

OPTION 2 (BASED ON FORT ORD)

NOTE: The below amendment is typically one of 3 documents (Administrative Order on Consent/ Environmental Services Cooperative Agreement (ESCA)/Federal Facility Agreement amendment) needed to proceed with an entity, other than a Federal agency, performing CERCLA response action at a Federally-owned NPL site. The entity doing the work would enter into an enforceable document such as an Administrative Order on Consent with EPA to perform the response action. In the ESCA, the Federal Agency and the transferee agree that the Federal agency will provide funds in exchange for a transferee's performance of the work.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [#]
THE
STATE OF [X] AND THE
[Name of Federal Agency]

IN THE MATTER OF:
The [Name of Federal Agency
and facility]

FEDERAL FACILITY AGREEMENT
CERCLA Section 120
AMENDMENT NO. 1
RELATED TO EARLY TRANSFER PROPERTY
REFERENCED IN FOSET [?]

This agreement ("this Amendment") amends the [year and site name] Federal Facility Agreement ("Interagency Agreement" under CERCLA Section 120), (the "FFA"). The principal purpose of this Amendment is to suspend or revise certain [name of Federal Agency] obligations under the FFA because the [Federal Agency] has entered into [name of relevant agreement, e.g., an Environmental Services Cooperative Agreement ("ESCA")] with the [transferee], the Grantee of approximately [#] acres of land commonly referred to as [reference to property/parcel] (the "Property") on [name of site], to perform or arrange for the performance of a portion of the necessary environmental response actions on that Property. All terms and conditions of the [year] FFA remain in effect and in full force unless expressly addressed or revised in this Amendment.

NOW, THEREFORE, the Parties agree to amend the FFA as provided below:

I. The (DEFINITIONS) section of the [year] FFA is amended as follows. [In this section, include changes/additions to the definitions listed in the original FFA. Terms may include:]

A. "ESCA" shall mean an environmental services cooperative agreement between the [Federal Agency] and [relevant Entity such as the Transferee] dated [DATE], pursuant to Title 32, Code of Federal Regulations, Parts 21 through 33 (32 CFR Parts 21 through 33).

- B. “Administrative Order on Consent” or “AOC” shall mean the agreement dated [DATE] among [Parties, including EPA and the Transferee] [DOCKET NO.] that provides for performance of response activities by [Transferee], including but not limited to, all response actions at the Property that are not [Federal Agency] Retained Conditions.
- C. “Amendment No. [1] to the [year] FFA,” or “Amendment,” or “FFA Amendment” shall mean this document, which supplements and revises the [year] FFA, among EPA, the [Federal Agency], and [State (where an FFA party)] for the Property only.
- D. [Include only where Federal Agency Retains Conditions] “Federal Agency Retained Conditions” or “Retained Conditions” shall mean any of the following environmental conditions or response actions, for which the [Federal Agency] remains fully responsible: [List] *Some examples include: radiological material, chemical or biological warfare agents, claims and settlements for natural resource damages, unknown, uninsured conditions.*
- E. “[Federal agency] Continuing Responsibilities”¹ shall mean the ongoing [Federal Agency] responsibilities that will continue after the transfer of the Early Transfer Property: [List] *Some examples include: Endangered species consultation, other settlement agreements, base wide range assessment.*
- F. “Property” shall mean those parcels of real property that the [Federal Agency] is conveying to [Transferee], as described in the Finding of Suitability for Early Transfer (“FOSET”) attached hereto.
- G. “Land Use Controls” or “LUCs” shall mean enforceable restrictions or administrative actions, including engineering and institutional controls, implemented to reduce risk to human health and the environment.
- H. “Property Transfer” shall mean the transfer of the Property by deed² from the [Federal Agency] to [Transferee].
- I. “Completion of Remedial Action” shall mean the point when [Entity performing the work] has performed all necessary response actions on the Property, including implementation of LUCs, except for Long-Term Obligations and EPA has certified completion of remedial action pursuant to Section [?] of the AOC.
- J. “Long-Term Obligations” shall mean the performance of any long-term review, monitoring, and operation and maintenance activities and reporting. This includes LUC implementation and enforcement obligations that are required following the EPA’s approval of the Completion of Remedial Action.

¹ This definition was not in the McClellan model, but in Fort Ord model largely because of a number of obligations under settlement agreements, etc.

