense (Environmental Security
Cleanup)

Enclosures

December 28, 1998

[This version is drafted on the assumption that the state will be a party. Words or terms have been placed in brackets to make them generic.]

[A] DEFINITIONS

[A]. “Deadlines” shall mean the near Term Milestones specifically established for the current fiscal year under the Plan. Deadlines are subject to stipulated penalties in accordance with Section [], *Stipulated Penalties*.

[A]. “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.

[A]. “Milestones” shall mean the dates established by the Parties in the 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.

[A]. “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).

[A]. “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).

[A]. “Plan”, unless the context indicates otherwise, shall refer to the ***[insert name of management plan]***.

[A]. “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.

[A]. “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.

[A]. “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.

[B]. CONTENTS OF PLAN

[B].1 This Agreement establishes a process for creating the Plan. (***Use in the alternative:*** The Plan is attached to this Agreement as Appendix []. ***Or.*** The ***[DoD Component]*** shall submit a Plan on ***[date]***, which will be attached to this Agreement as Appendix [].) The Plan and each annual Amendment to the Plan shall be Primary Documents. Milestones established in a Plan or established in a final Amendment to a 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 subsections [C].5 or [C].6. 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].2 The Plan includes proposed actions for both CERCLA responses and actions which would otherwise be handled pursuant to RCRA corrective actions per Section [], *Statutory Compliance/RCRA-CERCLA Integration*, 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.

[B].3 Milestones in the Plan reflect the priorities agreed to by the Parties through a process of “Risk Plus Other Factors” Priority Setting. Site activities have been prioritized by weighing and balancing a variety of factors including, but not limited to: (i) the DoD relative risk rankings 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 ***[DoD Component]***.

[B].4 The Plan and its annual Amendments include:

[B].4.1 A description of actions necessary to mitigate any immediate threat to human health or the environment;

[B].4.2 A listing of all currently identified Site Screening Areas (SSAs) (if applicable), Operable Units (including Accelerated Operable Units (AOUs)), Interim Remedial Actions, Supplemental Response Actions, and Critical and Non-Time Critical Removal Actions covered or identified pursuant to this Agreement.

[B].4.3 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 Target dates;
- Scheduled for initiation of Remedial Designs, Interim Response Actions, Non-Time Critical Removal Actions, AOU's, and any initiation of other planned response action(s) covered by this Agreement; and,
- All Project End Dates.

[B].5 The **[DoD Component]** shall submit an Amendment to the Plan on an annual basis as provided in Section [C], *Budget Development and Amendment of Plan*. All Amendments to the Plan shall conform to all of the requirements set forth in this Section.

[B].6 The Milestones established in accordance with this Section and Section [C], *Budget Development and Amendment of Plan*, remain the same unless otherwise agreed by the Parties, or unless changed in accordance with the dispute resolution procedures set out in subsections [C].5 and [C].6. The Parties recognize that possible bases for requests for changes or extensions of the Milestones include but are not limited to – (i) the identification of significant new site conditions at this installation; (ii) reprioritization of activities under this Agreement caused by changing priorities or new site conditions elsewhere in the **[DoD Component]**; (iii) reprioritization of activities under this Agreement caused by budget adjustments (e.g. rescissions, inflation adjustments, and reduced Congressional appropriations); (iv) an event of force majeure; (v) a delay caused by another party's failure to meet any requirement of this Agreement; (vi) a delay caused by the good faith invocation of dispute resolution or the initiation of judicial action; (vii) 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 (viii) any other event or series of events mutually agreed to by the Parties as constituting good cause.

[B].7 The Deadlines established in the Plan and its Amendments shall be published by EPA and the State.

[C]. BUDGET DEVELOPMENT AND AMENDMENT OF PLAN

[C].1 The **[DoD Component]**, as a federal agency, is subject to fiscal controls, hereinafter referred to as the Future Years Defense Plan (FYDP). The planning, programming, and budgeting process, hereinafter referred to as the POM process, is used to review total requirements for DoD programs and make appropriate adjustments within the FYDP for each program while adhering to the overall FYDP control. The Parties recognize that the POM process is a multi-year process. The Parties also agree that all Parties should be involved in the full cycle of POM activities as specified in this Agreement. Further, the Parties agree that each Party should consider the factors listed in Subsection [B].3., 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.

Facility-Specific Budget Building

[C].2 In order to promote effective involvement by the Parties in the POM process, the Parties will meet at the Project Manager level for the purpose of (1) reviewing the FYDP controls; (2) developing a list of requirements/work to be performed at the site for inclusion in the **(DoD Component)** POM process; and, (3) participating in development of the **[DoD Component]** submission to the proposed President's budget, based on POM decisions for the year currently under consideration. Unless the Parties agree to a different time frame, the **[DoD Component]** agrees to notify the other Parties within (10) days of receipt, at the Project Manager level, that budget controls have been received. Unless the Parties agree to a different time frame or agree that a meeting is not necessary, the Parties will meet, at the Project Manager level, within (5) days of receiving such notification to discuss the budget controls. However, this consultation must occur at least (10) days prior to the **[DoD Component]'s** initial budget submission to **[Major Command]**. 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 **[Major Command]**. If agreement cannot be reached informally within a reasonable period of time, the **[DoD Component]** 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, the **[DoD Component]** will forward through **[Major Command]** to the **[DoD Component]** Headquarters its budget request with the views of the Parties not in agreement and also inform **[DoD Component]** 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 the **[DoD Component]'s** budget submission to **[Major Command]** 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 the (DoD Component) 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 the **[DoD Component]'s** budget submission to the DoD Comptroller. DUSD(ES) shall receive information copies of any supplemental reports submitted to the DoD Comptroller.

