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BASE)

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10/25/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10
AND THE
WASHINGTON STATE DEPARTMENT OF ECOLOGY
AND THE
UNITED STATES DEPARTMENT OF THE NAVY

IN THE MATTER OF:)
)
U.S. Department of the Navy,) FEDERAL FACILITY AGREEMENT
) UNDER CERCLA SECTION 120
Naval Air Station Whidbey)
Island,)
Ault Field/Seaplane Base)
Whidbey Island, Washington) Administrative Docket Number:
1088-10-13-120

TABLE OF CONTENTS

		Page
I.	Jurisdiction	3
II.	Definitions.	4
III.	Purpose.	7
IV.	Parties Bound.	9
V.	Statutory Compliance/RCRA-CERCLA Integration . .	10
VI.	Statement of Facts	12
	A. Site History.	12
	B. Findings of Fact.	14
VII.	Regulatory Determinations.	15
VIII.	Scope of Agreement	17
	A. Work to be Performed	17
	B. Interim Actions.	17
	C. Remedial Investigations.	18
	D. Feasibility Studies.	18
	E. Remedial Actions	18
	F. Implementation of Remedial Actions	19
IX.	Project Managers	19
X.	Access	21
XI.	Sampling and Data/Document Availability.	22
XII.	Quality Assurance.	23

1	XIII.	Reporting.	24
	XIV.	Notice to the Parties.	24
2	XV.	Permits.	25
	XVI.	Retention of Records	27
3	XVII.	Public Participation and Administrative Record .	28
	XVIII.	Creation of Danger/Emergency Action.	29
4	XIX.	Five (5) Year Review	30
	XX.	Consultation with U.S. EPA and Ecology	31
5		A. Applicability.	31
		B. General Process for RI/FS and RD/RA Documents	32
6		C. Primary Reports.	33
		D. Secondary Documents.	33
7		E. Meetings of the Project Managers on	
		Development of Reports.	34
8		F. Identification and Determination of	
		Potential ARARS	35
9		G. Review and Comment on Draft Reports.	35
		H. Availability of Dispute Resolution	
10		for Draft Final Primary Documents	38
		I. Finalization of Reports.	38
11		J. Subsequent Modifications of Final Reports. .	39
	XXI.	Resolution of Disputes	40
12	XXII.	Enforceability	45
	XXIII.	Stipulated Penalties	46
13	XXIV.	Deadlines.	48
	XXV.	Extensions	53
14	XXVI.	Force Majeure.	55
	XXVII.	Funding.	57
15	XXVIII.	Recovery of Expenses	59
	XXIX.	Other Claims	64
16	XXX.	Other Applicable Laws.	65
	XXXI.	Confidential Information	66
17	XXXII.	Transfer of Property	66
	XXXIII.	Amendment of Agreement	67
18	XXXIV.	Severability	67
	XXXV.	Reservation of Rights.	67
19	XXXVI.	Termination.	68
	XXXVII.	Effective Date	68

Based on the information available to the Parties on the effective date of this Federal Facility Agreement ("Agreement"), and without trial or adjudication of any issues of fact or law, the Parties agree as follows:

I.

JURISDICTION

Each Party is entering into this Agreement pursuant to the following authorities:

1.1 The United States Environmental Protection Agency ("U.S. EPA"), Region 10, 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 referred to as "CERCLA"); 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;

1.2 U.S. EPA Region 10 enters into those portions of this Agreement that relate to interim actions and final remedial actions pursuant to Section 120(e)(2) of CERCLA, 42 U.S.C. § 9620(e)(2); Sections 6001, 3008(h), and 3004(u) and (v) of RCRA, 42 U.S.C. §§ 6961, 6928(h), 6924(u) and (v); and Executive Order 12580;

1.3 The United States Navy ("Navy") enters into those portions of this Agreement that relate to the RI/FS pursuant to Section 120(e)(1) of CERCLA, 42 U.S.C. § 9620(e)(1);

1 Sections 6001, 3008(h), and 3004(u) and (v) of RCRA, 42 U.S.C. §§
2 6961, 6928(h), and 6924(u) and (v); Executive Order 12580; the
3 National Environmental Policy Act, 42 U.S.C. § 4321 et seq.; and
4 the Defense Environmental Restoration Program ("DERP"), 10 U.S.C.
5 § 2701 et seq.;

6 1.4 The Navy enters into those portions of this
7 Agreement that relate to interim actions and final remedial
8 actions pursuant to Section 120(e)(2) of CERCLA, 42 U.S.C. §
9 9620(e)(2); Sections 6001, 3008(h), and 3004(u) and (v) of RCRA,
10 42 U.S.C. §§ 6961, 6928(h), and 6924(u) and (v); Executive Order
11 ("Exec. Order") 12580, and the DERP.

12 1.5 The State of Washington Department of Ecology
13 ("Ecology") enters into this Agreement pursuant to Sections 107,
14 120(e)(2), 120(f), and 121(f) of CERCLA, 42 U.S.C. §§ 9607,
15 9620(e)(2), 9620(f), and 9621(f), and Titles 70 and 43 of the
16 Revised Code of Washington ("RCW").

17 18 II.

19 DEFINITIONS

20 2.1 The terms used in this Agreement shall have
21 the same definition as the terms defined in Section 101 of
22 CERCLA, 42 U.S.C. § 9601, and the National Oil and Hazardous
23 Substances Pollution Contingency Plan ("NCP"), 40 CFR Part 300.
24 In addition:

25 (a) "Agreement" shall mean this document and shall
26 include all Attachments to this document. All such Attachments

1 shall be appended to and are an integral and enforceable part of
2 this document;

3 (b) "ARAR" or "Applicable or Relevant and Appropriate
4 Requirements" shall be as provided in Section 121(d)(2) of
5 CERCLA, 42 U.S.C. § 9621(d)(2);

6 (c) "Authorized representative" may include a Party's
7 contractors or any other designee;

8 (d) "CERCLA" shall mean the Comprehensive
9 Environmental Response, Compensation, and Liability Act,
10 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments
11 and Reauthorization Act of 1986, Pub. L. 99-499, or as further
12 amended;

13 (e) "Days" shall mean calendar days, unless otherwise
14 specified. In computing any period of time prescribed or allowed
15 by this Agreement, the day of the act, event, or default from
16 which the designated period of time begins to run shall not be
17 included. The last day of the period so computed shall be
18 included, unless it is a Saturday, Sunday, or a federal or state
19 holiday, in which event the period runs until the next day which
20 is not a Saturday, Sunday, or federal holiday;

