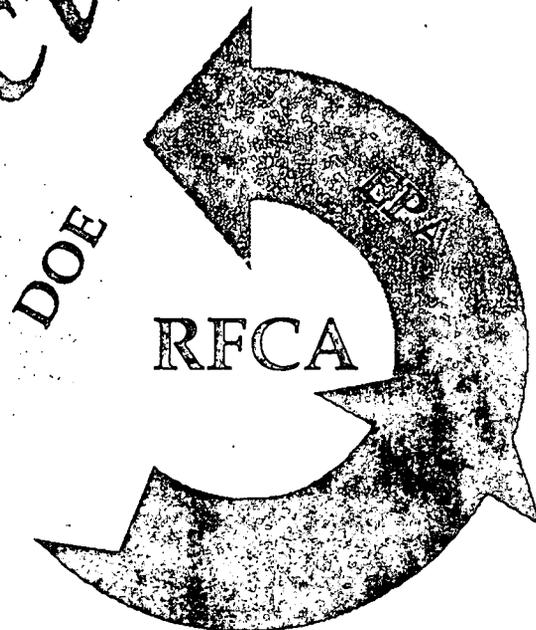

Issues and Positions Rocky Flats Cleanup Agreement Negotiation Strategy

Predecisional Draft



Revision 1
May 26, 1994

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INTRODUCTION

The purpose of this document is to reflect the current status and positions of issues surrounding the negotiation of the Rocky Flats Cleanup Agreement (RFCA). The issues have been analyzed and positions established for DOE as well as the anticipated positions of CDH and EPA. DOE's minimum position on the issues has been established and proposed language is being prepared to reflect this position. The section of the current IAG for which language will be modified is referenced for each issue. The modified language will be submitted to DOE Rocky Flats Field Office (RFFO) for review on May 27, 1994.

RFCA OBJECTIVE

The fundamental goal of negotiating the RFCA is to establish an agreement that will serve as a management tool to accelerate the cleanup of the Rocky Flats site in a safe and efficient manner.

The following elements have been identified as the fundamental means of achieving this objective:

1. Establishment of technical assumptions and processes required to implement expedited response actions and rebaseline existing commitments based on those assumptions.
2. Improve and institutionalize the existing change control and dispute resolution processes.
3. Develop and implement a process for establishing enforceable milestones that is integrated with the federal budget cycle and change control process.
4. Establish clear guidelines that enable modification to the RFCA to accommodate expedited cleanup initiatives by prioritizing current commitments and emerging work scope based on the element of risk.
5. Identification of specific roles and responsibilities of all parties and execute the agreement in a cooperative manner to obtain the unified cleanup objective.

SEQUENCE OF NEGOTIATION

The sequence for negotiation of the issues surrounding the establishment of the new RFCA is as follows:

- I. Integration of Enforceable Milestones with the Federal Budget Planning, Submission, and Execution Phases
- II. Efficiency Improvement Measures
- III. Building Remediation/Increased Scope of RFCA
- IV. Coordination and Integration of Regulatory Requirements and Jurisdiction
- V. Dispute Resolution and Enforcement Provisions
- VI. Public Involvement in RFCA Implementation
- VII. Relationship Between Future Site Use Decision and Cleanup Decisions
- VIII. Resource Reimbursement for CDH and EPA Oversight
- IX. Reconfiguration of Operable Unit Designations
- X. Schedules/Milestones

The issues presented within this document directly correlate to the elements indicated above. (Attached is a crosswalk of agency issues to DOE issues.) In addition, each issue included within this document references a corresponding agency issue identifier. The DOE issue numbers were not changed to accommodate familiarity with the numbering structure presented in the draft strategy document.

NEXT STEPS

Both the IAG and its successor, the RFCA, can be seen as two distinct, but interrelated parts; the process, which is comprised of the first five chapters of the IAG, and the baseline, which is comprised of the four attachments to the IAG. The issues can be seen as impacting either the process or the baseline. Some impact both. Because development of a new accelerated baseline is seen as the critical path of renegotiation, it is necessary to perform parallel negotiating tasks.

The evaluation of the IAG process and the lessons learned over the past four years identified the areas of the agreement that are deemed deficient. An intense effort to modify the language is under way. This modification will emphasize the need for a

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flexible document that accommodates the expedited cleanup objective. A draft proposed RFCA will be submitted to DOE-RFFO on May 27, 1994. Shortly thereafter, it will be forwarded to DOE Headquarters (HQ). Upon review and approval, this language will be negotiated with the agencies. Some issues are still being resolved by DOE-HQ, and are therefore not included in proposed language. These issues are funding and decontamination and decommissioning.

In parallel with this language development effort, a task force comprised of representatives of all parties and EG&G has been assembled to evaluate alternative approaches to cleanup and to develop a process by which expedited response efforts will be implemented. This process will form the basis for the RFCA baseline development efforts. As a result of the evolving nature of this effort, language reflecting the accelerated cleanup process will not be included in the May 27, 1994, submittal of draft RFCA language to DOE-RFFO.

AGENCY ISSUE	TITLE	DOE ISSUE
I.	INTEGRATION OF ENFORCEABLE MILESTONES WITH THE FEDERAL BUDGET PLANNING, SUBMISSION, AND EXECUTION PROCESS.	
I.A.	Regulator involvement in baselining process, including scope, schedule and cost.	1.2, 1.4, 6.1
I.B.	Regulator consultation on the 'baseline' into development of the budget and establishment of enforceable milestones	1.2, 1.4, 6.1
I.B.1	Definitions and criteria for modifying scope and/or schedule	7.1
I.B.2.	Definitions and criteria for modifying milestones in relation to efforts to obtain adequate funding.	7.1
I.B.3.	Criteria for identifying "out-year" milestones and transforming these into three-year milestones.	10.1
I.C.	Process for regulator involvement in the Federal Budget planning and execution.	4.1, 4.2
II.	EFFICIENCY IMPROVEMENT MEASURES	
II.A.	Necessary and sufficient requirements.	1.6, 1.10
II.B.	Improve procurement process.	1.1
II.C.	Streamlined review times.	1.7
II.D.	Contractor accountability.	8.2
II.E.	Expedited response action.	5.4, 5.1
II.F.	Intra- and Inter-Agency coordination.	9.2
II.G.	Elimination of duplicate regulatory analyses.	1.6
II.H.	Early identification of cleanup standards.	1.8
III.	BUILDING REMEDIATION/INCREASED SCOPE OF RFCA	
III.A.	Process, standards, and definitions of building and facility cleanup.	5.3, 5.6, 1.12
III.B.	Plutonium consolidation.	TBD
III.C.	Waste storage.	TBD
III.D.	Relationship of RCRA to NCPP.	5.3
IV.	COORDINATION AND INTEGRATION OF REGULATORY REQUIREMENTS AND JURISDICTION	8.3
IV.A.	Clarification of lead agency.	9.2
IV.B.	Application of US vs. Colorado (Arsenal Decision).	9.2
IV.C.	Application of FFCA to RFCA.	9.2
IV.D.	Application of CERFA.	1.5

IV.E.	Coordination/Integration of RCRA/CERCLA procedures and requirements.		9.2, 1.4
IV.F.	Coordination/Integration of CWA/RCRA/CERCLA.		5.2
IV.G.	Application of CERCLA Natural Resource Damage Assessment and Trustee Council Provisions.		1.11
V.	DISPUTE RESOLUTION AND ENFORCEMENT PROVISIONS - in light of agreements reached under Section I above:		
V.A.	Definition and application of Force Majeure.		TBD
V.B.	Additional issues for modifying enforceable milestones including extensions.		10.0, 6.1, 7.1
V.C.	Dispute resolution process improvements.		9.1
V.D.	Specification and application of stipulated penalties under RCRA and CERCLA.		8.1
VI.	PUBLIC INVOLVEMENT IN RFCA		1.9
VII.	RELATIONSHIP BETWEEN FUTURE SITE USE AND CLEANUP DECISIONS		1.3
VIII.	RESOURCE REIMBURSEMENT FOR CDH AND EPA OVERSIGHT		4.2
IX.	RECONFIGURATION OF OPERABLE UNITS		5.1, 5.5
X.	SCHEDULES AND MILESTONES FOR THE ROCKY FLATS SITE DEVELOPED IN A MANNER THAT IS CONSISTENT WITH PROCEDURES AGREED TO ABOVE.		*

* Due to the interrelationships of most of the issues the baselining process cross correlation of agency to DOE issues is not provided.

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1.0 DEVELOPMENT OF PROGRAM ASSUMPTIONS & TECHNICAL BASELINE

- 1.1 Procurement
- 1.2 Data Quality Objectives Under the
Current IAG Setting
- 1.3 Land Use Impacts on the Environmental
Restoration Program
- 1.4 Risk Assessments
- 1.5 Community Environmental Response
Facilitation Act Requirements
- 1.6 National Environmental Policy Act
- 1.7 Document Review Times
- 1.8 Applicable or Relevant and Appropriate
Requirements in the Remedial
Investigation/Feasibility Study
- 1.9 Role of Public Involvement
- 1.10 Applicability of DOE and EG&G Policies
and Procedures
- 1.11 Role of Natural Resource Trustees
- 1.12 Disposition of "Active" Units under the
IAG

AGENCY ISSUE II.B.
DOE ISSUE #1.1
PROCUREMENT

ISSUE

The current procurement process required to contract subcontractors for portions of the program is significantly more time consuming than was envisioned when setting schedules in the existing IAG. The longer procurement cycles have created unrecoverable delays in the program which are affecting the ability to meet enforceable milestones.

DOE POSITION

Rocky Flats has replaced the Basic Ordering Agreement (BOA) with Master Task Subcontracts (MTSs). The MTSs streamline the process and provide a more efficient process. However, the implementation of tasks under the new MTSs still exceeds the time allotted in the current IAG for procurement activities. The required time also exceeds the time required by EPA to implement similar subcontracted tasks. As a result, there is still a problem in meeting the enforceable milestones with a procurement system that requires more time than originally planned in the negotiated schedules. The DOE has endorsed the current procurement system in use at Rocky Flats for the acquisition of services and supplies. This process requires more time to obtain required resources than initially assumed in the IAG. It is Rocky Flats Field Office's position to present the current, actual time requirements for these activities to the regulators with the understanding that actual conditions are more reliable than planning assumptions, and to obtain appropriate schedule relief. EPA and CDH must recognize that procurement of remedial action construction projects could require up to six months because of the size and nature of the activities.

Rocky Flats will continue to assess alternative procurement strategies that would streamline the procurement process. In doing so, productivity will be enhanced, and some schedule relief will result. In the meantime, however, concurrence by both EPA and CDH on current procurement requirements needs to be obtained in order to establish enforceable milestone schedules.

EPA POSITION

It is our opinion that EPA will agree to the MTS cycle if continued efforts are made to streamline the process (especially for larger contract values). They also feel that the final scope of a project does not have to be set prior to procurement initiation.

CDH POSITION

Same as EPA position.

DOE NEGOTIATING TACTICS

The Quality Assessment Team (QAT) has proven that EPA's procurement process is less efficient than the MTS. DOE should emphasize this fact in order to obtain leverage for negotiations. The bundling approach (awarding larger multi-phased contracts without defining specific scopes of work) could be offered versus contracting each phase individually. This could be done on phases up to the Record of Decision (ROD). This would require recognition of schedule requirements of up to six months on the front end versus multiple procurements of at least one month at a time for each phase.

Another tactic is to use the procurement process to achieve the desired change control mechanism. The point here is that procurements could be expedited if work scopes are not continually changing. If work scope changes, procurement schedule relief is automatically granted.

DOE MINIMUM POSITION

Rocky Flats has already taken steps to expedite the procurement process with the implementation of the MTS. This process is regulated by federal guidelines (FARS and DEARS) and takes a specific amount of time to complete all the requirements. Actual, historical information must be necessary to generate durations used to determine enforceable milestone schedules.

The EPA should be challenged to provide specific information concerning where federal regulations can be by-passed in order to expedite the procurement process.

DISPOSITION PROPOSED IN RFCA

Assumptions will be established in development of a new baseline.

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AGENCY ISSUE II.B.
DOE ISSUE #1.1

BACKGROUND

Since the IAG was negotiated and signed, Rocky Flats has instituted several changes and additions to the procurement process. Most of the changes have increased the amount of time required to successfully negotiate and implement a service subcontract. Prior to and during the original negotiations for the IAG, Rocky Flats was production oriented. As a result, the procurement system was well defined and equipped to purchase tangible goods. However, there was a lack of definition and sophistication in the manner in which service subcontracts were negotiated and implemented. The majority of the environmental subcontracted tasks are service subcontracts. The maturation of the service subcontract process, coupled with the additional procurement requirements, has added considerably more requirements to the process than were in effect or were anticipated when the IAG was negotiated. The IAG schedules allowed 41 days for the procurement process. The current process requires one to three months. The procurement requirements have created program-wide milestone slippage that is too significant to allow recovery in other portions of the program. Rocky Flats has endorsed the current system and continues to maintain its requirements. This has produced a dilemma for meeting the enforceable milestones while adhering to the revised procurement requirements.

Environmental Restoration (ER) work scope more accurately aligns with a research and development (R&D) project than a production process. The ER work scope evolves from the initial characterization through the remedial action alternatives analyses.

Because of the fluid development of the defined work scope, pre-procurement planning for specific work scope is difficult at best. This situation, coupled with the uncertainty of subsequent years' funding, precludes planning for procurement and requires procurement processes to be streamlined and expedient.

A generic scope of work within a statement of work is not effective for requesting subcontracted support; however, it seldom occurs that the precise direction of an environmental project is known far enough in advance to accommodate the current procurement process.

**AGENCY ISSUES I.A., I.B.
DOE ISSUE #1.2
DATA QUALITY OBJECTIVES
UNDER THE CURRENT IAG SETTING**

ISSUE

Some Rocky Flats IAG work plans have been criticized for not fully addressing data quality objectives (DQOs). For example, work plans for Operable Units (OUs) 1 and 2 failed to identify surface soil contamination as a source of contamination because they were not recognized in the conceptual site model. Omitting a major pathway such as surface soil presents a significant limitation to the Remedial Investigation (RI) (or RCRA Facility Investigation [RFI] under Resource Conservation and Recovery Act [RCRA]), particularly in the case of an advanced phase study in which a final Record of Decision (ROD) is a clear DOE objective.

DOE POSITION

The DQO process should be linked to the technical baseline as assumptions. The DQO requirements (assumptions) will be concurred upon prior to establishing the technical work scope. Any changes to the assumptions will initiate formal change control proceedings. In order to accomplish this, personnel involved in execution of the amended IAG program (DOE, EG&G, contractors, EPA, CDH, etc.) must receive additional training in the DQO process. This will be financed by DOE. In addition, the DQO process must be linked to the baseline risk assessment (including environmental evaluation) and the Feasibility Study/Corrective Measures Study.

EPA POSITION

The EPA fundamentally supports their guidance on DQOs.

CDH POSITION

The CDH fundamentally supports the DQO process. However, they do realize that the current IAG schedule is too tight to allow for the proper application of the DQO process.

DOE NEGOTIATING TACTIC

The DOE should consider use of a collaborative process to help evaluate and establish the DQOs. The EPA and CDH do not currently agree on DQO requirements. If DOE is successful in obtaining regulator concurrence on the need to apply the DQO process, then insistence must be made that adequate times and schedule logic be incorporated into the new baseline. Provision of training should help gain concurrence from all parties.

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DOE MINIMUM POSITION

The DOE will provide training to EPA and CDH on establishing DQO requirements. The DQO requirements must be identified and agreed upon before a technical scope of work is finalized. Any changes to the DQO requirements will initiate the change control process.

DISPOSITION PROPOSED IN RFCA

Assumptions will be established in development of a new baseline.

AGENCY ISSUES I.A., I.B.
DOE ISSUE #1.2

BACKGROUND

DQOs are a planning tool designed to assist with scoping RIs so that information required to support an ROD is specified in the planning stages and obtained from the field investigation. The DQOs are closely associated with development of a conceptual site-specific pathway model (conceptual site model) that, on refinement with remedial investigation data, forms the basis of the baseline risk assessment (BRA) and the analysis of remedial action alternatives in the Feasibility Study (FS).

The requirement for DQOs arises from the National Contingency Plan as well as from EPA and DOE guidance. Work plan scoping using the DQO process is also identified in the IAG. Some form of DQO-based analysis is normally performed on nearly all Superfund projects; however, the degree to which the process is applied is subject to regulator discretion.

Application of the DQO process for scoping IAG work plans has been limited primarily through the specificity of the IAG itself. Within the IAG, "Table 5: Preliminary RFI/RI Work Plan for Previously Identified Inactive Sites" identifies the major work elements to be performed for each OU, and many work elements are identified in detail. The DOE funding of remediation efforts at Rocky Flats is closely tied to the requirements of the IAG. Thus, project managers are limited by specific work plan compliance requirements and funding limitations tied directly to specific requirements within the IAG. Other factors that limit the utility of the DQO planning process at Rocky Flats include (1) deficiency in understanding of the DQO process and its application by the regulators, DOE, and EG&G personnel; (2) inherent technical limitations of the phased approach outlined in the IAG (e.g., initial data gathering and analysis followed by refinement with a focused data collection program) and the paucity of data in a Phase I setting; and (3) restrictive IAG milestone schedule requirements that do not allow adequate time for development of a detailed conceptual site model and subsequent DQOs in addition to fulfilling the minimum work plan requirements.

An additional factor presents problems inherent to the DQO process. Rigorous adherence to the process will tend to produce maximal field and laboratory data requirements, particularly for sites with limited historical information. The DQO process emphasizes statistically based sampling programs and point of contact risk-based analytical detection limits, which tend to expand both sampling and laboratory analysis programs. This potential for scope expansion, coupled with a limited Phase I budget, will often predispose a project manager to a minimal DQO effort.

Advanced phase project work plans (OUs 1 and 2) have been implemented. Remaining OU work plans are approved (OUs 3, 4, 5, 6, 7, 9, 10 and 12) or are

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pending approval (OUs 8, 11, 13, 14, and 15). Thus, the DQO efforts for the Phase I studies are fairly well established. Because of the staged approach in the RFI/RI work plans, there is adequate opportunity to implement the DQO process within the Technical Memoranda to RFI/RI work plans. Considering the budget and schedule constraints, it is unlikely that any Phase I work plan DQO section can be revisited without budget and schedule impacts.

