

# ROCKY FLATS INTERAGENCY AGREEMENT

JANUARY 22, 1991



ADMIN RECORD

A-SW-000011

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### ATTACHMENTS

- ATTACHMENT 1: MAP  
 2: STATEMENT OF WORK  
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Operable Units at the Site, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA), 42 U.S.C. § 9601 et seq. Chapter Four provides the mechanism for integration of EPA and State responsibilities pursuant to CERCLA, RCRA and CHWA through the Lead/Support Regulatory Agency concept, and provides the mechanism for resolving disputes over regulatory conflicts in this context. Chapter 5 contains common provisions. All Chapters shall be construed as a whole, subject to Part 46 (Severability). Nothing in this Agreement shall be construed to change the jurisdictional authorities of the Parties. Titles to Parts and Chapters of this Agreement are for descriptive purposes only.

#### **PART 1 JURISDICTION**

1. The United States Environmental Protection Agency, Region VIII (EPA), enters into those portions of this Agreement that relate to the Remedial Investigation/Feasibility Study (RI/FS) pursuant to section 120(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9620(e)(1), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 [hereinafter jointly referred to as CERCLA]; and sections 6001, 3008(h), and 3004(u) and (v) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6961, 6928(h), 6924(u) and (v), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) [hereinafter jointly referred to as RCRA] and Executive

Order 12580.

2. EPA enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to section 120(e)(2) of CERCLA, Executive Order 12580, and sections 6001, 3008(h), and 3004(u) and (v) of RCRA.

3. Pursuant to section 3006 of RCRA, 42 U.S.C. § 6926, EPA may authorize States to administer and enforce a State hazardous waste management program in lieu of the Federal hazardous waste management program. The State of Colorado has received authorization from EPA to administer and enforce such a program within the State of Colorado. In addition, Colorado is, as of the date of execution of this Agreement, one of nineteen States authorized by EPA to regulate radioactive mixed wastes under RCRA. The Colorado Department of Health (CDH) is the State agency designated by section 25-15-301(1) C.R.S. (1989) to implement and enforce the provisions of RCRA and CHWA.

4. The State of Colorado (the State), enters into this Agreement pursuant sections 107, 120(f), 121, and 310 of CERCLA, § 3006 of RCRA, and CHWA. Portions of this Agreement and of the Statement of Work that relate to RCRA and CHWA are a Compliance Order on Consent issued by the State pursuant to § 25-15-308(2), C.R.S.

5. The United States Department of Energy (DOE) enters into those portions of this Agreement that relate to the RI/FS pursuant to section 120(e)(1) of CERCLA, sections 6001, 3008(h), and 3004(u) and (v) of RCRA, the National Environmental Policy

Act (NEPA), 42 U.S.C. § 4321, Executive Order 12580, and the Atomic Energy Act of 1954, as amended (AEA), 42 U.S.C. § 2011 et seq.

6. DOE enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to section 120(e)(2) of CERCLA, sections 6001, 3008(h), and 3004(u) and (v) of RCRA, Executive Order 12580, NEPA, and the AEA.

7. Pursuant to section 120(a) of CERCLA, DOE agrees that it is bound by this Agreement and that the terms of this Agreement may be enforced against it pursuant to Parts 13 (Enforceability), 20 (Enforceability), and 48 (Reservation of Rights) of this Agreement or as otherwise provided by law. DOE consents to and will not contest EPA or State jurisdiction for the purpose of executing and enforcing this Agreement or its requirements.

8. The Parties agree that the generation, treatment, storage, and disposal of hazardous waste at the Rocky Flats Site is regulated by the State pursuant to CHWA and regulations governing the management of hazardous wastes contained at 6 CCR 1007-3. Pursuant to section 6001 of RCRA, 42 U.S.C. § 6961, DOE agrees that as a Federal agency it must comply with the procedural and substantive requirements of such State law, except as provided by paragraphs 107 and 121, and Parts 27 (EPA-State Dispute Resolution) and 29 (RCRA/CERCLA Reservation of Rights) of this Agreement. DOE agrees that it is

a "person" as defined at § 25-15-101(18) C.R.S. (1989).

9. The activities undertaken pursuant to this Agreement shall be consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300, Federal Register Vol. 55, No. 46, at 8666 (March 8, 1990) (NCP). If the NCP or any other statute or regulation pertinent to this Agreement is amended subsequent to the date of execution of this Agreement, any modifications to this Agreement made necessary by such amendments shall be incorporated by modification into this Agreement, and other modifications related to such amendments shall be subject to further negotiations.

10. On the effective date of this Agreement as established pursuant to Part 56. (Effective Date) of the Agreement, the 1986 Compliance Agreement, RCRA VIII-86-06/CERCLA VIII-86-08, which became effective on July 31, 1986, shall terminate and be replaced with this Agreement by consensus of the Parties. The 1986 Compliance Agreement required that DOE conduct Remedial Investigations and Feasibility Studies (RI/FSs) and conduct Facility Investigations and/or closure activities for RCRA corrective action at the Site. The Parties have determined that the 1986 Compliance Agreement should be terminated and replaced by this Agreement for the following reasons:

A. The 1986 Compliance Agreement did not reflect the new requirements of SARA, including but not limited to the requirements governing Federal facilities pursuant to section 120 of CERCLA.

B. Since the 1986 Compliance Agreement was issued, EPA's and the State's priorities for investigation of the Site have been clarified based on increased knowledge of the Site accrued from the ongoing investigation. The current priorities place greater emphasis on those Operable Units that, based on information presently available, are known to pose the greatest risk to humans and the environment through actual or potential contact with wastes or contaminated soils, air, or water. EPA and the State establish criteria in this Agreement's Statement of Work reflecting priorities for addressing both human health and environmental issues.

Any work currently being conducted pursuant to the 1986 Agreement shall be incorporated into the requirements of this Agreement and shall become enforceable parts hereof.

**PART 2 PARTIES AND ROLE OF DOE CONTRACTORS**

11. The Parties to this Agreement are EPA, the State, and DOE.

12. DOE shall provide a copy of this Agreement and relevant attachments to its prime contractors. DOE is responsible for and assumes all liability for costs of CERCLA response actions or corrective actions required due to actions of its contractors. A copy of this Agreement shall be made available to all other contractors and subcontractors retained to perform work under this Agreement. DOE shall provide notice of this Agreement to

any successor in interest prior to any transfer of ownership or operation, and the provisions of this Agreement shall be binding on any successors in interest.

13. 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. Upon request, DOE shall also provide the identity and work scope of any lower tier subcontractors performing work under this Agreement. DOE shall be responsible for ensuring that all contractors, employees, agents, consultants, firms, and other persons or entities acting on behalf of DOE with respect to matters included herein, will comply with the terms of this Agreement. DOE remains obligated by this Agreement regardless of whether it carries out the terms through agents, contractors, operators, and/or consultants.

**PART 3 STATEMENT OF PURPOSE**

14. The general purposes of this Agreement are to:

A. Ensure that the environmental impacts associated with past and present activities at the Site will continue to be thoroughly investigated and that appropriate response action is taken and completed as necessary to protect the public health, welfare, and environment.

B. Facilitate cooperation and the exchange of information and expertise of the Parties to this

Agreement.

C. Establish a procedural framework and schedule for developing, implementing, and monitoring appropriate response actions at the Site in accordance with CERCLA, RCRA, and CHWA, implementing regulations of these statutes, including the NCP, and CERCLA, CHWA, and RCRA guidance and policy.

D. Provide a framework for permitting RCRA Treatment, Storage, and Disposal Units (TSDs); promote an orderly, effective investigation and cleanup of contamination at the Site; and avoid litigation between the Parties.

E. Ensure compliance with RCRA and CHWA, including requirements covering permitting, corrective action, closure, and post-closure care.

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

A. Identify Interim Remedial Actions (IRAs) and Interim Measures (IMs), if any, which are appropriate at the Site prior to the implementation of final remedial actions for the Site. IRA/IM alternatives shall be identified and proposed as early as possible prior to selection of final IRAs/IMs by EPA and the State, consistent with Paragraph 150 below. This process is designed to promote cooperation among the Parties in identifying IRA/IM alternatives prior to selection of final IRAs/IMs.

B. Identify any additional TSD Units that require

permits; establish schedules to complete DOE's Part B permit application for such Units in accordance with the Statement of Work; identify TSD Units that will undergo closure; close such TSD Units in accordance with State-approved closure plans and other laws and regulations; require post-closure care when necessary in accordance with post-closure permits or approved plans and other laws and regulations; and coordinate closure with any interconnected corrective or remedial action at the Site.

C. Establish requirements for the performance of a Remedial Investigation/RCRA Facility Investigation (RI/RFI) for each Operable Unit (OU) at the Site to determine fully the nature and extent of the threat to the public health or welfare or the environment caused by the release or threatened release of hazardous substances, pollutants, contaminants, hazardous waste or constituents at the Site; and to establish requirements for the performance of a Feasibility Study/Corrective Measures Study (FS/CMS) for each OU at the Site to identify, evaluate, and select alternatives for the appropriate remedial/corrective action(s) to prevent, mitigate, or abate the release or threatened release of hazardous substances, pollutants, contaminants, hazardous waste or constituents at the Site in accordance with CERCLA, RCRA, and CHWA.

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

E. Implement the selected IRAs/IMs and final remedial/corrective actions in accordance with CERCLA, RCRA, and CHWA.

F. Assure compliance with Federal and State hazardous waste laws and regulations for matters covered by this Agreement.

G. Describe the roles and responsibilities of the Parties.

H. Describe and list the applicable or relevant and appropriate legal requirements for remedial action(s).

I. Provide for continued operation and maintenance of the selected remedial/corrective action(s).

J. Provide for interactive community involvement in the initiation, development and selection of remedial actions to be undertaken at Rocky Flats, including timely review of applicable data, reports, and action plans developed for the site.

**PART 4 STATUTORY COMPLIANCE/RCRA-CERCLA INTEGRATION**

16. The Parties intend to integrate into this Agreement DOE's CERCLA response obligations and CHWA and RCRA closure and corrective action obligations which relate to the release(s) of

hazardous substances, contaminants, pollutants, hazardous wastes, and hazardous constituents covered by this Agreement. Therefore, the Parties intend that compliance with activities covered by this Agreement will be deemed to achieve compliance with CERCLA, 42 U.S.C. § 9601 et seq.; to satisfy the corrective action requirements of sections 3004(u) and (v) of RCRA, 42 U.S.C. § 6924(u) and (v), for a RCRA permit, and section 3008(h), 42 U.S.C. § 6928(h), for interim status facilities; the closure and corrective action requirements of CHWA; and to meet or exceed all applicable or relevant and appropriate Federal and State laws and regulations, to the extent required by section 121 of CERCLA, 42 U.S.C. § 9621.

17. Operable Units (OUs) at the Rocky Flats Site have been classified as either 1) State Lead Regulatory Agency OUs that the State will address under RCRA and CHWA primarily, but shall also address CERCLA requirements, 2) EPA Lead Regulatory Agency OUs that EPA shall address primarily under CERCLA, but shall also address RCRA and CHWA requirements, or 3) EPA-State joint lead OUs. Chapter 2 of this Agreement sets forth the State's responsibilities as Lead Regulatory Agency and DOE's obligations to obtain TSD permits, to close TSD Units, and otherwise comply with applicable RCRA and CHWA requirements. Chapter 3 of this Agreement sets forth EPA's responsibilities as Lead Regulatory Agency and DOE's obligations to satisfy CERCLA.

18. On November 2, 1984, EPA authorized the State to implement CHWA in lieu of the base RCRA Program implemented by

EPA. On July 14, 1989, EPA authorized the State to implement, inter alia, the corrective action provisions of HSWA pursuant to section 3006 of RCRA. EPA will administer those provisions of Subtitle C of RCRA for which the State is not authorized. When the State issues a permit to DOE for hazardous waste management activities pursuant to Chapter 2 of this Agreement, any interim and remedial actions at OUs will be incorporated in the corrective action requirements of the permit.

19. When Corrective Action regulations are promulgated and become effective, the Parties agree to amend the Statement of Work as necessary to incorporate such regulatory requirements. Prior to such amendment, should any activity at an OU identified as a State lead reach the corrective action stage, DOE and the State will utilize the CERCLA remedial action process.

20. Based upon the foregoing, the Parties intend that any remedial action/corrective action selected, implemented, and completed under this Agreement shall be deemed by the Parties to be protective of human health and the environment such that remediation of releases covered by this Agreement shall obviate the need for further action outside the scope of this Agreement on those same OUs or individual sites.

21. The State is preparing a draft permit for certain ongoing hazardous waste management activities at the Plant. The draft permit will incorporate corrective action provisions. The Parties recognize the need for consistency between the draft permit conditions and Attachments 2 and 3 of this Agreement. To

insure such consistency, the State will include provisions of Attachments 2 and 3 in the draft permit. Should public comment on the draft permit necessitate changes to the corrective action portions of the permit, the Parties agree to meet to resolve inconsistencies between the two documents. The Corrective Action schedules of the final permit shall be incorporated into this Agreement and shall become an enforceable part hereof.

**PART 5 DEFINITIONS**

22. Except as noted below or otherwise explicitly stated, the definitions provided in CERCLA, RCRA, CHWA, and their implementing regulations, as appropriate, shall control the meaning of the terms used in this Agreement. If there is inconsistency in any definition in CERCLA, RCRA, or CHWA, the definitions in CERCLA shall apply.

In addition:

23. "Additional Work" within the context of this Agreement shall mean any new or different work outside 1) the originally agreed upon Statement of Work and 2) any subsequent Workplans incorporated into this Agreement.