21 (f) "Ecology" shall mean the State of Washington, as
22 represented by the Department of Ecology, its employees, and
23 authorized representatives;

24 (g) "Interim Action" or "IA" shall mean all discrete
25 remedial response actions implemented prior to a final remedial
26 action which are taken to prevent or minimize the release of

1 hazardous substances, pollutants, or contaminants so that they do
2 not migrate or endanger public health, welfare, or the
3 environment. All interim actions shall be undertaken in
4 accordance with 40 C.F.R. Part 300, as amended, and with the
5 requirements of CERCLA;

6 (h) "Management Plan" shall mean the RI/FS planning
7 document that contains the Work Plan, Field Sampling Plan,
8 Quality Assurance Project Plan, Community Relations Plan, and the
9 Health and Safety Plan;

10 (i) "Navy" shall mean the Department of the Navy, its
11 employees, and authorized representatives;

12 (j) "NCP" shall mean the National Oil and Hazardous
13 Substances Pollution Contingency Plan, as set forth at 40 C.F.R.
14 Part 300, as amended;

15 (k) "Operable Unit" or "OU" shall have the same
16 meaning as set out in the NCP at 40 CFR 300.5;

17 (l) "Paragraph" shall mean a numbered paragraph of
18 this Agreement;

19 (m) "Part" shall mean one of the thirty-seven (37)
20 subdivisions of this Agreement designated by a Roman numeral;

21 (n) "Parties" shall mean the Navy, U.S. EPA, and
22 Ecology;

23 (o) "RCRA" shall mean the Resource Conservation and
24 Recovery Act, 42 U.S.C. § 6901 et seq., as amended by the
25 Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L.
26 98-616, or as further amended;

(p) "Site" shall mean the Naval Air Station Whidbey Island ("NAS Whidbey Island") facility, which includes Ault Field and the Seaplane Base, and any off-base area contaminated by the migration of hazardous substances, pollutants, or contaminants from Ault Field and the Seaplane Base;

(q) "U.S. EPA" shall mean the United States Environmental Protection Agency, including Region 10, its employees, and authorized representatives; and

(r) "Work Plan" shall mean the RI/FS or RD/RA Work Plans prepared in accordance with Office of Solid Waste and Emergency Response ("OSWER") Directives 9355.3-01 (October 1988) and 9355.0-4A (June 1986), and the NCP.

III.

PURPOSE

3.1 The general purposes of this Agreement are to:

(a) Ensure that the environmental impacts associated with past and present activities at the Site are thoroughly investigated and appropriate removal and remedial action(s) are taken as necessary to protect the public health, welfare, and the environment;

(b) Establish a procedural framework and schedule for developing, implementing, and monitoring appropriate response actions at the Site in accordance with CERCLA, the NCP, Superfund guidance and policy; and

1 (c) Facilitate cooperation, exchange of information,
2 and participation of the Parties in such actions.

3 3.2 Specifically, the purposes of this Agreement
4 are to:

5 (a) Identify Interim Action ("IA") alternatives which
6 are appropriate at the Site prior to the implementation of final
7 remedial action(s) for the Site. IA alternatives shall be
8 identified and proposed to the Parties as early as possible prior
9 to formal proposal of IA(s) to U.S. EPA pursuant to CERCLA. This
10 process is designed to promote cooperation among the Parties in
11 identifying IA alternatives prior to selection of final IA(s);

12 (b) Establish requirements for the performance of a
13 Remedial Investigation ("RI") to determine fully the nature and
14 extent of the threat to the public health or welfare or the
15 environment caused by the release or threatened release of
16 hazardous substances, pollutants, or contaminants at the Site and
17 to establish requirements for the performance of a Feasibility
18 Study ("FS") for the Site to identify, evaluate, and select
19 alternatives for the appropriate remedial action(s) to prevent,
20 mitigate, or abate the release or threatened release of hazardous
21 substances, pollutants, or contaminants at the Site in accordance
22 with CERCLA;

23 (c) Identify the nature, objective, and schedule of
24 response actions to be taken at the Site. Response actions at
25 the Site shall attain that degree of cleanup of hazardous
26 substances, pollutants, or contaminants mandated by CERCLA.

1 (d) Implement the selected interim actions and final
2 remedial action(s) in accordance with CERCLA and meet the
3 requirements of Section 120(e)(2) of CERCLA, 42 U.S.C.
4 § 6920(e)(2), for an interagency Agreement between U.S. EPA and
5 the Navy;

6 (e) Assure compliance, through this Agreement, with
7 RCRA and other federal and state hazardous waste laws and
8 regulations for matters covered herein;

9 (f) Coordinate response actions at the Site with the
10 mission and support activities at NAS Whidbey Island;

11 (g) Expedite the cleanup process to the extent
12 consistent with protection of human health and the environment;
13 and

14 (h) Identify removal actions which are appropriate to
15 the Site and provide timely notice to the other Parties of these
16 proposed actions.

17
18 IV.

19 PARTIES BOUND

20 4.1 This Agreement is entered into by the Parties
21 to enable the Navy to meet the provisions of CERCLA, 42 U.S.C.
22 § 9601 et seq.

23 4.2 The Navy will notify U.S. EPA and Ecology of
24 the identity of its contractors performing work under this
25 Agreement. The Navy shall provide copies of this Agreement to
26 all contractors performing any work pursuant to this Agreement.

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

4 4.3 In selecting contractors to perform work
5 associated with the Site, the Parties will comply with the
6 Federal Acquisition Regulation ("FAR") Subpart 9.4, 48 C.F.R.
7 Subpart 9.4 and 40 C.F.R. Part 32.

8
9 V.

10 STATUTORY COMPLIANCE/RCRA-CERCLA INTEGRATION

11 5.1 The Parties intend to integrate the Navy's
12 CERCLA response obligations and corrective action obligations of
13 other statutes which relate to the release(s) of hazardous
14 substances, hazardous wastes, pollutants, or contaminants covered
15 by this Agreement into this comprehensive Agreement. Therefore,
16 the Parties intend that activities covered by this Agreement will
17 achieve compliance with CERCLA, 42 U.S.C. § 9601, et seq., and
18 applicable state law; satisfy the corrective action requirements
19 of Sections 3004(u) and (v), 42 U.S.C. § 6924(u) and (v), for a
20 RCRA permit, and Section 3008(h), 42 U.S.C. § 6928(h), for
21 interim status facilities; and meet or exceed all applicable or
22 relevant and appropriate federal and state laws and regulations,
23 to the extent required by Section 121 of CERCLA, 42 U.S.C.
24 § 9621.