**AGENCY ISSUE VII.
DOE ISSUE #1.3
LAND USE IMPACTS ON THE
ENVIRONMENTAL RESTORATION PROGRAM**

ISSUE

The future use selected for the land and facilities at the Rocky Flats site will have a significant effect on Rocky Flats overall environmental restoration costs under the IAG.

DOE POSITION

The DOE recommends the adoption of a maximum acceptable risk level of $1E-4$ for the Environmental Restoration Program with a possible $1E-6$ when costs, ecological concerns, and socioeconomic factors have been considered. Cleanup standards of 10^{-6} have different meanings for different land uses. This is inherent in the risk assessment methodology under both the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA)/Colorado Hazardous Waste Act (CHWA). Cleanup-level requirements are completely independent of land use determinations. The pursuit of regulator concurrence by DOE is urged. This recommendation is based on the lessons learned from other DOE and U.S. Department of Defense sites where cleanup actions have occurred. The following approach will guide DOE Rocky Flats Field Office (RFFO) to achieve an appropriate future use/cleanup level.

EPA POSITION

If DOE can prove that the residential scenario will never be considered, cleanup can be performed at reduced levels. The EPA has required conservative risk assessments until DOE can demonstrate that future land use will avoid a residential scenario. The EPA policy is outlined in their OSWER Directive on "The Role of the Baseline Risk Assessment in the Remedy Selection Process." This policy essentially commits EPA to a $1E-4$ cleanup level unless more conservative, appropriate, and relevant requirements exist or there are significant environmental impacts. This cleanup level is not tied to a specific land use.

CDH POSITION

The CDH is requiring that the 10^{-6} cleanup level is appropriate for the on site residential exposure scenario. They have issued a policy stating that 10^{-6} risk is required under all circumstances. CDH feels that the ability to clean up drives land use decisions.

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DOE NEGOTIATING TACTICS

The DOE needs to push for a cleanup level of 1E-4 because 1E-6 is overly conservative for any land use scenario. DOE needs to push for commercial/industrial land use in the Rocky Flats industrial area and recreational land use in the Rocky Flats buffer zone with continued ownership by the federal government (not necessarily DOE). These scenarios make the most sense and are readily defensible to the public.

The combination of residential land use and 1E-6 cleanup have the potential to cause great natural resource injury (and damages) at Rocky Flats. Be aware that for certain contaminants lower cleanup levels are required for ecological receptors than human receptors. For example, the soils at OU 2 are contaminated with Pu and Am from the 903 Pad to Indiana Street. It is likely that groundwater pump and treatment will adversely impact wetlands at seeps, and large potential impacts to natural resources are probable.

DOE MINIMUM POSITION

The DOE should categorically establish that future land use at Rocky Flats will preclude residential scenarios. DOE should push for a 1E-4 cleanup level because this adequately protects human health and the environment in many, if not most, cases. However, land use should not be tied to a 1E-4 cleanup level because they are independent. It is important to remember ecological receptors because they also receive protection under CERCLA and RCRA/CHWA.

DISPOSITION PROPOSED IN RFCA

Long-range and interim land use will be addressed in a new section titled "Facility and Land Area Use Planning."

AGENCY ISSUE VII.
DOE ISSUE #1.3

BACKGROUND

The future use of the Rocky Flats site is highly uncertain based on DOE's commitment to stakeholder involvement in the selection process. One group that will investigate possible uses in greater depth is the Rocky Flats Future Site Use Working Group, which is being convened by the Rocky Flats Local Impacts Initiative (RFLII). This group is made up of representatives of the community, DOE Rocky Flats Field Office (RFFO) personnel, the regulatory community, business groups, and other interested stakeholders. This working group is still in the process of being formed. Until the group is formed and a timetable is set, no credible planning basis can exist for a future use/cleanup level for the site.

In the absence of a credible future use recommendation based on broad stakeholder involvement, DOE-RFFO must consider the formal comments from the CDH and EPA requiring a hypothetical future of onsite residential usage which assumes a 1 in 1,000,000 (1E-6) lifetime added cancer risk. These alternatives that achieve this (1E-6) status in the Corrective Measures Study (CMS) and Feasibility Study (FS). The National Contingency Plan encourages agency discretion within the 1E-6 to 1E-4 (1 in 10,000) range. The DOE maintains that a future onsite residential level of cleanup (1E-6) is not realistic for all areas and should be evaluated in risk assessments only when it is plausible.

In addition to human health risk assessments, other factors should be taken into consideration when determining future site uses and cleanup levels necessary to achieve those uses. Three such factors are cost, ecological concerns, and socioeconomic considerations. Each of these factors must be examined in depth for each alternative put forth. Until the public provides input into potential future uses, it is impossible to fully examine alternatives.

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AGENCY ISSUES I.A., I.B., IV.E.
DOE ISSUE #1.4
RISK ASSESSMENTS

ISSUE

A consensus on risk measurement and assessment methodologies in the RCRA Facility Investigation (RFI)/Remedial Investigation (RI), and Corrective Measures Study (CMS)/Feasibility Study (FS) processes is needed to ensure that risk evaluation is consistent, adequate, and defensible among all operable units (OUs). Additionally, a universal set of assessment endpoints should be developed for use in the risk assessments.

DOE POSITION

A period of time should be built into the Rocky Flats Cleanup Agreement (RFCA) for formal agreement on risk assessment methodologies. Many of the risk assessments associated with RFI/RI investigations are already under way, and agreement on some key issues may come in the near future. However, a specific RFCA milestone built into the critical path for risk assessments would serve to formalize any agreements made now.

A process should be included in the RFCA for developing consensus on what aspects of the ecosystem should become the focus of the Environmental Evaluations (EEs) and other natural resource investigations. This process should be started soon because many of the risk assessments are under way. The RFCA should also include provisions for conducting follow-up investigations directed at evaluating sitewide ecological issues and satisfying requirements of the Natural Resource Damage Assessment. Some discussion has already begun among the Natural Resource Trustees concerning a sitewide comprehensive risk assessment, but this process should be formalized in the RFCA.

Most of the EE work plans have been written and many of the investigations have begun. Thus, revision of the existing work plans and schedules may not be practical. However, provisions for additional follow-up investigations could be included in the RFCA. Work plans for such investigations should not be designed until data on the nature and extent of contamination are available. The work plan could be included as a Technical Memorandum and include a screening-level risk assessment using abiotic data to identify contaminants that may pose a threat to ecological receptors. The work plan should include the "Problem Formulation" phase of EPA's Framework for Ecological Risk Assessment (EPA 1992) in which the data needs and data gaps are identified. The work plan should also include a field sampling plan designed to address the additional data needs.

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Comprehensive Risk Assessment should be a requirement in the Rocky Flats RFCA and furthermore, it should also be the driver for the program. Compliance with the statutes is not an end in itself. The Comprehensive Risk Assessment should be both a risk prioritization tool and a risk management tool for cleanup at Rocky Flats. The DOE, EPA, and CDH need to concentrate resources on areas where the greatest risk reduction can be achieved.

Both Hanford and Fernald have risk assessment methodology milestones incorporated into their Federal Facility Compliance Acts (FFCAs). We need a milestone in the Rocky Flats RFCA for development of risk assessment methodologies for the risk assessment (RFI/RI), FS/CMS risk assessment and the Comprehensive Risk Assessment. In addition, the milestone should include radiological dose assessment for all of these risk assessments.

EPA POSITION

The EPA fully supports the Comprehensive Risk Assessment concept. They are, however, very concerned about the use of professional judgment by DOE. Therefore, the EPA will not want to use Comprehensive Risk Assessment for risk prioritization and risk management.

CDH POSITION

No position statement is available at this time.

DOE NEGOTIATING TACTIC

The DOE should use public involvement (especially for the Comprehensive Risk Assessment) in order to push EPA and CDH responsible and defensible risk management at Rocky Flats. DOE should remind EPA and CDH of the eight-month delay because of the recent risk assessment stop work order. DOE must have methodologies in place to avoid repetition of this fiasco. Risk Management Assumptions must be concurred upon in order to establish the technical, cost, and schedule baselines.

The DOE should present Hanford and Fernald as examples of DOE facilities that have a Comprehensive Risk Assessment (Fernald) as well as FFCA milestones for risk assessment methodology (Hanford and Fernald).

DOE MINIMUM POSITION

The DOE should delete all references to normal occurring radioactive materials as requested previously.

In particular, DOE should push for Comprehensive Risk Assessment as a risk prioritization and risk management tool and RFCA milestone for risk assessment methodology for all required risk assessments.

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DISPOSITION PROPOSED IN RFCA

Revisions need to be made to Attachment 2 - Statement of Work, VII, VIII, and Tables 5 and 6.

A new section titled "Project Baseline and Milestones" in Chapter 3, Common Provisions, identifies utilizing a work prioritization methodology that will be based on minimizing risk to human health and the environment.

**AGENCY ISSUES I.A., I.B., IV.E.
DOE ISSUE #1.4**

BACKGROUND

Through the IAG, DOE has agreed to perform environmental investigations consistent with requirements of the RCRA and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) federal statutes at each of its 16 operable units (OUs). These investigations are hybrids between the CERCLA RI/FS and the RFI/CMS. The investigations are divided into two stages, the RFI/RI and the CMS/FS. Each of the RFI/RI and CMS/FS studies requires performance of a BRA which includes two components: a human health risk assessment (HHRA) to evaluate threats to human receptors and an EE to evaluate threats to ecological receptors.

The OUs include an array of suspected primary and secondary contaminant sources called individual hazardous substance sites (IHSSs). Although the BRAs must be performed according to site-specific conditions, certain aspects of the risk assessments must be consistent between investigations at different OUs. To date, programmatic coordination of BRAs has been largely absent owing primarily to a lack of adequate time to plan and prepare a sitewide comprehensive risk assessment program before the first BRAs were due for completion. Implementation of the OU1 — 881 Hillside Area BRA has allowed time to evaluate the limiting aspects of the current risk assessment approach and the identification of areas where the process can be improved. The following is a list of issues identified with input from DOE and EG&G personnel. The issues are presented in order of overall scope of the activities they affect, not necessarily in order of importance.

- A consensus on risk assessment methodologies in the RFI/RI and CMS/FS processes is needed to ensure that risk evaluation is consistent among OUs. Such a consensus would also reduce or eliminate the need for renegotiating approaches and methods for each BRA. Agreement among DOE, EPA, and CDH on approach and methods has been developing as a result of activities on OU 1 and other BRAs in earlier stages of development. However, delays caused by disagreements on contaminant identification, data aggregation for exposure assessment, and other issues have resulted in missed deadlines and milestones. Currently, all risk assessment work at Rocky Flats has been halted for more than six months because of disagreement on how data should be aggregated to estimate exposures. This "stop work" may have been averted if methodologies had been agreed upon prior to beginning investigations. Defining the sometimes conflicting roles of RCRA and CERCLA regulations in each BRA is an important part of this process.
- Assessment of risk to ecological receptors and other natural resources can be difficult because of the variety of endpoints that can be evaluated. The EPA

guidance suggests development of "assessment endpoints" which focus ecological investigations on a few parameters that best represent the overall threat (EPA 1992). Most of the EE work plans at Rocky Flats were written before the EPA had formulated a framework for evaluating ecological risk and did not include development of assessment endpoints. Moreover, under the current structure, development of assessment endpoints is conducted independently for each BRA. This is inappropriate because Rocky Flats is a contiguous ecosystem that should be evaluated as a whole. Thus, a universal set of assessment endpoints should be developed for use in the BRAs. This approach will also be important to efficient implementation of a Natural Resource Damage Assessment (NRDA) following remedial actions at Rocky Flats.

- The EE portion of the BRA evaluates risks posed to ecological receptors by exposure to site contaminants. While the HHRA is largely an office activity, the EE can include extensive field investigations intended to measure effects of contaminants. In order to conduct these investigations, the specific contaminants that threaten ecological receptors must be known. However, the schedule in the current IAG requires that EE field investigations commence prior to availability of data on the nature and extent of contamination. As a result the EEs are performed at a "screening" level using site data on abiotic media, but few measures of potential ecological effects specific to a contaminant are made. Screening-level risk assessments are useful and should be performed. However, time for further ecological investigations is needed to investigate potential problems indicated in the screening-level investigation.
- Baseline risk assessments are currently being performed for individual OUs. However, there is a recognized need for a sitewide BRA that addresses the aggregate risks posed by Rocky Flats to humans and the environment. Evaluation of risks on a sitewide basis may move the focus of risk management from localized and possibly insignificant risks to an area-wide scale more appropriate to assessing the actual threat to human health and the environment. Evaluation of the process and data requirements for such an investigation have been extensively discussed, but no consensus on the approach or even the need for a BRA has been reached. Inclusion of the comprehensive sitewide BRA as a requirement in the IAG may serve DOE's best interests.
- The IAG currently does not include provisions for the approach to risk assessment in the CMS/FS phases of the OU investigations. A framework for conducting risk assessments and use of the data in making decisions on remedial actions are needed to avoid schedule delays that may result when negotiations are held on a site-specific basis.

**AGENCY ISSUE IV.D.
DOE ISSUE #1.5
COMMUNITY ENVIRONMENTAL RESPONSE FACILITATION ACT
REQUIREMENTS**

ISSUE

The DOE is in the process of developing a cleanup agreement with the State of Colorado and the EPA concerning the remediation of environmental contamination at Rocky Flats. This issue concerns whether the Community Environmental Response Facilitation Act (CERFA) of 1992, 42 USC 9620(h)(4) and (5), 102 Pub.L. 426, should be a regulatory driver for these negotiations.

DOE POSITION

The change in the Rocky Flats mission has raised the possibility that DOE may want to release portions of the site to the local community. Consequently, CERFA should be included in the provisions of the Rocky Flats Cleanup Agreement (RFCA) and should also remain consistent with other actions in the agreement (i.e., Comprehensive Risk Assessment).

Under the provisions of CERFA, the EPA administrator is required to concur that the property to be released has been assessed to be "clean."

EPA POSITION

The EPA will be reluctant to concur without exhaustive evidence, because Rocky Flats is a National Priorities List (NPL) site. However, they are required by the Comprehensive Environmental Response, Compensation and Liability Act to render that decision. At this time, regulations that codify the CERFA process have not yet been promulgated.

CDH POSITION

The CDH should generally support the return of federal lands to the state. The CDH will also be supportive of public participation in the land use planning which will be a primary driver for CERFA.

DOE NEGOTIATING TACTIC

The DOE should encourage EPA to codify the CERFA regulations to facilitate DOE's post-cleanup mission.

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DOE MINIMUM POSITION

The DOE should establish language that allows use of the CERFA process in the most effective manner.

DISPOSITION PROPOSED IN RFCA

- Modify Part I, Jurisdiction, to include EPA and DOE responsibilities under CERFA.
- Modify Part 43, Conveyance of Title, to reflect the CERFA process.
- Modify Attachment 2, Statement of Work VIII, to indicate that the proposed Comprehensive Risk Assessment fulfills the requirements of the CERFA Baseline Risk Survey.

**AGENCY ISSUE IV.D.
DOE ISSUE #1.5**

BACKGROUND

CERFA was passed by Congress in 1992 as an amendment to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980. The CERFA requires the federal government to identify government-owned real property where no hazardous substances were stored, released, or disposed of. The purpose of CERFA is to expedite the redevelopment of such property after the federal government has terminated its use of the property.

There are two separate requirements under CERFA. One is for the government's identification and reporting of real property where environmental contamination is not evident. The other involves notifying the state of any leases that would encumber the property after the government has ceased operations on that property. Each of these requirements will be dealt with below.

The first requirement identification of obvious contamination has three separate elements: identification of the uncontaminated property, reporting the findings, and inclusion of certain warranties in the property deed when the property is finally sold. The CERFA requires the head of the department, agency, or instrumentality of the U.S. government to identify the "real property on which no hazardous substances and no petroleum products or their derivatives were stored for one year or more" or were known to have been released or disposed of on the property. This investigation is to include a review of government records, title documents, and aerial photographs; visual inspection; inspection of surrounding properties; and interviews with current and former employees involved in the operations on the property. Sampling may also be required where necessary. In short, the government must do a Phase I environmental site assessment of the property and possibly a Phase II assessment as warranted. The results of the assessment must be provided immediately to the administrator as well as the state and must include a concurrence of the findings by the administrator (if the property is on the National Priorities List) or by the state (if the property is not listed). This identification and concurrence must be done at least six months before termination of the operations on the real property.

When the property is sold by the federal government, the deed that passes title to the property must contain a covenant warranting that any necessary response or corrective action after the date of sale shall be conducted by the United States and a clause granting the United States access to the property in the event that a response or corrective action becomes necessary.

The second requirement of CERFA is that the United States notify the state of any lease into which the United States entered that will encumber the property beyond

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the date of termination of operations on the property. This requirement applies only to those properties where hazardous substances or any petroleum products or its derivatives were stored for one year or more, or where these substances are known to have been released or disposed of on the property. This notice must be given before the United States enters into any such lease for the property.

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**AGENCY ISSUES II.A., II.G.
DOE ISSUE #1.6
NATIONAL ENVIRONMENTAL POLICY ACT**

ISSUE

The EPA and the CDH believe that the National Environmental Policy Act (NEPA) is redundant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) process and should not be a requirement in the IAG. The EPA and CDH position is contrary to DOE policy, and this concern is applicable to many activities governed by the IAG.

DOE POSITION

The development of a position paper by DOE Rocky Flats Field Office (RFFO) and DOE Headquarters (HQ) describing the following policy and subsequent acceptance of this position by EPA should prevent a recurrence of this issue.

The DOE issued DOE Order 5400.4, *Comprehensive Environmental Response, Compensation and Liability Act Requirements*, on October 6, 1989. Section 7, subpart (d) of the order reads, in part:

Where DOE remedial actions under CERCLA trigger the procedures set forth in NEPA, it is the policy of DOE to integrate the procedural and documentation requirements of CERCLA and NEPA, wherever practical. The primary instrument for this integration will be the Remedial Investigation/Feasibility Study (RI/FS) process. This process will be supplemented, as needed, to meet the procedural and documentation requirements of NEPA. In addition, the public review processes of CERCLA and NEPA will be combined for RI/FS-NEPA documents, where appropriate.