24. "Administrative Record" shall refer to the compilation of documents which establishes the basis of all remedial action decision(s) for each OU at the Site, required pursuant to Part 44 (Public Participation) of this Agreement, the Statement of Work incorporated into this Agreement as Attachment 2, and section 113(k)(1) of CERCLA. The Administrative Record requirements shall apply to all OUs at the Site.

25. "Agreement", "Inter-Agency Agreement", or "IAG" shall refer to this document and shall include all Submittals, Attachments, Addenda, Amendments, and Modifications to this document. All such Submittals, Attachments, Addenda, Amendments, and Modifications shall be incorporated into and become an enforceable part of this Agreement.

26. "As appropriate" when used throughout this Agreement in reference to dispute resolution provisions of Parts 12, 16, and/or 27, shall mean use of Part 12 dispute resolution mechanisms for disputes arising at an OU for which the State is the Lead Regulatory Agency, except as otherwise provided throughout this Agreement; use of Part 16 dispute resolution mechanisms for disputes arising at an OU for which EPA is the Lead Regulatory Agency, except as otherwise provided throughout this Agreement; and use of Part 27 for disputes between EPA and the State except as otherwise provided throughout this Agreement.

27. "Authorized representative" shall include a Party's contractors or agents acting in a specifically designated or defined capacity, including in an advisory capacity.

28. "CERCLA," shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499, and the NCP.

29. Colorado Hazardous Waste Act (CHWA) shall refer to §§ 25-15-101 et seq., C.R.S. (1982) as amended, and its implementing regulations.

30. "Consultation," as that term is used anywhere in this Agreement to describe EPA's obligation to consult with the State, shall include, but not be limited to, reviewing any State comments and recommendations, advising the State of EPA's proposed position or determination, giving in writing its reasons for disagreeing with any comments or recommendations by the State, and, if requested, meeting with the State to attempt to resolve differences before announcing its position or determination. Where the term is used to describe the State's obligations to consult with EPA, the same obligations shall apply.

31. "Corrective Action" (CA) shall refer to the RCRA term for the cleaning up of releases of hazardous waste or hazardous constituents at treatment, storage, or disposal facilities subject to Subtitle C of RCRA.

32. "Corrective Action Decision" (CAD) shall refer to the RCRA term for the decision by the State selecting a corrective measure alternative or alternatives to remedy environmental concerns at a Site. Consideration will be given to health risks, environmental effects and other pertinent factors. The selecting agency shall use technical, human health, and environmental criteria to justify the remedy selection.

33. "Corrective Measures Study" (CMS) shall refer to the RCRA term for the study through which the owner/operator of a facility identifies and evaluates appropriate corrective measures and submits them to the regulatory agency.

34. "Days" shall mean calendar days unless business days are specified. Any submittal or Written Statement of Dispute that under the terms of this Agreement would be due on a Saturday, Sunday, State of Colorado, or Federal holiday shall be due on the following business day.

35. "Individual Hazardous Substance Site (site)" shall refer to individual locations where hazardous substances have come to be located at a discrete area within the larger "Site".

36. "Interim Measure" (IM) shall refer to the RCRA term for corrective actions, generally of short term, that may be taken at any time during the RFI/CMS process, to respond to immediate threats, such as actual or potential exposure to hazardous waste or constituents, drinking water contamination, threats of fire and explosion, and other situations posing similar threats.

37. "Lead Regulatory Agency" is that regulatory agency (EPA or the State) which is assigned primary administrative and technical responsibility with respect to actions under this Agreement at a particular Operable Unit pursuant to the Statement of Work attached hereto as Attachment 2.

38. "Operable Unit" (OU) shall refer to those groupings of individual hazardous substance sites into a single management area, as detailed in the Statement of Work attached herein as Attachment 2, and any additional groupings developed for the Site according to the procedures in Part 22 of this Agreement.

39. "Radioactive Mixed Waste" or "Mixed Waste" shall refer to waste that contains both hazardous waste and material that DOE

classifies as source, special nuclear, or byproduct material.

40. "Interim Remedial Action" (IRA) shall refer to the CERCLA term for an expedited response action done in accordance with remedial action authorities to abate an actual or potential threat to public health, welfare, or the environment at or from the Site.

41. "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., as amended by the Hazardous and Solid Waste Amendments of 1984, and implementing regulations.

42. "RCRA Permit" means a permit issued under RCRA and/or CHWA for treatment, storage, or disposal of hazardous waste.

43. "RCRA Facilities Investigation" shall refer to the RCRA term for an investigation conducted by the owner/operator of a facility to gather data sufficient to fully characterize the nature, extent, and rate of migration of contamination from releases identified at the facility.

44. "Site" shall refer to the federal enclave known as the Rocky Flats Plant, including the buffer zone, as identified in the map attached hereto as Attachment 1 and shall also include all areas that are contaminated by hazardous substances, pollutants, or contaminants as those terms are defined in sections 101(14) and (33) of CERCLA, and/or any hazardous waste or hazardous constituents as those terms are defined in section 1004 of RCRA or CHWA from sources at the federal enclave.

45. "Solid Waste Management Unit" (SWMU) means an individual location on the Rocky Flats Site where solid waste,

including hazardous waste, has or may have been placed, either planned or unplanned, as identified in the Statement of Work.

46. "State" shall refer to the State of Colorado, its employees and authorized representatives.

47. "Statement of Work" is an initial project description including, at a minimum, the elements listed in Attachment 2 to this Agreement. The elements listed in the Statement of Work shall form the basis of any Workplan(s) developed for the Site.

48. "Submittal" shall mean every document, report, schedule, deliverable, Workplan, or other item to be submitted to EPA and the State pursuant to this Agreement.

49. "Timetables and deadlines" shall mean schedules for performance of tasks including Submittals and all work and actions which are to be completed and performed in conjunction with such schedules (including performance of actions established pursuant to the dispute resolution procedures set forth in Parts 12, 16 or 27 of this Agreement). The "deadline(s)" established in the schedules shall reflect the dates by which documents are to be received by EPA or the State.

50. "TSD Unit" means a treatment, storage, or disposal unit which is required to be permitted and/or closed pursuant to RCRA and CHWA requirements as determined in the Statement of Work.

51. "U.S. DOE" or "DOE" shall mean the United States Department of Energy and/or any predecessor or successor agencies, their employees and authorized representatives.

52. "U.S. EPA" or "EPA" shall mean the United States

Environmental Protection Agency, its employees and authorized representatives and successor agencies.

53. "Workplan(s)" shall refer to the detailed plans developed from the Statement of Work incorporated into this Agreement and to be attached hereto.

54. "Written Statement of Dispute" shall mean a written statement by a Party of its position with respect to any matter subject to dispute resolution pursuant to either Part 12, 16, or 27 of this Agreement, as appropriate, containing, at a minimum, the elements described in paragraphs 92 and 109.

#### **PART 6 LEGAL BASES OF AGREEMENT**

55. The following Paragraphs 56 through 88 constitute a summary of the Findings of Facts, Conclusions of Law, and Determinations upon which EPA and the State are relying to enter into this Agreement. Nothing in the following Parts shall be considered admissions by DOE, nor shall they be used for any purpose other than to determine the jurisdictional basis of this Agreement.

#### **PART 7 FINDINGS OF FACT**

56. The U.S. Department of Energy's Rocky Flats Plant, (the Plant or Rocky Flats), was acquired and established in 1951 by the U.S. Atomic Energy Commission (AEC), began operation in 1953, and is still an operating plant. Rocky Flats is part of a nation-wide nuclear weapons research, development, and production complex. The Management and Operating contractor from July 1975 through December 1989 was Rockwell International. The present

Management and Operating contractor is EG&G. Prior to July 1975, the Dow Chemical Company was the operating contractor. The Plant, in existence since 1951, is the sole manufacturing plant in the country for production of plutonium components for nuclear weapons. Both radioactive and nonradioactive wastes are generated in the process. Storage and disposal of hazardous and radioactive wastes occurred at various locations within the boundaries of the federally-owned property.

57. The Site consists of 2650 hectares (6550 acres) of Federally owned land plus property beyond the boundaries that has become contaminated from sources within the boundaries of the Federally-owned property. The Site is located approximately 26 kilometers (16 miles) northwest of downtown Denver and is almost equidistant from the cities of Boulder, Golden, and Arvada. In addition to these cities, several large communities are located near the Site, including Louisville, Lafayette and Broomfield. Major plant structures are located within a security-fenced area of 155 hectares (384 acres).

58. The Site is directly upstream of two major metropolitan drinking water supplies (Great Western Reservoir and Standley Lake) and some groundwater drinking and agricultural water supply sources. The 1980 population, within a 50-mile radius of the plant, consisted of approximately 1.8 million people. Several ranches are located within 10 miles of the Site. They are operated to produce crops, raise beef cattle, supply milk, and/or breed and train horses.

59. Production of nuclear weapons components, reprocessing of radioactive substances, various mission support laboratory research, and modern metals fabrication are the primary functions of the Plant.

60. Since establishment of the Plant in 1951, materials defined as hazardous substances, pollutants, and contaminants by CERCLA, and materials defined as hazardous waste and hazardous constituents by RCRA and/or CHWA, have been produced and disposed or released at various locations at the Site, including, but not limited to, Treatment, Storage and Disposal Units (TSDs). Certain hazardous substances, contaminants, pollutants, hazardous wastes, and hazardous constituents have been detected and remain in groundwater, surface water, and soils at the Site. Groundwater, soils, sediments, surface water, and air pathways provide routes for migration of hazardous substances, pollutants, contaminants, hazardous wastes, and hazardous constituents from the Plant into the environment.

61. Between July 1, 1975, and December 31, 1989, DOE contracted with Rockwell to perform management services and operate the Plant in support of DOE's production activities. On January 1, 1990, the new operating contractor became EG & G.

62. Consistent with section 3010 of RCRA, 42 U.S.C. § 6930, DOE and Rockwell notified EPA of hazardous waste activity at the Plant on or about August 18, 1980. In this notification, DOE and Rockwell identified themselves as a generator and as a treatment, storage, and/or disposal facility of hazardous waste at the

Plant. DOE and Rockwell also identified themselves as handling several hazardous wastes at the Plant.

63. The Site was proposed for inclusion on the National Priorities List (NPL) on October 15, 1984, pursuant to section 105 of CERCLA, 42 U.S.C. § 9605 and became final September 21, 1989.

64. On November 1, 1985, DOE and Rockwell filed Part A and B permit applications to both EPA and the State, identifying certain hazardous waste generation streams and processes.

65. On December 4, 1985, CDH issued a Notice of Intent to Deny DOE's Part B permit application on the grounds of incompleteness.

66. On July 31, 1986, DOE, CDH, and EPA entered into a Compliance Agreement (1986 Compliance Agreement) which defined roles and established milestones for major environmental operations and corrective/remedial action investigations for the Site. The 1986 Compliance Agreement also established requirements for compliance with CERCLA. Through this action, the 1986 Compliance Agreement established a specific strategy which allowed for management of high priority past disposal areas and low priority areas at the Site.

67. Pursuant to the 1986 Compliance Agreement, DOE identified approximately 178 individual hazardous substance sites and RCRA/CHWA regulated closure sites.

68. The 1986 Compliance Agreement also established roles and requirements for compliance with RCRA and CHWA through

compliance with interim requirements and submittal of required permit applications and closure plans. The major TSD units identified to date which may have impacted groundwater and soils include the Solar Evaporation Surface Impoundments, the Present Landfill, the Old Process Waste Lines, the Building 443 Fuel Oil Tank, the West Spray Fields, and Outside Storage Areas [See Map, Attachment 1]. DOE and Rockwell have submitted additional closure plans which are being evaluated by EPA and the State to determine whether these areas are sources of groundwater and soils contamination.

69. Through the 27 specific tasks identified in the five schedules included in the 1986 Compliance Agreement, DOE and Rockwell identified over 2000 waste generation points.

70. As required by the 1986 Compliance Agreement, draft Remedial Investigation/Feasibility Study (RI/FS) reports and revisions for the 881 Hillside Area and draft RI reports and Workplans for the 903 Pad, East Trenches, and Mound Areas were submitted.

71. Several evaluations discussed in paragraph 70, above, have indicated elevated levels of hazardous substances including uranium, plutonium, and other metals of concern. In addition, contamination from chlorinated hydrocarbons has been detected in groundwater at the Site. These materials have toxic effects, including possible carcinogenic, mutagenic, and/or teratogenic effects on humans and other life forms.

**PART 8 CONCLUSIONS OF LAW**

72. Based on the Findings of Fact set forth in paragraphs 56 to 71 and the information available as of the date of execution of this Agreement, EPA and the State have determined the following:

73. DOE is a "person" as defined in section 101(21) of CERCLA, 42 U.S.C. section 9601(21).

74. The Rocky Flats Site is a "facility" as defined in section 101(9) of CERCLA, 42 U.S.C. section 9601(9).

75. DOE is the "owner" of the Rocky Flats Site within the meaning of section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

76. Plutonium, trichloroethylene (TCE), tetrachloroethylene (PCE), and 1,1,1, trichloroethane (TCA), inter alia, are "hazardous substances" as defined by section 101(14) of CERCLA, 42 U.S.C. § 9601(14)(E). Attachment 4 lists all the hazardous substances found in significant quantities at the Site.

77. The discharge, pouring, emitting, and/or disposing of these hazardous substances at the Rocky Flats Site constitutes a "release" as defined in section 101(22) of CERCLA, 42 U.S.C. section 9601(22).