25 5.2 Based upon the foregoing, the Parties intend
26 that any remedial action selected, implemented, and completed

1 under this Agreement will be protective of human health and the
2 environment such that remediation of releases covered by this
3 Agreement shall obviate the need for further corrective action.
4 The Parties agree that with respect to releases of hazardous
5 waste covered by this Agreement that have occurred on the Site,
6 RCRA and Ch. 70.105 et seq. of the Revised Code of Washington
7 ("RCW") shall be considered ARARs to Section 121 of CERCLA,
8 42 U.S.C. § 9621. If RCRA or RCW Ch. 70.105 et seq. ARARs are
9 waived by the Record of Decision ("ROD") pursuant to Section 121
10 of CERCLA, 42 U.S.C. § 9621, Ecology shall have the right to
11 withdraw from this Agreement within sixty (60) days following the
12 effective date of the ROD and exercise any legal rights and
13 remedies available under law. If Ecology exercises its right to
14 withdraw from this Agreement, the Navy expressly preserves its
15 ability to assert any defense that it may have under the law in
16 regard to the legal right or remedies pursued by Ecology.
17 Releases or other hazardous waste activities not covered by this
18 Agreement remain subject to all applicable state and federal
19 environmental requirements.

20 5.3 The Parties recognize that the requirement to
21 obtain permits for response actions undertaken pursuant to this
22 Agreement shall be as provided for in CERCLA and the NCP.

23 5.4. Nothing in this Agreement shall alter the
24 Navy's authority with respect to removal actions conducted
25 pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

VI.

STATEMENT OF FACTS

6.1 For purposes of this Agreement, the following constitutes a summary of the facts upon which this Agreement is based. None of the facts related herein are admissions nor are they legally binding upon any Party with respect to any unrelated claims of persons not a Party to this Agreement.

A. Site History

6.2 The Naval Air Station at Whidbey Island ("NAS Whidbey Island") was commissioned in September 1942. It is a complex of over seven thousand (7,000) acres and is composed of two (2) bases that are five (5) miles apart: Ault Field and the Seaplane Base. The mission of NAS Whidbey Island is to maintain and operate facilities and provide services and materials to support operations of aviation activities and units of the operating forces of the Navy.

6.3 The Navy completed an Initial Assessment Study ("IAS") for NAS Whidbey Island in 1984. The purpose of the IAS was to identify and assess areas at the facility that posed a potential threat to human health or the environment, caused by the release or threatened release of hazardous substances, pollutants, or contaminants.

6.4 Ault Field contains most of the military activities. The IAS identified thirty-four (34) areas as waste disposal, leak, or spill areas with possible contaminant release at Ault Field. These areas overlie at least three (3) aquifers.

1 Freshwater wetlands are located on the Site.

2 6.5 The major waste-generating activities at Ault
3 Field include aircraft and vehicle maintenance and washing,
4 engine testing, non-destructive testing, parts cleaning, paint
5 and paint stripping, pest control, public work maintenance, and
6 transformer servicing. Wastes generated include
7 trichloroethylene, methyl ethyl ketone, toluene, trichloroethane,
8 zinc, lead, caustic cleaners, waste paints, and
9 pentachlorophenol.

10 6.6 The Seaplane Base contains support activities
11 for the station. The IAS identified sixteen (16) areas as
12 possibly contaminated. The waste areas could potentially impact
13 the City of Oak Harbor's supplemental water supply wells.

14 6.7 The major waste generating activities at the
15 Seaplane Base includes(ed) aircraft and vehicle maintenance,
16 paint and paint stripping, and machine and boat shop activities.
17 Wastes generated include, solvents, red lead primer paint wastes,
18 thinners, ethyleneglycol, sulfuric acid, and lead-based sealants.

19 6.8 Thirty-five (35) of the areas identified in
20 the IAS for Ault Field and the IAS for the Seaplane Base were
21 recommended for further study in order to verify the existence of
22 contamination. These areas were selected based upon potential
23 human health impacts. They were grouped into eleven (11) major
24 areas for investigation in the next phase of the field work.
25 Results of the investigation were reported in the Current
26 Situation Report ("CSR") in January 1988, which identified

1 contamination at several areas.

2 6.9 As a result of past studies and pursuant to
3 the recommendations of U.S. EPA and Ecology, the Navy conducted
4 an expanded investigation at Ault Field, Site 6 Landfill.
5 Results from the investigation revealed contamination of the
6 shallow aquifer and identified a hydraulic connection between the
7 shallow and the intermediate aquifer. Confirmation studies
8 regarding contaminants of concern, contaminant plume
9 characteristics, and their potential threat to human health and
10 the environment are ongoing. It is known that the contamination
11 at Site 6 (Operable Unit 1) has migrated off the property owned
12 by the United States. The exact extent of the migration,
13 however, and the number of private properties affected is
14 unknown. Also unknown is the condition of the private properties
15 and the willingness of the owners to allow the Parties access to
16 their properties. Future data compilation and potential Interim
17 Action(s) resulting from the confirmation study will be factored
18 into the overall RI/FS process for NAS Whidbey Island.

19 B. Findings of Fact

20 6.10 The Site is located on the north end of
21 Whidbey Island, Island County, Washington. It is owned by the
22 United States of America, and is operated by the Navy.

23 6.11 The NAS Whidbey Island - Ault Field and NAS
24 Whidbey Island - Seaplane Base are separately listed on the
25 National Priorities List ("NPL"). Both were proposed for the NPL
26 on September 18, 1985, 50 Fed. Reg. 37950. Final designation on

1 the NPL was established on February 21, 1990, 55 Fed. Reg. 6154.

2 6.12 The Site is a facility under the
3 jurisdiction, custody, or control of the United States Department
4 of Defense within the meaning of Executive Order 12580. 52 Fed.
5 Reg. 2923 (January 29, 1987). The Navy is authorized to act on
6 behalf of the Secretary of Defense for all functions delegated by
7 the President through Executive Order 12580 which are relevant to
8 this Agreement.

9 6.13 The Site is a facility under the jurisdiction
10 of the Secretary of Defense within the meaning of Section 211 of
11 SARA, 42 U.S.C. § 2701.

12 6.14 Under Executive Order No. 12088, 43 Fed. Reg.
13 47,707 (October 13, 1978), U.S. EPA is required to provide timely
14 technical advice and assistance to the Navy.