This policy was recognized in the IAG by placing an allowance for preparation of an environmental assessment into the schedule for every operable unit (OU). Allowance for an environmental assessment was made as a "place holder" for the type of NEPA document that might later be determined appropriate for each OU, a determination that could not be made at the time the IAG was signed. The proposed delegation of NEPA decisions to the DOE Field Office should further reduce any potential impacts from incorporation of NEPA requirements.

EPA POSITION

The EPA contends that the CERCLA process incorporates the necessary requirements of NEPA.

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CDH POSITION

The CDH generally dislikes the DOE NEPA process. However, the Colorado Governor's Office has approval input to NEPA determinations. Environmental Assessments (EA) and Findings of No Significant Impact (FONSI) are submitted to the governor for review and comment.

DOE NEGOTIATING TACTIC

Differing positions within the state's jurisdiction exist. This point should be made to maximize the negotiating leverage of DOE. The delegation of NEPA decisions to the field office should be sold as a streamlining effort by DOE. This issue should earn bargaining power for DOE because the field office holds authority to address EPA and CDH concerns.

DOE MINIMUM POSITION

The DOE should delegate NEPA authority to the field office to be integrated at its discretion.

DISPOSITION PROPOSED IN RFCA

Attachment 2, Tables 5 and 6 will be modified to reflect integration impacts.

An internal RFFO policy should be developed which would govern the application of NEPA to site activities.

AGENCY ISSUES II.A., II.G.
DOE ISSUE #1.6

BACKGROUND

At the time the IAG was prepared, the application of NEPA was not considered in developing the schedule logic.

Despite disagreeing with the policy, EPA has agreed that DOE may implement its NEPA/CERCLA integration policy for IAG remedial activities as long as doing so does not result in delays in meeting IAG schedules.

AGENCY ISSUE II.C.
DOE ISSUE #1.7
DOCUMENT REVIEW TIMES

ISSUE

Document review times by all parties to the IAG need to be established for those documents that are essential to the implementation of activities under the IAG.

DOE POSITION

Changes need to be made to the existing IAG to resolve this problem. The following actions should be taken:

- Concurrence on assumptions for document review times should be obtained and strictly tied to the proposed change control process.
- A review of all the documents that must be generated or require review by another organization must be made and suitable time periods assigned to complete the document preparation and subsequent reviews.
- The results of this review should be incorporated into Table 4 of Attachment 2 to identify new primary or secondary documents. A new table or attachment would be developed to specify the appropriate document preparation and review times that will be applicable to the various types of submittals.
- Part 25, Documents, should be revised to require that the dispute resolution process be initiated by the DOE project coordinator whenever a document review period is violated by the regulators.
- Part 25, Documents, will have a provision for initiating a change to Table 4 whenever new documents are identified so that the proper document classification and review times can be established.

EPA POSITION

The EPA feels that the current review times and processes are adequate. In addition, they believe that the downstream work activities should remain on schedule despite delays incurred due to extended review times.

CDH POSITION

Same as EPA position.

DOE NEGOTIATING TACTIC

The DOE should encourage acceleration and include a principal element that is subject to change control. All agreed-upon review time assumptions should be recognized in the establishment of milestones. DOE also needs to develop a thorough history of how this issue has impacted work under the current IAG. DOE will not be able to overcome EPA and CDH contentions without such a document.

DOE MINIMUM POSITION

The DOE should insist that formal review periods be established and incorporated into every milestone schedule. DOE should also require that the dispute resolution process be initiated whenever a document review period is violated by a signing party to the agreement.

DISPOSITION PROPOSED IN RFCA

Part 25, Documents, will be modified.

Develop an internal Rocky Flats Field Office document detailing the historical impacts of this issue.

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AGENCY ISSUE II.C.
DOE ISSUE #1.7

BACKGROUND

Table 4 of Attachment 2, Statement of Work, identifies the primary and secondary document classification of submittals that are made to implement and/or report on IAG activities (as specified in the Statement of Work). However, no review times are specified. Part 25, Documents, recognizes that primary and secondary documents exist and states that the dispute resolution process can be invoked for primary documents. Once again, no review times are identified in Part 25.

A review of the IAG revealed that official guidance on how the IAG parties should review primary and secondary documents had not been clearly defined. Furthermore, it is apparent from past experience that Table 4 also needs to be reviewed in order to determine if additional documents must be added to the listing of primary or secondary documents. Documents initiating changes need to be added to the primary list. Any secondary documents that would support change requests should be subject to dispute resolution.

Failure to have specific review times mandated for documents results in loss of control over the schedule for completing planned activities. If the delays become excessive for obtaining the necessary approvals or decisions (positive or negative), then work in progress or work to be implemented can be affected and result in missing an enforceable milestone. Missing milestones can then result in stipulated penalties.

**AGENCY ISSUE II.H.
DOE ISSUE #1.8
APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS
IN THE
REMEDIAL INVESTIGATION/FEASIBILITY STUDY PROCESS**

ISSUE

The determinations of applicable and relevant and appropriate requirements (ARARs) are at a standstill because the parties to the IAG cannot agree on a definition.

DOE POSITION

To date, the parties have not been forced to deal with ARARs because a Record of Decision (ROD) has not yet been obtained. The determination of ARARs has to be defined prior to proposing a ROD. If an earlier determination would be made, it may eliminate some of the unnecessary requirements that are currently being performed under the characterization program.

The DOE should propose ARARs on an operable unit-specific basis as early as possible in the remediation process. The ARAR designations need to be linked to required document review times and ultimately to dispute resolution in order to force all parties to reach an agreement.

EPA POSITION

The EPA does not support state ARARs. They believe that federal standards and promulgated regulations should form the basis for establishing ARARs at Rocky Flats.

CDH POSITION

The CDH is trying to impose the state standards (especially for radionuclides) which are more restrictive than the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) standards. The Resource Conservation and Recovery Act does not give relief for cost factors associated with cleanup.

DOE NEGOTIATING TACTICS

The DOE should form an alliance with EPA in order to provide more reasonable options under federal cleanup standards. CERCLA provides a more flexible approach to the development of ARARs as where state standards tend to be overly conservative and inflexible, and will drive DOE toward unrealistic cleanup options. Early discussions will help generate realistic baselines for work implementation.

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DOE MINIMUM POSITION

The DOE should adopt an internal policy that requires early identification of ARARs. Part 25, Documents, of the proposed Rocky Flats Cleanup Agreement (RFCA) must include ARARs in order to provide DOE the ability to force these issues to dispute resolution.

DISPOSITION PROPOSED IN RFCA

Modify Part 25, Documents, to include ARARs and the linkage of document review to dispute resolution.

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AGENCY ISSUE II.H.
DOE ISSUE #1.8

BACKGROUND

The ARARs act as legal drivers, that in coordination with the baseline risk assessment, determine action levels and minimum technical standards for remedial action. The DOE has maintained that ARARs should be developed in a manner consistent with the National Contingency Plan (NCP). The NCP, however, does not address many subjective issues because the ultimate selection of ARARs depends upon site-specific factors.

Defining standards that are relevant and appropriate depends on some consensus regarding the future use of the Rocky Flats site, characterizing contaminants found on the site, and determining where contamination should be measured. The DOE is currently identifying site-specific factors at Rocky Flats and a methodology for determining ARARs.

The way DOE should address state standards has been a source of concern in identifying ARARs. State standards are generally considered ARARs for CERCLA remedial actions when they have been "promulgated" within the meaning of the NCP. The DOE questions whether many state standards were promulgated. The DOE also maintains that sovereign immunity protects Rocky Flats from some state standards such as state groundwater standards. Colorado groundwater quality standards are disputed because they were enacted without an accompanying funded permit program.

AGENCY ISSUE VI.
DOE ISSUE #1.9
THE ROLE OF PUBLIC INVOLVEMENT

ISSUE

The role that public involvement should play in the implementation of the IAG has yet to be defined. Increased public involvement is consistent with DOE's policy of early, meaningful, and frequent stakeholder involvement.

DOE POSITION

The DOE should involve the public in the Rocky Flats Cleanup Agreement (RFCA) implementation process in order to temper unreasonable expectations of regulators with regard to the cleanup of Rocky Flats. A public participation plan will be developed to ensure that the public is provided with an opportunity for up-front public involvement in the decision-making process throughout the RFCA negotiation and implementation process. The plan will specify how regulatory, DOE, EPA, CDH, and EG&G commitments and requirements for public involvement and information exchange will be met. The plan will also specify the roles and responsibilities of the various organizations in public information and participation activities during the implementation process.

EPA POSITION

The EPA feels that greater public involvement will reduce their control over the project. Therefore, they will request restrictions on the subject matter and timing of information presented to the public.

CDH POSITION

Same as EPA position.

DOE TACTIC

The DOE should use public involvement as a leverage on regulator-specified project requirements. Cost implications of overly conservative cleanup plans should be highlighted, as should cleanup impacts on the ecosystems affected.

DOE MINIMUM POSITION

The RFCA should include a public involvement plan that implements DOE's overall public involvement objectives.

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DISPOSITION PROPOSED IN RFCA

Modification of Part 44, Public Participation/Administrative Record, will be performed to reflect DOE's public involvement objectives.

**AGENCY ISSUE VI.
DOE ISSUE #1.9**

BACKGROUND

The public has been very interested in Rocky Flats operations and activities. Special citizen committees have been formed by Colorado officials and private citizens over the years to air public concerns and provide information to area residents about the plant. Some of the more significant groups include the Sierra Club, Greenpeace, Rocky Mountain Peace Center, Environmental Defense Fund, Citizens Against Nuclear Disinformation in Colorado, Rocky Flats Environmental Monitoring Council (1987 to 1993), Blue Ribbon Citizens Committee (1981 to 1983), Rocky Flats Cleanup Commission (which was funded as the Technical Advisory Group under an EPA grant), and the Rocky Flats Local Impact Initiative. These organizations represent a highly diverse public.

In the past few years, DOE and EG&G have aggressively pursued a course of action to better inform and involve the public in the DOE decision-making effort. As a result of the many private and governmental organizations (Rocky Flats Local Impacts Initiative, CDH, and EPA) that sponsor the numerous Rocky Flats public involvement activities, a Rocky Flats focus group was formed to coordinate Rocky Flats public participation efforts.

In late 1993, a Citizen Advisory Board was formed as a result of discussions on a nation-wide basis among DOE, EPA, and citizen groups on how to better involve the public in the decision-making process at DOE sites. The Citizen Advisory Board took the place of the Rocky Flats Environmental Monitoring Council. The Citizen Advisory Board is accepted by the CDH, EPA, and DOE as having a representative role in Rocky Flats public participation efforts. The Citizen Advisory Board is however, a very new group that has yet to fully define the role that it will play in the Rocky Flats public participation activities including the IAG renegotiation.

**AGENCY ISSUE II.A.
DOE ISSUE # 1.10
APPLICABILITY OF DOE AND EG&G
POLICIES AND PROCEDURES**

ISSUE

Since the current IAG was signed in 1991, both the EPA and the CDH have made the allegation that DOE and EG&G conduct the process of environmental restoration (ER) under a set of procedures that slow the process without adding value. These procedures and requirements range from application of the National Environmental Policy Act (NEPA) requirements to internal EG&G procurement procedure. The regulators believe that the illogical application of these requirements has raised the cost of performing ER work and significantly delayed cleanup schedules. They believe that many of EG&G's requests for schedule extensions have been driven by application of these requirements which add no value to the process.

DOE POSITION

The DOE should begin an internal program to streamline its own procedures and requirements to include the following topics:

1. Establish a Rocky Flats Field Office (RFFO) policy on the application of NEPA to site activities.
2. Establish an RFFO policy on the application of safety analysis reports (SARs) to site activities so that it is consistent with the site SAR which is currently under development.
3. Training for Environmental Restoration Management (ERM) personnel should commence on the Transition Standards Identification Program approach to activity-based planning.
4. Recent improvements in the Rocky Flats procurement process should be incorporated into the ERM baseline, currently under development as part of Rocky Flats Cleanup Agreement (RFCA) negotiation.
5. Recent improvements in the Rocky Flats Integrated Work Control Program should be incorporated into the ERM baseline which is currently under development as part of the RFCA negotiation.
6. An ongoing Process Improvement Team should be established; perhaps with regulator involvement to further streamline administrative processes affecting work performed under the RFCA.

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EPA POSITION

The EPA feels that current DOE and EG&G procedures are too cumbersome and that they increase cost and schedule requirements. The EPA should be supportive of a "bottoms-up" activity-based planning system.

CDH POSITION

The CDH feels that current DOE and EG&G procedures are too cumbersome and that they increase cost and schedule requirements. The CDH should be supportive of a "bottoms-up" activity-based planning system.

DOE NEGOTIATING TACTICS

The regulators are greatly interested in DOE's improvements in this area. DOE should ensure that appropriate concessions are made by the regulators in exchange for these improvements. Most of these areas are under DOE control and could be used to produce regulator acceptance for other DOE proposals.

DOE MINIMUM POSITION

This should be considered during RFCA baseline development.

DISPOSITION PROPOSED IN RFCA

Disposition will be made in establishment of the new RFCA baseline and reflected in Attachment 2, Tables 5 and 6.

AGENCY ISSUE II.A.
DOE ISSUE # 1.10

BACKGROUND

The causes for this issue can be divided into two fundamental groups. The first is the lack of a clearly identified standards basis for the performance of work. This has led to a situation where all administrative requirements are applied to ER tasks, regardless of whether they add value or not. Secondly, the full range of tasks required to complete the ER work scope had never been performed at Rocky Flats, and was an assumption of the original Statement of Work in the IAG. As the work progressed, it became apparent that those Statements of Work were not always accurate or appropriate. Currently, there is not a commonly agreed upon standards basis for conducting work, and as a result, procedures and requirements have been applied to the various operable units in a somewhat ad hoc manner. Furthermore, the work follows several distinct patterns and does not lend itself to the straight application of one Remedial Investigation/Feasibility Study process unilaterally.

AGENCY ISSUE IV.G.
DOE ISSUE #1.11
ROLE OF NATURAL RESOURCE TRUSTEES

ISSUE

The interests of the trustees under the National Resource Damage Assessment (NRDA) are not clearly represented in the Remedial Investigation (RI)/Feasibility Study (FS) phase of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) process. This could create remedies that are substantially more intrusive than would otherwise be required. Early involvement of trustees in the CERCLA process would encourage a more reasonable and balanced approach to remediation at Rocky Flats.

DOE POSITION

Remedial Actions selected for the Rocky Flats site should represent a collective agreement among all trustees to minimize damage to the ecosystem while maintaining a risk management approach for protection of human health and the environment. This position should be linked to the land use, applicable and relevant appropriate requirements (ARARs), and lead agency positions in order to ascertain unified positions.

EPA POSITION

CERCLA mandates addressing both the human health and ecological aspects of remediation requirements. As such, EPA embraces the concepts of NRDA. However, because EPA is not a trustee they are fearful that their control over ARARs will be lessened.

CDH POSITION

The CDH is playing dual roles as a trustee and a regulator of the Resource Conservation and Recovery Act (RCRA)/Colorado Hazardous Waste Act (CHWA) requirements. The roles of the state, however, are somewhat contradictory. To date, the state trustees have not fully represented the interests of the NRDA for cleanup of the Rocky Flats site.

DOE NEGOTIATING TACTICS

Negotiating team members who are also trustees should be encouraged to represent the interests of NRDA in the Rocky Flats Cleanup Agreement (RFCA) negotiations. In addition, DOE should exploit the dual roles of the state and the responsibilities associated with each.

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DOE MINIMUM POSITION

The language of the renegotiated IAG must affirmatively recognize the trustee role as stated in CERCLA.

DISPOSITION PROPOSED IN RFCA

Modifications to Part 1, Jurisdiction, will be made to indicate the understanding that was reached regarding the role of the Natural Resource Trustees. In addition, Part 3, Statement of Purpose, paragraph A.3 (new), will address the emphasis to be placed on remediation options that not only meet minimum requirements for cleanup standards but would also minimize potential impacts to natural resources. Modifications have also been made to Part 4, Statutory Compliance/RCRA-CERCLA Investigation, Paragraph E.

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AGENCY ISSUE IV.G.
DOE ISSUE #1.11

BACKGROUND

CERCLA, Section 104 (Response Authorities) (b)(2), Coordination of Investigations states: The President (read Secretary of Energy) shall... "Seek to coordinate the assessments, investigations, and planning under this section with such federal and state trustees."

The following federal and state agencies have been designated as the Rocky Flats Plant Natural Resource Trustees.

Federal: U.S. Department of Energy (DOE)

U.S. Department of Interior (DOI)

State: Colorado Department of Health (CDH)

Colorado Department of Law (AG)

Colorado Department of Natural Resources (CDNR)

A Draft Memorandum of Understanding (MOU) among the Rocky Flats trustees and EPA (not a trustee) dated September 1993 has been sent to DOE Headquarters (HQ) for review and approval. The stated goal of the parties to the MOU is to "integrate protection and restoration of natural resources into Rocky Flats Field Office CERCLA and the RCRA/CHWA response activities whenever practicable by providing cooperation among all RFP natural resource trustees and EPA during the planning and implementation of response activities covered by the RFP IAG." The stated purpose of the MOU is to "provide broad guidance for natural resource trustees cooperation at the RFP under CERCLA Section 104 (b)(2)." In addition, the MOU "is to recognize and further develop this cooperative relationship by encouraging federal and state trustees and the EPA to provide technical expertise to the DOE and each other regarding natural resources during RCRA/CERCLA activities."

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**AGENCY ISSUE III.A.
DOE ISSUE # 1.12
DISPOSITION OF "ACTIVE" UNITS
UNDER THE IAG**

ISSUE

Many milestones that are currently in jeopardy regarding non-compliance are associated with areas considered "active" units within the facility. Key Principle #1 states that "Negotiations will work toward a Rocky Flats Cleanup Agreement (RFCA) that considers the mission of Rocky Flats, which is to manage waste and materials, clean up and convert Rocky Flats site to beneficial use in a manner that is safe, environmentally and socially responsible, physically secure, and cost effective." The current IAG, however, does not provide a placeholder for "active" units that would allow pursuit of these objectives.