(DoD Component) Budget for Clean Up Activities

[C].3 The **[DoD Component]** shall forward to the other Parties documentation of the budget requests (and any supplemental reports) for the site, as submitted by the **[DoD Component]** to **[Major Command]**, and by **[Major Command]** to the **[DoD Component]** Headquarters, within 14 days after the submittal of such documentation to the **[DoD Component]** Headquarters by **[Major Command]**. If the **[DoD Component]** 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.

Amended Plan

[C].4 No later than June 15 of each year after initial adoption of the Plan, the **[DoD Component]** shall submit to the other Parties a draft Amendment to the Plan. When formulating the draft Amendment to the Plan, the **[DoD Component]** shall consider funding circumstances (including OMB targets/guidance) and "risk plus other factors" outlined in subsection [B].3 to evaluate whether the previously agreed upon Milestones should change. Prior to proposing changes to Milestones in its annual Amendment to the Plan, the (DoD Component) will first offer to meet with the other Parties to discuss the proposed changes. The Parties will attempt to agree on Milestones before the **[DoD Component]** 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 all 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 POM process outlined in this Section. Resolution of any disagreement over adjustment of Milestones pursuant to this subsection shall be resolved pursuant to Subsection [C].5.

[C].5.1 The Parties shall meet as necessary to discuss the draft Amendment to the Plan. The Parties shall use the consultation process contained in Section [], *Consultation*, 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 the **[DoD Component]** no later than 30 days after receipt by EPA and the State of the draft Amendment. If either EPA or the State provide comments and are not satisfied with the draft Amendment during this comment period, the Parties shall meet to discuss the comments within 15 days of the **[DoD Component]'s** receipt of comments on the draft Amendment. The draft final Amendment to the Plan will be due from the (DoD Component) no later than 30 days after the end of the EPA and State comment period. During this second 30-day time period, the **[DoD Component]** will, as

appropriate, make revisions and re-issue a revised draft herein referred to as the draft final Amendment. To the extent that Section [], *Consultation*, contains time periods differing from these 30-day periods, this provision will control for consultation of the Amendment to the Plan.

[C].5.2.1 If the **[DoD Component]** proposes, in the draft final Amendment to the Plan, modifications of Milestones to which either EPA or the State have not agreed, those proposed modifications shall be treated as a request by the **[DoD Component]** for an extension. Milestones may be extended during the Plan review process by following Subsections [C].4 through [C].7. All other extensions will be governed by Section [], *Extensions*. The time period for EPA to respond to the request for extensions will begin on the date EPA receives the draft final Amendment to the Plan, and EPA and the State shall advise the **[DoD Component]** in writing of their respective positions on the request within thirty days. If EPA and the State approve of the **[DoD Component]'s** draft final Amendment, the document shall then await finalization in accordance with Subsections [C].5.3 and [C].6. If EPA denies the request for extension, then the **[DoD Component]** may amend the Plan in conformance with EPA and State comments or seek and obtain a determination through the dispute resolution process established in Section [], *Dispute Resolution*, within 21 days of receipt of notice of denial. Within 21 days of the conclusion of the dispute resolution process, the **[DoD Component]** shall revise and reissue, as necessary, the draft final Amendment to the Plan. (If EPA or the State initiates a formal request for a modification to the Plan to which the **[DoD Component]** does not agree, EPA or the State may initiate dispute resolution as provided in Section [], *Dispute Resolution* 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 Subsection [B].6 asserted to be present, and the facts and arguments of each of the Parties.

[C].5.2.2 Notwithstanding Subsection [C].5.2.1, if the **[DoD Component]** 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 the Record of Decision but to which either EPA or the State have not agreed, those proposed modifications shall not be treated as a request by the **[DoD Component]** for an extension, but consistent with Section [], *Dispute Resolution*, EPA or the State may initiate dispute resolution with respect to such Project End Date.

[C].5.2.3 In any dispute under this Section, the time periods for the standard dispute resolution process contained in Subsections [].3, [].4, [].5, and [].6 of Section [], *Dispute Resolution*, shall be reduced by half in regard to such dispute, unless the Parties agree to dispute directly to the SEC level.

[C].5.3 The **[DoD Component]** 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 **[DoD Component]** receives official notification of Congress' 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 Subsection [C].6. 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' authorization and appropriation.

[C].5.4 (Include if State is not a Party.) If 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.