15 6.15 The Navy is authorized, pursuant to Executive
16 Order 12580, to receive notification of state ARARs as required
17 by CERCLA Section 121(d)(2)(A)(ii), 42 U.S.C.
18 § 9621(d)(2)(A)(ii).

19 6.16 The authority of the Navy to exercise the
20 delegated removal authority of the President, pursuant to Section
21 104 of CERCLA, 42 U.S.C. § 9604, is not altered by this
22 Agreement.

23
24 VII.

25 REGULATORY DETERMINATIONS

26 7.1 For purposes of this Agreement, the following

1 constitutes a summary of the Regulatory Determinations upon which
2 this Agreement is based. None of the Regulatory Determinations
3 related herein are admissions nor are they legally binding upon
4 any Party with respect to any unrelated claims of person(s) not a
5 Party to this Agreement.

6 7.2 On the basis of the results of the testing
7 and analysis described in the Statement of Facts, U.S. EPA and
8 Ecology have determined that:

9 (a) The Site is a facility within the meaning of
10 Section 101(9) of CERCLA, 42 U.S.C. § 9601(9);

11 (b) Hazardous substances, pollutants, or contaminants
12 within the meaning of Section 101(14) and 104(a)(2) of CERCLA,
13 42 U.S.C. §§ 9601(14) and 9604(a)(2), have been disposed of at
14 the Site;

15 (c) There have been unintentional releases and there
16 continue to be releases and threatened releases of hazardous
17 substances, pollutants, or contaminants into the environment
18 within the meaning of Sections 101(22), 104, 106, and 107 of
19 CERCLA, 42 U.S.C. §§ 9601(22), 9604, 9606, and 9607, at and from
20 the Site;

21 (d) With respect to those releases and threatened
22 releases, the Navy is a responsible person within the meaning of
23 Section 107 of CERCLA, 42 U.S.C. § 9607;

24 (e) The actions to be taken pursuant to this Agreement
25 are reasonable and necessary to protect the public health,
26 welfare, or the environment.

VIII.

SCOPE OF AGREEMENT

A. Work to be Performed

8.1 The Navy will conduct and finance the cost of an RI/FS consultant study in accordance with the RI/FS Management Plan and implement the Remedial Design and the Remedial Action Work Plan ("RA Work Plan") at the Site in accordance with that Work Plan and all relevant statutes, regulations, policies, guidance, and criteria.

8.2 The Navy shall perform the tasks and submit plans, reports, and other documents as required by those provisions of the Work Plans.

8.3 This Agreement fully incorporates the provisions of the Work Plans. In the event of any inconsistency between this Agreement and the Work Plans, this Agreement shall govern unless and until duly amended pursuant to Part XXXIII of this Agreement.

B. Interim Actions

8.4 The Navy shall develop and implement IA(s) as set forth in this Agreement. The IA(s) shall be consistent with the purposes set forth in Part III of this Agreement. The Navy shall propose IA(s) to U.S. EPA and Ecology. Alternatively, U.S. EPA and Ecology may request IA proposals. The Navy and U.S. EPA, in consultation with Ecology, shall select appropriate IA(s). U.S. EPA shall make the selection in the event of disagreement, subject to Part XXI of this Agreement. IA(s)

1 shall, to the greatest extent practicable, attain ARARs and be
2 consistent with and contribute to the efficient performance of
3 final response actions.

4 C. Remedial Investigations

5 8.5 The Navy shall develop, implement, and report
6 upon remedial investigations of the Site which comply with
7 applicable requirements of CERCLA, the NCP, written guidance and
8 U.S. EPA policy, and which is in accordance with the requirements
9 and deadlines set forth in this Agreement.

10 D. Feasibility Studies

11 8.6 The Navy shall design, propose, undertake,
12 and report upon feasibility studies for the Site which comply
13 with applicable requirements of CERCLA, the NCP, and relevant
14 written guidance and established U.S. EPA policy, and which is in
15 accordance with the requirements and deadlines set forth in this
16 Agreement.

17 E. Remedial Actions

18 8.7 The Navy shall develop and submit its
19 proposed remedial action alternative following completion and
20 approval of an RI and FS Report. Ecology may recommend the
21 remedial action alternative it deems appropriate to U.S. EPA.
22 Pursuant to Part XXI, the U.S. EPA Administrator, in consultation
23 with the Navy and Ecology, shall make final selection of the
24 remedial actions(s) for the Site. The final selection of
25 remedial action(s) by the U.S. EPA Administrator shall be final
26 and not subject to dispute. Notwithstanding this Part, or any

1 other Part of this Agreement, Ecology may seek judicial review of
2 an interim action or final remedial action in accordance with
3 Sections 113 and 121(f)(3)(A) of CERCLA, 42 U.S.C. §§ 9613 and
4 9621(f)(3)(A).

5 F. Implementation of Remedial Actions

6 8.8 Following finalization of any ROD in
7 accordance with Part XXI, the Navy shall design, propose, and
8 submit, where necessary, a detailed RA Work Plan for
9 implementation of each selected remedial action, including
10 appropriate schedules, to U.S. EPA and Ecology. Following review
11 by Ecology and U.S. EPA and finalization of the RA Work Plan in
12 accordance with Part XX of this Agreement, the Navy shall
13 implement the remedial action(s) in accordance with the
14 requirements and schedules set forth in this Agreement.

15
16 IX.

17 PROJECT MANAGERS

18 9.1 Not later than five (5) days after the
19 effective date of this Agreement, the Navy, Ecology, and U.S. EPA
20 shall each designate a Project Manager and alternate. Each
21 Project Manager shall be responsible for overseeing the
22 principal's duties concerning the implementation of this
23 Agreement. All written communications between the Parties
24 (including communication by letter, reports, notices, etc.)
25 concerning activities related to this Agreement shall be directed
26 or a copy sent to the appropriate Project Manager(s).

1 9.2 Each Project Manager shall be, or rely on, a
2 qualified and competent person with experience in hazardous
3 substances site investigations and remedial actions and having
4 the skills necessary to implement this Agreement. All technical
5 work performed pursuant to this Agreement shall be under the
6 direction and supervision of, or in consultation with, a
7 qualified engineer, geologist, scientist, or equivalent expert
8 with expertise in hazardous substances site investigation and
9 remediation.