DOE POSITION

1. Initiate informal discussions with EPA and CDH regarding the utilization of Part 41, Amendment of the Agreement, of the IAG to create a placeholder for "active" units. Follow up the discussions with a formal transmittal of an appropriate amendment.
2. Do not include radionuclides in the Resource Conservation and Recovery Act (RCRA)/Colorado Hazardous Waste Act (CHWA) Part B permit.
3. Initiate informal discussions with CDH regarding the closure plan requirements. Because of workload and regulatory implications, the DOE Rocky Flats Field Office waste management personnel feel very strongly that closure plans should follow the statutory and regulatory requirements of the RCRA and CHWA rather than the approved Phase I RCRA Facility Investigation (RFI)/Remedial Investigation (RI) Work Plans. This could potentially be a much larger issue than "active" units under the IAG.
4. The DOE needs the ability to carve out whatever is necessary in order to achieve the mission of Rocky Flats. This directly ties to Key Principle #1.

EPA POSITION

The EPA feels that DOE has not acted in accordance with commitments and that they do possess the authority to provide adequate storage which would enable work initiation on "active" units.

CDH POSITION

The CDH is against offering buildings for economic development that could be used to store wastes and allow closure of pads.

DOE NEGOTIATING TACTIC

The DOE's tactic is to stress that the non-consideration of "active" units, while establishing schedules and milestones, was a fundamental flaw in the original agreement.

DOE MINIMUM POSITION

The RFCA needs to recognize that the Rocky Flats mission has changed and that no disposal options are currently available. The revised agreement must provide a placeholder for determining when work will be performed on "active" units based on disposal availability.

DISPOSITION PROPOSED IN RFCA

In Chapter 3, a section on Emerging Work covers "active units" in paragraph A.3. See also definition in Part 5.B, "Definition of Active Units."

AGENCY ISSUE III.A.
DOE ISSUE # 1.12

BACKGROUND

"Active" units under the IAG present a problem in that characterization; RCRA/CHWA closure (if required); remediation pursuant to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and RCRA/CHWA corrective action can or should not be initiated until these units are no longer in use. Table 6, Attachment II, of the IAG contains milestones for these activities which are subject to IAG stipulated penalties as well as enforcement actions under the Rocky Flats RCRA/CHWA Part B permit. The IAG as it currently exists has no placeholder for these "active" units and has no suitable mechanism to delay required activities. Extensions under Part 42 require the length of an extension to be specified, which is currently undetermined for these units. Modification to Work under Part 32 has been formally proposed to EPA and CDH for the delay of IAG activities at the 750 and 904 Pads in operable unit (OU) 10; however, we have not yet received a response to our May 1993 request. It appears that Amendment to Agreement under Part 41 holds the greatest promise for creating a placeholder for "active" units which would assure the EPA and CDH that all required activities are performed after their use are no longer required by the DOE.

"Active" units under the IAG fall under the following three categories:

1. Permitted units in the Rocky Flats RCRA/CHWA Part B permit
2. Interim status units under the RCRA/CHWA
3. Neither permitted nor have interim status

The current "active" units in question are as follows:

1. OU 9 - Original Process Waste Line
 - Tanks 5, 24, 25, 26 - permitted (RCRA Units 40.04, 40.05, 40.20-40.26, 40.30, 40.31, 40.39-40.41). Efforts are currently under way to gain an exemption for these units under the wastewater treatment unit exclusion. After this is granted by CDH, these units will neither be permitted nor have interim status.
 - Tanks 4, 6, 7, 8, 9, 11, 19, 28, 30, 32, 38 - neither permitted nor have interim status.
2. OU 10 - Other Outside Closures
 - 750 Pad - permitted (RCRA Unit 25)
 - 904 Pad - permitted (RCRA Units 15A, 15B and 35?)

3. OU 15 - Inside Building Closures

- Individual Hazardous Substance Site 212 - permitted (RCRA Unit 63)
- Original Uranium Chip Roaster - interim status

Guidance from CDH and EPA regarding RCRA/CHWA closure has been provided to DOE Rocky Flats and is attached. Both CDH and EPA have stated that it is DOE's responsibility to adhere to milestones listed in Table 6, Attachment II, of the IAG while acknowledging that, because of the "active" status of the units, it is impossible for required IAG activities to proceed. This contradiction is both unworkable and unacceptable to DOE. In addition, both EPA and CDH have proposed that radionuclides be added to the RCRA/CHWA Part B permit. The CDH has stated that the Interim Measure (IM)/Interim Remedial Actions (IRA) decision documents coupled with Phase I RFI/RI Reports will fulfill the requirements of CHWA closure. They have further stated that closure plans submitted for interim status and permitted units should include relevant portions of approved RFI/RI work plans. All these requirements exceed normal RCRA/CHWA requirements and offer CDH additional control over radionuclides which they are not allowed by statute.

Utilizing Part 41, Amendment to Agreement, to produce an Addendum to the IAG is the preferred option for providing a placeholder for "active" units. This will provide for future RCRA/CHWA closure of both permitted and interim status "active" units and CERCLA response actions along with RCRA/CHWA corrective action for all "active" units. In addition, these activities will be tied to the unit becoming inactive and/or the completion of decontamination and decommissioning (D&D). Thus, a date will not be required for the initiation of IAG activities. Instead, IAG activities will be initiated when conditions will allow them to proceed. The continued use of some of these units (e.g., 750 and 904 Pads) for environmental restoration waste storage should be stressed to EPA and CDH. The availability of waste storage capacity will enhance our efforts to meet IAG remediation milestones in the future.

In addition to providing a placeholder for "active" units in the IAG, use of Part 41 will enable DOE to eliminate current liabilities under the IAG and RCRA/CHWA Part B permit for missing IAG milestones. It is likely, however, that EPA and CDH will attempt to require the insertion of a schedule for IAG activities dependent upon the date that units are declared inactive.

With regard to inclusion of radionuclides in the RCRA/CHWA Part B permit, DOE Rocky Flats Field Office (RFFO) should invoke the exclusion for source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended, as solid wastes excluded by definition from being hazardous. This exclusion is located at Section 1004 (270) of RCRA, as amended. In this manner, radionuclides would be regulated under CERCLA and would be addressed after RCRA/CHWA closure and/or concurrently with RCRA/CHWA corrective action.

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For closure plans under RCRA/CHWA, DOE-RFFO needs to ensure that both statutory and regulatory requirements are met. Although CDH's May 29, 1992, letter to DOE-RFFO regarding the closure process for RCRA units under the IAG stated that IM/IRA decision documents and Phase I RFI/RI Reports will satisfy closure requirements, these documents address radionuclides in addition to hazardous waste. Thus, DOE-RFFO has the option of including those portions of Phase I RFI/RI activities exclusive of radionuclides or can simply follow the statutory and regulatory requirements for closure.

4.0 FUNDING

- 4.1 Availability of Funding
- 4.2 Funding of Regulatory Oversight

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AGENCY ISSUE I.C.
DOE ISSUE # 4.1
AVAILABILITY OF FUNDING

ISSUE

Both the CDH and the EPA are requesting that full funding for achieving the IAG milestones be requested of the Congress of the United States.

DOE POSITION

The DOE has a firm commitment to cleanup Rocky Flats, but a realistic acceptance of the federal budgeting process by the regulators is essential to a workable agreement. This is the primary DOE position.

A funding approach will be proposed that is similar to the one currently under consideration at Hanford. The DOE Rocky Flats Field Office (RFFO) approach will incorporate the following features:

1. Regulators receive a copy of the DOE Headquarters (HQ) budget guidance to DOE-RFFO.
2. The DOE-RFFO will prepare its budget request to HQ and will identify those prioritized activities that will be performed for both the full compliance funding level and the budget guidance level. Regulators may review and comment on DOE-RFFO's budget request to DOE-HQ. The DOE-RFFO will forward any unresolved regulator comments to DOE-HQ.
3. Within 30 days of submission to Congress, the site will brief regulators on the President's budget request, identifying any differences between the target and compliance funding levels and the actual funding levels in the President's request to Congress.
4. Regulators agree not to release confidential budget information prior to submission of the President's budget request, unless authorized by DOE or required by court order.
5. Within 30 days of congressional budget appropriation, DOE-RFFO will brief the regulators on the budget appropriation and subsequent funding allocations. Regulators may review and comment on these budget appropriation and funding allocation actions.
6. If the congressional budget appropriation differs from the funding levels required to comply with the agreement, the site shall adjust the schedule and enforceable milestones in accordance with the established process for setting enforceable milestones as proposed in Objective No. 3, Setting Enforceable Milestones.

7. The DOE-RFFO and the regulators will agree on a prioritized list of activities that will be performed to clean up Rocky Flats.

It is unlikely that the regulators will agree to this approach unless some preparation occurs at the level of the Secretary of Energy, the head of the Office of Management and Budget (OMB), the EPA Administrator, and the Executive Director of the CDH.

EPA POSITION

The EPA considers the budget provisions their highest priority. They also view DOE as being in violation of the Comprehensive Environmental Response, Compensation and Liability Act statute because full funding requirements have not been requested by the President.

CDH POSITION

The CDH concurs with the EPA position noted above. The Federal Facilities Compliance Act (FFCA) states that "the President will obtain adequate funds to clean up Rocky Flats". CDH's definition of "adequate" appears to be synonymous with full funding.

DOE NEGOTIATING TACTIC

The FFCA requires request of "adequate" funding. The current budget process is the mechanism for provision of adequate funding. DOE may wish to incorporate the funding language in the Superfund Amendments and Reauthorization Act to counter EPA's position.

DOE MINIMUM POSITION

The current DOE funding process will continue to be followed with more regulator involvement by identifying the activities to be performed each fiscal year while taking into consideration all resource constraints. Unresolved issues regarding the availability of sufficient funding will be made known to DOE-HQ and to OMB. Planned activities and enforceable milestone commitments will be adjusted if impacted by congressional funding allocation actions.

DISPOSITION PROPOSED IN RFCA

Part 50, Funding, will be modified to reflect DOE's position.

AGENCY ISSUE I.C.
DOE ISSUE # 4.1

BACKGROUND

The root cause of this issue is the failure of EPA and CDH to recognize that funding of the cleanup at the Rocky Flats site is controlled by the President's budget that is submitted to Congress. Initial funding of the activities that were necessary to accomplish all the IAG specified enforceable milestones identified in Table 6 were adequate in the early years of the IAG. From the very beginning, however, slippages in the work schedule were incurred because of changes in the original work scope assumptions and the addition of work scopes without negotiating schedule extensions. Adding to this problem was the establishment of over-optimistic schedules when the original IAG was negotiated. These slippages in the schedules resulted in the following problems:

1. All of the activities that needed to be performed in subsequent fiscal years to return to the original schedule could not be implemented because of work space limitations when too many activities were scheduled in the same work area as sample data analysis.
2. The originally projected funding for the outyears that was the basis for targeted budgets was not adequate to cover the increased work load in the outyears.
3. Stipulated penalties were levied for missed milestones.

This limited funding situation existed even though some funds authorized in the earlier years were underrun and reapplied to later years. Failure to meet earlier milestones created a domino effect resulting in slippage of activities necessary to meet outyear enforceable milestones. This will result in the issuance of more Notices of Violations.

Both CDH and EPA are stating that Executive Order 12088 requires that DOE obtain full funding for the cleanup activities that are identified in the IAG. A letter dated July 1, 1993, sent by Martin Hestmark, EPA Region VIII, and Gary Baughman, CDH, to Jim Hartman of DOE-RFFO, threatens enforcement action against DOE and all present and past operations and maintenance contractors as a mechanism for EPA and CDH to resolve funding deficiencies.

**AGENCY ISSUES I.C., VIII.
DOE ISSUE #4.2
FUNDING OF REGULATORY OVERSIGHT**

ISSUE

The EPA and CDH feel that DOE should provide funding for oversight activities of the Rocky Flats Cleanup Agreement (RFCA). They have expressed the opinion that their current staffing levels do not allow them to properly implement the agreement.

DOE POSITION

The DOE is willing to fund regulators at the level necessary to conduct adequate oversight of the RFCA. DOE should push to fund CDH under the Resource Conservation and Recovery Act (RCRA) permit instead of the RFCA, unless CDH agrees to separate the RFCA from the RCRA permit. The RCRA permit defines what oversight activities can be performed and is more restrictive in nature than the IAG. If this occurs then equal funding to the regulatory agencies will be provided under the IAG. The agencies, however, must realize that any funding provided will reduce the amount available for program execution.

EPA POSITION

The EPA feels that DOE should provide the funding necessary to conduct oversight of the cleanup activities at Rocky Flats.

CDH POSITION

The CDH has requested continued and increased funding from DOE.

DOE NEGOTIATING TACTIC

The DOE should provide funding to EPA at a level commensurate with funds provided to CDH. This should be done as a bargaining tool in order to obtain other objectives. Funding EPA at a level equal to CDH will help control oversight capabilities. The CDH currently has limited resources.

DOE MINIMUM POSITION

The EPA and CDH should be funded equally. CDH funding should be moved under RCRA if segregation of the RFCA from the RCRA permit does not occur.

DISPOSITION PROPOSED IN RFCA

Chapter 5 - Part 30, Recovery of EPA Expenses, and Part 31, Recovery of State Costs, will be modified to address the funding of oversight provisions.

**AGENCY ISSUES I.C., VIII.
DOE ISSUE #4.2**

BACKGROUND

This issue was brought up in negotiation of the original IAG, in which DOE decided against providing funding for EPA oversight activities of the IAG. This issue was brought up again as part of the development of the Quality Action Team items (#6). Part 30 to the IAG, Recovery of EPA Expenses, states that DOE and EPA have been unable to resolve the issue of reimbursement of EPA's expenses associated with fulfilling its obligations under the IAG. The EPA agreed to reprogram its funds to fulfill the obligations under the IAG for a period not to exceed one year. A mutually satisfactory method to fund EPA for its expenses, incurred in the course of executing the IAG, was to be created within the 1-year period. If this issue was not resolved within the 1-year period, EPA would hold the right to terminate the IAG at any time after 90 days written notice to all parties.

The EPA is currently investigating the Office of Management and Budget's language and other recent actions that presumably make it acceptable for DOE to provide funding for EPA oversight activities of the IAG.

5.0 MODIFIED, ACCELERATED, OR DELETED WORK SCOPE

- 5.1 Industrial Area Intrameasures/Interim Remedial Action Plan Environmental Assessment
- 5.2 National Pollutant Discharge Elimination System/Comprehensive Environmental Response, Compensation and Liability Act/Resources Conservation and Recovery Act Pond Control
- 5.3 Emerging Work Scope
- 5.4 Expedited Response Actions
- 5.5 Regrouping of the Operable Units
- 5.6 Decontamination and Decommissioning Approach within the Rocky Flats Cleanup Agreement

AGENCY ISSUES I.I.E., IX.
DOE ISSUE #5.1
**INDUSTRIAL AREA INTERIM MEASURE/
INTERIM REMEDIAL ACTION PLAN/ENVIRONMENTAL ASSESSMENT**

ISSUE

The current IAG includes established milestones for work within the industrial area (IA) that does not reflect the most effective means of performing work within the IA confines. (This issue ties to Decontamination and Decommissioning [D&D] strategy, accelerated cleanup initiatives, and flexible milestones.)

DOE POSITION

- Work within the IA should be separated between areas that are accessible and areas that are not.
- A proposed Interim Measure (IM)/Interim Remedial Action (IRA) should be designed to ensure that present contamination, or contamination discovered in the future, in the IA would be contained and that there would be no threat to the health and safety of workers or the general public until final remediation actions are feasible.
- Ongoing monitoring efforts will be proposed to ensure the effectiveness of the IA umbrella and its protection of human health and the environment. Language should be proposed in the new Rocky Flats Cleanup Agreement (RFCA) to reflect the requirements of monitoring efforts.
- DOE should use the IM/IRA to satisfy EPA's desire for expanded Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) jurisdiction over ongoing operations within the IA.

EPA POSITION

The EPA generally supports the IA IM/IRA concept. The EPA also views implementation of the IA IM/IRA as a means to fulfill its statutory obligations under CERCLA.

CDH POSITION

The CDH position is fairly benign on this issue because adequate controls already exist under the Resource Conservation and Recovery Act permit.

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DOE NEGOTIATING TACTICS

The DOE can use the IM/IRA as a means to obtain EPA concessions on other matters. The EPA will gain credibility with its stakeholder by ensuring the safety of ongoing Rocky Flats operations from a CERCLA perspective.

DOE MINIMUM POSITION

The DOE must obtain schedule relief from existing IAG commitments within the IA. This issue could be used as a bargaining tool if necessary.

DISPOSITION PROPOSED IN RFCA

Disposition will be reflected in the establishment of a new baseline in Attachment 2, Tables 5 and 6.

**AGENCY ISSUES II.E., IX.
DOE ISSUE #5.1**

BACKGROUND

The IA at Rocky Flats contains all or portions of operable units (OUs) 2, 4, 6, 8, 9, 10, 12, 14, 15, and 16. The individual hazardous substance sites (IHSSs) contained within these OUs exhibit the full spectrum of contaminants, sources, media, and transport mechanisms present at Rocky Flats. Because of the diverse nature and extent of contamination found in the IAG, the Remedial Investigation (RI) process for each OU is likely to be lengthy, costly, and complex.

The change in mission of Rocky Flats, which became effective in January 1992, will impact the Environmental Program, and the IAG will incur a significant impact. As areas of the IAG are transitioned to economic development and/or D&D, the remediation efforts will be affected. For example, the D&D efforts will probably involve modifications to the structures in the IA. In turn, these modifications could cause changes to the contamination profile. A characterization of the area will be required after the D&D activities are complete so the current, scheduled IAG activities in the IA should be deferred to eliminate a redundant characterization program.

Each of the IAG activities from characterization through the final remediation or closure may be affected by economic development and D&D. The current, scheduled remediation efforts in the IA will be costly and will encounter significant logistical problems if undertaken while the area is still operable and secured. Uncertainties inherent to the working environment at Rocky Flats have been shown to adversely affect budgets, schedules, and work scopes. This may be especially true in the IA where safety, security, and accessibility all significantly affect the working environment. The necessity of maintaining high security levels can impact costs by as much as 300 percent to 400 percent. Cost impacts generally take the form of delays in moving equipment and personnel in and out of the Protected Area (PA) and other secured areas; physical plant interference in the form of buildings, overhead, and buried power lines; water and sewer lines; security systems; and daily plant operations. The unreliability of plant "as built" utility drawings introduces a level of hazard and uncertainty that justifies a cautious investigative approach.