² Reminder: the transfer deed must retain the Federal agency’s, EPA’s, and the state’s right of access to address any Retained Conditions and the regulators’ oversight of the implementation of such conditions.

II. The following obligations and rights of the [Federal agency] in respect to the Early Transfer Property or “Property” shall be suspended or otherwise changed as provided in this Amendment: Section 6 (“Work to be Performed”), Section 7 (“Consultation”), Section 8 (“Deadlines”), Section 9 (“Extensions”), Section 11 (Emergencies and Removals”), Section 12 (“Dispute Resolution”), Section 13 (“Stipulated Penalties”), Section 31 (“Covenant not to Sue and Reservation of Rights”), Section 36 (“Effective Date and Public Comments”), provided however that none of these Sections shall be suspended with respect to any [Federal agency] Retained Conditions or Continuing Responsibilities on the Property, including but not limited to submission of final proposed plans and Records of Decision.

II. Section 6 of the [year] FFA (WORK TO BE PERFORMED)³ is amended to add the following:

6.5 PERFORMANCE OF WORK ON PROPERTY BY [Transferee].⁴

6.5.1 Under the terms of the ESCA [or other appropriate name of the agreement], the [Federal Agency] has agreed to provide funds to [Transferee] in exchange for [Transferee]’s agreement to assist the [Federal Agency] in performing certain CERCLA response actions, including but not limited to remedial investigation and feasibility studies and remedial actions selected in Records of Decision for the Property. EPA and [state] agree that Transferee has full responsibility for completion of necessary CERCLA response actions except [Federal agency] Continuing Responsibilities on Early Transfer Property. [If applicable, add the following statement] The [Federal Agency] is also retaining certain CERCLA response obligations at the Property: "Federal Agency Retained Conditions" as defined in the ESCA [or name of the relevant agreement]). The [Federal agency] Retained Conditions for the Property are as follows:

In furtherance of the agreements reached between the [Federal Agency] and [Transferee] in the ESCA [or name of relevant agreement] and [Transferee’s] commitments contained in the AOC, EPA and [State Agency] agree to look to [Transferee] in the first instance for completion of necessary CERCLA response actions on the Property, excluding any Federal Agency Retained Conditions or Continuing Responsibilities, thereby suspending but not eliminating the [Federal Agency]’s statutory obligations for same.

6.5.2 In the event that there is a dispute between [Transferee] and the [Federal Agency] or between [Transferee] and EPA concerning whether a particular required response action is a [Transferee] responsibility under the ESCA [or relevant agreement] or a Federal Agency Retained

³ FFAs, while quite similar generally, can differ in terms of numbering, order, and the inclusion of certain non-model provisions. If an FFA does not include a “Work to be Performed” section, for example, “Performance of Work on Property by [Transferee]” would be added to the FFA as a separate, new provision. Such an approach would apply to all the suggested provisions for amendment. For convenience, this model FFA amendment uses the section numbers used in the McClellan Air Force Base FFA amendment. EPA recognizes that the section numbers may need to be revised to conform to the FFA at issue.

⁴Where the transferee is doing the work (envisioned in this model), the AOC would be issued to the transferee. It is possible that someone other than the transferee could perform the work and be a party to the AOC similarly to what is in the Option 1 based on McClellan Air Force Base.

Condition, the [Federal Agency]'s continuing obligations under the FFA are not suspended and the [Federal Agency] remains responsible for such response activities pending the resolution of the dispute between [Transferee] and the [Federal Agency] and EPA. The [Federal Agency] agrees that, in the event the response action is determined to be a Federal Agency Retained Condition, it will conduct the necessary response in accordance with the FFA and this Amendment 1.

6.5.3 EPA and [State Agency]'s agreement to suspend the [Federal Agency]'s obligations is conditioned upon: (1) the continued existence of and compliance with the ESCA [or relevant agreement], or extensions thereof as determined by the [Federal Agency]; and (2) [Transferee's] compliance with the AOC and accompanying Statement of Work.

6.5.4 As long as the conditions listed in Subsection 6.5.3 above are met, the following obligations and rights of the [Federal Agency] with respect to the Property shall be suspended or otherwise modified as provided in this Amendment: [Section 6] (WORK TO BE PERFORMED), [Section 7] (CONSULTATION), [Section 10] (FORCE MAJEURE), [Section 11] (EMERGENCIES AND REMOVALS), [Section 14] (STIPULATED PENALTIES), [Section 15] (FUNDING), [Section 16] (EXEMPTIONS), [Section 20] (QUALITY ASSURANCE), provided however, that none of these Sections shall be suspended with respect to any Federal Agency Retained Conditions.