10 9.3 The Navy, Ecology, and U.S. EPA may
11 unilaterally change their respective Project Manager(s) by
12 sending a written notification to the other Parties no later than
13 five (5) days before the date of such change, without resort to
14 Part XXXIII.

15 9.4 The Project Managers may, upon unanimous
16 agreement, make minor field modifications to the work to be
17 performed pursuant to this Agreement, or in techniques,
18 procedures, or design utilized in carrying out this Agreement,
19 which are necessary to the completion of the project, without
20 resort to Part XXXIII. All modifications shall be documented in
21 writing.

22 9.5 The Project Manager for the Navy or his/her
23 designee shall be physically present at the Site to supervise all
24 significant work performed at the Site during implementation of
25 the work performed pursuant to this Agreement and be available to
26 the U.S. EPA and Ecology Project Managers for the pendency of

1 this Agreement. The absence of the regulatory agency Project
2 Managers from the Site shall not be cause for work stoppage or
3 delay.

4
5 X.

6 ACCESS

7 10.1 Without limitation on any authority conferred
8 on them by law, U.S. EPA, Ecology, and/or their authorized
9 representatives, shall have authority to enter the Site at all
10 reasonable times consistent with the terms of the Agreement, for
11 purpose of, among other things: (1) inspecting records,
12 operating logs, contracts, and other documents; (2) reviewing the
13 progress of the Navy or its response action contractors in
14 implementing this Agreement; (3) conducting such tests as the
15 Ecology and U.S. EPA Project Managers deem necessary; and
16 (4) verifying the data submitted to U.S. EPA and Ecology by the
17 Navy.

18 10.2 The Navy shall honor all requests for such
19 access by U.S. EPA and Ecology, conditioned only upon
20 presentation of proper credentials, and conformance with security
21 and safety regulations. The Navy reserves the right to require
22 an escort for representatives of U.S. EPA and Ecology when
23 visiting the Site. The Parties agree that conformance with
24 security regulations and the provision of an escort will not
25 unduly delay access. If U.S. EPA or Ecology is denied access to
26 Ault Field or the Seaplane Base, U.S. EPA or Ecology shall

1 contact the Environmental Affairs Office (257-1009) or, after
2 business hours, the Office of the Day (257-2631) immediately
3 after being denied access. NAS Whidbey Island shall make every
4 attempt to resolve the problem and provide access. If access
5 continues to be denied, NAS Whidbey Island shall provide U.S. EPA
6 or Ecology a memorandum stating the reasons for the denial of
7 access within two (2) business days.

8 10.3 To the extent that this Agreement requires
9 access to property not owned and controlled by the Navy, the Navy
10 shall take all reasonable steps to obtain access including, but
11 not limited to, relying on its authority under Section 104(e) of
12 CERCLA, 42 U.S.C. § 9604(e). If the Navy obtains access to the
13 property by agreement with the property owner, the Navy shall
14 make every effort to obtain identical access rights for U.S. EPA
15 and Ecology and shall also make every effort to include in the
16 access agreement a provision requiring the property owner to give
17 the Parties notice at least thirty (30) days prior to conveyance
18 of the property owner's interests.

19
20 XI.

21 SAMPLING AND DATA/DOCUMENT AVAILABILITY

22 11.1 If requested, the Project Managers shall make
23 available to each other quality assured results of sampling,
24 tests, or other data generated by any Party, or on their behalf,
25 with respect to the implementation of this Agreement within
26 forty-five (45) days of their collection or field testing. If

1 quality assurance is not completed within forty-five (45) days,
2 preliminary data or results shall be made available within the
3 forty-five (45) day period and quality assured data or results
4 shall be submitted as they become available but in no event later
5 than ninety (90) days after the sampling or testing. These
6 periods can be extended upon mutual agreement among the Project
7 Managers.

8 11.2 At the request of either the Ecology or
9 U.S. EPA Project Manager, the Navy shall allow split or duplicate
10 samples to be taken by Ecology or U.S. EPA during sample
11 collection conducted during the implementation of this Agreement.
12 The Navy's Project Manager shall notify, whenever possible, the
13 U.S. EPA and Ecology Project Managers not less than fourteen (14)
14 business days in advance of any well drilling, sample collection,
15 or other monitoring activity, conducted pursuant to this
16 Agreement. The fourteen (14) day notification requirement can be
17 waived upon mutual agreement among the Project Managers.

18 11.3 If preliminary analysis indicates a potential
19 imminent and substantial endangerment to the public health, all
20 Project Managers shall be immediately notified.

22 XII.

23 QUALITY ASSURANCE

24 12.1 Throughout all sample collection,
25 transportation, and analyses activities conducted in connection
26 with this Agreement, the Navy shall use procedures for quality

1 assurance, and for quality control, and for chain-of-custody in
2 accordance with approved U.S. EPA methods, including "Interim
3 Guidelines and Specifications for Preparing Quality Assurance
4 Project Plans," QAMS-005/80, "Data Quality Objective Guidance,"
5 U.S. EPA 1540/687/003 and 004, and subsequent amendments to such
6 guidelines. The Navy shall require each laboratory it uses to
7 perform any analysis according to approved U.S. EPA methods and
8 to participate in a quality assurance/quality control program
9 equivalent to that which is followed by U.S. EPA and which is
10 consistent with U.S. EPA document QAMS-005/80.

11
12 XIII.

13 REPORTING

14 13.1 The Navy shall submit to Ecology and the
15 U.S. EPA quarterly written progress reports which describe the
16 actions which the Navy has taken during the previous quarter to
17 implement the requirements of this Agreement. Progress reports
18 shall also describe the activities scheduled to be taken during
19 the upcoming quarter. Progress reports shall be prepared and
20 submitted in accordance with the Work Plans.

21
22 XIV.

23 NOTICE TO THE PARTIES

24 14.1 All Parties shall transmit primary and
25 secondary documents, and all notices required herein by next day
26 mail, hand delivery, or facsimile. Time limitations shall

commence upon receipt.

14.2 Notice to the individual Parties shall be provided under this Agreement to the following addresses:

(A) For the Navy:

Commanding Officer
Attn: Bryan Haelsig
Engineering Field Activity Northwest
Naval Facilities Engineering Command
3505 Anderson Hill Road
Silverdale, Washington 98383

(B) For the U.S. EPA:

Bub Loiselle
NAS Whidbey Island Project Manager
U.S. Environmental Protection Agency Reg. 10
1200 Sixth Avenue, HW-074
Seattle, Washington 98101

(C) For Ecology:

D. Robert Goodman
Washington Department of Ecology
Mail Stop PV-11
Olympia, Washington 98504-8711

Express Mail:
Washington Department of Ecology
4415 Woodview Drive, S.E.
Lacey, Washington 98503

14.3 Unless otherwise requested, the Parties shall send all routine correspondence by regular mail to the persons identified above.