Work within the IA may require the establishment of Rocky Flats' vital safety and security systems. Moving RI activities into the IA can only further erode the operating efficiency in what is already a difficult operating environment. Previous investigations in the PA and the IA have encountered operating difficulties due to cultural interference. It is apparent that RI activities can be carried out more readily where plant activities are curtailed.

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The RI of the IAG should be linked to the transition and economic development of the site so that scheduling, funding, and policy can be integrated.

AGENCY ISSUE IV.F.

DOE ISSUE #5.2

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM,
COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION
AND LIABILITY ACT, AND RESOURCE CONSERVATION AND
RECOVERY ACT POND CONTROL**

**Operating, Administrative, and Regulatory Impacts of a Change in Regulatory
Drivers for Surface Water Impoundments at Rocky Flats**

ISSUE

Management of the Rocky Flats Surface Water Impoundments under the National Pollutant Discharge Elimination System (NPDES) and Clean Water Act (CWA) while trying to meet EPA and CDH requirements under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), respectively, are both conflicting and duplicative.

DOE POSITION

The DOE should continue operating surface water impoundments under the NPDES permit and the CWA. However, DOE should try to coordinate the requirements of CWA with CERCLA requirements for closure of the ponds if and when DOE decides there is no further need for them. Regulation of the ponds under RCRA should be avoided at all costs. The ponds in their current state do not meet the design requirements under RCRA regulation.

EPA POSITION

The EPA wants CERCLA authority during operation of the ponds and feels that it is the appropriate regulating authority. Final cleanup of the ponds will be under CERCLA; however, earlier control of the ponds is desired.

CDH POSITION

The state's perspective regarding control over the ponds is split. The hazardous waste side of the state supports EPA's position, but others have threatened closure requirements under RCRA.

DOE NEGOTIATING TACTICS

The DOE should require agencies to show the benefit of operating under duplicative laws, i.e., application of CERCLA regulations during pond operation status. This could also involve the public gaining support to avoid additional expenditures on an alternative control measure.

DOE MINIMUM POSITION

- Should hold firm that regulation of the ponds remain under the CWA as long as they are in operation
- Avoid RCRA control at all costs
- Maintain a single agency lead over pond operation jurisdiction

DISPOSITION PROPOSED IN RFCA

Part 7, Findings of Fact, and the new section under "Emerging Work" will address DOE's position.

AGENCY ISSUE IV.F.
DOE ISSUE #5.2

BACKGROUND

On June 26, 1992, the EPA officially informed the DOE of its decision to regulate the surface water impoundments at Rocky Flats under RCRA and CERCLA rather than the CWA's NPDES. The EPA also announced that the agency would not allow the use of the upper ponds (A-1, A-2, B-1, and B-2) for containment and storage of spills. The letter formalized the decision announced at a meeting with EPA, DOE, and EG&G on December 19, 1991.

Converting control of the Rocky Flats ponds from NPDES to RCRA and CERCLA has a number of implications for the operation of the ponds, the role they play in controlling storm water runoff from the site, and the avenues of input DOE and EG&G would have in managing the surface waters. The following points represent some of the implications of this EPA decision:

Negative Impacts

1. The EPA decision represents unilateral action by the agency without consultation with the affected federal agency. This does not seem to be consistent with Executive Order 12088, which covers pollution control at federal facilities and requires the concurrence of the Office of Management and Budget (OMB).
2. Attorney Peter Ornstein of the EPA stated emphatically at the December meeting that this was not a major federal action and did not require activation of any National Environmental Policy Act (NEPA) processes. His opinion may not be substantiated. As these points indicate, there are substantial costs associated with this action, which were probably not considered by the agency, and, at the very least, would require OMB review.
3. The DOE has authorized a major project to describe surface water management at Rocky Flats, the Surface Water Management Plan. It was produced at substantial cost and could be severely impacted by changes in the regulatory status of the ponds.
4. The EPA stated flatly that the surface waters at Rocky Flats were considered waters of the United States, citing the agency's numerous successes in court cases challenging its authority to make such determinations. The "reasonable bird" theory was used. Rocky Flats documents show that the ponds were designed and built for spill containment and runoff control and treatment. Such uses conflict with the water of the United States argument.
5. The change in regulatory status of the ponds could have an impact on the implementation of Option B. Great Western Reservoir is also identified as a

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- CERCLA site, and if the Rocky Flats ponds are incorporated into the IAG process, so must Great Western and the Option B process. Furthermore, the OMB review of Option B may have to be redone if new regulatory requirements apply to the reservoir.
6. The fiscal impacts of this change to operations within Environmental Management are uncertain at this point. Additional staffing will likely be required to address the substantial administrative requirements of RCRA and CERCLA documentation.
 7. The NPDES permit will now cover only the discharge from the Rocky Flats wastewater treatment plant (WWTP) and storm water runoff under the storm water permitting process. Control of pollutants at the outfall of the WWTP is generally good, but discharge limits are not the same as water quality standards in the receiving water. The classification as CERCLA would require the application of water quality standards as applicable or relevant and appropriate requirements (ARARs), limitations that are substantially more restrictive than the NPDES permit limitations. Major upgrades to the WWTP are currently budgeted at more than \$8 million based on the existing requirements of the NPDES permit and the Federal Facility Compliance Agreement (FFCA). The advanced treatment additions would have to be revisited in light of these announced changes, and it may cost considerably more to further upgrade the WWTP.
 8. The classification of all surface water at Rocky Flats is now in question. Storm water runoff will be regulated by the NPDES permit, but its classification may change as it flows into the terminal ponds. If runoff quality is regulated in the future permits, limitations could be applied at the six monitoring points at the terminal ponds. Of all aspects of the surface water management at Rocky Flats, this could be the most crucial. The ponds provide sediment removal capacity, greatly reducing contaminant loads.
 9. This action was taken without review of the status of Rocky Flats operations. No alternatives were considered based on possible changes in operations at Rocky Flats, especially in light of the newspaper headlines on the day of the meeting which stated "Closure [of Rocky Flats] in January or February very clear, Wirth says."
 10. The IAG is now included by reference in the RCRA permit issued by the state. Current management practices include treatment at the ponds prior to discharge; such treatment may now be subject to RCRA requirements, including the handling of all materials, such as filter socks, as hazardous wastes.
 11. The Surface Water Division (SWD) has budgeted funds for strengthening the existing dams to improve safety. Expenditures for dam improvements may be questionable if the dams and ponds are targeted for removal under this action.

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12. Is the EPA decision telling DOE how to operate its plant (i.e., that the ponds are no longer needed to operate and that a closure plan is required), or is the EPA saying that the ponds, previously covered in two NPDES permits, are not legal, and DOE is currently operating illegally?
13. If the ponds are no longer available for runoff and flood control, alternative "off-line" storage would be required. Current estimates are as high as \$50 million to provide storage for 300 acre-feet of runoff, the volume currently stored in the A-, B-, and C- series ponds.
14. Both DOE and EG&G are preparing the Spill Prevention Control Countermeasures (SPCC) and Best Management Practices (BMP) plan required under the NPDES permit. The provisions of this plan could require substantial revision, at additional cost, as a result of the regulatory change.
15. Any suggestion that the ponds be removed is, at a minimum, contrary to professional engineering practice in providing storm water control using best management practices. In fact, it is a standard practice across the country to construct wet retention facilities within natural drainage ways. Several consultants have commented that if Rocky Flats were to initiate pond construction today to do what the existing ponds do, they would be sited exactly where they are.
16. Potential penalties under RCRA and CERCLA differ from those applicable under the CWA. If the ponds become RCRA-permitted facilities, fines could be imposed by the state. Coincidentally, the state would also be responsible for setting the standards that the discharge would have to meet. It seems possible that a situation is being created in which the state could make it impossible to discharge, or at least to overcome the current state budget deficits.

Positive Impacts

17. The option of a pipeline from the Rocky Flats WWTP to the Northglenn plant becomes more attractive under the changed regulatory status of the ponds. Cost of the pipeline is likely to be lower than added treatment for ammonia removal and effluent storage now budgeted under the FFCA requirements. Northglenn has already indicated an interest in this option because the city's existing waste water treatment plant is operating at only about one-half capacity. Additional waste water flows would increase the efficiency of operation.

**AGENCY ISSUES III.A., III.D.
DOE ISSUE #5.3
EMERGING WORK SCOPE**

ISSUE

The new Rocky Flats site mission, adopted in 1994, includes a number of activities that are regulated by differing statutes and attendant regulation. The new site mission can be divided into four major segments: nuclear material management, waste management operations, environmental restoration, and general site management operations.

Nuclear Material Management

This segment includes ongoing operations in the six plutonium buildings and also the Transition, Deactivation, and Decommissioning of other former production facilities. The predominant statute that governs operation of these facilities is the Atomic Energy Act (AEA), and the body of regulations that was generated from that statute are the DOE orders. Aside from certain Nuclear Regulatory Commission standards, there is no equivalent body of regulations that could deal with this type of operation.

It is important to note that DOE is not self-regulating in this arena. The Defense Nuclear Facilities Safety Board, created through the Defense Authorization Act, has broad oversight powers in this area and has drastically influenced DOE operations during the past five years.

This mission will continue at Rocky Flats in the foreseeable future and may include plutonium operations associated with preparing Special Nuclear Material (SNM) for final shipment from the Rocky Flats site. In sitewide risk management scenarios, this area of operations comprises the highest risk group of operations at the site.

Waste Management Operations

Rocky Flats will continue to provide storage for a large quantity and wide variety of regulated wastes. In addition to the wastes, a large quantity of plutonium-bearing residues are also stored at the site. A certain amount of additional waste is routinely generated by ongoing nuclear materials management operations and as Decontamination and Decommissioning (D&D) operations begin at Rocky Flats, large quantities of waste and residue will be generated. These wastes and residues are regulated primarily by the Resource Conservation and Recovery Act (RCRA) and related state statutes, and the CDH is the primary regulator.

This area of the site mission will continue to grow as D&D operations increase; the scope of these operations is directly related to the national DOE waste management program.

Environmental Restoration

The Environmental Restoration Management (ERM) program at Rocky Flats was established following the formal inclusion of the site on the National Priorities List (NPL) in 1989. Hazardous substances, pollutants, contaminants, hazardous wastes, and hazardous constituents as defined by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and RCRA have been produced and disposed or released at various locations at the Rocky Flats site since its establishment approximately 40 years ago. Since 1986, DOE, as owner of the site, has been a party to a variety of environmental agreements governing corrective/remedial actions. The current agreement, known as the IAG, governs activities in 16 operable units and deals with known releases of hazardous constituents, defined by CERCLA and RCRA. The IAG is a conscious attempt by all three parties to integrate the activities of CERCLA and RCRA. A variety of regulations stemming from these statutes govern these operations.

This area of operations plans to continue at the site. However, as DOE terminates operations conducted under the AEA, they may fall under the jurisdiction of CERCLA, and therefore be regulated by the EPA. The wastes generated by these activities will be regulated by CDH, pursuant to its authority under RCRA and the Federal Facility Compliance Act (FFCA).

General Site Management Operations

This group of operations includes miscellaneous facilities, such as surface water impoundments (ponds) operated to control storm water runoff or the Sewage Treatment Plant (STP). The ponds are regulated under the Clean Water Act (CWA) through the National Pollution Discharge Elimination System (NPDES) and the STP is operated under a variety of statutes and regulations. However, they are not currently considered remediation projects because they are primarily ancillary functions necessary to maintain the overall site mission. In addition, as the site is remediated, these operations may no longer be required by DOE, and consequently would be terminated. At that time, they would come under the control of the RFCA because the entire site is included in the NPL.

The IAG is a remediation document and its successor, the Rocky Flats Cleanup Agreement (RFCA), is also intended as a remediation document (per Key Principles for negotiation); therefore, the progression of the site mission will naturally increase the scope of work that falls under the agreement. The "emerging work" concept is intended to provide a line of demarcation for the operations governed by the agreement. Currently, a great deal of question surrounds this issue for all parties involved.

DOE POSITION

The DOE's primary position on emerging work is that all work at the site should be governed by appropriate statutes, regulations, and regulators. To the extent that

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RFCA will primarily be a remediation document, the work performed under the RFCA will be remediation work, as governed by CERCLA and RCRA. As the new site mission progresses, a natural differentiation will form between its elements. Buildings that are undergoing Transition, Deactivation, and Decommissioning will remain primarily under the jurisdiction of DOE and the AEA. EPA's statutory requirements could be met through and IM/IRA for the Industrial Area. CDH's interests are fully represented in the RCRA permit for the site.

Following a DOE decision that DOE has no further beneficial use for a facility, the remaining work in that facility could be deemed remedial in nature, and discussion should then begin with regulators on its inclusion in the ER Major System Acquisition (MSA) baseline.

Several other categories of emerging work must also be addressed. Specifically, "active units" (DOE Issue 1.12) and Surface Water Impoundments (DOE Issue 5.2). These facilities follow the same concept and should be brought under RFCA jurisdiction when they no longer contribute to DOE's mission at the site and therefore require remediation.

Item #13 of the renegotiation principles indicates that "the scope of the agreement will increase." Generically, this scope increase would cover all site cleanup activities at high level, with regulatory participation ranging from DOE notification (no regulator authority) to full regulatory approval. Detailed scope of the agreement will begin with the current IAG scope and expand through the change control and the emerging work process. Detailed scope yet to be added to the RFCA will consist of those activities that will be identified as part of the current IAG process (e.g., the Historical Release Report) and will also include those that result from facilities and equipment determined to be surplus to any DOE mission. The current Historical Release Report process will essentially continue as currently defined.

For surplus facilities and equipment, the detailed scope to be added to the RFCA will consist of D&D and remedial actions. In general, a facility would pass through a transitional D&D phase in which the interior equipment would be decontaminated and removed and the facility decontaminated and decommissioned. In some cases, the facility would be unconditionally released. A "facility" remedial action would then occur, including demolition and remediation of the environmental media remaining within the facility "footprint." Regulator interaction with D&D is described in Issue #5.6. Regulator interaction for the "facility" remedial action will be the same as for other environmental media, and the activities would be part of the Industrial Area OU scope. These activities would be conducted under the routine process described in the RFCA.

Other elements on the topic of emerging work scope involve the reduction of current work scope through process changes and improvements in efficiency, modification of OU for improvements in efficiency, identification of beneficial early actions, and the ongoing operation of "active units" (DOE Issue 1.12). The RFCA

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should allow streamlined processes for these actions with regulator approval and base decisions on risk reduction, improvement in efficiencies, and other publicly recognized measures of merit.

EPA POSITION

The EPA would probably support this concept, based on its acceptance of the renegotiation principles. The EPA has previously stated that the only reason it is entering into this process is because of the D&D scope. Either the EPA will want to force the process to expedite bringing detailed scope into the MSA baselines or it may want to achieve greater authority in the overall budgeting and prioritization process.

CDH POSITION

Generally, the CDH position should be the same as the EPA position. However, CDH may be less concerned about levels of authority in D&D activities because it has authority under the RCRA permit

DOE NEGOTIATING TACTICS

The DOE should present a process consistent with the change control process.

DOE MINIMUM POSITION

The DOE's minimum position is that the DOE itself has authority over its ongoing mission decisions, including all aspects of the new site mission.

DISPOSITION PROPOSED IN RFCA

A new section, Emerging Work, will be included in Chapter 3, Common Provisions, Part 24, Change Control.

The change to the project baseline for incorporation of Emerging Work will be made through the Chapter 3 section on the Change Control Process.

**AGENCY ISSUE II.E.
DOE ISSUE # 5.4
EXPEDITED RESPONSE ACTIONS**

ISSUE

The current IAG is too rigid in its administrative structure and does not currently have the flexibility to permit creative approaches to accelerate the cleanup activities.

DOE POSITION

The Rocky Flats Cleanup Agreement (RFCA) needs to include wording that specifically allows implementation of alternative cleanup approaches that represent the most effective performance of work scope. The following objectives should be sought in development of the new RFCA:

- Specific language should be developed that enhances options for performance of accelerated actions. This should include wording on IM/IRAs, removal actions, Corrective Action Management Units, and the Resource Conservation and Recovery Act/Comprehensive Environmental Response, Compensation and Liability Act separation in implementation of the most appropriate action.
- Proposed Expedited Response Actions should be linked to the change control and dispute resolution processes to ensure flexibility and fair consideration are given. This will also tie to the process for incorporation of emerging work scope.
- Generic accelerated actions processes could be established to streamline implementation upon identification of potential early action candidates.

EPA POSITION

The EPA generally agrees with accelerated cleanup initiatives; however, it may object to some approaches, i.e., removal actions.

CDH POSITION

The CDH generally agrees with accelerated cleanup initiatives.

DOE NEGOTIATING TACTICS

- The DOE should demonstrate the redundancies between Records of Decision and Corrective Action Decisions and the lack of cost effectiveness required through their full implementation.
- The DOE should incorporate public values to drive cleanup priorities and acceleration.

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DOE MINIMUM POSITION

The DOE should insist on an agreement that allows flexibility and also consideration of changing requirements and cleanup options to enable the most effective performance of workscope.

DISPOSITION PROPOSED IN RFCA

Language was added in Chapter 1, General Provisions, under Part 3, Statement of Purpose, Paragraph A.11.

Attachment 2, Statement of Work, will be modified to incorporate expedited response actions.

AGENCY ISSUE II.E.
DOE ISSUE # 5.4

BACKGROUND

Environmental Restoration (ER) activities began at Rocky Flats in 1984 under the Comprehensive Environmental Assessment and Response Program. A preliminary site assessment report and the first individual hazardous substance site (IHSS) list were completed in 1986. Schedules were developed in 1986 for the characterization program of the 881 Hillside (now operable unit [OU] 1) and the 903 Pad (now OU 2) in 1987. A sitewide characterization was performed in 1986 and updated in 1987. Rocky Flats was added to the National Priority List (NPL) in the fall 1989. Subsequently, the IAG was negotiated among DOE, EPA, and CDH, to establish a common basis of understanding and to integrate the requirements of EPA and CDH. The IAG was signed on January 22, 1991. The IAG provides the legally enforceable framework to coordinate cleanup and oversight efforts and to standardize requirements at Rocky Flats. In March 1992, the historical mission of Rocky Flats, nuclear weapons production for defense, ended after 35 years. The current mission is to clean up and convert Rocky Flats to beneficial use in a manner that is safe, environmentally and socially responsible, secure, and cost effective.