**PART 9 DETERMINATIONS**

78. Based on the preceding Findings of Facts, Conclusions of Law, information available as of the date of execution of this Agreement, and the entire Administrative Record for this Site, EPA and the State have determined that:

79. The Rocky Flats Site is subject to the requirements of

CERCLA.

80. Pursuant to § 6001 of RCRA, 42 U.S.C. § 6961, DOE is subject to, and must comply with RCRA and CHWA.

81. DOE is a responsible party subject to liability pursuant to 42 U.S.C. § 9607 of CERCLA, with respect to present and past releases at the Rocky Flats Site.

82. There is or has been a release of hazardous substances, pollutants, or contaminants into the environment from the Rocky Flats Site.

83. The Rocky Flats Plant includes certain hazardous waste treatment, storage, and disposal units authorized to operate under section 3005(e) of RCRA, 42 U.S.C. § 6925(e), and section 25-15-303(3) of CHWA, and is subject to the permit requirements of section 3005 of RCRA, and section 25-15-303 of CHWA.

84. Certain wastes and constituents at the Rocky Flats Site are hazardous wastes or hazardous constituents as defined by section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and 40 C.F.R. Part 261. There are also hazardous wastes or hazardous constituents at the Rocky Flats Site within the meaning of section 25-15-101(9) of CHWA and 6 CCR 1007-3, Part 261.

85. The Rocky Flats Site constitutes a facility within the meaning of sections 3004 and 3005 of RCRA, 42 U.S.C. §§ 6924 and 6925, and section 25-15-303 of CHWA.

86. DOE is the owner and co-operator, and EG&G is the co-operator, of the Rocky Flats hazardous waste management facility within the meaning of RCRA and CHWA.

87. There is or has been a release of hazardous waste and/or hazardous constituents into the environment from Solid Waste Management Units and disposal of hazardous waste within the meaning of section 3004(u) of RCRA, and CHWA.

88. The Submittals, actions, schedules, and other elements of work required or imposed by this Agreement are necessary to protect the public health, welfare, and the environment.

## CHAPTER TWO

### STATE AS LEAD REGULATORY AGENCY

#### PART 10 STATE RESPONSIBILITIES

89. This Chapter Two addresses the roles and responsibilities of the State. The Parties agree that the State shall perform its responsibilities under this Agreement in accordance with the provisions of Chapter 4.

90. OUs for which the State has been designated the Lead Regulatory Agency are identified in Attachment 2. Additional OUs for which the State shall be the Lead Regulatory Agency shall be identified according to the procedures in paragraph 142 of this Agreement.

#### PART 11 PERMITTING AND CLOSURE

91. DOE shall comply with RCRA and CHWA permit and closure requirements, including State-approved closure plans, for OUs specifically identified for permitting or closure in the Statement of Work, and shall submit permit applications and closure plans in accordance with the Statement of Work. DOE shall implement all closures in accordance with the Statement of Work and approved Workplans. Closures under this Chapter shall be regulated by the State under applicable law, but shall as necessary be coordinated with remedial action requirements of this Agreement.

#### PART 12 RESOLUTION OF DISPUTES

92. If DOE objects to any action taken by the State in accordance with the State's role as Lead Regulatory Agency as

described in Chapter 4, it shall submit to the State Project Coordinator within 14 days of such State action, a Written Statement of Dispute, setting forth the nature of the dispute, DOE's position with respect to the dispute, and the information relied upon to support its position. EPA shall invoke the provisions of this Part for disputes regarding approval by the State in accordance with its role as Lead Regulatory Agency, of Submittals other than Workplans, the Comprehensive Risk Assessment, IRAs/IMS, draft Proposed Plans, and CAD/RODs. The Parties agree to raise disputes within fourteen days of any such State action; however, failure to raise a dispute within this timeframe shall not affect any remedial/corrective action selection authorities pursuant to Chapter 4. All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Coordinator level. The Parties agree to utilize the dispute resolution process only in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used.

93. If the Project Coordinators are unable to resolve such dispute within fourteen (14) days of notice to the State of the objections as described above, the Project Coordinators shall jointly draft a written statement describing the issues underlying the dispute and attempts to resolve the dispute, and shall provide this statement along with the Written Statement of Dispute to the Dispute Resolution Committee (DRC) by the end of the 14 day period. The DRC will serve as a forum for resolution

of disputes for which agreement has not been reached through informal dispute resolution.

94. The State designated member of the DRC is the Chief of the Hazardous Waste Control Section. DOE's designated member of the DRC is the Assistant Manager for Environmental Management, Rocky Flats Office. The EPA member of the DRC is the Region VIII Hazardous Waste Management Division Director. Written notice of any delegation of authority from a Party's designated DRC member shall be provided to the other Parties, pursuant to the procedures of Part 36 (Notification). The DRC shall have 21 days from receipt of the Written Notice of Dispute and joint statement described in paragraphs 92 and 93 to unanimously resolve the dispute and issue a written decision. If the DRC is unable to unanimously resolve the dispute within this 21-day period, the Written Statement of Dispute and joint statement shall be forwarded along with any supporting information to the Senior Executive Committee (SEC) for resolution.

95. The SEC will serve as the forum for resolution of disputes for which agreement has not been reached by the DRC. The State's representative on the SEC shall be the Assistant Director for the Office of Health and Environmental Protection of the Department of Health (Assistant Director). The EPA's representative on the SEC is the Regional Administrator of EPA's Region VIII. The DOE's representative on the SEC is the Manager, Rocky Flats Office.

96. The SEC members shall as appropriate, confer, meet, and

exert their best efforts to resolve the dispute and issue a written decision. If unanimous resolution of the dispute is not reached within 21 days, the Assistant Director shall issue a written position on the dispute. The decision or determination shall be considered final agency action for the purposes of judicial review under § 24-4-106, C.R.S. (1988). If DOE objects to such decision or determination, DOE may appeal to the appropriate tribunal for review. The decision of the State Director shall in no way impair or limit EPA's responsibilities for oversight pursuant to Federal authorization of the hazardous waste program(s).

97. Subject to Parts 29 (RCRA/CERCLA Reservation of Rights) and 48 (Reservation of Rights), the Parties shall be bound by and abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Part.

98. The pendency of any dispute under this Chapter shall not affect DOE's responsibility for timely performance of the work required by this Agreement except as provided in Part 42 (Extensions). All elements of the work required by this Agreement which are not directly affected by the dispute shall continue and be completed in accordance with this Agreement.

99. Within 21 days of the final resolution of any dispute under this Part, or under any appeal action, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule, or procedure(s) and proceed to implement this Agreement according to the amended plan, schedule,

or procedure(s). DOE shall notify the State as to the action(s) taken to comply with the final resolution of a dispute.

100. The State shall process closure plans, post-closure plans, and permit applications in accordance with its applicable regulations. Under the applicable portions of the Statement of Work attached to this Agreement, the State will make final written decisions or determinations regarding compliance with CHWA. Disputes regarding these decisions or determinations shall be resolved utilizing the appropriate dispute resolution procedures.

#### **PART 13 ENFORCEABILITY**

101. The State, at OUs for which it is the Lead Regulatory Agency, shall conduct "close out sessions" with DOE (and EPA, if EPA so desires) at the conclusion of inspections of the Site related to implementation of this Agreement. After an inspection has concluded, the State shall also send DOE a letter summarizing the State's initial assessment of the inspector's findings (a "follow-up letter"). Any Party may invoke the provisions of Part 12 to resolve issues raised in the follow-up letter.

102. In the event DOE fails to comply with RCRA or CHWA provisions of this Agreement at OUs for which the State is the Lead Regulatory Agency, the State (or EPA, pursuant to its oversight authority specifically reserved in Part 28 (EPA Oversight)) may utilize the appropriate dispute resolution procedures prior to initiating administrative or judicial enforcement of this Agreement. The State (or EPA) may initiate

administrative or judicial enforcement at these OUs regardless of whether dispute resolution has been invoked. For any RCRA or CHWA violations at EPA Lead OUs, the State agrees to employ the appropriate dispute resolution procedures prior to initiating any enforcement action. Any Notice of Violation (NOV) or Compliance Order prepared by the State shall be reviewed by the Director of the Hazardous Materials and Waste Management Division, Colorado Department of Health, prior to issuance. Notwithstanding paragraph 105, in enforcing the RCRA or CHWA provisions of this Agreement, the State or EPA may seek injunctive relief, specific performance, and penalties under CHWA or RCRA, and such sanctions or other relief as may be available under other applicable law. DOE agrees not to contest the State's (or EPA's) choice of enforcement authorities from those available under this Agreement.

103. Chapter Two and other RCRA and CHWA provisions of this Agreement including those related to statutory requirements, Submittals, regulations, permits, closure plans, corrective action requirements, or record keeping and reporting shall be enforceable as an order by any person, including the State, pursuant to any rights existing under section 7002(a)(1)(A) of RCRA. DOE agrees that the State or one of its agencies is a "person" within the meaning of section 7002(a) of RCRA.

104. The Parties agree that the RCRA and CHWA provisions set forth in this Agreement which address record keeping, reporting, Submittals, regulations, permits, closure plans, or

corrective action are statutory requirements and are thus enforceable by the Parties.

105. In the event (1) legislation is enacted that either (a) clarifies that RCRA Section 6001 waives the Federal government's sovereign immunity from State-imposed fines and penalties, or (b) waives such sovereign immunity or (2) the U.S. Supreme Court rules that RCRA § 6001 waives the federal government's sovereign immunity from State-imposed fines and penalties, the Parties agree to negotiate appropriate changes and modify the Agreement accordingly.

## CHAPTER THREE

### EPA AS LEAD REGULATORY AGENCY

#### **PART 14 EPA RESPONSIBILITIES**

106. This Chapter addresses the roles and responsibilities of EPA. OUs for which EPA has been designated the Lead Regulatory Agency are identified in Attachment 2. Additional OUs for which EPA shall be Lead Regulatory Agency shall be identified according to the procedures in paragraph 142 of this Agreement. The Parties agree that EPA shall perform its responsibilities under this Agreement in accordance with the provisions of Chapter 4.

#### **PART 15 ARARs**

107. DOE shall conduct a detailed ARARs analysis to establish cleanup standards at the Site, taking into account both Federal and State ARARs. The ARARs analysis shall be conducted according to the terms and schedules established in the Statement of Work attached hereto as Attachment 2, and the Workplan(s) developed pursuant to the Statement of Work. EPA, after consultation with the State, will determine the ARARs to be applied at the Rocky Flats Site. If DOE or the State disputes EPA's determination, either party may initiate the Dispute Resolution procedures in Part 16 (Resolution of Disputes) of this Agreement. ARARs shall also be re-evaluated, at a minimum, throughout the document review process referenced in Part 25 (Documents). Nothing in this Agreement shall be construed to

resolve whether any waiver by EPA of an ARAR affects any authority the State may have to impose such an ARAR as a substantive requirement under State law.

108. ARARs determinations shall be incorporated into this Agreement and shall be an enforceable part thereof. CERCLA remedial action(s) and, as appropriate, HSWA corrective action(s), shall meet ARARs in accordance with section 121 of CERCLA.

#### **PART 16 RESOLUTION OF DISPUTES**

109. If DOE objects to any action taken by EPA in accordance with the EPA's role as Lead Regulatory Agency as described in Chapter 4, it shall submit to the EPA Project Coordinator within 14 days of such EPA action, a Written Statement of Dispute, setting forth the nature of the dispute, DOE's position with respect to the dispute, and the information relied upon to support its position. The State shall invoke the provisions of this Part for disputes regarding approval by EPA, in accordance with its role as Lead Regulatory Agency, of Submittals other than Workplans, the Comprehensive Risk Assessment, IRAs/IMs, draft Proposed Plans and ROD/CADs. The Parties agree to raise disputes within fourteen days of any such EPA action; however, failure to raise a dispute within this timeframe shall not affect any remedial/corrective action selection authorities pursuant to Chapter 4. All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Coordinator level. The Parties agree to

utilize the dispute resolution process only in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used.

110. If the Project Coordinators are unable to resolve such dispute within fourteen (14) days of notice to EPA of the objections as described above, the Project Coordinators shall jointly draft a written statement describing the issues underlying the dispute and attempts to resolve the dispute, and shall provide this statement along with the Written Statement of Dispute to the Dispute Resolution Committee (DRC) by the end of the 14 day period. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached through informal dispute resolution.

111. The EPA member of the DRC is the Region VIII Hazardous Waste Management Division Director. The State member of the DRC is the Chief of the Hazardous Waste Control Section. DOE's designated member of the DRC is the Assistant Manager for Environmental Management, Rocky Flats Office. Written notice of any delegation of authority from a Party's designated DRC member shall be provided to the other Parties, pursuant to the procedures of Part 35 (Notification). The DRC shall have 21 days from receipt of the Written Notice of Dispute and joint statement described in paragraphs 109 and 110 to unanimously resolve the dispute and issue a written decision. If the DRC is unable to unanimously resolve the dispute within this 21-day period, the Written Statement of Dispute and joint statement shall be

forwarded along with any supporting information to the Senior Executive Committee (SEC) for resolution.

112. The SEC will serve as the forum for resolution of disputes for which agreement has not been reached by the DRC. The EPA's representative on the SEC is the Regional Administrator of EPA's Region VIII. The State's representative on the SEC shall be the Assistant Director of Office of Health and Environmental Protection (Assistant Director). The DOE's representative on the SEC is the Manager, Rocky Flats Office.

113. The SEC members shall as appropriate, confer, meet, and exert their best efforts to resolve the dispute and issue a written decision. If unanimous resolution of the dispute is not reached within 21 days, EPA's Regional Administrator shall issue a written position on the dispute.