XV.

PERMITS

15.1 The Parties recognize that the requirement to obtain permits for response actions undertaken pursuant to this Agreement shall be as provided for in CERCLA and the NCP. The

1 Parties further recognize ongoing hazardous waste management
2 activities at the Site may require the issuance of permits under
3 federal and state laws. This Agreement does not affect the
4 requirements, if any, to obtain such permits. However, if a
5 permit is issued for ongoing hazardous waste management
6 activities at the Site, U.S. EPA shall reference and incorporate
7 any appropriate provisions, including appropriate schedules (and
8 the provisions for extension of such schedules), of this
9 Agreement into such permit. The Parties intend that the judicial
10 review of any permit conditions which reference this Agreement
11 shall, to the extent authorized by law, only be reviewed under
12 the provisions of CERCLA.

13 15.2 If a permit which is necessary for
14 implementation of this Agreement is not issued, or is issued or
15 renewed in a manner which is materially inconsistent with the
16 requirements of this Agreement, the Navy agrees it shall notify
17 Ecology and U.S. EPA of its intention to propose necessary
18 modifications to this Agreement to obtain conformance with the
19 permit (or lack thereof). Notification by Navy of its intention
20 to propose modifications shall be submitted within seven (7)
21 calendar days of receipt by Navy of notification that: (1) a
22 permit will not be issued; (2) a permit has been issued or
23 reissued; or (3) a final determination with respect to any appeal
24 related to the issuance of a permit has been entered. Within
25 thirty (30) days from the date it submits its notice of intention
26 to propose modifications, the Navy shall submit to Ecology and

1 U.S. EPA its proposed modifications to this Agreement with an
2 explanation of its reasons in support thereof.

3 15.3 Ecology and U.S. EPA shall review the Navy's
4 proposed modifications to this Agreement made pursuant to this
5 Part. If Navy submits proposed modifications prior to a final
6 determination of any appeal taken on a permit needed to implement
7 this Agreement, Ecology and U.S. EPA may elect to delay review of
8 the proposed modifications until after such final determination
9 is entered. If Ecology and U.S. EPA elect to delay review, the
10 Navy shall continue implementation of this Agreement which can be
11 reasonably implemented pending final resolution of the permit
12 issue(s).

13 15.4 During any appeal of any permit required to
14 implement this Agreement or during review of any of Navy's
15 proposed modifications as provided in Paragraph 15.2 above, the
16 Navy shall continue to implement those portions of this Agreement
17 which can be reasonably implemented pending final resolution of
18 the permit issue(s).

19
20 XVI.

21 RETENTION OF RECORDS

22 16.1 The Navy shall preserve, during the duration
23 of this Agreement and for a minimum of ten (10) years after
24 termination and satisfaction of this Agreement, the complete
25 Administrative Record, post-Record of Decision primary and
26 secondary documents, and annual reports. After this ten (10)

1 year period, the Navy shall notify U.S. EPA and Ecology at least
2 forty-five (45) days prior to the destruction or disposal of any
3 such records or documents.

4 16.2 Upon request by U.S. EPA or Ecology, the Navy
5 shall make available any records in its possession which relate
6 in any way to the presence of hazardous wastes and constituents,
7 hazardous substances, pollutants, and contaminants at the Site,
8 or to the implementation of this Agreement, unless withholding is
9 authorized and determined appropriate by law.

10
11 XVII.

12 PUBLIC PARTICIPATION AND ADMINISTRATIVE RECORD

13 17.1 The Parties agree that any subsequently
14 proposed plan(s) considered for remedial action(s) at the Site
15 arising out of this Agreement shall comply with public
16 participation requirements of Section 117 of CERCLA, 42 U.S.C.
17 § 9617, the NCP, and applicable U.S. EPA written guidance.

18 17.2 The Navy agrees it shall establish and
19 maintain an Administrative Record at or near the Site in
20 accordance with Section 113(k) of CERCLA, 42 U.S.C. § 9613(k),
21 the NCP, and applicable U.S. EPA written guidance, and that a
22 copy of this Agreement will be placed in the Administrative
23 Record. The Administrative Record developed by the Navy shall be
24 periodically updated and a copy of each document included in the
25 Administrative Record will be provided, upon request, to U.S. EPA
26 and Ecology.

1 17.3 The Navy shall implement a Community
2 Relations Plan which responds to the need for an interactive
3 relationship with all interested community elements, both on and
4 off the Site, regarding environmental activities conducted
5 pursuant to this Agreement by the Navy. The Parties agree to
6 comply with all relevant U.S. EPA policy and written guidance on
7 community relations programs which are in accordance with CERCLA
8 and consistent with the NCP.

9 XVIII.

10 CREATION OF DANGER/EMERGENCY ACTION

11 18.1 In the event U.S. EPA or Ecology determine
12 that activities or circumstances related to this Agreement are
13 creating a danger to the health or welfare of the people on the
14 Site or in the surrounding area or to the environment, U.S. EPA
15 or Ecology may require or order the Navy to stop such activities
16 for such period of time as the Project Managers determine is
17 needed to abate the danger. Any unilateral order to stop work
18 for longer than twenty-four (24) hours requires a written
19 explanation by U.S. EPA or Ecology.

20 18.2 In the event the Navy determines that
21 activities or circumstances related to this Agreement or any
22 other circumstances or activities at the Site are creating an
23 imminent and substantial endangerment to the people on the Site
24 or in the surrounding area or to the environment, the Navy may
25 stop such activities for such periods of time necessary for
26 U.S. EPA and Ecology to evaluate the situation and determine

1 whether the Navy should proceed with such activities or whether
2 the work stoppage should be continued until the danger is abated.
3 The Navy shall notify the Project Managers as soon as is
4 possible, but not later than twenty-four (24) hours after such
5 stoppage of work. Any unilateral order to stop work for longer
6 than twenty-four (24) hours requires a written explanation by the
7 Navy. If U.S. EPA, in consultation with Ecology, disputes the
8 Navy's determination, it may require the Navy to resume work or
9 activities under this Agreement.