Since the signing of the IAG, several events have occurred that indicate that the approach to remediating the Rocky Flats site needs to be revisited. The ever-expanding cost and schedule requirements for the cleanup effort, the mission change for the site, the efficiencies identified through increased knowledge, and the growing pressure for more accelerated, cost-effective cleanup all have led the DOE Rocky Flats Field Office (RFFO) to conclude that a revised ER approach is needed. To achieve this objective, DOE-RFFO approved action to examine Rocky Flats ER program, address pertinent issues, and develop a strategy to more efficiently perform cleanup activities. This revised ER approach includes the following:

- Initiating Interim Measure (IM)/Interim Remedial Actions (IRAs) or removal actions to accelerate corrective action on IHSSs whose removal and/or isolation will substantially reduce risk
- Eliminating current operations for which results indicate that contamination is not significant and poses no risk to the public or the environment (i.e., groundwater treatment at OU 1)
- Deferring activities on IHSSs within the IA that pose no immediate risk to the public or environment and should be integrated with transition/decontamination and decommissioning activities for technical and cost-effective reasons

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- Fully integrating ER activities with waste management activities to allow efficient consideration and provision of interim storage capacity requirements
- Regrouping/consolidating IHSSs and OUs to improve the efficiency of program execution
- Modifying the IAG to reflect new milestones and a change control mechanism that allows flexibility in its commitments as increased knowledge and experience are obtained

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AGENCY ISSUE IX.
DOE ISSUE # 5.5
REGROUPING OF THE OPERABLE UNITS

ISSUE

The regrouping of individual hazardous substance sites (IHSS) into operable units (OUs) would allow more efficient configuration of remediation work at Rocky Flats.

DOE POSITION

There are several compelling reasons to regroup the current OU structure into a more efficient configuration:

- Combination of overlapping or similar OUs and/or IHSSs will save resources by conducting more efficient field investigations and reducing the number of documents required as a result of economies of scale (one RCRA Facility Investigation [RFI]/Remedial Investigation [RI] report instead of three or four).
- Better assessment of contaminant fate and transport migration (combining OUs) would allow for more effective examination of contaminant pathways, such as groundwater, which would be inhibited by the use of inappropriate artificial OU boundaries.
- Any IHSSs with similar problems and solutions could be grouped together resulting in a more cost-effective remediation approach.
- All IHSSs in areas of Rocky Flats that are impacted by the infrastructure and restrictions associated with continuing operations should be evaluated and remediated together so as to minimize security, logistical, and/or health and safety risks.

Analysis of the current OUs suggests the following changes:

- Consolidate OUs 8, 9, 10, 12, 13, and 14, each of which contain IHSSs scattered throughout the industrial area (IA), into one OU and establish an OU remediation schedule that coincides with the transition and decontamination and decommissioning (D&D) of buildings and facilities. These OUs are already being managed as an integrated unit for some activities (e.g., non-intrusive sampling, ecological evaluations, and consolidated risk assessment). However, these OUs are still officially separate, requiring separate approvals of individual work plan changes; separate program management documentation and management; and separate generation of RI/FS documents, all of which requires excessive resources and time. The DOE Rocky Flats Field Office has proposed to the regulators that the OUs be officially combined.

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- Evaluate the potential for establishing one or several sitewide groundwater/surface water OUs. This configuration would ensure a more accurate understanding of groundwater flow, contaminant transport, groundwater/surface water interactions, and potential exposure pathways. Removal of the groundwater issue from the OUs will transfer the focus to source removal and isolation and could reduce the time required to complete accelerated cleanups by streamlining the IM/IRA decision document process for the IHSSs within the OUs.
- Place all of the retention-pond sediments (except those in the present landfill runoff retention pond in OU 7) into one OU, because any contaminated sediments probably will require very similar, if not identical, remediation technologies. This may also simplify the permit issues. The ponds should continue to be used as a spill-prevention measure until the remainder of the IA is remediated. Thus, this OU would be the last to be remediated and would be dealt with under the "emerging work" section.
- Place all IHSSs that meet the criteria of a No Further Action (NFA) into one OU.

Regrouping the IHSSs into OUs that utilize the mission change and existing data to identify NFA alternatives would allow a more efficient configuration, accelerate cleanup, and achieve substantial cost effectiveness without compromising either human health or the environment.

EPA POSITION

The EPA is willing to accept changes upon proposal of appropriate justification by DOE.

CDH POSITION

Same as EPA position.

DOE NEGOTIATING TACTIC

None.

DOE MINIMUM POSITION

Need to include language in the new agreement that accommodates the flexibility necessary to modify OU and/or IHSS structure.

DISPOSITION PROPOSED IN RFCA

Will be considered in development of the Rocky Flats Cleanup Agreement (RFCA) Baseline and incorporated into the Statement of Work in Attachment 2.

Part 3, Paragraph A.11. was added to incorporate flexibility language that accommodates the restructuring of IHSSs and/or OUs.

**AGENCY ISSUE IX.
DOE ISSUE # 5.5**

BACKGROUND

The Environmental Restoration Program at Rocky Flats has had several recent developments that were not part of the original IAG assumptions. The most significant changes have occurred because of the recent change in mission at Rocky Flats. The new mission has substantially impacted the technical, cost, and schedule assumptions of many of the OUs at Rocky Flats. The most significant impact has been the development of the transition and D&D planning efforts. The impacts from transition and D&D have mainly affected IAG schedules for OUs within the IA at Rocky Flats, which include OUs 8, 9, 10, 12, 13, and 14.

Additionally, current field data have been obtained for many OUs (both in and out of the IA) that demonstrate concentrations of contaminants in the IHSS are not above cleanup levels. Historical data indicate releases of only small quantities or low concentrations of hazardous and/or radioactive substances within the IHSS, such that limited field investigation techniques would suffice to demonstrate that no significant contamination exists. In this case, the IHSS could be characterized as an NFA.

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AGENCY ISSUE III.A.
DOE ISSUE #5.6
DECONTAMINATION AND DECOMMISSIONING APPROACH
WITHIN THE RFCA

ISSUE

Decontamination and Decommissioning (D&D), i.e., the cleanup activities associated with facilities as opposed to environmental media, has been identified as being within the scope of the overall cleanup agreement. To permit D&D projects to be performed in a cost efficient manner, the two related issues of regulatory involvement in the D&D process and of the legal provisions or framework to utilize for D&D must be defined. Generally speaking, it consists of final facility actions taken following transition, deactivation, decommissioning, and interim surveillance and maintenance.

DOE POSITION

D&D, generally defined as the clean up of surplus facilities and equipment, will be covered under the Rocky Flats Cleanup Agreement (RFCA) as a type of work separate from the remedial action activities that cover the site environmental media to which a release has occurred. D&D is not covered under the current IAG. The current facilities are considered to be "operating;" after they are declared surplus, then they will be brought under the IAG through the change process as described under Issue #5.3, Emerging Work Scope. The specific D&D process will minimize initial characterization, use "expedited approaches," and package work to promote efficiency by comparison to current IAG and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) remedial action activities. It will be subject to different processes and provisions than remedial actions within the RFCA, and will be generally classed as clean up or removal of source terms conducted prior to a formal actions. At completion of D&D, the cleaned facility or site remaining after facility removal will be the subject of a "facility remedial action." The scope of this action would be to verify D&D achievement of cleanup standards and remediation of environmental media to which a release had occurred. This remediation will likely be part of the scope of the Industrial Area OU.

The regulator involvement in this process will be defined so as not to affect the planning and execution of D&D activities. The activities basically will be conducted under DOE orders. As part of the Conceptual Design process that would begin after the facility was declared surplus, a "D&D Program Plan" would be prepared that would cover items over which the regulators would have approval authority. These areas are final cleanup standards, final characterization/certification, waste disposal provision, and actions that could directly affect releases to the environment

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(such as demolition of facilities with residual contamination of dismantlement of filter plenums). Closure of the Resource Conservation and Recovery Act (RCRA) units would be included unless previously performed during the "operating" phase. Regulators will be provided with courtesy copies (not for review, comment, or approval) of all documents and will be expected to participate in staff-level discussions.

The legal framework under which D&D will be performed would be the CERCLA 104(a) provision with DOE exercising its role as the lead agency. This would allow the greatest latitude while invoking the provisions of CERCLA. In the event that this is not possible, the Removal Action coverage should be invoked.

EPA POSITION

The EPA has stated that its major interest is in assuring that there is no substantial threat of release, either now or during D&D operations. The EPA has indicated that it would prefer a streamlined process and would be satisfied with a high-level presence. The EPA might be comfortable with the DOE position, but will more likely press for some high-level authority in the project prioritization and funding processes. The EPA also requires that work in this area be done as IM/IRAs.

CDH POSITION

The CDH has indicated more of an interest in characterization and waste management in line with their RCRA permitting authority. The CDH has also indicated that it would like a streamlined process.

DOE NEGOTIATING TACTICS

The DOE should stress the need to get work done and the need to streamline the CERCLA process. The DOE must also stress that the regulators will have control over how D&D leaves the site through subsequent facility remedial action. The DOE must present a case for the inclusion of emerging work into the RFCA and conduct successful pilot projects under DOE orders.

DOE MINIMUM POSITION

The minimum acceptable position would be the ability to control what work is brought into the RFCA, the ability to "package" that work for efficient management of D&D activities, and the one-time regulatory approval of a high-level document covering a D&D project. Although some milestones for D&D activities can be accepted, DOE orders should comprise the standards for D&D, and long range commitments should be governed totally by the "Emerging Work" section of the RFCA.

DISPOSITION PROPOSED IN RFCA

Chapter 1 - Part 5, Definitions, will incorporate any inclusion of D&D work brought into the RFCA.

The DOE's position will also be addressed under the new section proposed for "Emerging Work" under Chapter 1 of the Proposed RFCA.

D&D pilot projects will be included in the RFCA baseline development process.

AGENCY ISSUE III.A.
DOE ISSUE #5.6

BACKGROUND

With respect to decommissioning its facilities, DOE is committed to taking all actions that may be required under applicable laws and regulations. This is made clear throughout DOE Order 5820.2A, Chapter V.

There is no single regulatory driver that requires the conduct of D&D per se.

- The Department of Energy Organization Act states that one purpose underlying the creation of DOE is to "advance the goals of restoring, protecting, and enhancing environmental quality, and assuring public health and safety" (Section 102[13]) but does not specify that particular actions (such as D&D) must be taken to meet these goals.
- Under certain circumstances, CERCLA or RCRA may drive the initiation of D&D-type activities, but these statutes are not universally applicable to all D&D projects. Conditions under which CERCLA may require the initiation of D&D activities are detailed in Attachment 1 of this issue paper.

An objective, structured approach or methodology is needed to determine whether D&D-type actions are required under CERCLA, RCRA, or other environmental regulations. In particular, a consistent means of assessing DOE facilities in terms of the "substantial threat of release" criterion of CERCLA is needed.

For facilities not subject to a regulatory driver such as CERCLA, DOE could nonetheless voluntarily choose to follow some, all, or no CERCLA requirements. Such facilities could do the following:

- By mutual agreement between DOE and appropriate regulatory agencies, be treated as though fully subject to such regulations
- Be governed solely by DOE orders in terms of priority, schedule, and cleanup standards (this represents the status quo for most D&D projects at present)

These options represent two extremes, each of which would offer certain advantages and disadvantages to DOE. Other "intermediate" options exist that vary in the degree to which CERCLA requirements are voluntarily adopted.

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6.0 PRIORITIZATION OF WORK ACTIVITIES

6.1 Prioritization of Work Activities

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AGENCY ISSUES I.A., I.B., V.B.
DOE ISSUE #6.1
PRIORITIZATION OF WORK ACTIVITIES

ISSUE

Work within the Rocky Flats Cleanup Agreement (RFCA) and the Environmental Restoration (ER) Major System Acquisition (MSA) needs to be prioritized to be able to best utilize resources and funds. This issue will become more acute as additional scope is added to the RFCA.

DOE POSITION

The cleanup activities that will be performed under the RFCA include those currently within the scope of the IAG, those that will be identified as part of the IAG process (e.g., the Historical Release Report), and those that result from facilities and equipment determined to be surplus to any DOE mission. Constraints, both external (funding, waste disposal) and internal (staff, logistics), argue for prioritizing cleanup work and planning that work based on those priorities. The principal criteria for this prioritization should be risk to human health and the environment. However, in view of the diversity represented in the site mission, a multi-attributed prioritization model should be developed and implemented. This priority will allow those activities covered by the RFCA to be managed to eliminate those items or sources of highest risk first and defer those of marginal risk.

A Comprehensive Risk Assessment (CRA) needs to be developed as the technical basis for implementing a risk prioritization and management strategy. The prioritization approach based on the CRA will eventually cover all cleanup activities at the site; it will be implemented in phases, with the first being the prioritization of current operable unit activities followed by D&D activities of facilities determined to be surplus. One goal is to extend the prioritization approach to other facilities in order to reduce the sitewide risks to humans and the environment as quickly as is feasible within the appropriate sitewide funding levels.

The focus of this prioritization process is for cleanup tasks only. There are secondary benefits from using risk as a means of prioritization and assigning risk to cleanup activities. These would include the ability to quantify the risk reduced by a given activity and subsequently use this risk reduction as a method for demonstrating cleanup progress or accomplishment. The determination of where particular cleanup actions fall with respect to the 10⁻⁴ and 10⁻⁶ risk levels would provide a basis to rate actions as those that need to be done now, later, or never. The use of such a tool might permit a new milestone structure. This structure would move away from milestones for specific documents or cleanup activities and move toward milestones for reduction of specific risk levels.

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EPA POSITION

The EPA will probably support the concept to the extent that it will extend its jurisdiction into the decision making process on overall plant cleanup priorities. The EPA will probably object to attempts to defer previously planned cleanup and to manage a fixed budget (versus obtaining additional budget for emerging scope).

CDH POSITION

Same as EPA position.

DOE NEGOTIATING TACTIC

The DOE should stress that the current IAG's inability to address areas of highest risk first and foremost is a major flaw.

DOE MINIMUM POSITION

The DOE needs the new agreement to adopt a risk-based prioritization approach for current and future activities covered by the RFCA.

DISPOSITION PROPOSED IN RFCA

A new section called "Project Baseline and Milestones" in Chapter 3; Common Provisions, addresses prioritization of work based on minimizing risk to humans and the environment.

Disposition will be considered in establishment of a new baseline that will be reflected in Attachment 2, Tables 5 and 6.

AGENCY ISSUES I.A., I.B., V.B.
DOE ISSUE #6.1

BACKGROUND

The current mission of the Rocky Flats site can only be accomplished if each of the various site programs such as Environmental Restoration, Waste Management and Transition can effectively implement the activities that accomplish their role in the overall site mission. The possibility of obtaining the necessary funding each year to maintain a defined baseline of scheduled activities for the various Rocky Flats Site programs is very uncertain because of the continually decreasing availability of federal funds to the DOE to cover the cleanup of some 17 sites and facilities. When funding is limited, a decision on which work to pursue in the forthcoming fiscal years must be made.

To aid in making these types of decisions, the DOE Rocky Flats Field Office has supported the development of a sitewide screening and prioritization system that will be used to rank work for funding purposes when the system is approved for use. This system is very similar to other systems in use throughout the DOE Weapons Complex. It ranks and scores proposed activities on the basis of a "consequence-value" matrix defined by a procedure. This matrix reflects the site goals and objectives by considering the following seven consequence categories:

- Public health and safety
- Environmental protection
- Worker health and safety
- Compliance with standards
- Cleanup mission/Business efficiency
- Safeguards and security
- Public and community relations

The scoring weight for the various factors has been developed through consensus of senior site management. Scores for proposed activities can be measured for risk-reduction potential. Using summed scores of all proposed activities, various expenditure scenarios can be developed in which risk-reduction potential can be compared and optimized in an iterative, time-phased planning system. Stakeholder groups participated in the development of this screening and prioritization methodology.

A separate work task prioritization process has been developed by the EG&G Environmental Restoration organization, which ranks only those activities that are governed by the IAG. This system is being used to develop the baseline for the IAG

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work that is planned for FY96 through FY2000. It is currently planned to make a comparison with the two systems to determine if the ER work will be prioritized in the same manner using both systems. Any differences will be evaluated to determine if the sitewide prioritization needs adjustment. As both systems use similar assumptions in the developed methodology, the results should agree.

7.0 CHANGE CONTROL

7.1 Change Control

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**AGENCY ISSUES I.B.1, I.B.2, V.B.
DOE ISSUE #7.1
CHANGE CONTROL**

ISSUE

A formalized change control process needs to be developed to govern changes made to approved work plans and to add new work tasks such as planning assumptions for the overall cleanup effort change. Experience with the IAG since its inception has shown that a more formal and disciplined process needs to be invoked.

DOE POSITION

A formal change control process needs to be developed and invoked by the IAG. The following key elements will be parts of the developed process:

- The process is as simple as possible.
- Any signing party to the agreement can initiate change control.
- The administration and management of the change control process will be the primary responsibility of DOE.
- A form will be developed for the initiation of a change that addresses all the information that must be provided when a change request is submitted. This will require a review of all the Technical Memoranda, which are currently identified in various parts of the IAG, and an evaluation of those features that need to be modified to achieve a common format that will provide the best chance to succeed on the first submittal.
- Any extensions or reductions in the existing schedules and enforceable milestones resulting from the proposed changes to the work scope will be identified, and approval will be requested in the submitted change request.
- The change process will be tightly scheduled with identified time limits for making reviews and decisions or passing to a higher level for action.
- It will be mandatory to go immediately to dispute resolution when deadlines for completing reviews and making decisions are missed. The objective of this provision is to have a fixed maximum time period to reach a final decision on a proposed change.
- Provisions will be made to identify a time period in the change control and dispute resolution process at which the schedule for activities that are impacted by a delay in making decisions can be slipped on a day-to-day basis until the disputed issue is resolved. See Renegotiation Issue #5, Dispute Resolution. The objective of this provision is to avoid any stipulated penalties for missing

enforceable milestones by work impacted by the change control and dispute resolution processes. The change control process will be integrated in the existing Rocky Flats site change control process for environmental restoration work.