114. DOE or the State may, within 21 days of the Regional Administrator's issuance of EPA's position, issue a written notice elevating the dispute to the Administrator of EPA for resolution, in accordance with applicable laws and procedures. In the event that DOE or the State elects not to elevate the dispute to the Administrator within the designated 21-day escalation period, DOE and the State shall be deemed to have agreed with the Regional Administrator's written position with respect to the dispute.

115. Upon escalation of a dispute to the Administrator of EPA pursuant to paragraph 114, the Administrator will review and resolve the dispute within 21 days. Upon request and prior to

resolving the dispute, the EPA Administrator shall meet and confer with the Secretary of DOE and the Colorado Department of Health Executive Director to discuss the issue(s) under dispute. Upon resolution, the Administrator shall provide DOE and the State with a written decision setting forth final resolution of the dispute.

116. Subject to Parts 29 (RCRA/CERCLA Reservation of Rights) and 48 (Reservation of Rights), the Parties shall be bound by and abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Part.

117. The pendency of any dispute under this Chapter shall not affect DOE's responsibility for timely performance of the work required by this Agreement except as provided in Part 42 (Extensions). All elements of the work required by this Agreement which are not directly affected by the dispute shall continue and be completed in accordance with this Agreement.

118. Within 21 days of the final resolution of any dispute under this Part, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule, or procedure(s) and proceed to implement this Agreement according to the amended plan, schedule, or procedure(s). DOE shall notify EPA as to the action(s) taken to comply with the final resolution of a dispute.

#### **PART 17 SCHEDULES**

119. DOE shall commence activities according to the schedules set forth in the attached Statement of Work and the

Workplan(s) developed thereunder. The Parties agree that these schedules satisfy section 120(e)(1) of CERCLA. RI/RFI and FS/CMS Schedules for each OU will be published by EPA and the State, as provided in section 120(e)(1) of CERCLA.

120. DOE shall commence substantial continuous physical on-Site remedial action for each OU in accordance with section 120(e)(2) of CERCLA. DOE shall complete the remedial action as expeditiously as possible, as required by CERCLA § 120(e)(3).

#### **PART 18 PERMITS**

121. The Parties recognize that under section 121(e)(1) of CERCLA, portions of the response actions called for by this Agreement and conducted entirely on the Rocky Flats Site are exempted from the procedural requirement to obtain Federal, State, or local permits, when such response action is selected and carried out in compliance with Section § 121 of CERCLA. Nonetheless, these actions must satisfy all the applicable or relevant and appropriate Federal and State standards, requirements, criteria, or limitations which would have been included in any such permit. It is the understanding of the Parties that the statutory language is intended to avoid delay of on-Site response actions, due to procedural requirements of the permit process. DOE agrees to seek and implement any permit, including RCRA or CHWA permits, for any operation or process, other than permits for portions of remedial/corrective actions which are both (1) exclusively limited to DOE's obligation to perform a remedial/corrective action in accordance with paragraph

161 and (2) conducted entirely on-Site. All such permits shall be incorporated into this Agreement and become an enforceable part hereof.

122. When DOE proposes a response action to be conducted entirely on the Rocky Flats Site which in the absence of CERCLA section 121(e)(1) and the NCP would require a Federal or State permit, DOE shall include in the submittal:

- A. Identification of each permit which would otherwise be required.
- B. Identification of the standards, requirements, criteria, or limitations which would have had to have been met to obtain each such permit.
- C. Explanation of how the response action proposed will meet the standards, requirements, criteria, or limitations identified in subparagraph 122(B) immediately above.

123. Upon the request of DOE, EPA and the State will provide their positions with respect to paragraphs 122B and C above in a timely manner.

124. This Part is not intended to relieve DOE from any applicable requirements, including section 121(d)(3) of CERCLA, for the shipment or movement of hazardous waste or hazardous substances off the Rocky Flats Site. DOE shall obtain all permits and comply with applicable Federal, State, or local laws for such shipments. DOE shall submit timely applications and requests for such permits and approvals. Disposal of hazardous

substances off-site shall comply with DOE's Policy on Off-Site Transportation, Storage, and Disposal of Nonradioactive Hazardous Waste, dated June 24, 1986, and the EPA Off-Site Response Action Policy, dated May 6, 1985, 50 Fed. Reg. 45933 (November 5, 1985), as amended by EPA's November 13, 1987, "Revised Procedures for Planning and Implementing Off-Site Response Actions" and as subsequently amended.

125. DOE shall notify the State and EPA in writing of any permits required for off-site activities related to this Agreement as soon as DOE becomes aware of the requirement. Upon request, DOE shall provide the State and EPA with copies of all such permit applications and other documents related to the permit process.

126. If a permit which is necessary for implementation of activities related to this Agreement is not issued or is issued or renewed in a manner that is materially inconsistent with the requirements of this Agreement, DOE shall notify the State and EPA of its intention to propose modifications to this Agreement to comply with the permit (or lack thereof). Notification by DOE of its intention to propose modifications shall be submitted within seven calendar days of receipt by DOE of notification that: (1) a permit will not be issued; (2) a permit has been issued or reissued; (3) a final determination with respect to any appeal related to the issuance of a permit has been entered. Within 30 days from the date it submits its notice of intention to propose modifications, DOE shall submit to the State and EPA

its proposed modifications to this Agreement with an explanation of its reasons in support thereof.

127. The State and EPA shall review any of DOE's proposed modifications to this Agreement pursuant to this Part. If DOE submits proposed modifications prior to a final determination of any appeal taken on a permit needed to implement this Agreement, the State and EPA may elect to delay review of the proposed modifications until after such final determination is entered. If the State and EPA elect to delay review, DOE shall continue implementation of this Agreement as provided in the following paragraph. If EPA and the State fail to agree to a modification proposed by DOE within 30 days of such proposal, pursuant to paragraph 126, DOE may invoke the Dispute Resolution procedures of Part 12 or 16, as appropriate.

128. During any appeal of any permit required to implement this Agreement or during review of any of DOE's proposed modifications as provided in the preceding paragraph, DOE shall continue to implement those portions of this Agreement which can be reasonably implemented pending final resolution of the permit issue(s).

**PART 19 DELAY IN PERFORMANCE/STIPULATED PENALTIES**

129. In the event that DOE fails to submit a primary document to EPA and the State pursuant to the appropriate timetable or deadline in accordance with the requirements of this Agreement or fails to comply with a term or condition of this Agreement which relates to an interim or final remedial action,

EPA may assess a stipulated penalty against DOE. If EPA fails to assess a stipulated penalty against DOE, and the State believes it appropriate to assess one, the State may request of EPA that it do so. In the case of a State request for issuance of a stipulated penalty by EPA, the matter may be referred to the DRC for resolution pursuant to Part 16. A stipulated penalty may be assessed in an amount not to exceed \$5,000 for the first week (or part thereof) and \$10,000 for each additional week (or part thereof) for which a failure set forth in this paragraph occurs. The stipulated penalty shall begin to accrue upon receipt of notice of violation pursuant to paragraph 130 below.

130. Upon determining that DOE has failed in a manner set forth in paragraph 129, EPA, after consultation with the State, shall so notify DOE in writing. If the failure in question is not already subject to dispute resolution at the time such notice is received, DOE shall have 15 days after receipt of the notice to invoke dispute resolution on the question of whether the failure did in fact occur. DOE may dispute whether the violation upon which the stipulated penalty is assessed has occurred, and the number of days that the violation has occurred, but shall not dispute the amount of stipulated penalties assessed. DOE shall not be liable for the stipulated penalty assessed by EPA if the failure is determined, through the dispute resolution process, not to have occurred. No assessment of a stipulated penalty shall be final until the conclusion of any dispute resolution procedures related to the assessment of the stipulated penalty.

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

- A. The facility responsible for the failure.
- B. A statement of the facts and circumstances giving rise to the failure.
- C. A statement of any administrative or other action taken at the relevant facility, or a statement of why such measures were determined to be inappropriate.
- D. A statement of any additional action taken by or at the facility to prevent recurrence of the same type of failure.
- E. The total dollar amount of the stipulated penalty for the particular failure.

132. Stipulated penalties assessed pursuant to this Part shall be payable to the Hazardous Substances Response Trust Fund from funds authorized and appropriated for that specific purpose.

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

134. This Part shall not affect DOE's ability to obtain an extension of a timetable, deadline, or schedule pursuant to Part 42 of this Agreement.

135. Nothing in this Part shall preclude EPA from pursuing any other remedy or sanction for DOE's failure to comply with

this Agreement, after the appropriate dispute resolution process has concluded in accordance with paragraph 137.E.

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

**PART 20 ENFORCEABILITY**

137. The Parties agree that:

A. Upon the effective date of this Agreement, any standard, regulation, condition, requirement, or order which has become effective under CERCLA, and is incorporated into this Agreement is enforceable by any person pursuant to section 310 of CERCLA, and any violation of such standard, regulation, condition, requirement, or order will be subject to civil penalties under sections 310(c) and 109 of CERCLA.

B. All timetables or deadlines associated with the development, implementation, and completion of the RI/RFI or the FS/CMS as specified in the Statement of Work shall be enforceable by any person pursuant to section 310 of CERCLA, and any violation of such timetables or deadlines will be subject to civil penalties under sections 310(c) and 109 of CERCLA.

C. All terms and conditions of this Agreement which relate to interim measures, interim or final remedial actions, and/or corrective actions, including corresponding timetables, deadlines, or schedules and

all work associated with the interim or final remedial actions, shall be enforceable by any person pursuant to section 310(c) of CERCLA, and any violation of such terms or conditions will be subject to civil penalties under sections 310(c) and 109 of CERCLA.

D. Any final resolution of a dispute pursuant to this Agreement which establishes a term, condition, timetable, deadline, or schedule shall be enforceable by any person pursuant to section 310(c) of CERCLA, and any violation of such term, condition, timetable, deadline, or schedule will be subject to civil penalties under sections 310(c) and 109 of CERCLA.

E. At EPA lead OUs, EPA may invoke dispute resolution prior to invoking its enforcement authorities pursuant to CERCLA or RCRA, including its RCRA oversight authorities. However, EPA may initiate administrative or judicial enforcement at EPA lead OUs regardless of whether dispute resolution has been invoked by any Party. At State lead OUs, EPA agrees to employ the appropriate dispute resolution prior to initiating any enforcement action.

138. Nothing in this Agreement shall be construed as authorizing any person to seek judicial review of any action or work where review is barred by any provision of CERCLA, including section 113(h) of CERCLA.

139. The Parties agree that all Parties shall have the right to enforce the terms of this Agreement.

## CHAPTER FOUR

### INTEGRATION OF EPA AND STATE RESPONSIBILITIES

#### PART 21 RCRA/CERCLA INTERFACE

140. EPA and the State recognize that there is a potential for the two regulatory agencies to impose conflicting requirements upon DOE due to the complexities of the Rocky Flats Site and due to the overlap between the respective authorities of the two regulatory agencies. This Chapter Four establishes the procedures for remedial/corrective activities and the framework for EPA and the State to resolve certain disputes that may arise concerning the respective responsibilities of the two regulatory agencies. EPA and the State intend to carry out their responsibilities so as to minimize the potential for any such conflicts.

#### PART 22 LEAD REGULATORY AGENCY AND REGULATORY APPROACH DECISIONS

141. In order to minimize the potential for such conflicts, the Parties mutually agree to recognize a Lead Regulatory Agency and Support Regulatory Agency for each specific OU at the Site. In certain instances, EPA and the State may choose to have a joint lead for a particular OU. Lead Regulatory Agency and Support Regulatory Agency designations for each of the sixteen OUs identified as of the date of execution of this Agreement are specified in the Statement of Work. The designation of a Lead and Support Regulatory Agency is for the purposes of administering this Agreement only and shall not change the

jurisdictional authorities of the Parties. Where EPA is designated the Lead Regulatory Agency, the State shall be the Support Regulatory Agency for that OU. Conversely, where the State is designated the Lead Regulatory Agency, EPA shall be the Support Regulatory Agency for that OU. The designation of the State as Lead Regulatory Agency for any OU shall not constitute "authorization" of any of its actions pursuant to § 122(e)(6) of CERCLA. DOE recognizes the need for and benefit of oversight of environmental investigatory and response activities at the Site and agrees to this concept for the purposes of minimizing conflicts between the Parties and clarifying roles and responsibilities. The respective duties of each of the Parties in order to implement this concept are detailed in this Chapter. Particular tasks related to these duties are detailed in the Statement of Work, incorporated into this Agreement as Attachment 2, and shall be further delineated in the Workplan(s) to be submitted pursuant to paragraph 148 of this Agreement.

142. The redesignation of Lead Regulatory Agency, and designation of Lead Regulatory Agency for OUs and/or individual hazardous substance site(s) not identified as of the date of execution of this Agreement, shall be made through the Workplan update process. EPA and the State have joint authority to determine the choice of Lead Regulatory Agency, and DOE shall not dispute such joint determinations, although EPA and the State agree to consider DOE's technical comments on the appropriateness of either other Party as the Lead or Support Regulatory Agency

for a particular OU. The Parties agree that absent any pertinent statutory amendment, EPA shall be designated the Lead Regulatory Agency for any additional OUs identified after the effective date of this Agreement and believed to contain purely radioactive substances. Any Party may, as appropriate, request that the Lead Regulatory Agency designation at an OU be redesignated pursuant to the procedures of this Part.

143. If the EPA and State Project Coordinators cannot agree on the choice of Lead Regulatory Agency for a particular OU or individual hazardous substance site not identified as of the date of execution of the Agreement, then they shall resolve such disputes using the dispute resolution process in Part 27.