10 18.3 If the U.S. EPA and Ecology concur in the
11 work stoppage by the Navy, or if U.S. EPA or Ecology require or
12 order a work stoppage, the Navy's obligations shall be suspended
13 and the time periods for performance of that work, as well as the
14 time period for any other work dependent upon the work which was
15 stopped, shall be extended, pursuant to Part XXV of this
16 Agreement.

17
18 XIX.

19 FIVE (5) YEAR REVIEW

20 19.1 Consistent with Section 121(c) of CERCLA,
21 42 U.S.C. § 9621(c), and in accordance with this Agreement, the
22 Parties will review remedial actions that allow hazardous
23 substances, pollutants, or contaminants to remain on-site no less
24 often than each five (5) years after the initiation of a final
25 remedial action to assure that human health and the environment
26 are being protected by the remedial action being implemented.

1 Upon the completion of such review, and in accordance with Part
2 XX of this Agreement, the Navy shall submit a report to U.S. EPA
3 and Ecology, including a recommendation as to whether additional
4 action or modification of the remedial action is appropriate in
5 accordance with Sections 104 or 106 of CERCLA, 42 U.S.C. §§ 9604
6 or 9606. The Parties shall determine the necessary remedial
7 actions or modifications, if any. In the event of dispute, the
8 final determination of additional remedial actions shall be by
9 the U.S. EPA Administrator in accordance with Part XXI of this
10 Agreement and the final decision by the Administrator shall not
11 be subject to further dispute by the Parties. The Navy shall
12 implement such additional or modified action as finally
13 determined.

14
15 XX.

16 CONSULTATION WITH U.S. EPA AND ECOLOGY

17 A. Applicability

18 20.1 The provisions of this Part establish the
19 procedures that shall be used by the Navy, U.S. EPA, and Ecology
20 to provide the Parties with appropriate notice, review, comment,
21 and response to comments regarding RI/FS and RD/RA documents,
22 specified herein as either primary or secondary documents. In
23 accordance with Section 120 of CERCLA, 42 U.S.C. § 9620, and
24 10 U.S.C. § 2705, the Navy will normally be responsible for
25 issuing primary and secondary documents to U.S. EPA and Ecology.
26 As of the effective date of this Agreement, all draft and final

1 reports for any deliverable document identified herein shall be
2 prepared, distributed, and subject to dispute in accordance with
3 Part XXI of this Agreement.

4 20.2 The designation of a document as "draft" or
5 "final" is solely for purposes of consultation with U.S. EPA and
6 Ecology in accordance with this Part. Such designation does not
7 affect the obligation of the Parties to issue documents, which
8 may be referred to herein as "final," to the public for review
9 and comment as appropriate and as required by law.

10 B. General Process for RI/FS and RD/RA Documents

11 20.3 Primary documents include those reports that
12 are major, discrete portions of RI/FS or RD/RA activities.
13 Primary documents are initially issued by the Navy in draft
14 subject to review and comment by U.S. EPA and Ecology. Following
15 receipt of comments on a particular draft primary document, the
16 Navy will respond to the comments received and issue a draft
17 final primary document subject to dispute resolution. The draft
18 final primary document will become the final primary document
19 either thirty (30) days after the period established for review
20 of a draft final document if dispute resolution is not invoked or
21 as modified by decision of the dispute resolution process.

22 20.4 Secondary documents include those reports
23 that are discrete portions of the primary documents and are
24 typically input or feeder documents. Secondary documents are
25 issued by the Navy in draft subject to review and comment by
26 U.S. EPA and Ecology. Although the Navy will respond to comments

received, the draft secondary documents may be finalized in the context of the corresponding primary documents. A secondary document may be disputed at the time the corresponding draft final primary document is issued.

C. Primary Reports

20.5 The Navy shall complete and transmit draft reports for the following OU primary documents to U.S. EPA and Ecology for review and comment in accordance with the provisions of this Part:

- (a) Scope of Work
- (b) RI/FS Management Plan
- (c) RI Report, including the Initial Screening of Alternatives
- (d) Baseline Risk Assessments
- (e) FS Report
- (f) Record of Decision ("ROD")
- (g) Remedial Design ("RD")
- (h) Remedial Action ("RA") Work Plan

20.6 Only the draft final reports for the primary documents identified above shall be subject to dispute resolution. The Navy shall complete and transmit draft primary documents in accordance with the timetable and deadlines established in Part XXIV of this Agreement.

D. Secondary Documents

20.7 The Navy shall complete and transmit draft reports for the following secondary documents to U.S. EPA and Ecology for review and comment in accordance with the provisions

1 of this Part:

- 2 (a) Site Characterization Summary
- 3 (b) Risk Assessment Conceptual Site Model
- 4 (c) Detailed Analysis of Alternatives
- 5 (d) Identification of ARARs and TBC Evaluation
- 6 (e) Treatability Study Work Plan, as needed
- 7 (f) Treatability Studies Report, as needed
- 8 (g) Sampling and Data Results
- 9 (h) Proposed Plan
- 10 (i) Proposed RA Work Plan
- 11 (j) Conceptual RD Report
- 12 (k) Sixty (60) Percent Completion RD Report
- 13 (l) Other submittals, as needed.

14 20.8 Although U.S. EPA and Ecology may comment on
15 the draft reports for the secondary documents listed above, such
16 documents shall not be subject to dispute resolution. Target
17 dates shall be established for the completion and transmission of
18 draft secondary reports pursuant to Part XXIV of this Agreement.

19 E. Meetings of the Project Managers on Development of Reports

20 20.9 The Project Managers shall meet or confer
21 approximately every thirty (30) days, except as otherwise agreed
22 by the Parties, to review and discuss the progress of work being
23 performed at the Site on the primary and secondary documents.
24 Prior to preparing any draft report specified in Paragraphs 20.5
25 and 20.7 above, the Project Managers shall meet to discuss the
26 report results in an effort to reach a common understanding, to

1 the maximum extent practicable, with respect to the results to be
2 presented in the draft report.

3 F. Identification and Determination of Potential ARARs

4 20.10 For those primary reports or secondary
5 documents that consist of or include ARAR determinations, prior
6 to the issuance of a draft report, the Project Managers shall
7 meet to identify and propose, to the best of their ability, all
8 potential ARARs pertinent to the report being addressed. Draft
9 ARAR determinations shall be prepared by the Navy in accordance
10 with Section 121(d)(2) of CERCLA, 42 U.S.C. § 9621(d)(2), the
11 NCP, and pertinent written guidance issued by U.S. EPA and
12 Ecology, which is not inconsistent with CERCLA and the NCP.