- Part 32 of the existing IAG will be modified to invoke the new change control process and will delineate the general steps in the process. A separate IAG change control document will be prepared to explain the detailed change control process. This document will be included in the IAG as an attachment or identified as a separate governing document.

EPA POSITION

The EPA has elected not to participate in change control process at this time.

CDH POSITION

The CDH has stated that they do not have the resources to become an active participant in the change control process.

DOE NEGOTIATING TACTICS

- Offer CDH additional funding to obtain the resources necessary to be an active participant. This money would be withheld if participation is not provided.
- Emphasize participation and ability of all parties to live up to their commitments to expedite cleanup efforts.

DOE MINIMUM POSITION

The DOE should demand agency participation. If the agencies do not participate, they would lose their right to provide input, and modifications to milestone dates would occur.

DISPOSITION PROPOSED IN RFCA

Modified language will be included in Chapter 3, Common Provisions, Part 32, Modification to Work.

Part 32 will be renamed as "Change Control."

**AGENCY ISSUES I.B.1, I.B.2, V.B.
DOE ISSUE #7.1**

BACKGROUND

Part 32 of the current IAG, Additional Work or Modification to Work, has provisions for adding work or modifying existing approved work plans but is too generic to properly manage the process that ensures that decisions on requested changes to work scopes are rendered in a timely fashion.

The lack of a disciplined change control process with formalized procedures has resulted in the following:

- Requests for changes are not submitted in a standardized format that delineates the exact information necessary for the regulators to understand the need and justification for the change. This results in the documents being returned because of missing information.
- Review times for completing reviews and making decisions are not specified. This results in uncertainty in knowing how long it will take to receive the decision. For planning purposes, it is necessary to have defined time periods to receive decisions.
- Delays in achieving decisions on changes that impact work in progress can result in penalties when the impacted work is key to achieving an enforceable milestone.

A configuration management plan (CMP) was developed and issued in draft form on January 27, 1994. The CMP establishes the approach and requirements for conducting configuration management (CM) and change control processes in support of the DOE Rocky Flats Environmental Restoration (ER) Major System Acquisition (MSA) Project (the Project). The CMP and included change control process will assist the Project in implementing comprehensive CM and change control processes over the project baseline (PB) (technical, schedule, and cost), PB-related documentation, and the configuration control of operational remediation facilities. This document will not be issued for use until the DOE-Rocky Flats Field Office project management procedure is issued.

8.0 TRI-PARTY AGREEMENT

- 8.1 Stipulated Penalties
- 8.2 Role of DOE Contractors
- 8.3 Resource Conservation and Recovery Act
Permit vs. IAG (Parties Thereto)

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**AGENCY ISSUE V.D.
DOE ISSUE #8.1
STIPULATED PENALTIES**

ISSUE

All parties to the IAG need to reach a consensus as to the magnitude of current stipulated penalties for failure to meet milestones stated in the IAG.

DOE POSITION

Stipulated penalties in the IAG should be on a graded system. The graded system should take into account the amount of control over the milestone, the effect on the environment, and the effect on the total remediation of Rocky Flats under the IAG that will occur as a result of the missed milestone. For instance, milestones that require policy decisions and develop the plan and criteria for the cleanup are typically not under the control of one party, as policies and plans require agreement of all parties and stakeholders. Therefore, the risk of missing the milestone is far greater than during the implementation phase of the IAG. In addition, no fieldwork has started so the potential impact to the environment is not changing, and the timing of a particular policy or plan probably does not have the impact on the total remediation program as much as the substance of that particular policy or plan. Therefore, the policy and decision phase milestones should have a minimum penalty such as \$300 per calendar day for the first 15 calendar days; \$450 per day for the sixteenth day through the thirtieth calendar day; and \$600 per calendar day thereafter.

The implementation phase is usually performed by one party with greater control over the scheduled milestones; therefore, the risk of missing the milestone is less than during the policy and planning phase. Implementation usually takes place in the field, which increases the possible impact on the environment. Also the implementation and completion of the selected remediation will have direct impact on the total remediation of Rocky Flats. Therefore, the implementation phase milestones should be assessed higher stipulated penalties, such as \$1,000 per calendar day for the first 15 calendar days; \$2,000 per day for the sixteenth day through the thirtieth calendar day; and \$4,000 per calendar day thereafter. This approach emphasizes carefully considered planning and should result in optimizing environmental protection.

A system of credits should also be developed to enable positive recognition for DOE schedule acceleration achievements.

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EPA POSITION

The EPA wants more milestones included in the agreement and higher penalties for non-compliance with enforceable milestones.

CDH POSITION

The CDH's position is generally the same as EPA's position; however, CDH would like fines for non-compliance to come from a source other than the Rocky Flats Environmental Restoration (ER) program budget appropriations.

DOE NEGOTIATING TACTIC

The DOE should emphasize that CDH does not currently get use of fines. Instead, fines applied to the Hazardous Substances Response Trust Fund. This reduces the funding availability of the Rocky Flats ER program.

DOE MINIMUM POSITION

Fines and penalties should be assessed based on the significance of the activity missed (i.e., Draft Remedial Investigation report is not as critical as Final Record of Decision). On the other hand, DOE should receive credit for accelerated performance.

DISPOSITION PROPOSED IN RFCA

Part 19, Delay in Performance/Stipulated Penalties, will be modified to incorporate DOE's position.

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May 26, 1994

AGENCY ISSUE V.D.
DOE ISSUE #8.1

BACKGROUND

There has not been agreement reached concerning the financial penalties that have been stipulated for IAG milestones that have been missed.

Revision 1
May 26, 1994

AGENCY ISSUE II.D.
DOE ISSUE #8.2
ROLE OF DOE CONTRACTORS

ISSUE

The role of DOE contractors performing work governed by the IAG and their accountability for the cleanup activities need to be clarified.

DOE POSITION

It is DOE's position that the DOE contractors' roles are determined by the contracts between DOE and the contractors. The contractors' accountability and responsibilities shall be governed by DOE. To have the contractors directly accountable to CDH and EPA would undermine DOE's ability to manage the site and implement the IAG. The DOE does not want the contractor making comments concerning Rocky Flats to the regulators if the contractor was directly accountable to the regulators for implementing any portion of the IAG.

The DOE should insert language into the agreement that is similar to the language contained in the Rocky Flats Residue Agreement. This would effectively separate responsibilities of the parties.

EPA POSITION

The EPA would like stronger language and more involvement in the new Rocky Flats Cleanup Agreement (RFCA) for dealings between DOE and EG&G.

CDH POSITION

The CDH already has leverage on a contractor under the Resource Conservation and Recovery Act Permit.

DOE NEGOTIATING TACTICS

None.

DOE MINIMUM POSITION

The DOE should retain full responsibility for and control over the actions of its contractors. Any erosion in this position would make DOE potentially adverse to its contractors.

DISPOSITION PROPOSED IN RFCA

Chapter 1 - Part 2, Parties and Role of DOE Contractors, will be modified to reflect the DOE position.

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AGENCY ISSUE II.D.

DOE ISSUE #8.2

BACKGROUND

As experience has been gained with performing cleanup activities governed by the IAG, it has been noted that the definition of the roles of the DOE contractors performing work and their accountability for the cleanup activities needs clarification.

The IAG clearly states DOE's responsibilities and obligations in Part 2, "Parties and Roles of DOE Contractors." Paragraph 13 under Part 2 states, "DOE shall notify EPA and the State of the identity and work scope of each of its prime contractors and their subcontractors to be used in carrying out the terms of this Agreement in advance of their involvement in such work." In compliance with this section, DOE provided copies to EPA and CDH of the sections of the DOE contract with EG&G that relate to carrying out the IAG.

However, guidance provided in EPA's new Enforcement Policy for Government-Owned, Contractor-Operated (GOCO) Facilities effectively holds contractors responsible for the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) remediation activities at a site as well as the day-to-day environmental compliance of the site. This guidance, in part, provides for the following:

1. Contractors who are responsible or partially responsible for the operation of government facilities will be required to sign environmental permits.
2. More enforcement actions for noncompliance under Resource Conservation and Recovery Act (RCRA), Toxic Substances Control Act (TSCA), Clean Air Act (CAA), and Clean Water Act (CWA) will be brought against the contractor and, more frequently, only against the contractor.
3. When compliance has been delayed because of protracted negotiation with the federal agency, an enforcement action will be brought against the contractor to expedite compliance.
4. Contractors will be held responsible for CERCLA cleanups to the same extent (joint and several) that they would be responsible if they were operating a private facility.
5. Missed milestones or deadlines under a Federal Agency Interagency Agreement under CERCLA can be enforced against the contractor under a separate CERCLA 106 Order. And the CERCLA 106 Order may expedite the cleanup by requiring different deadlines and may impose activities that exceed the scope of the IAG.

EG&G is willing to be a party to the IAG as a DOE contractor as stated in Issue #18A.

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May 26, 1994

AGENCY ISSUE IV.
DOE ISSUE # 8.3
RESOURCE CONSERVATION AND RECOVERY ACT PERMIT
VS.
IAG (PARTIES THERETO)

ISSUE

Some inconsistencies exist between Resource Conservation and Recovery Act (RCRA) permits and the IAG.

DOE POSITION

It is the DOE position that the IAG milestones should not be a part of the RCRA permit. This is duplicative regulation and, at a minimum, causes administrative problems. It effectively puts the permittee in a position of double jeopardy, because enforcement can be sought under the IAG and the RCRA permit. In addition, implementation of accelerated cleanup initiatives will require continuous revisions to the RCRA permit, which would render it unfeasible to maintain.

EPA POSITION

The EPA is relatively benign on this issue although they do feel that they do not have enough control over the contractor, they intend to pursue this under the "Contractor Accountability Section" (see Issue 8.2).

CDH POSITION

The CDH wants to maintain control over both DOE and EG&G wherever possible. They are not concerned about whether it is duplicative and will walk out of negotiating when DOE pushes this issue.

DOE NEGOTIATING TACTIC

The ability to include the state in sharing stipulated penalties should affect its desire to keep the Rocky Flats Cleanup Agreement (RFCA) under the RCRA permit.

DOE MINIMUM POSITION

The DOE wants the new RFCA out of the RCRA permit.

DISPOSITION PROPOSED IN RFCA

Chapter 1 - Part 4, Statutory Compliance: RCRA/Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Integration, Paragraph 21 will be modified to reflect DOE's position.

Chapter 2, Lead Regulatory Agency, Part 11, Permitting and Closure, and Part 13, Enforceability, will also be modified to reflect DOE's position.

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AGENCY ISSUE IV.
DOE ISSUE # 8.3

BACKGROUND

In carrying out cleanup activities, it has been noted that whereas EG&G is a responsible party when it comes to obtaining a RCRA permit, EG&G is not currently a party to the IAG. This is an inconsistency in the assignment of responsibility for performing certain work activities.

EG&G is not a party to the IAG but has the responsibility for obtaining RCRA permits. When, within the context of the IAG, an assignment of responsibility for performing a work activity is made, and the activity is governed by a RCRA permit, the inconsistency occurs.

If the resolution of IAG Renegotiation Issues Numbers 18(a) and 18(b) result in EG&G becoming a party to the IAG, the inconsistency between the parties of the RCRA permit and the IAG should be resolved. However, if EG&G becomes a party to the IAG, the IAG milestones must be removed from the RCRA permit to avoid having the same required action being subject to enforcement in two documents.

The problem with the existing RCRA permit/IAG integration is that original milestones negotiated between the parties in the IAG were unilaterally imposed on EG&G in the RCRA permit. Although EG&G (and Rockwell) technical staff may have had some input into the original IAG milestones, EG&G does not have equal negotiating power with the other parties as to the final IAG milestones. Even though EG&G had the right to appeal the RCRA permit under the statute, DOE has denied EG&G the right to appeal the incorporation of the IAG milestones into the permit.

In addition, incorporation of the IAG milestones into the RCRA permit causes, at a minimum, administrative problems when the IAG scope of work or milestones are changed. Permit modifications need to be prepared and executed when the IAG milestones are changed.

9.0 DISPUTE RESOLUTION

- 9.1 Dispute Resolution
- 9.2 Definition and Responsibilities of Lead Agency

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May 26, 1994

**AGENCY ISSUE V.C.
DOE ISSUE #9.1
DISPUTE RESOLUTION**

ISSUE

The dispute resolution sections of the IAG are not effectively used to resolve disputes in a timely fashion.

DOE POSITION

The following actions should be taken in revising the IAG to resolve this issue:

1. Review and response times to make decisions should be established for all phases of the process, including those actions taken at the highest levels.
2. It must be made mandatory that after a dispute is put into the dispute resolution process a decision will be made in a specified period of time.
3. It shall be mandatory that when an established review time for a primary document has not been met by CDH or EPA, the dispute process will be automatically initiated at the project coordinator's level.
4. At the initiation of a dispute by DOE, the date at which the failure to resolve the dispute impacts enforceable milestones will be identified and justified. When that date passes, the enforceable milestone for that date will be extended automatically on a day-to-day basis until the dispute is resolved, and a new date will be established as a part of the dispute resolution decision.
5. Any stop work on IAG work will initiate the time clock for resolution through change control or dispute resolution, and at a minimum, all affected milestones will slip directly with those work stoppages.
6. Attempt to include all three dispute resolution processes into a single process.

EPA POSITION

The EPA will not like the proposed process. They will argue that the current system is workable and that they have not experienced any problems under it.

CDH POSITION

Same as EPA position.

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DOE NEGOTIATING TACTIC

The DOE should emphasize the delays caused by the stop work order and the potential for loss of funds.

DOE MINIMUM POSITION

The DOE should settle for nothing less than the positions noted above.

DISPOSITION PROPOSED IN RFCA

A new section, Resolution of Disputes, has been added that includes the desired features and combines the previous Parts 12, 16, and 27.

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AGENCY ISSUE V.C.
DOE ISSUE #9.1

BACKGROUND

The dispute resolution process was placed in the IAG to facilitate the timely resolution of disputes. An important function of the dispute resolution process is to expedite decision making on various reports and plans to permit work to proceed at a regulated and known pace to achieve scheduled enforceable milestones without penalties. This is not happening.

The dispute resolution process is failing for the following reasons: (1) DOE is concerned that by taking an issue to dispute resolution, the EPA and/or CDH will take retaliatory action on some other issue that is presented to one or both of those bodies to resolve; (2) the EPA has admitted that the process does not work (it is DOE's perception that this problem is a result of the fact that the lower levels in the EPA/CDH do not want to elevate a dispute to a management level where they lose control in the Denver area); and (3) the time periods allowed for each step of the dispute process are not specified in some instances, especially when the dispute is elevated to the highest levels in the state and EPA.

**AGENCY ISSUES II.F, IV.A., IV.B., IV.C., IV.E.
DOE ISSUE # 9.2
DEFINITION AND RESPONSIBILITIES OF LEAD AGENCY**

ISSUE

The current IAG identifies a lead agency for each operable unit. Under Part 29, Reservation of Rights, however, each regulatory agency reserves its rights to impose its requirements directly on DOE, to defend the basis for those requirements, and to challenge the other regulatory agency's conflicting requirements. This has the potential to cause and impose redundant and/or conflicting guidance and may directly impact technical, cost, and schedule baselines.

DOE POSITION

Although DOE must accept dual regulation in this area, the Rocky Flats Cleanup Agreement (RFCA) should be structured so that the lead/support agency concept is refined. This must include clearly stated, consistent agency positions and must tie directly into the dispute resolution process when concurrence cannot be reached.

EPA POSITION

The EPA feels that there is no problem with the current structure and supports the lead/support agency concept as described in the IAG.

CDH POSITION

The CDH concurs with EPA's position in this matter.

DOE NEGOTIATING TACTICS

The DOE can agree with the lead/support agency concept but must insist on receiving consolidated positions within specified time limits. The DOE can also state the need for effective use of tax dollars to support this position. The new document review language in the model RFCA is being taken from the EPA model language for agreements such as the RFCA. Therefore, DOE could take the position that EPA Headquarters has approved the language.

DOE MINIMUM POSITION

The DOE must insist on consolidated positions on documents submitted for review and approval within specified time frames. Dispute resolution must be automatically invoked to force the process to keep moving, in the event of disagreement between the regulators.

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DISPOSITION PROPOSED IN RFCA

A new "Document Review" section will replace Part 25.

Chapters 2, 3, and 4 will be revised to describe integration of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)/Resource Conservation and Recovery Act (RCRA).

A new "Dispute Resolution" section will replace Parts 12, 16, and 27.

**AGENCY ISSUES II.F, IV.A., IV.B., IV.C., IV.E.
DOE ISSUE # 9.2**

BACKGROUND

To minimize potential conflicts, EPA and CDH agreed to recognize a lead regulatory agency and a support regulatory agency for each operable unit (OU) at the site. Work is required to be performed in accordance with RCRA, CERCLA, and the Colorado Hazardous Waste Act. Currently, the EPA is the designated lead on OUs 3, 5, 6, and 14, and CDH is the designated lead agency on OUs 4, 7, 9, 10, 11, 12, 13, 15, and 16. OUs 1, 2, and 8 have been designated joint lead agency designation. If EPA and CDH are unable to resolve an issue through the appropriate dispute resolution process they may both impose their respective requirements. The action to propose a determination of the lead agency definition has been accepted by CDH under Quality Action Team #12. This should clarify its position on the regulatory jurisdiction issue.

10.0 REVISED TECHNICAL BASELINE AND ENFORCEABLE MILESTONES

10.0 Flexible IAG Schedule

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**AGENCY ISSUES I.B.3, V.B.
DOE ISSUE #10.1
FLEXIBLE IAG SCHEDULES**

ISSUE

The IAG needs to incorporate a mechanism that will allow for modification of project milestone schedules over the course of the program. This process will allow the program to meet compliance requirements while responding to the dynamic program and technical requirements.