144. The Lead Regulatory Agency shall be responsible for primary review and sole approval of all Submittals received pursuant to the terms of this Agreement except as provided in paragraphs 148, 150, 154, and 155. The Support Regulatory Agency shall provide comments on each Submittal to the Lead Regulatory Agency, which shall assemble those comments and provide them without editing to DOE. The Lead Regulatory Agency shall transmit a copy of its consolidated comments to the Support Regulatory Agency at least seven business days prior to transmittal to DOE. No informal guidance, suggestions, or comments by the State or EPA regarding reports, Workplans, specifications, schedules, or any other Submittal shall satisfy the requirement for formal approval required by this Agreement. The Lead Regulatory Agency may provide written comments to DOE on

the Support Regulatory Agency's comments along with its distribution to DOE of comments on the Submittal.

145. When drafting comments and providing commentary on the Support Regulatory Agency's comments, the Lead Regulatory Agency shall render responses which are, to the maximum extent possible, consistent with CERCLA, RCRA, and CHWA. For those OUs for which the State is the Lead Regulatory Agency, it shall also take into account the technical requirements for the CERCLA RI/FS process, in order to minimize conflict and to promote efficient regulatory efforts at the Site. For those OUs for which EPA is the Lead Regulatory Agency, it shall also take into account the technical requirements for the RCRA/CHWA process.

146. The Parties recognize the present regulatory jurisdictional dispute between DOE and the State concerning regulation of radioactive waste pursuant to RCRA and CHWA. In order to ensure that all contaminants are properly addressed at the Site, and to avoid any delays in the regulatory process and environmental cleanup due to this dispute, the Parties agree that for those OUs for which the State is the Lead Regulatory Agency, it shall address both the radioactive and hazardous components of hazardous substances. The Parties acknowledge that EPA shall also, if necessary, impose requirements pursuant to CERCLA on the radioactive waste, the radioactive portion of the mixed waste, or both the hazardous and radioactive constituents of the mixed waste at issue if the radioactive portion can not be segregated out for that portion of the investigative or response process.

Should this become necessary, as agreed to by EPA and the State, EPA agrees to impose such requirements in a way that minimizes any interference with the State's role as the Lead Regulatory Agency for that OU.

147. In the event that EPA and the State cannot agree on a unified position on the remedial/corrective action, EPA retains final decision-making authority for CERCLA determinations, and the State retains final decision-making authority for CHWA determinations. If EPA and the State make inconsistent decisions, the provisions of Part 26 shall apply.

**PART 23. WORK TO BE PERFORMED UNDER DIRECTION OF LEAD AND SUPPORT REGULATORY AGENCIES**

148. DOE shall submit to the State and EPA for their joint review and approval, according to the schedule established in the Statement of Work, Workplan(s) for those OUs identified in Attachment 2. Said Workplan(s) shall be based upon, and consistent with, the Statement of Work attached to this Agreement as Attachment 2. Said Workplan(s) shall provide a detailed description of the work to be performed in order to comply with the requirements of Attachment 2 and RCRA, CERCLA, and CHWA. After approval of each such Workplan, it shall be incorporated into this Agreement in subsequent Attachments and shall become an enforceable part hereof. DOE shall perform the actions described in the Statement of Work and Workplan(s) in accordance with the requirements and schedules therein. EPA and the State agree to provide DOE with guidance and timely response to requests for

guidance to assist DOE in the performance of its work under this Agreement. Any dispute raised by DOE regarding Workplan approval shall be resolved through Parts 12 or 16, as appropriate. A dispute between EPA and the State over Workplan approval shall be resolved through the dispute resolution procedures of Part 27.

149. The following paragraphs 150 through 156 provide summaries of categories of work required of DOE pursuant to this Agreement and the respective statutes it embodies. DOE shall perform the requirements of these paragraphs in accordance with pertinent guidance and policy as set forth in the Statement of Work and updated regularly through the Workplan update process. Detailed descriptions of the work described below are provided in the Statement of Work attached to this Agreement as Attachment 2.

150. Interim Remedial Actions/Interim Measures. DOE agrees that it shall develop and implement Interim Remedial Actions/Interim Measures (IRAs/IMs) as required by EPA and the State. EPA and DOE shall jointly select the IRA in the IRA portion of the IRA/IM decision document. In the event that EPA does not agree with DOE's proposed selection of the IRA or that DOE fails to propose an IRA, EPA shall select the IRA, in accordance with applicable laws. The State shall select the IM in the IM portion of the IRA/IM decision document, except as provided in Paragraph 153. The IRAs/IMs shall be consistent with the purposes set forth in Part 3 (Purpose) of this Agreement. All IRA/IMs shall be based on, and consistent with, the requirements for IRAs/IMs detailed in the Statement of Work.

IRAs/IMs shall, to the greatest extent practicable, attain ARARs and be consistent with and contribute to the efficient performance of final response actions consistent with section 121 of CERCLA. Any dispute raised by DOE concerning an IRA/IM shall be resolved pursuant to Parts 12 or 16, as appropriate (Resolution of Disputes). Any dispute between EPA and the State on the selection of an IRA/IM shall be resolved through the dispute resolution procedures of Part 27.

151. Remedial Investigations/ RCRA Facility Investigations. DOE agrees it shall develop, implement, and report upon Remedial Investigations/RCRA Facility Investigations (RI/RFIs) to investigate the nature and extent of contamination at the Site. RI/RFIs shall be submitted in accordance with the requirements and the time schedules set forth in the Statement of Work and shall comply with the requirements of CERCLA, RCRA, CHWA, pertinent guidance and policy as set forth in the Statement of Work.

152. Feasibility Studies/Corrective Measures Studies. DOE agrees to design, propose, undertake, and report upon Feasibility Studies/Corrective Measures Studies (FS/CMSs) to identify alternatives for remedial action/corrective action for OUs at the Site. FS/CMSs shall be submitted in accordance with the requirements and time schedules set forth in the Statement of Work and shall comply with the requirements of CERCLA, RCRA, CHWA, and pertinent guidance and policy as set forth in the Statement of Work.

153. All OUs shall undergo the RI/RFI and FS/CMS process set forth in Paragraphs 151 and 152. For OUs identified at the completion of the FS/CMS stage as containing purely radioactive substances, EPA (and DOE in accordance with its authority under § 120(e)(4) of CERCLA) shall issue a ROD. If at the end of the FS/CMS process either (1) hazardous waste constituents are also identified to be present or, (2) federal statutory amendments expressly provide for State authority over radionuclides, then the State shall issue a CAD and the procedures of paragraphs 155, 156, 158, 160, and 161 shall apply. However, if neither of the events in (1) or (2) of this paragraph occur, the State shall not issue a CAD, and only the CERCLA provisions of this Part shall apply to remedy selection at that OU.

154. Risk Assessment. DOE shall conduct a Risk Assessment for each OU at the Site and shall submit the Risk Assessment to EPA and the State for review and comment by both Parties and approval by the Lead Regulatory Agency for that OU according to the schedule set forth in the Statement of Work. If EPA and the State, in consultation with DOE, determine that a comprehensive Risk Assessment is necessary, as provided in the SOW, the OU specific Risk Assessments shall form the basis for the Comprehensive Risk Assessment. The Comprehensive Risk Assessment shall be jointly reviewed and approved by EPA and the State. The OU-specific and Comprehensive Risk Assessments shall comply with the requirements of CERCLA, RCRA, CHWA and pertinent guidance and policy as set forth in the Statement of Work.

155. Remedial and Corrective Actions/Proposed Plan. DOE shall develop and submit to EPA and the State for their joint review and comment, a draft Proposed Plan for Remedial/Corrective Action in accordance with the requirements and schedules set forth in the Statement of Work. Upon incorporation of EPA and State comments, DOE shall release a final Proposed Plan for public comment in accordance with § 117 of CERCLA. The State will simultaneously issue a draft permit modification consistent with the final Proposed Plan in accordance with 6 C.C.R. 1007-3, Part 100.60.

156. DOE and EPA, in consultation with the State, shall select the remedial action for each OU, taking into consideration comments received during the final Proposed Plan comment period described in paragraph 155 above. If DOE and EPA are unable to agree on the remedial action, the selection of such action shall be made by the Administrator of EPA or his duly authorized delegate. The State, in consultation with EPA, shall select the Corrective Action, except as provided in paragraph 153, and shall prepare a CAD describing such decision.

157. This paragraph describes dispute resolution for disputes relating to selection of a corrective/remedial action at OUs for which the State is the Lead Regulatory Agency, as described in the attached Statement of Work. For each of these OUs, the State shall issue a CAD. EPA, as the Support Regulatory Agency for that OU, (and DOE, consistent with its authorities pursuant to section 120(e)(4) of CERCLA), shall issue a Record of

Decision (ROD) for the remedial action portion of that OU. Public comment on the final Proposed Plan shall be addressed in a responsiveness summary and be incorporated within the CAD/ROD, as appropriate. The CAD/ROD shall constitute the Final Plan and permit modification. Where all Parties agree on the corrective/remedial action as described in the CAD/ROD, the ROD portion of the CAD/ROD at a State lead OU shall be a concurrence ROD. If EPA and the State disagree on the remedy for that particular OU, the dispute resolution procedures of Part 27 shall be invoked, subject to the reservations of right in Parts 29 and 48. If EPA and the State agree on the remedy selected in the CAD/ROD, but DOE disagrees on any element common to both the CAD and ROD, DOE shall invoke the dispute resolution procedures of Part 12. If DOE disagrees with any element of the selected remedy pertaining solely to the CAD portion, it shall invoke the dispute resolution procedures of Part 12. If DOE disagrees with any element of the selected remedy pertaining solely to the ROD portion, it shall invoke the dispute resolution procedures of Part 16, although final remedy selection on the remedial action portion shall be made by the EPA Administrator in the event that the disagreement can not be resolved.

158. This paragraph describes dispute resolution for disputes relating to selection of a remedial/corrective action for those OUs for which EPA is the Lead Regulatory Agency. For each of these OUs, EPA (and DOE consistent with its authority pursuant to section 120(e)(4) of CERCLA) shall prepare a Record

of Decision (ROD) based on the final Proposed Plan. The State, as Support Regulatory Agency for that OU, except as provided in paragraph 153, shall prepare a CAD. Public comment on the final Proposed Plan shall be addressed in a responsiveness summary and be incorporated into the ROD/CAD, as appropriate. The ROD/CAD shall constitute the Final Plan and permit modification. Where all Parties agree on the remedial/corrective action for that OU, the CAD portion shall be a concurrence CAD. If EPA and the State disagree on the remedy for that OU, the dispute resolution procedures of Part 27 shall be invoked, subject to the reservation of rights in Parts 29 and 48. If EPA and the State agree on the remedy selected, but DOE disagrees on an element common to both the ROD and the CAD, DOE shall invoke the dispute resolution procedures of Part 16, although final remedy selection for that OU shall be made by the EPA Administrator in the event the disagreement can not be resolved. If DOE disputes an element of the remedy related solely to the ROD portion, it shall invoke the dispute resolution procedures of Part 16, although final selection of the remedy for that OU shall be made by the EPA Administrator, in the event that the disagreement can not be resolved. If DOE disputes an element of the remedy related solely to the CAD portion, it shall invoke the dispute resolution procedures of Part 12.

159. Consistent with EPA's responsibilities pursuant to section 120(g) of CERCLA, EPA (and DOE, to the extent required by section 120(e)(4)) shall prepare a ROD for those OUs for which

the State is the Lead Regulatory Agency. EPA agrees that its intent is to prepare a ROD consistent with the CAD, so long as the CAD is consistent with the requirements of CERCLA.

160. For those OUs for which EPA is designated the Lead Regulatory Agency, and where preparation of a CAD by the State is appropriate, the State agrees that its intent is to prepare a CAD consistent with the ROD, so long as the ROD is consistent with RCRA and CHWA.

161. Implementation of Remedial and Corrective Actions.

Following final selection for each OU of the remedial action by EPA (and DOE consistent with its authority pursuant to § 120(e)(4) of CERCLA), and final selection of the corrective action by the State, DOE shall design, propose, and submit to EPA and the State a detailed plan for implementation of each selected remedial action and corrective action, including arrangements for long term operation and maintenance, according to the schedule and conditions set out in the Statement of Work and Workplan(s) developed according to the Statement of Work. Following review and approval by the Lead Regulatory Agency for that OU according to the procedures referenced in Part 25 (Documents), DOE shall implement the remedial action(s) and corrective action(s) in accordance with the requirements and time schedules in the Statement of Work and the approved Workplan(s).

**PART 24. WORK STOPPAGE**

162. Any Party may request a work stoppage order, whether or not the particular work at issue is already the subject of

dispute resolution, (1) if it believes a particular task or portion of work is inadequate or defective and likely to yield an adverse effect on human health or the environment as a result of such inadequacy or defect, or (2) with respect to work that it believes is likely to have a substantial adverse effect on the remedy/corrective action selection or implementation process; except that the work stoppage provisions of this Part shall not be invoked for any disagreement on the selection of remedy for that OU or an affected OU. Such request shall be made in writing by the DRC member of the requesting Party, sent to the DRC members of all other Parties, and shall state the reason as to why stoppage is required.

163. Work affected by the stoppage will immediately be discontinued for up to five (5) business days pending determination by the DRC. The DRC shall confer and meet as necessary during this period. If the DRC does not concur in the need for work stoppage, work shall remain stopped pending elevation to the SEC. Once the issue is referred to the SEC, the procedures of Parts 12 and 16 shall apply as appropriate, except that the Lead Regulatory Agency member of the SEC shall render its decision within five (5) business days. To the extent practicable, prior notification shall be given to all other parties that a work stoppage request is forthcoming.