6.5.5 The Parties agree that in the event one of the conditions listed in subsection 6.5.3 above is not met, the [Federal Agency] shall resume responsibility under the [year] FFA. In the event that EPA issues a Finding of Default under [Section] of the AOC, the [Federal Agency]'s obligation to resume work may be limited to the same degree as the Finding of Default. Such responsibilities may include, but are not limited to, (i) implementation of any selected response actions that have not yet been fully performed and (ii) completion of any investigations and preparation of any such deliverables not yet completed to reach a final response decision.

6.5.6 The effective date for the [Federal Agency] to resume its responsibilities under the [year] FFA, including but not limited to the requirements in Paragraph 6.5.5 immediately above, shall be the date upon which the ESCA [or relevant agreement] terminates or expires, or the date the [Federal Agency] receives a copy of EPA's written Finding of Default issued to [Transferee] pursuant to [Section] of the AOC.

6.5.7 Within 30 days of the effective date for the [Federal Agency's] resumption of responsibilities as described in subsection 6.5.6 above, the [Federal Agency] will provide EPA and [State Agency] with its schedule for the implementation of all response actions remaining to be performed on the Property. To the extent EPA, [State Agency], and the [Federal Agency] disagree on the [Federal Agency]'s proposed implementation schedule, EPA or [State Agency] may initiate Dispute Resolution pursuant to [Section 12] of the [year] FFA.

6.5.8 In the event the [Federal Agency] resumes responsibility under the [year] FFA for the investigation, design, construction, and implementation of some or all CERCLA response actions required at the Property, the [Federal Agency] will continue to perform all CERCLA response

actions selected prior to any Finding of Default that have not been completed. If a Record of Decision has not been issued prior to the [Federal agency's] resumption of responsibilities, the [Federal agency] may, within 21 days of [Federal Agency's] resumption propose to EPA and [State] modifications to the relevant Work Plan(s). To the extent that EPA or [State], does not agree with respect to any [Federal agency] proposal, any Party may initiate Dispute Resolution pursuant to the [year] FFA.

6.5.9 The [Federal Agency] shall notify EPA in writing within 14 days, with a copy to [State], upon learning any information that may constitute a material breach by the [transferee] under the ESCA [or name of relevant agreement].

6.5.10 The [Federal agency] agrees that it will conduct necessary response actions for [Federal agency] Retained Conditions. The [Federal agency] will notify EPA and [State] upon receipt of a claim by [Transferee] that it has encountered an [Federal agency] Retained Conditions. Under the AOC, if EPA or [State] directs [Transferee] to proceed with addressing the responsibility encountered and the issue is in dispute resolution under the ESCA, the [Federal agency] shall, within 15 days of receipt of [Transferee's] workplan, either agree to undertake such work itself under the [year] FFA, or authorize [Transferee] to conduct such work under the AOC schedule.

III. SELECTION OF RESPONSE ACTIONS

Notwithstanding that [Transferee] is performing certain [Federal agency] responsibilities under the ESCA, consistent with Sections 7, 8, 9, and 12 below, the [Federal agency] and EPA (or EPA in the event of a dispute) shall select a remedial action in accordance with CERCLA, the NCP, and the [year] FFA for the Property with the participation of the [state].

IV. Section 7 (CONSULTATION: REVIEW AND COMMENT PROCESS FOR DRAFT AND FINAL DOCUMENTS) is suspended in regard to the [Federal agency's] consultation responsibilities for the Property except for the following subsections:

7.11 The [Federal agency] will coordinate with [Transferee], and [Transferee], on behalf of the [Federal agency], will submit all drafts of Proposed Plans and Records of Decision to EPA and [State] for review, comment and approval. EPA and [State] will submit comments to the [Federal agency] on the draft Proposed Plans and Records of Decision as further described in Paragraph 7.15 below. Upon the resolution of comments, the [Federal agency] will submit to EPA and [State] all draft final versions of the Proposed Plans and Records of Decision.

7.12 The [Transferee], on behalf of the [Federal agency], shall be responsible for the submission of all documents and deliverables pursuant to the AOC, except draft final Proposed Plans and Records of Decision. Under the process and schedule contained in the AOC, the [Transferee] will submit for review, comment, and approval all documents, deliverables, reports, and other information necessary to implement response actions on the Property and achieve Completion of Remedial Action.