Resolving Appropriations Shortfalls

[C].6 After authorization and appropriation of funds by Congress and within 21 days after the **[DoD Component]** has received official notification of **[DoD Component]'s** allocation based on the current year's Environmental Restoration, **[DoD Component]** (ER,X) Account, the **[DoD Component]** shall determine if planned work (as outlined in the draft final Amendment to the Plan) can be accomplished with the allocated funds. (1) 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, the **[DoD Component]** shall immediately forward a letter to the other Parties indicating that the draft final Amendment to the Plan has become the final Amendment to the Plan. (2) If the **[DoD Component]** determines within the 21-day period specified about that the allocated funds are not sufficient to accomplish the planned work for the site (an appropriations shortfall), the **[DoD Component]** shall immediately notify the Parties. The Project Managers shall meet within thirty (30) days to determine if planned work (as outlined in the draft final Amendment to the Plan) can be accomplished through: 1) rescoping or rescheduling activities in a manner that does not cause previously agreed upon Near Term Milestones and Out Year Milestones to be missed; or 2) developing and implementing new cost-saving measures. If, during this thirty (30) day discussion period, the Parties determine that rescoping or implementing cost-saving measures are not sufficient to offset the appropriations shortfall such that New 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 "Risk Plus Other Factors" prioritization process discussed in Subsection [B].3, and shall be specifically identified by the **[DoD Component]**. The **[DoD Component]** 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, the **[DoD Component]** shall give full consideration to EPA and State input during the 30-day discussion period. If the EPA and State concur with the modifications made to the draft final Amendment to the Plan, EPA and the State shall notify the **[DoD Component]** 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 the **[DoD Component]** for an extension, which request is treated as having been

made on the date that EPA receives the new draft final Plan or draft final Amendment to the Plan. EPA and the State shall advise the **[DoD Component]** in writing of their respective positions on the request within 21 days. The **[DoD Component]** may seek and obtain a determination through the dispute resolution process established in Section [], *Dispute Resolution*. The **[DoD Component]** may invoke dispute resolution within fourteen days of receipt of a statement of nonconcurrence with the requested extension. If any dispute concerning modifications under this Section, 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 Subsections [].3, [].4, [].5, and [].6 or Section [], *Dispute Resolution*, shall be reduced by half in regard to such dispute. Within 21 days after the conclusion of the dispute resolution process, the **[DoD Component]** shall revise and reissue, as necessary, the final Amendment to the Plan.

[C].7 It is understood by all Parties that the **[DoD Component]** will work with representatives of the other Parties to reach consensus on the reprioritization of work made necessary by any annual appropriations shortfalls or other circumstances as described in Section [C].6. This may also include discussions with other EPA Regions and states with installations affected by the reprioritization; the Parties may participate in any such discussions with other states.

Public Participation

[C].8 In addition to any other provision for public participation contained in this Agreement, the development of the Plan, including its annual Amendments, shall include participation by members of the public interest in this action. The **[DoD Component]** must ensure that the opportunity for such public participation is timely; but this Subsection [C].8 shall not be subject to Section [], *Stipulated Penalties*.

[C].8.1 The Parties will meet, after seeking the views of the general public, and determine the most effective means to provide for participation by members of the public interest in this action in the POM process 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 **[Installation]**, or by other appropriate means.

[C].8.2 The **[DoD Component]** shall provide timely notification under Section [C].6, regarding allocation of ER,X, to the members of the public interested in this action.

[C].8.3 The **[DoD Component]** shall provide opportunity for discussion under Sections [C].2, [C].5, [C].6, and [C].7 to the members of the public interested in this action.

[C].8.4 The **[DoD Component]** shall ensure that public participation provided for in this Subsection [C].8 complies with Executive Order 12898, Federal Actions to Address *Environmental Justice in Minority Populations and Low-Income Populations*.

[D]. FUNDING

[D].1 It is the expectation of the Parties to this Agreement that all obligations of the (DoD Component) arising under this Agreement will be fully funded. The **[DoD Component]** agrees to seek sufficient funding through its budgetary process to fulfill its obligations under this Agreement.

[D].2 in accordance with CERCLA Section 120(e)(5)B), 42 U.S.C. Section 9620(e)(5)(B), the **[DoD Component]** shall submit to DoD for inclusion in its annual report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement.

[D].3 Any requirement for the payment or obligation of funds, including stipulated penalties, by the **[DoD Component]** 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. Section 1342. 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].4 if appropriated funds are not available to fulfill the **[DoD Component]'s** obligations under this Agreement, EPA and the State reserve the right to initiate an action against any other person, or to take any response action, which would be appropriate absent this Agreement.

[D].5 Funds authorized and appropriated annually by Congress under the Environmental Restoration, **[DoD Component]** (ER,X) appropriation in the Department of Defense Appropriations Act will be the source of funds for activities required by this Agreement consistent with 10 U.S.C. Chapter 160. However, should the ER,X appropriation be inadequate in any year to meet the total **[DoD Component]'s** implementation requirements under this Agreement, the **[DoD Component]** will, after consulting with the other Parties and discussing the inadequacy with the members of the public interested in the action in accordance with Section [C], *Budget Development and Amendment of Plan*, prioritize and allocate that year's appropriation.