164. DOE's time periods for performance of the work subject to the work stoppage, as well as the time period for any other work dependent upon the work which was stopped, shall be extended

pursuant to Part 42 (Extensions) of this Agreement for such period of time equivalent to the time in which work was stopped, or longer as agreed to by the Parties.

#### **PART 25 DOCUMENTS**

165. The Statement of Work establishes the procedures that shall be used by EPA and the State for appropriate notice, review, comment, and response to comments regarding Submittals specified as either Primary or Secondary documents in the Statement of Work. All Primary Documents shall be subject to Dispute Resolution in accordance with Parts 12, 16, or 27 (Resolution of Disputes), as appropriate. Secondary Documents shall not be subject to Dispute Resolution.

#### **PART 26 PHYSICALLY INCONSISTENT ACTIONS**

166. EPA and the State intend that neither regulatory agency shall direct actions to be taken at the Rocky Flats Site that are physically inconsistent with other actions directed by either regulatory agency at the Site. This provision applies to any actions required to be taken at the Site pursuant to RCRA, CHWA, or CERCLA, including field modifications. For the purposes of this Agreement, Physically Inconsistent Actions shall mean any actions, which, if either were properly performed, would significantly reduce the effectiveness of, or render it impossible to perform, part or all of the other action at the same area, another area, or the Site. The setting of priorities for action based on budgetary considerations shall not be used as a factor in determining the presence of physical inconsistency.

Actions shall not be considered physically inconsistent merely because one action is more stringent than the other. The provisions of this Part are independent of and do not modify or otherwise affect the provisions of Part 29 (RCRA/CERCLA Reservation of Rights).

167. In the event of a dispute between EPA and the State over an issue of physical inconsistency, either Party may refer such dispute to the dispute resolution process pursuant to Part 27. In resolving a dispute concerning a possible physical inconsistency, the Project Coordinators, the Dispute Resolution Committee, and the Senior Executive Committee shall attempt to resolve the dispute in such a way as to promote timely cleanup and benefit to overall environmental quality at the Site.

**PART 27 DISPUTE RESOLUTION BETWEEN STATE AND EPA**

168. Except as provided in paragraphs 92 and 109, resolution of disputes between the State and EPA under this Agreement shall be resolved as described in paragraphs 169-175 below:

169. Each regulatory agency's Project Coordinator shall make reasonable efforts to informally resolve disputes arising between EPA and the State. If informal resolution cannot be achieved, the disputing party shall submit a Written Statement of Dispute setting forth the nature of the dispute, the disputing party's position with respect to the dispute, and the information relied upon to support its position to the State-EPA Dispute Resolution Committee (SEDRC) as described below. Receipt of the

Written Statement of Dispute, along with any supporting documents, by the SEDRC shall constitute formal elevation of the dispute in question to the SEDRC. At such time as the disputing party submits a statement of dispute to the SEDRC, a copy shall be sent to DOE. The SEDRC will serve as the forum for resolution of disputes for which agreement has not been reached through informal dispute resolution. The State and EPA agree to utilize the dispute resolution process only in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used.

170. The State designated member of the SEDRC is the Hazardous Materials and Waste Management Division Director. EPA's designated member of the SEDRC is the Hazardous Waste Division Director of EPA's Region VIII. Following elevation of a dispute to the SEDRC, the SEDRC shall have 21 days to unanimously resolve the dispute. Any successful resolution shall be documented within an additional 21 days by a jointly signed determination outlining the resolution reached and the reasons for such determination. At such time, a copy of such documentation shall be sent to DOE. If the SEDRC is unable to unanimously agree on a resolution, the members shall forward pertinent information and their respective recommendations to the State-EPA Senior Executive Committee (SESEC) for resolution.

171. The State designated member of the SESEC is the Assistant Director, Office of Health and Environmental Protection, Colorado Department of Health. EPA's designated

member of the SESEC is the Regional Administrator of EPA's Region VIII. The SESEC will serve as the forum for resolution of disputes for which agreement has not been reached by the SEDRC. The SESEC members shall, as appropriate, confer, meet, and exert their best efforts to resolve the dispute. The SESEC shall have 21 days to unanimously resolve the dispute. Any successful resolution shall be documented, within an additional 21 days, by a jointly signed determination outlining the resolution reached and the reasons therefor. At such time, a copy of such documentation shall be sent to DOE.

172. If unanimous resolution is not reached within 21 days, EPA or the State may issue a written notice elevating the dispute to the Administrator of EPA and the Executive Director of the State Department of Health for resolution. The Administrator and Executive Director shall, as appropriate, confer, meet, and exert their best efforts to resolve the dispute and issue a written decision.

173. Throughout the above dispute resolution process, EPA and the State shall as appropriate consult with DOE in order to facilitate resolution of disputes.

174. If disputes are not resolved pursuant to this Part, such disputes shall be subject to Part 29 (RCRA/CERCLA Reservation of Rights) and Part 48 (Reservation of Rights).

175. The pendency of any dispute under this Part shall not affect DOE's responsibility for timely performance of the work required by this Agreement, except as provided in Part 42

(Extensions).

**PART 28 EPA OVERSIGHT**

176. Nothing in this Agreement shall be interpreted to affect EPA's responsibility for oversight of the State's exercise of its authorized RCRA authorities. In carrying out any such oversight, EPA shall follow the statutory and regulatory procedures for such oversight and the provisions of this Agreement, including as appropriate, the Dispute Resolution process in Part 27.

**PART 29 RCRA/CERCLA RESERVATION OF RIGHTS**

177. If EPA and the State are unable to resolve any dispute arising under this Agreement after utilizing the appropriate dispute resolution procedures, then 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.

178. EPA and the State each reserve any rights they may have to seek judicial review of a proposed decision or action taken with respect to corrective or remedial actions at any given OU on the grounds that either EPA or the State claims that such proposed decision or action conflicts with its respective laws governing protection of human health and/or the environment. EPA and the State agree to utilize the appropriate Dispute Resolution procedures provided in this Agreement prior to seeking such judicial review. It is the understanding of the Parties that this reservation is intended to provide for challenges where the

adequacy of protection of human health and the environment or the means of achieving such protection is at issue.

179. Nothing in this Agreement shall be interpreted to affect EPA's authority under CERCLA to impose requirements necessary to protect public health and the environment. EPA agrees to utilize the appropriate dispute resolution procedures prior to invoking this authority at State lead OUs.

180. Nothing in this Agreement shall be construed to excuse DOE from complying with the requirements of RCRA and CHWA, including closure and corrective action requirements as specified in the attached Statement of Work and subsequent Workplans, subject to Parts 26 (Physically Inconsistent Actions), 27 (EPA-State Dispute Resolution), and 29 (RCRA/CERCLA Reservation of Rights), and paragraphs 107 (ARARs) and 121 (Permit Waivers).

CHAPTER FIVE  
COMMON PROVISIONS

**PART 30 RECOVERY OF EPA EXPENSES**

181. EPA and DOE recognize that in order to fully implement this Agreement, the costs of both Parties must be adequately funded. Therefore, DOE agrees to use its best efforts to assist EPA to obtain adequate funds and Full Time Equivalent (FTE) positions to provide timely response and competent oversight, and EPA agrees to use its best efforts to assist DOE to obtain adequate funds for implementing the activities mandated by this Agreement, including the Statement of Work and subsequent Workplans.

182. The Parties recognize that significant resources will be required for EPA to fulfill its obligations established by this Agreement. EPA estimates that adequate funding for Federal fiscal years 1991 and 1992 (FY91 and FY92) over currently budgeted resources and including Superfund response costs incurred by EPA prior to the effective date of this Agreement, is as follows:

FY91: 6 FTE and \$1,800,000

FY92: 6 FTE and \$600,000

183. EPA contends that monies expended by EPA in the course of fulfilling its obligations established by this Agreement should be reimbursed by DOE. As of the effective date of this Agreement, EPA and DOE have been unable to resolve the issue of

reimbursement of EPA's expenses associated with fulfilling its obligations under this Agreement.

184. Nevertheless, so that activities to be performed under this Agreement may be commenced, EPA agrees to reprogram its funds to fulfill its obligations under this Agreement for a period not to exceed one year. During this one-year period, EPA and DOE will develop a mutually satisfactory method to fund EPA for its expenses incurred in the course of DOE's response activities at the Rocky Flats Site, including all EPA expenses associated with fulfilling EPA's obligations under this Agreement.

185. If EPA and DOE are unable to resolve the issue of cost reimbursement within the one-year period established above, EPA may terminate this Agreement at any time upon ninety (90) days written notice to all Parties.

186. EPA's agreement to continue to negotiate a mechanism to fund EPA for its expenses shall not prejudice EPA's ability to obtain reimbursement of funds expended regarding the Rocky Flats Site, including those expended during the one year period referred to in paragraph 184. EPA reserves all rights to recover at any time and from any entity any past and future costs incurred by EPA and not reimbursed in connection with CERCLA activities conducted at the Rocky Flats Site.

[Paragraphs 187-188 Reserved]

**PART 31 RECOVERY OF STATE COSTS**

189. Permit Fees and Reasonable Service Charges. DOE agrees to pay in full, and no later than 30 days after receipt of invoice, all document review fees and annual waste fees as required by 6 CCR 1007-3, Part 100.3, consistent with § 6001 of RCRA. In the event DOE disputes any such charges by the State, DOE may contest the disputed charges in accordance with the Dispute Resolution procedures of Part 12.

190. DOE agrees to reimburse the State for all costs incurred by the State specifically related to the implementation of this Agreement at the Rocky Flats Site and not inconsistent with the NCP, to the extent such costs are not covered by permit fees and other assessments, or by other agreement between the Parties. The amount and schedule of payment of these costs will be negotiated with consideration for DOE's multi-year funding cycle. The State reserves all rights it has to recover any other past and future costs incurred by the State in connection with CERCLA activities conducted at the Rocky Flats Site. For the purposes of budget planning only, the State shall annually provide DOE, before the beginning of the fiscal year, a written estimate of the State's projected costs to be incurred in implementing this Agreement in the upcoming fiscal year. A separate funding agreement between DOE and the State will be executed within 90 days after the Parties execute this Agreement, which shall be the specific mechanism for the transfer of funds

(e.g. a Grant) between DOE and the State for payment of the costs referred to in this paragraph.

**PART 32 ADDITIONAL WORK OR MODIFICATION TO WORK**

191. In the event that any Party to this Agreement determines that additional work, or modification to work, including investigatory work, engineering evaluation, and/or construction activities is necessary to accomplish the objectives of this Agreement, notification of such additional work or modification to work shall be provided to the other Parties. Upon agreement that such additional work or modification to work is necessary, DOE agrees to implement any such work. If DOE does not agree that such additional work is necessary to accomplish the objectives of this Agreement or if DOE asserts that such additional work is otherwise inappropriate, DOE may invoke the Dispute Resolution procedures of Part 12 or Part 16 of this Agreement, as appropriate. The Workplan(s) for that OU shall be amended to reflect this additional work, with sufficient time to perform the additional or modified work and to complete other work affected by such additional or modified work.

192. Any additional work or modification to work agreed to or determined to be necessary pursuant to paragraph 191 above, shall be completed in accordance with the standards, specifications, and schedule established in the amendment referenced in paragraph 191 above.

**PART 33 QUALITY ASSURANCE**

193. All work performed pursuant to this Agreement shall be done under the direction and supervision of, or in consultation with, as necessary, an engineer, hydrologist, geologist, or other expert with experience and expertise in hazardous waste management, site investigation, cleanup, and monitoring.

194. Throughout all sample collection and analysis activities, DOE shall submit to EPA for approval, with a copy to the State prior to implementation, a detailed description of its quality assurance, quality control, and chain of custody procedures. EPA, in consultation with the State, agrees to evaluate the QA, QC, chain of custody, sampling protocols, etc., used by DOE with respect to work completed at the Site for consistency with EPA-approved procedures. In the event of a conflict between EPA- and State-approved procedures, compliance with EPA-approved procedures shall constitute compliance with this Part.

195. As EPA and the State determine it to be appropriate, DOE shall:

A. Follow guidance in accordance with the Statement of Work and any additional guidance incorporated into future Workplans or modifications to Workplans.

B. Consult with EPA and the State in planning for, and prior to submitting, a Sampling and Analysis Plan for review, concurrence, and approval.

C. Inform the EPA and State Project Coordinators in advance which laboratories will be used by DOE and ensure that EPA and State personnel and EPA-authorized and State-authorized representatives have reasonable access to the laboratories and personnel used for analyses.

D. Ensure that laboratories used by DOE perform analyses according to EPA methods or other methods deemed satisfactory to EPA and the State. DOE shall submit all protocols to be used for analyses to EPA and the State within 14 days prior to the commencement of analyses.

E. Ensure that laboratories used by DOE for analyses participate in a Quality Assurance/Quality Control program (QA/QC) equivalent to that of, and approved by, EPA. As part of such a program and upon request by EPA or the State, such laboratories shall perform analyses of samples provided by EPA or the State to demonstrate the quality of the analytical data. A maximum annual number of four (4) such samples per agency may be provided to each laboratory. If State quality assurance/quality control programs are in conflict with EPA's program, compliance with an EPA-approved QA/QC program shall constitute compliance with this Part.

**PART 34 REPORTING**

196. DOE shall submit to EPA and the State monthly written progress reports which describe the actions which DOE has taken during the previous month to implement the requirements of this Agreement. Progress reports shall also describe the activities scheduled to be taken during the upcoming month. Progress reports shall be submitted by the 20th day of each month following the effective date of this Agreement. The progress reports shall include:

- A. A detailed statement of the manner and extent to which the requirements and time schedules set out in this Agreement are being met.
- B. Any anticipated delays in meeting time schedules, the reason(s) for the delay, and action taken to prevent or mitigate the delay.
- C. Any potential problems that may result in a departure from the requests and time schedules.