DOE POSITION

The following actions should be taken to resolve this issue:

1. As part of the renegotiation, a new baseline and schedule need to be established for the cleanup activities that are currently part of the IAG. At this time, a few key long-range, enforceable milestones that reflect significant project completion dates will be identified, and new short-range, enforceable milestones will be established to cover the current fiscal year (FY 0) and the next fiscal year (FY+1). The new enforceable milestones will be the minimum number necessary to track critical path items, major project decision points, and completion of major project phases.
2. Provisions need to be incorporated into the IAG that provide for a periodic renegotiation of the schedules (and enforceable milestones) to reflect current requirements and restrictions. The periodicity would be tied to key dates in the fiscal year federal budget cycle. The attached table outlines the generic process that would be followed each year to identify the activities and to establish schedules and enforceable milestones for those activities. The proposed process would have the following key elements:
 - In conjunction with the stakeholders, a list of activities would be developed in the first quarter FY 0 for work that was to start in FY+2. The list would be based on achieving full funding for accomplishing the activities on the approved baseline established during the IAG renegotiations.
 - The list of activities would be prioritized to identify activities that should be performed first if there is a budget constraint imposed by the Office of Management and Budget (OMB) or Congress. Any changes to this prioritized list are subject to change control. The prioritization method used would have the concurrence of the stakeholders.
 - The prioritized list will be the basis for developing the activity data sheets for the work that is to be accomplished from FY+2 through FY+6. The

DOE will identify the activities that would be accomplished within any budget constraints mandated by OMB. The activity data sheets with input from the stakeholders will be submitted to DOE Headquarters in the second quarter of FY 0.

- When the Congressional budget is approved and the DOE financial plan is issued, DOE will notify EPA and CDH of any changes to the planned activities for FY 0 and will request EPA and CDH to approve any changes to the schedules and milestones for the activities to be performed in FY 0 and FY+1. The change control process (to be developed, see Renegotiation Issue #6.1) specified in the IAG will be the vehicle for changing any planning assumptions for the scheduled work activities. Changes to the schedule and enforceable milestones will be requested through Part 42, Extensions, which will be modified to clearly state that the failure of the OMB to approve adequate funding is a justifiable reason to change the schedule and enforceable milestones.
- During the third quarter of FY 0, the work packages covering the activities to be performed during FY+1 through FY+5 will be completed. At this time, the schedules will be developed for those activities, and enforceable milestones will be established for FY+2. The milestones for FY+3 through FY+5 are only considered to be planning milestones and are not enforceable. Any changes to the work activities or schedules and enforceable milestones previously established for FY 0 and FY+1 will be identified, and changes will be processed in accordance with the IAG Part 42, Extensions, and the change control process (to be developed, see Renegotiation Issue #6.1).
- The new enforceable milestones specified each year for FY+2 will be the minimum number necessary to track critical path items, major project decision points, and completion of major project phases.
- Do not commit to any milestone beyond the Record of Decision (ROD).

EPA POSITION

The EPA would like three years of committed milestones and a final end-date for each operable unit. The EPA does, however, recognize the change control process and schedule extensions which will occur as a direct result.

CDH POSITION

The CDH basically agrees with the flexible milestone concept.

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DOE NEGOTIATING TACTICS

None.

DOE MINIMUM POSITION

The DOE must obtain some concession from the regulators on the flexible milestone concept. All milestones beyond three years will be planning dates only and no milestones beyond the ROD should be hard dates. All settings of enforceable milestones will be subject to the baseline development process and change control.

DISPOSITION PROPOSED IN RFCA

Part 17, Schedules, has been modified to reflect the proposed "flexible schedule" concept. This section is now titled "Project Baseline and Milestones."

**AGENCY ISSUES I.B.3, V.B.
DOE ISSUE #10.1**

BACKGROUND

Since the IAG was successfully negotiated and executed in January 1991, the program milestone schedules have been affected by several factors that could not have been anticipated during original negotiations. These factors include changes to procurement procedures, the necessity for safety analysis reviews, a national shortage of laboratory capacity, additional DOE reviews, and budgetary and funding inconsistencies with increased requirements. Constraints on the budget beginning in 1991 have created the situation of missed milestones with corresponding levied penalties. Failure to meet earlier milestones has created a domino effect resulting in slippage of outyear enforceable milestones.

The projected activities to be performed during FY 96 to FY 2000, constrained by the OMB target budget, will not be sufficient to meet all the enforceable milestones that will come due during that period.

The existing IAG has fixed milestone schedules for the program through the year 2001. The mechanisms available to change schedules in the current IAG are through Part 42, Extensions, and then through Parts 12 and 16, Dispute Resolution, if an extension request is not honored. As currently written, Part 42 does not specifically provide for modifying the agreement to acknowledge program issues such as funding, reviews, safety analysis reports, procurement, and other changes that affect the assumptions on which the original work scope and schedule dates were based.

RELATIONSHIP OF AGENCY NEGOTIATION ISSUES TO RFCA LOCATION

TABLE 1 OLD IAG/NEW RFCA TABLE OF CONTENTS

Inter-Agency Agreement		Rocky Flats Cleanup Agreement	
Chapter One: General Provisions		Chapter One: General Provisions	
PART	SUBJECT	PART	SUBJECT
1	Jurisdiction	1	Jurisdiction
2	Parties And Role of DOE Contractors	2	Parties And Role of DOE Contractors
3	Statement of Purpose	3	Statement of Purpose
4	Statutory Compliance: RCRA/CERCLA Integration	4	Statutory Compliance: RCRA/CERCLA Integration
5	Definitions	5	Definitions
6	Legal Basis of Agreement	6	Legal Basis of Agreement
7	Findings of Fact	7	Findings of Fact
8	Conclusions of Law	8	Conclusions of Law
9	Determinations	9	Determinations
Chapter Two: State as Lead Regulatory Agency		Chapter Two: Regulatory Agency Responsibilities	
10	State Responsibilities	10	RCRA/CERCLA Interface
11	Permitting And Closure	11	Lead Regulatory Agency and Regulatory Approach Decisions
12	Resolution of Disputes	12	Work To Be Performed Under Direction of Lead and Support Regulatory Agencies
13	Enforceability	13	State and EPA Responsibilities
Chapter Three: EPA as Lead Regulatory Agency		14	Permitting and Closure
14	EPA Responsibilities	15	Delay In Performance/Stipulated Penalties
15	ARARs	16	Enforceability
16	Resolution of Disputes	17	Work Stoppage
17	Schedules	18	EPA Oversight
18	Permits	19	RCRA/CERCLA Reservation of Rights
19	Delay In Performance/Stipulated Penalties	Chapter Three: Common Provisions	
20	Enforceability	20	Submission and Review of Documents
Chapter Four: Integration of EPA and State Responsibilities		21	Resolution of Disputes
21	RCRA/CERCLA Interface	22	Project Baseline and Milestones
22	Lead Regulatory Agency And Regulatory Approach Decisions	23	Emerging Work
23	Work To Be Performed Under Direction of Lead And Support Regulatory Agencies	24	Change Control Process
24	Work Stoppage	25	Extensions
25	Documents	26	Amendment of Agreement
26	Physically Inconsistent Actions	27	Five-Year Review
27	Dispute Resolution Between State EPA	28	Reporting
28	EPA Oversight	29	Notification
29	RCRA/CERCLA Reservation of Rights	30	Project Coordinators
Chapter Five: Common Provisions		31	Sampling and Data/Document Availability
30	Recovery of EPA Expenses	32	Retention of Records
31	Recovery of State Costs	33	Access
32	Additional Work Or Modification To Work	34	Conveyance of Title
33	Quality Assurance	35	Facility and Land Area Use Planning
34	Reporting	36	Public Participation: Administrative Record
35	Notification	37	Duration/Termination
36	Project Coordinators	38	Severability
37	Sampling And Data/Document Availability	39	Classified and Confidential Information
38	Retention of Records	40	Reservation of Rights
39	Access	41	Force Majeure

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Chapter	Part	Subject	Chapter	Part	Subject
4	22	Lead Regulatory Agency and Regulatory Approach Decisions	2	11	Lead Regulatory Agency and Regulatory Approach Decisions
4	23	Work To Be Performed Under Direction of Lead and Support Regulatory Agencies	2	12	Work To Be Performed Under Direction of Lead and Support Regulatory Agencies
4	24	Work Stoppage	2	17	Work Stoppage
4	25	Documents	3	20	Submission and Review of Documents
4	26	Physically Inconsistent Actions	N/A	N/A	DELETED
4	27	Dispute Resolution Between State EPA	3	21	Resolution of Disputes
4	28	EPA Oversight	2	18	EPA Oversight
4	29	RCRA/CERCLA Reservation of Rights	2	19	RCRA/CERCLA Reservation of Rights
5	30	Recovery of EPA Expenses	3	42	Recovery of EPA Expenses and State Costs
5	31	Recovery of State Costs	3	42	Recovery of EPA Expenses and State Costs
5	32	Additional Work Or Modification To Work	3	24	Change Control Process
5	33	Quality Assurance	N/A	N/A	DELETED
5	34	Reporting	3	28	Reporting
5	35	Notification	3	29	Notification
5	36	Project Coordinators	3	30	Project Coordinators
5	37	Sampling and Data/Document Availability	3	31	Sampling and Data/Document Availability
5	38	Retention of Records	3	32	Retention of Records
5	39	Access	3	33	Access
5	40	Five-Year Review	3	27	Five-Year Review
5	41	Amendment of Agreement	3	26	Amendment of Agreement
5	42	Extensions	3	25	Extensions
5	43	Conveyance of Title	3	34	Conveyance of Title
5	44	Public Participation/Administrative Record	3	36	Public Participation/Administrative Record
5	45	Duration/Termination	3	37	Duration/Termination
5	46	Severability	3	38	Severability
5	47	Classified and Confidential Information	3	39	Classified and Confidential Information
5	48	Reservation of Rights	3	40	Reservation of Rights
5	49	Force Majeure	3	41	Force Majeure
5	50	Funding	3	43	Funding
5	51	Compliance With Applicable Laws	3	44	Compliance With Applicable Laws
5	52	Other Claims	3	45	Other Claims
5	53	Public Comment/Effective Date	3	46	Public Comment/Effective Date
		New Part	3	23	Emerging Work
		New Part	3	35	Facility and Land Area Use Planning

TABLE 3 HOW AGENCY ISSUES ARE ADDRESSED IN RFCA

AGENCY ISSUE	RFCA LOCATION
<p>I. INTEGRATION OF ENFORCEABLE MILESTONES WITH THE FEDERAL BUDGET PLANNING, SUBMISSION, AND EXECUTION PROCESS</p>	
<p>A. Regulator involvement in the "baselining" process, including the specification of, and the process for controlling changes to, the scope, schedule, and cost estimates for the Rocky Flats cleanup effort.</p>	<ul style="list-style-type: none"> • Addressed in new/revised Parts 22 (Project Baseline and Milestones), 23 (Emerging Work), 24 (Change Control Process), 25 (Extensions), and 26 (Amendment of Agreement).
<p>B. Process for translating regulator consultation on the "baseline" into the development of the budget and the establishment of enforceable milestones, including ongoing efforts to establish and modify milestones for the next three-year period, as well as "out-year" milestones beyond the next three-year period. Related issues include:</p> <ol style="list-style-type: none"> 1. Definitions and criteria for what constitutes "good cause" for modifying the scope and/or schedule aspects of enforceable milestones independent of funding issues. 2. Definitions and criteria for what constitutes "good cause" for modifying milestones in relation to DOE efforts to obtain adequate funding for enforceable milestones through the federal budget process. 3. Criteria for identifying a reasonable set of "out-year" milestones and the process for transforming "out-year" milestones to three-year milestones. 	<ul style="list-style-type: none"> • Addressed in new/revised Parts 22 (Project Baseline and Milestones), 23 (Emerging Work), 24 (Change Control Process), 25 (Extensions), and 26 (Amendment of Agreement).
<p>C. Process for regulators' involvement in the Federal budget planning and execution process in relation to the Rocky Flats Cleanup Agreement. This may include, but not be limited to, supplemental budget requests, reprogramming of funds, and tracking outlays and progress.</p>	<ul style="list-style-type: none"> • Addressed in new/revised Parts 22 (Project Baseline and Milestones), 23 (Emerging Work), 24 (Change Control Process), 25 (Extensions), and 26 (Amendment of Agreement).
<p>II. EFFICIENCY IMPROVEMENT MEASURES</p>	
<p>A. What Constitutes "Necessary and Sufficient Requirements" for Program Implementation.</p>	<ul style="list-style-type: none"> • This issue will be addressed in the revision to Attachment 2, SOW
<p>B. Measures to Improve the Procurement Process for Items such as Subcontracted Work and Purchased Items</p>	<ul style="list-style-type: none"> • This issue will be addressed in the revision to Attachment 2, Tables 5 & 6. • RFP will assess alternative procurement strategies to streamline the procurement process. • EPA/CDH concurrence needed on current process in order to establish enforceable milestones.
<p>C. Streamlined Document Review/Review Times</p>	<ul style="list-style-type: none"> • Old Part 25 (Documents) has been deleted and been replaced with new Part 20 (Submission and Review of Documents). • Proposed language was developed using CERCLA model provisions • Proposed Part 20 language also dealt with ARARs

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AGENCY ISSUE	RFCA LOCATION
D. Contractor Accountability Issues	<ul style="list-style-type: none"> Part 2 (Parties and Role of DOE Contractors) revised.
E. Accelerated Cleanups and Improving Interim Cleanup Process	<ul style="list-style-type: none"> Any needed language will be incorporated in Part 24 (Change Control Process).
F. Inter- and Inter- Agency Coordination	<ul style="list-style-type: none"> Included in overall re-write of old Chapters 2, 3, and 4 into new Chapter 2 (Regulatory Agency Responsibilities).
G. Elimination of Duplicative Regulatory Analyses (e.g., NEPA overlay).	<ul style="list-style-type: none"> This issue will be addressed in the revision to Attachment 2, SOW.
H. Early Identification of Cleanup Standards.	<ul style="list-style-type: none"> This issue will be addressed in the revision to Attachment 2, SOW, I.B.8
III. BUILDING REMEDIATION/INCREASES SCOPE OF RFCA	
A. Process, Standards, and Definitions for Building and Facility Cleanup.	<ul style="list-style-type: none"> This issue will be addressed in the revision to Attachment 2 Information on D&D will be incorporated into Part 23 (Emerging Work).
B. Plutonium Consolidation	<ul style="list-style-type: none"> Not Addressed.
C. Waste Storage	<ul style="list-style-type: none"> Not Addressed.
D. Relationship of RFCA to National Conversion Pilot Project (NCP)	<ul style="list-style-type: none"> Addressed in revisions to Parts 1 and 35.
IV. COORDINATION AND INTEGRATION OF REGULATORY REQUIREMENTS AND JURISDICTION	
A. Clarification of Lead Agency Designation Procedure and Role	<ul style="list-style-type: none"> Included in overall re-write of old Chapters 2, 3, and 4 into new Chapter 2 (Regulatory Agency Responsibilities).
B. Application of <u>U.S. v. Colorado</u> (Arsenal Decision) to the RFCA	<ul style="list-style-type: none"> Not Addressed.
C. Application of the Federal Facility Compliance Act (FFCA) to the RFCA	<ul style="list-style-type: none"> Not Addressed.
D. Application of the Community Environmental Response Facilitation Act (CERFA) to the RFCA	<ul style="list-style-type: none"> Old Part 43 (Conveyance of Title) is now Part 34 and has been revised to address issue.
E. Coordination/Integration of RCRA and CERCLA Procedures and Regulatory Requirements.	<ul style="list-style-type: none"> Included in overall re-write of old Chapters 2, 3, and 4 into new Chapter 2 (Regulatory Agency Responsibilities).
F. Coordination/Integration of CWA/RCRA/CERCLA	<ul style="list-style-type: none"> Not Addressed.
G. Application of CERCLA Natural Resource Damage Assessment and Trustee Council Provisions to the RFCA	<ul style="list-style-type: none"> Part 3 (Statement of Purpose) has been revised to address this issue.
V. DISPUTE RESOLUTION AND ENFORCEMENT PROVISIONS	
A. Definition and Application of <i>Force Majeure</i> Provisions	<ul style="list-style-type: none"> Not Addressed.
B. Any additional issues regarding the process for modifying enforceable milestones, including granting extensions to milestones	<ul style="list-style-type: none"> Addressed in new/revised Parts 22 (Project Baseline and Milestones), 24 (Change Control Process), and 26 (Amendment of Agreement).
C. Dispute Resolution Process Improvements	<ul style="list-style-type: none"> Dispute Resolution was covered in three sections of the old IAG -Parts 12, 16, and 27. New Part 21 (Resolution of Disputes) combines old parts and addresses issue

AGENCY ISSUE	RFCA LOCATION
D. Specification and Application of Stipulated Penalties under RCRA and CERCLA	<ul style="list-style-type: none"> Old Part 19 (Delay in Performance/Stipulated Penalties) renumbered as Part 15 and revised to address issue.
VI. PUBLIC INVOLVEMENT IN RFCA IMPLEMENTATION	<ul style="list-style-type: none"> Old Part 44 (Public Participation/Administrative Record) renumbered as Part 38 and revised to address issue.
VII. RELATIONSHIP BETWEEN FUTURE SITE USE DECISIONS AND CLEANUP DECISIONS	<ul style="list-style-type: none"> New Part 35 (Facility and Land Area Use Planning) addresses issue.
VIII. RESOURCE REIMBURSEMENT FOR CDH AND EPA OVERSIGHT	<ul style="list-style-type: none"> Old Parts 30 (Recovery of EPA Expenses) and 31 (Recovery of State Costs) have been combined into new Part 42 (Recovery of EPA Expenses and State Costs) and revised to address issue.
IX. RECONFIGURATION OF OPERABLE UNIT DESIGNATIONS	<ul style="list-style-type: none"> This issue will be addressed in the revision to Attachment 2
X. SCHEDULES/MILESTONES - The section of the RFCA that would result from this aspect of the negotiation would include schedules and milestones for the Rocky Flats site that are developed in a manner that is consistent with the procedures agreed to in the above sections.	<ul style="list-style-type: none"> Addressed in new/revised Parts 22 (Project Baseline and Milestones). This issue will also be addressed in the revision to Attachment 2, SOW

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