7.13 The [Federal agency] and [Transferee] will coordinate, as necessary, on all documents and deliverables required under the AOC before [Transferee] submits them to EPA and [State].

7.14 The schedule for submission of Proposed Plans and Records of Decision shall be the schedule contained in the approved RI/FS Work Plan or such other document that EPA agrees will contain the RI/FS and ROD schedule under the AOC.

7.15 EPA and [State] will review and provide the [Federal agency] with comments on the first drafts of Proposed Plans and Records of Decision within 60 days of receipt of the first draft, unless the Parties mutually agree, as provided in Section [7.7(b)] of the [year] FFA, that an additional 30 days is required. The [Federal agency] and [Transferee] shall address EPA and [state] comments, and the [Federal agency] will submit a revised draft final document within 60 days of receipt of EPA and [State] comments, unless an extension is requested in accordance with Section 9 below. EPA and [State] will review the draft final document and the [Federal agency's] response to their comments within 30 days of receipt unless an extension is requested. Disputes on the [Federal agency's] draft final version shall be conducted in accordance with Section 12 of this FFA Amendment.

V. Section 8 (DEADLINES)⁵ is amended to add the following subsection which applies only to the Property.

8.6 The [Federal agency] will meet the deadlines contained in this Amendment and those RI/FS and ROD schedules developed under the AOC.

VI. Section 9 (EXTENSIONS) is amended to add the following subsection applicable only to the Property:

9.8 The [Federal agency] may request extensions to the schedules for submission of Proposed Plans and Records of Decision for the Property in accordance with Sections [9.1-9.7] of the [year] FFA. Furthermore, EPA and [State] may request an extension to their reviews of such deliverables.

VII. Section 11 (EMERGENCIES AND REMOVALS) OF THE [YEAR] FFA is amended to add the following subsection with respect to the Property:

11.1 Although the [Transferee], under the terms of the AOC, shall be responsible for providing notice upon its discovery or awareness of a release or threat of release of a hazardous substance, pollutant or contaminant or an emergency situation, to the extent that [Federal Agency] personnel or its contractors become aware of an emergency or other situation that may present an endangerment to public health, welfare or the environment at or near the Property, the [Federal Agency] shall notify EPA and [State] in accordance with [Section 11.1] of the FFA. For those situations that

⁵ Some FFAs have a different provision that contains the Federal agency's schedules rather than a "Deadlines" provision. If so, that provision would be amended consistent with the Section V above.

involve or pertain to a Federal Agency Retained Condition or Continuing Responsibilities, the [Federal Agency] will take on all responsibilities outlined in [Sections 11.1 to 11.5] of the FFA upon the [Federal Agency]'s discovery, or after receipt of notice from the [Transferee], EPA or [State Agency], whichever occurs first.

VIII. Section 12 (DISPUTE RESOLUTION) of the [year] FFA is amended to add the following subsections:

12.13 The Parties agree that, while the AOC is in effect, the AOC dispute resolution process is the exclusive dispute resolution process related to the work that [Transferee], has agreed to conduct for the [Federal Agency] under the ESCA and perform under the AOC.

12.14 Section 12 of the [year] FFA remains in effect relative to violations of the [year] FFA, this Amendment, and the [Federal Agency's] Retained Conditions and Continuing Responsibilities. EPA, [State], or the [Federal Agency] may raise a dispute in accordance with Section 12 of the [year] FFA regarding the draft final proposed Plan or Record of Decision submitted by the [Federal Agency] under this Amendment.

12.15 In the event of [Transferee]'s default under the AOC, EPA will provide notice to the [Federal Agency] by sending a copy of the Notice of Intent to Find Default provided for in the AOC. The [Federal Agency] may submit comments on the Notice within 20 days of its receipt for EPA to consider during EPA's discussions or dispute with [Transferee]. Neither EPA's Notice of Intent nor final Finding of Default under the AOC is subject to dispute by the [Federal Agency].