**PART 35 NOTIFICATION**

197. Unless otherwise specified, any report, document, or Submittal provided to EPA and the State pursuant to a schedule or deadline identified in or developed under this Agreement shall be sent by certified mail, return receipt requested, or hand delivered in duplicate to:

U.S. Environmental Protection Agency, Region VIII  
ATTN: Rocky Flats Project Manager, 8HWM-RI  
999 18th Street, Suite 500  
Denver, Colorado 80202-2405

and

Hazardous Waste Facilities Unit Leader  
Colorado Department of Health  
4210 E. 11th Avenue  
Denver, CO 80220

Documents must be sent in a manner designed to be received by the date due.

198. Documents sent to DOE shall be addressed as follows unless DOE specifies otherwise by written notice:

IAG Project Coordinator  
United States Department of Energy  
Rocky Flats Office  
P.O. Box 928  
Golden, Colorado 80402-0928

199. Unless otherwise requested, all routine correspondence may be sent via regular mail to the above-named persons.

**PART 36 PROJECT COORDINATORS**

200. Within ten (10) days of the effective date of this Agreement, each Party shall notify all other Parties of the name and address of its Project Coordinator and Alternate (herein jointly referred to as Project Coordinator). Each Project Coordinator shall be responsible for overseeing the implementation of this Agreement. To the maximum extent possible, all communications between DOE, the State, and EPA, and all documents including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Agreement shall be directed through the Project Coordinators.

201. Any Party may change its designated Project Coordinator by written notification to the other Parties.

202. Each Project Coordinator shall be responsible for assuring that all communication from the other Project Coordinators is appropriately disseminated and processed by the entities which the respective Project Coordinators represent.

203. The EPA-designated Project Coordinator shall have the authority vested in the Remedial Project Manager and the On-Scene Coordinator by the NCP including, but not limited to, the authority to direct DOE to halt, conduct, or perform any tasks required by this Agreement and any response action portions thereof when the EPA Project Coordinator determines that conditions may present an immediate risk to public health or welfare or the environment. If EPA issues such verbal request, it shall follow up such request in writing within seven (7) days.

204. The State Project Coordinator shall be an employee of the Hazardous Materials and Waste Management Division of the Colorado Department of Health and shall have the authorities described in § 25-15-301(4)(a) of CHWA.

205. EPA and State Project Coordinators shall have the authority to, among other things: (1) take samples, obtain duplicate, split samples or sub-samples of DOE samples, (2) ensure that work is performed properly and pursuant to EPA and State protocols, as well as pursuant to the Attachments and Workplans incorporated into this Agreement; (3) observe all activities performed pursuant to this Agreement, take photographs

consistent with security restrictions, and make such other reports on the progress of the work as the Project Coordinator deems appropriate; (4) review records, files, and documents relevant to this Agreement; and, (5) require field modifications to the work to be performed pursuant to this Agreement, or in techniques, procedures, or design utilized in carrying out this Agreement, which are necessary to the completion of the project.

206. The DOE Project Coordinator may also recommend and request non-routine field modifications to the work to be performed pursuant to this Agreement or in techniques, procedures, or design utilized in carrying out this Agreement which are necessary to the completion of the project. The Lead Regulatory Agency, after consultation with the Support Regulatory Agency, must approve the proposed modification in writing for said modification to be effective. Notification of routine field modifications shall be provided in the monthly progress reports required in Part 34 for the month immediately following the modification.

207. If agreement cannot be reached on the proposed additional work or non-routine field modification pursuant to paragraph 205 and 206, dispute resolution as set forth in Part 16 or Part 12, as appropriate, may be used in addition to this Part. Within five (5) business days following a modification made pursuant to this Part, the Project Coordinator who requested the modification shall prepare a memorandum detailing the

modification and the reasons therefore and shall provide or mail a copy of the memorandum to the other Project Coordinators.

208. The DOE Project Coordinator or his designee shall be physically present at the Rocky Flats Site or reasonably available to supervise work performed at the Site during implementation of the work performed pursuant to this Agreement.

**PART 37 SAMPLING AND DATA/DOCUMENT AVAILABILITY**

209. DOE shall make available to EPA and the State quality-assured results of sampling, tests, or other data generated by DOE or on its behalf, with respect to the implementation of this Agreement as specified in the Statement of Work or subsequent Workplans, as appropriate. If quality assurance is not completed within the time frames specified in the Statement of Work and subsequent Workplan(s), raw data or results shall be submitted upon the request of EPA or the State within that period and quality-assured data or results shall be submitted as soon as they become available.

210. DOE shall notify the EPA and State Project Coordinators by telephone, providing for sufficient time for EPA and the State to attend, before conducting independent verification, and shall provide a schedule for routine environmental sampling in the monthly progress reports required by Part 34. At the request of EPA or the State, DOE shall provide or allow EPA or the State or the authorized representative of each to observe field work and to take split or duplicate samples of all samples collected by DOE pursuant to this Agreement. At the request of DOE, EPA and

the State similarly shall provide or allow DOE or its authorized representatives to take split or duplicate samples of all samples collected by EPA or the State related to the Rocky Flats Site. If it is not possible to provide the designated prior notification described above, the other Project Coordinators shall be notified as soon as possible after the other Parties become aware that samples will be collected, but no later than 48 hours in advance.

211. DOE shall permit EPA, the State, or their authorized representatives to inspect and copy, at reasonable times, all records, files, photographs, documents, and other writing, including sampling and monitoring data, pertaining to work undertaken pursuant to this Agreement.

#### **PART 38 RETENTION OF RECORDS**

212. DOE shall preserve, for a minimum of ten (10) years after termination of this Agreement, all of its records and documents in its possession or in the possession of its divisions, employees, agents, accountants, or contractors which relate in any way to the presence of hazardous substances, pollutants, and contaminants at the Site, or to the implementation of this Agreement, despite any document retention policy to the contrary. After this ten-year (10) period, DOE shall notify EPA and the State at least 45 days prior to destruction or disposal of any such documents or records. Upon request by EPA or the State, DOE shall make available such records or documents to either Party.

**PART 39 ACCESS**

213. Without limitation on any authority conferred on EPA or the State by statute, regulation, or other agreement, EPA, the State, and/or their authorized representatives, with proper safety and security clearances, shall have authority to enter the Site at all reasonable times, with or without advance notification for the purposes of, among other things:

- A. Inspecting records, operating logs, contracts, and other documents directly related to implementation of this Agreement.
- B. Reviewing the progress of DOE, or its response-action contractors in implementing this Agreement.
- C. Conducting such tests as the EPA or State Project Coordinator deems necessary.
- D. Verifying the data submitted to EPA and/or the State by DOE.

214. DOE shall honor all requests for such access by EPA or the State, conditioned only upon presentation of proper credentials and conformance with Plant security and safety requirements. The latter may include dosimetry devices, training on Plant safety features (such as alarms, barriers, and postings), and advance fittings for clothing and respiratory equipment as ordinarily required. Escorts to restricted areas shall be assigned expeditiously by the Assistant Manager for Compliance, Rocky Flats Office.

215. To the extent that this Agreement compels access to property not owned by DOE, DOE shall use the maximum extent of its authority, including CERCLA section 104 authorities, to obtain access for DOE, EPA, the State, and their authorized employees and contractors. DOE shall provide a copy of such signed agreements to EPA and the State. With respect to non-DOE property upon which monitoring wells, pumping wells, treatment facilities, or other response actions are to be located, the access agreements shall also provide that no conveyance of title, easement, or other interest in the property shall be consummated without provisions for the continued operation of such wells, treatment facilities, or other response actions on the property. The access agreements shall also provide that the owners of any property where monitoring wells, pumping wells, treatment facilities, or other response actions are located shall notify EPA, the State, and DOE by certified mail, at least 30 days prior to any conveyance, of the property owner's intent to convey any interest in the property and of the provisions made for the continued operation of the monitoring wells, treatment facilities, or other response actions installed pursuant to this Agreement.

216. In the event that Site access is not obtained as described in paragraph 215 above, DOE shall notify EPA and the State within 15 days regarding the lack of, and efforts to obtain, such access agreements. Within 15 days of any such

notice, DOE shall submit appropriate modification(s) to this Agreement in response to such inability to obtain access.

**PART 40 FIVE-YEAR REVIEW**

217. Pursuant to CERCLA section 121(c), DOE agrees that EPA and the State will review any remedial action that results in any hazardous substances, pollutants, or contaminants remaining on-site, no less often than every five (5) years after the initiation of such final remedial action to assure that human health and the environment are being protected by the remedial action being implemented. If upon such review it is the judgment of EPA, after consultation with the State, that additional action or modification of the remedial action is appropriate in accordance with section 104 or section 106 of CERCLA, EPA shall require DOE to implement such additional or modified action, notwithstanding Parts 32 or 41.

218. Any dispute by DOE or the State of the determination under this Part shall be resolved under Part 16 of this Agreement.

**PART 41 AMENDMENT OF AGREEMENT**

219. This Agreement may be amended by mutual agreement among EPA, the State, and DOE. Such amendments shall be in writing and shall have as their effective date the date on which they are signed by all Parties, unless otherwise agreed, and shall be incorporated into this Agreement by reference. Any dispute as to the need for the proposed amendment shall be resolved pursuant to Part 12, 16, or 27 of this Agreement, as appropriate. Should the

Parties determine that an amendment to this Agreement is necessary, and the amendment would affect the CHWA permit for the Plant, the State shall initiate appropriate permit modification procedures for that permit in accordance with its regulations.

220. Any noncompliance with amendments to this Agreement shall be considered a failure to achieve the requirements of this Agreement.

**PART 42 EXTENSIONS**

221. Either a timetable and deadline or a schedule shall be extended upon receipt of a timely request for extension and when good cause exists for the requested extension. Any request for extension by any Party shall be submitted in writing and shall specify:

- A. The timetable and deadline or the schedule that is sought to be extended.
- B. The length of the extension sought.
- C. The good cause(s) for the extension.
- D. Any related timetable and deadline or schedule that would be affected if the extension were granted.

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

- A. An event of Force Majeure.
- B. A delay caused by another Party's failure to meet any requirement of this Agreement.
- C. A delay caused by the good faith invocation of

dispute resolution or the initiation of judicial action.

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

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

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

224. Within fourteen (14) days of receipt of a request by DOE for an extension of a timetable and deadline or a schedule, the Lead Regulatory Agency, after consultation with the Support Regulatory Agency, shall advise DOE and the Support Regulatory Agency in writing of its respective position on the request. For any requested change in a RCRA or CHWA corrective action schedule, the State shall also be required to approve the schedule subject to the procedures of this paragraph. If the Lead Regulatory Agency does not concur in the requested extension, it shall include in its statement of nonconcurrence an explanation of the basis for its position.

225. If there is agreement among the Parties that the requested extension is warranted, the affected timetable and deadline or schedule shall be extended accordingly. If there is no agreement among the Parties as to whether all or part of the requested extension is warranted, the timetable and deadline or

schedule shall not be extended except in accordance with a determination resulting from the dispute resolution process. If an extension would affect a RCRA or CHWA Permit, the permit shall be amended in accordance with the procedures in 6 CCR 1007-3, Part 100.6 and 40 CFR § 270.42.

226. Within fourteen (14) days of receipt of a statement of nonconcurrence with the requested extension, any Party disagreeing with the proposed extension may invoke the dispute resolution procedures of Parts 12 or 16, as appropriate.

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

#### **PART 43 CONVEYANCE OF TITLE**

228. No conveyance of title, easement, or other interest in the Rocky Flats Site on which any containment system, treatment system, monitoring system, or other response action(s) is installed or implemented pursuant to this Agreement shall be

consummated by DOE without provision for continued maintenance of any such system or other response action(s). At least 30 days prior to any conveyance, DOE shall notify EPA and the State of the provisions made for the continued operation and maintenance of any response action(s) or system installed or implemented pursuant to this Agreement. DOE shall also comply with the provisions of section 120(h) of CERCLA regarding any conveyance of title at the Site.

**PART 44 PUBLIC PARTICIPATION/ADMINISTRATIVE RECORD**

229. DOE shall develop and implement a Community Relations Plan (CRP) which responds to the need for an interactive relationship with all interested community elements in the Rocky Flats area. The plan shall be based on community interviews, and other relevant information including public comments received on this Federal Agreement and Consent Order. The Plan shall address current and future activities and elements of work being undertaken by DOE. DOE agrees to develop and implement the CRP in a manner consistent with sections 113(h) and 117 of CERCLA, 42 U.S.C. Sections 9313(k) and 9617, relevant community relations provisions of the NCP, EPA policy and guidance (including but not limited to EPA OSWER Directive 2903.03B, Community Relations in Superfund: A Handbook, June 1988, and any modifications thereto), DOE policy and guidance, State statutes, regulations, and guidance identified in the Community Relations Plan, and the Statement of Work attached hereto in Attachment 2. The CRP shall be reviewed in accordance with the requirements of the Statement

of Work. Community involvement activities shall be conducted by DOE in consultation with EPA and the State.

230. Except in case of an emergency or the need for the public to receive information immediately, any Party issuing a formal press release to the media regarding any of the work required by this Agreement shall advise the other Parties of such press release, and the contents thereof, at least 48 hours before the issuance of such press release and of any subsequent changes prior to release.

231. DOE shall establish and maintain an Administrative Record at or near the Site in accordance with section 113(k) of CERCLA. The Administrative Record shall be established in accordance with EPA policy and guidelines. Any future changes to these policies and guidelines affecting DOE's maintenance of the Administrative Record shall be discussed by the Parties and an agreement will be reached on how best to accommodate those changes. Once the Administrative Record is established, DOE shall maintain the master (paper) copy of the Administrative Record at the Rocky Flats Plant in the Environmental Restoration Department currently located in Building T130B. The master copy is not required to be accessible to the public. This copy will be maintained specifically to ensure the integrity of the documents. There will be four (4) additional locations for the public to view the Administrative Record. These four repositories will house at least one microfiche copy of the

Administrative Record along with the microfiche reader/copier.

These repositories are as follows:

Rocky Flats Reading Room  
Front Range Community College  
3645 W. 112th Avenue  
Library  
Westminster, Colorado 80030  
(303) 469-4435

Colorado Department of Health  
4210 East 11th Avenue  
Room 351  
Denver, Colorado 80220  
(303) 331-4830

Rocky Flats Environmental  
Monitoring Council  
1536 Cole Blvd., Suite 150  
Golden, Colorado 80401  
(303) 232-1966

U.S. Environmental Protection  
Agency (EPA)  
Superfund Documents Room  
5th Floor  
999 18th Street  
Denver, Colorado 80202  
(303) 293-1444

At least one copy of the Administrative Record shall be accessible to the public at times other than normal business hours. Such times shall be determined through the Community Relations Plan interview process.

232. The Administrative Record developed by DOE, including copies maintained at the Front Range Community College, the Colorado Department of Health, the Rocky Flats Environmental Monitoring Council, and the U.S. Environmental Protection Agency, shall be updated by DOE on at least a quarterly basis. The Administrative Record shall address all the OUs at the Site. An index of documents in the complete Administrative Record will accompany each update to the Administrative Record. Documentation on issues giving rise to decisions from the dispute resolution procedures of Parts 12, 16, and 27, and the decisions themselves, shall be included in the Administrative Record.

233. EPA, after consultation with the State when necessary, shall make the final determination of whether a document is appropriate for inclusion in the Administrative Record. EPA or the State may also submit documents to DOE that DOE shall include in the Administrative Record as EPA or the State deems appropriate.

**PART 45 DURATION/TERMINATION**

234. Upon satisfactory completion of a remedial action phase at a given OU, as identified in the Statement of Work, the Lead Regulatory Agency shall issue a Notice of Completion to DOE for that OU. At the discretion of the Lead Regulatory Agency, a Notice of Completion may be issued for completion of a portion of the response action for an OU.

235. This Agreement shall terminate by written notice from EPA and the State to DOE when DOE has satisfactorily completed all work pursuant to this Agreement and the Statement of Work and subsequent Workplan(s) as determined by EPA and the State or when the Parties unanimously agree to termination.

**PART 46 SEVERABILITY**

236. If any provision of this Agreement is ruled invalid, illegal, or unconstitutional, the remainder of the Agreement shall not be affected by such ruling.

**PART 47 CLASSIFIED AND CONFIDENTIAL INFORMATION**

237. Notwithstanding any provision of this Agreement, all requirements of the Atomic Energy Act of 1954, as amended, and all Executive Orders concerning the handling of unclassified

controlled nuclear information, restricted data, and national security information, including "need to know" requirements, shall be applicable to any access to information or facilities covered under the provisions of this Agreement. EPA and the State reserve their right to seek to otherwise obtain access to such information or facilities when it is denied, in accordance with applicable law.

238. Any Party may assert on its own behalf, or on behalf of a contractor, subcontractor, or consultant, a confidentiality claim or privilege covering all or any part of the information requested by this Agreement, pursuant to 42 U.S.C. § 9604 and State law. Except as provided in paragraph 237, analytical data shall not be claimed as confidential. Parties are not required to provide legally privileged information. At the time any information is furnished which is claimed to be confidential, all Parties shall afford it the maximum protection allowed by law. If no claim of confidentiality accompanies the information, it may be made available to the public without further notice.

#### **PART 48 RESERVATION OF RIGHTS**

239. The Parties have determined that the activities to be performed under this Agreement are in the public interest. Except as provided in paragraph 243, EPA and the State agree that compliance with this Agreement shall stand in lieu of any administrative and judicial remedies against DOE, that are available to EPA and the State regarding the currently known release or threatened release of hazardous substances, hazardous

wastes, pollutants, hazardous constituents, or contaminants at the Site that are the subject of the activities being performed by DOE under Part 23 (Work). Provided that nothing in this Agreement shall preclude EPA or the State from exercising any administrative or judicial remedies available to them under the following circumstances:

A. In the event or upon the discovery of a violation of, or noncompliance with, any provision of RCRA or CHWA including any discharge or release of hazardous waste which is not addressed in the Statement of Work or subsequent Workplans.

B. Upon discovery of new information regarding hazardous substances or hazardous waste management including, but not limited to, information regarding releases of hazardous waste, hazardous constituents, or hazardous substances which is not addressed in the Statement of Work or subsequent Workplans.

C. Upon the State's or EPA's determination that such action is necessary to abate an imminent and substantial endangerment to the public health, welfare, or the environment.

240. For matters within the scope of this Agreement, the State and EPA reserve the right to bring any enforcement action against other potentially liable parties, including contractors, subcontractors and/or operators, if DOE fails to comply with this Agreement. For matters outside this Agreement, and any actions

related to costs or funding, EPA and the State reserve the right to bring any enforcement action against other potentially liable parties, including DOE's contractors, subcontractors and/or operators, regardless of DOE's compliance with this Agreement.

241. This Agreement shall not be construed to limit in any way the right provided by law to the public or any citizen to obtain information about the work under this Agreement or to sue or intervene in any action to enforce State or Federal law.

242. Except as provided in paragraph 239, DOE is not released from any liability which it may have pursuant to any provisions of State and Federal law; nor does DOE waive any rights it may have under such law to defend any enforcement actions against it.

243. DOE is not released from any claim for damages for injury to, destruction of, or loss of natural resources pursuant to § 107(a)(4)(c) of CERCLA.

244. EPA and the State reserve all rights to take any legal or response action for any matter not specifically part of the work covered by this Agreement.

245. Nothing in this Agreement shall be construed to affect any criminal investigations or criminal liability of any person(s) for activities at the Site. However, compliance with an EPA directive pursuant to this Agreement shall constitute an affirmative defense for any matter related to that compliance.

246. Notwithstanding this Part or any other Part of this Agreement, the State reserves any rights it may have to seek

judicial review of an interim or final remedial action in accordance with sections 113, 121 and 310 of CERCLA, 42 U.S.C.

§§ 9613, 9621 and 9659, but agrees to employ the appropriate dispute resolution process prior to seeking judicial review.

247. The State also reserves any rights it may have to seek judicial review of any ARAR determination in accordance with sections 121 and 310 of CERCLA.

248. The Parties reserve their rights to challenge any decision affecting remedy selection under all applicable Laws consistent with Part 29.

#### **PART 49 FORCE MAJEURE**

249. A Force Majeure shall mean any event arising from factors beyond the control of a Party that causes a delay in, or prevents the performance of, any obligation under this Agreement, including, but not limited to, acts of God; fire; war; insurrection; civil disturbance; explosion; unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance; adverse weather conditions that could not reasonably be anticipated; restraint by court order or order of public authority; inability to obtain, consistent with statutory requirements and after exercise of reasonable diligence, any necessary authorizations, approvals, permits, or licenses due to action or inaction of any governmental agency or authority other than the DOE; and delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures,

despite the exercise of reasonable diligence. A Force Majeure shall also include any strike or other labor dispute not within the control of the Parties affected thereby. Force Majeure shall not include increased costs or expenses of response actions, whether or not anticipated at the time such response actions were initiated.

**PART 50 FUNDING**

250. It is the expectation of the Parties that all obligations of DOE arising under this Agreement will be fully funded. DOE shall take all necessary steps and use its best efforts to obtain timely funding to meet its obligations under this Agreement, including but not limited to budget requests supported by DOE's Environmental Restoration and Waste Management Five Year Plan.

251. The activities and related milestones in the Five-Year Plan shall be consistent with the provisions, including requirements and schedules, of this Agreement; it is the intent of DOE that the Five-Year Plan shall reflect the provisions of this Agreement. Any amendments to this Agreement will be incorporated, as necessary, in the annual updates of the Five-Year Plan. To support the annual updates of the Five-Year Plan that are consistent with the provisions of this Agreement, the State and EPA shall assist DOE in determining the activities and corresponding work schedule for each fiscal year in the following manner:

A. DOE shall develop its Activity Data Sheets (ADS) for the Rocky Flats Plant compliance and cleanup activities in consultation with the State and EPA. This information shall be provided to the State and EPA for the purpose of reaching agreement on the activities to be included in the period addressed by each annual update of the Five-Year Plan.

B. DOE agrees to meet and confer with the State or EPA, at the request of either, up to and including the point at which the ADSs are submitted to DOE Headquarters for validation.

C. DOE also agrees to meet and confer with the State and EPA during the development of the implementation plans for each update of the Five-Year Plan, prepared on an annual basis to address the budget request year and subsequent four year period.

D. Subsequent to receipt of Congressional appropriations by DOE, DOE agrees to meet and confer with the State and EPA during any revision to the Rocky Flats Plant implementation plans associated with the annual update of the Five-Year Plan where such revisions are necessitated by differences in appropriated funding from that identified in the budget request. This consultation would be dependent upon the timing of the Congressional action.

E. Nothing in this Agreement shall affect DOE's intended separate interactions on the Five-Year Plan with States,

EPA, public and other groups for the purposes of consultation and implementation.

252. In accordance with section 120(e)(5)(B) of CERCLA, 42 U.S.C. § 9620(e)(5)(B), DOE shall include in its Annual Report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement, including any EPA and State cost estimates, and shall justify any discrepancies between EPA, State, and DOE estimates.

253. If appropriated funds are not available to fulfill DOE's obligations under this Agreement, EPA and the State reserve the right to initiate any other action either Party deems appropriate. Initiation of any such action shall not release DOE from its obligations under this Agreement.

254. EPA and DOE agree that any requirement for the payment or obligation of funds including stipulated penalties under Part 19 (Stipulated Penalties) of this Agreement by DOE, established by the terms of this Agreement, shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds to pay EPA-assessed stipulated penalties in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, in cases where payment or obligation of such funds shall be appropriately adjusted.

255. If appropriated funds are not available to fulfill DOE's obligations under this Agreement, the Parties shall attempt to agree upon appropriate adjustments to the dates which require the payment or obligation of such funds. If no agreement can be

reached, then the State and DOE agree that in any action by the State against DOE to enforce any provision of this Agreement, DOE may raise as a defense that its failure or delay was caused by the unavailability of appropriated funds. The State disagrees that lack of appropriations or funding is a valid defense. However, DOE and the State agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense. Acceptance of this paragraph 255 does not constitute a waiver by DOE that its obligations under this Agreement are subject to the provisions of the Anti-Deficiency Act, 31 U.S.C. § 1341.

**PART 51 COMPLIANCE WITH APPLICABLE LAWS**

256. All actions required to be taken pursuant to this Agreement shall be taken in accordance with the requirements of all applicable Federal and State laws and regulations. All Parties acknowledge that such compliance may impact schedules to be performed under this Agreement. Extensions of schedules, when necessary, shall be provided in accordance with Part 42 (Extensions).

**PART 52 OTHER CLAIMS**

257. Nothing in this Agreement shall constitute or be construed as a bar or release from any claim, cause of action, or demand in law or equity by or against any person, firm, partnership, or corporation, including any DOE or predecessor agency contractor, subcontractor, and/or operator, either past or present, for any liability it may have arising out of or relating

in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Rocky Flats Site.

258. This Agreement does not constitute any decision on pre-authorization of funds under section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

259. Neither EPA nor the State shall be held as a party to any contract entered into by DOE to implement the requirements of this Agreement.

**PART 53 PUBLIC COMMENT/EFFECTIVE DATE**

260. This Agreement has undergone a 60 day public review and comment period. The Parties have responded to public comments received during the public comment period in a separate document entitled "Responsiveness Summary for Rocky Flats Federal Facility Agreement and Consent Order" and have made numerous revisions to this Agreement as a direct result of those public comments.

261. The effective date of this Agreement shall be the date on which the last party signs this Agreement.

IT IS SO AGREED:

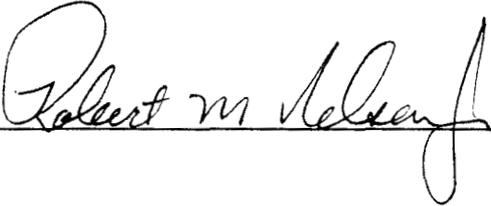
Each undersigned representative of a Party certifies that he or she is fully authorized to enter into this Agreement and to legally bind such Party to this Agreement.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

  
\_\_\_\_\_  
Regional Administrator, Region VIII  
U.S. Environmental Protection Agency

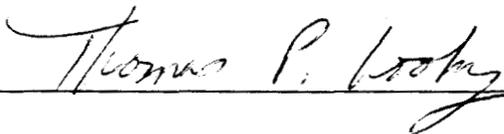
Date: January 22, 1991

FOR THE UNITED STATES DEPARTMENT OF ENERGY:

  
\_\_\_\_\_  
Regional Administrator, Region VIII  
U.S. Environmental Protection Agency

Date: Jan 22, 1991

STATE OF COLORADO DEPARTMENT OF HEALTH:

  
\_\_\_\_\_  
Regional Administrator, Region VIII  
U.S. Environmental Protection Agency

Date: 1/22/91