IX. Section 31 (COVENANT NOT TO SUE AND RESERVATION OF RIGHTS) of the [year] FFA is amended to add the following subsection related exclusively to the Property:

31.2 In consideration of the [Federal Agency]'s compliance with this Amendment and the [year] FFA, and based on the information known to the Parties or reasonably available on the effective date of this Amendment, EPA, the [Federal Agency], and [State] agree that compliance with this Amendment and the [year] FFA shall stand in lieu of any administrative, legal, and equitable remedies, as applicable, against the [Federal Agency] available to EPA and [State] regarding the releases or threatened releases of hazardous substances, pollutants or contaminants at the Site that are the subject of a CERCLA response action conducted pursuant to this Amendment and the [year] FFA by the [Federal Agency], or [Transferee] pursuant to the AOC and ESCA.⁶

X. Section 36 (EFFECTIVE DATE AND PUBLIC COMMENT) of the [year] FFA is amended by adding the following section applicable only to the Property:

36.1 This Amendment becomes effective after all Parties have signed this Amendment, and upon the effective date of the AOC. After all these conditions are met, EPA shall promptly notify all Parties in writing of the effective date.

⁶ These express covenants not to sue and reservations of rights are in addition to any such covenants or reservations of rights in existing FFAs and are not intended to replace or supersede them.

XII. A new Section 38 of the [year] FFA is added on Land Use Controls:

38. LAND USE CONTROLS⁷

38.1 As a condition of deferring the CERCLA Section 120(h)(3) covenant, land, water, and resource use restrictions on the Property where the covenant is being deferred must be established where necessary to protect human health and the environment during the deferral period. Land use controls will be defined in the finding of suitability for early transfer (FOSET) for the Property. [Transferee] and [State] will implement the land, water, and resource use restrictions on the Property by entering into a state land use covenant (SLUC) within 10 days after conveyance of the Property. The restrictions to be contained in the SLUC shall be included in the federal quitclaim deed transferring Property to [Transferee]. The [Federal Agency] has continuing obligations to ensure compliance with the SLUC and the federal quitclaim deed restrictions until the levels of hazardous substances, pollutants, and contaminants in all media allow for unlimited use and unrestricted exposure.

38.2 These restrictions in the SLUC and the Federal deed are to be placed on the Property as a condition of deferring the CERCLA covenant to ensure the protection of human health and the environment prior to completing all remedial actions. The [Federal agency] agrees to comply with the land, water and resource restrictions. The [Federal agency] shall report any activities prohibited by the SLUC and Federal deed known by it or reported to the [Federal agency] during the course of [Federal agency] or [Transferee's] activities at or near the Property. The [Federal agency] will seek to enforce any such restriction, to the extent it has authority, if [Transferee], the [State], or another entity has not initiated necessary enforcement action.

XIII. The [year] FFA shall be amended by adding the following new Section 39:

39. EFFECT OF AMENDMENT NO. 1 TO THE [year] FFA

39.1 Nothing in this Amendment to the [year] FFA shall modify any term or condition of the [year] FFA unless expressly set forth herein. Nothing in this Amendment creates any third-party rights.

39.2 Nothing in this Amendment to the [year] FFA shall require EPA or the State to perform response actions at the Property.

39.3 Nothing in this Amendment to the [year] FFA shall affect whatever authority the [Federal Agency] may have to transfer operational responsibilities for actions pertaining to the Property to other parties through contracts and agreements.

39.4 The [Federal Agency] acknowledges its ultimate liability under CERCLA to complete all necessary response actions at the Property, in accordance with CERCLA, including the performance of any transferred operational responsibilities as described in Section 39.3. The Parties acknowledge that the [Transferee] under the AOC is required to perform response actions for the cleanup of the

⁷ This language may need to be modified to reflect applicable state law.

Property pursuant to the ESCA [or relevant agreement] and the AOC. In the event the ESCA [or relevant agreement] is terminated, or either [Transferee] or AOC respondent defaults under the ESCA [or relevant agreement] or AOC, the [Federal Agency] will be responsible for all such remaining obligations under CERCLA and the [year] FFA, as amended herein. The Parties further agree that it is to the benefit of both the citizens of the State of [state name] and of the United States for the [Federal Agency] to complete its obligations under the [year] FFA. Nothing in this Amendment to the [year] FFA pertaining to the Property will be precedent for agreements concerning any other Superfund Site.

Attachment (FOSET)

AUTHORIZED SIGNATURES

Each of the undersigned representatives of the Parties certifies that he or she is fully authorized by the Entity he or she represents to enter into the terms of Amendment No. [1] to the (year) FFA and to legally bind such Entity thereto. ·

IT IS SO AGREED:

by