13 20.11 In identifying potential ARARs, the Parties
14 recognize that actual ARARs can be identified only on an
15 OU-specific basis and that ARARs depend on the specific hazardous
16 substances, pollutants, contaminants, the particular actions
17 proposed as a remedy, and the characteristics of the OU. The
18 Parties recognize that ARAR identification is necessarily an
19 iterative process and that potential ARARs must be re-examined
20 throughout the RI/FS process until a Record of Decision ("ROD")
21 is issued.

22 G. Review and Comment on Draft Reports

23 20.12 The Navy shall complete and transmit each
24 draft primary report to U.S. EPA and Ecology on or before the
25 corresponding deadline established for the issuance of the
26 report. The Navy shall complete and transmit the draft secondary

1 document in accordance with the target dates established for the
2 issuance of such reports established pursuant to Part XXIV of
3 this Agreement.

4 20.13 Unless the Parties mutually agree to another
5 time period, all draft reports shall be subject to a thirty (30)
6 day period for review and comment. The thirty (30) day period
7 shall commence with receipt of the documents or the designated
8 deadline in Part XXIV, whichever is later. Review of any
9 document by U.S. EPA or Ecology may concern all aspects of the
10 report (including completeness) and should include, but is not
11 limited to, technical evaluation of any aspect of the document,
12 and consistency with CERCLA, the NCP, and any pertinent written
13 guidance or policy issued by U.S. EPA or Ecology. Comments by
14 U.S. EPA and Ecology shall be provided with adequate specificity
15 so that the Navy may respond to the comments and, if appropriate,
16 make changes to the draft report. Comments shall refer to any
17 pertinent sources of authority or references upon which the
18 comments are based, and, upon request of the Navy, U.S. EPA and
19 Ecology shall provide a copy of the cited authority or reference.
20 In cases involving complex or unusually lengthy reports, U.S. EPA
21 and Ecology may extend the thirty (30) day comment period for an
22 additional twenty (20) days by written notice to the Navy prior
23 to the end of the thirty (30) day period. In appropriate
24 circumstances, the time period may be further extended in
25 accordance with Part XXV. On or before the close of the comment
26 period, U.S. EPA and Ecology shall transmit by next day mail

1 their written comments to the Navy.

2 20.14 Representatives of the Navy shall make
3 themselves readily available to U.S. EPA and Ecology during the
4 comment period for purposes of informally responding to questions
5 and comments on draft reports. Oral comments made during such
6 discussions need not be the subject of a written response by the
7 Navy on the close of the comment period.

8 20.15 In commenting on a draft report which
9 contains a proposed ARAR determination, U.S. EPA and Ecology
10 shall include a reasoned statement of whether they object to any
11 portion of the proposed ARAR determination. To the extent that
12 U.S. EPA and Ecology do object, they shall explain the basis for
13 their objection in detail and shall identify any ARARs which they
14 believe were not properly addressed in the proposed ARAR
15 determination.

16 20.16 Following the close of the comment period for
17 a draft report, the Navy shall give full consideration to all
18 written comments on the draft report submitted during the comment
19 period. Within thirty (30) days after the close of the comment
20 period on a draft secondary report, the Navy shall transmit to
21 U.S. EPA and Ecology its written response to comments received
22 within the comment period. Within thirty (30) days after the
23 close of the comment period on a draft primary report, the Navy
24 shall transmit to U.S. EPA and Ecology a draft final primary
25 report, which shall include the Navy's response to all written
26 comments, received within the comment period. While the

1 resulting draft final report shall be the responsibility of the
2 Navy, it shall be the product of consensus to the maximum extent
3 possible.

4 20.17 The Navy may extend the thirty (30) day
5 period for either responding to comments on a draft report or for
6 issuing the draft final primary report for an additional twenty
7 (20) days by providing notice to U.S. EPA and Ecology. In
8 appropriate circumstances, this time period may be further
9 extended in accordance with Part XXV.

10 H. Availability of Dispute Resolution for
11 Draft Final Primary Documents

12 20.18 Dispute resolution shall be available to the
13 Parties for draft final primary reports as set forth in Part XXI.

14 20.19 When dispute resolution is invoked on a draft
15 primary report, work may be stopped in accordance with the
16 procedures set forth in Part XXI regarding dispute resolution.

17 I. Finalization of Reports

18 20.20 The draft final primary report shall serve as
19 the final primary report if no Party invokes dispute resolution
20 regarding the document or, if invoked, at completion of the
21 dispute resolution process should the Navy's position be
22 sustained. If the Navy's determination is not sustained in the
23 dispute resolution process, the Navy shall prepare, within not
24 more than thirty-five (35) days, a revision of the draft final
25 report which conforms to the results of dispute resolution. In
26 appropriate circumstances, the time period for this revision

1 period may be extended in accordance with Part XXV hereof.

2 J. Subsequent Modifications of Final Reports

3 20.21 Following finalization of any primary report
4 pursuant to Paragraph 20.20 above, U.S. EPA, Ecology, or the Navy
5 may seek to modify the report, including seeking additional field
6 work, pilot studies, computer modeling, or other supporting
7 technical work, only as provided in Paragraphs 20.22 and 20.23
8 below.

9 20.22 U.S. EPA, Ecology, or the Navy may seek to
10 modify a report after finalization if it determines, based on new
11 information (i.e., information that became available, or
12 conditions that became known, after the report was finalized)
13 that the requested modification is necessary. U.S. EPA, Ecology,
14 or the Navy may seek such a modification by submitting a concise
15 written request to the Project Managers of the other Parties.
16 The request shall specify the nature of the requested
17 modification and how the request is based on new information.

18 20.23 In the event that a consensus is not reached
19 by the Project Managers on the need for a modification, either
20 U.S. EPA, Ecology, or the Navy may invoke dispute resolution to
21 determine if such modification shall be conducted. Modification
22 of a report shall be required only upon a showing that: (1) the
23 requested modification is based on significant new information,
24 and (2) the requested modification could be of significant
25 assistance in evaluating impacts on the public health or the
26 environment, in evaluating the selection of remedial

alternatives, or in protecting human health and the environment.

20.24 Nothing in this Subpart shall alter U.S. EPA's or Ecology's ability to request the performance of additional work which was not contemplated by this Agreement. The Navy's obligation to perform such work must be established by either a modification of a report or document or by amendment to this Agreement.

XXI.

RESOLUTION OF DISPUTES

21.1 Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement, the procedures of this Part shall apply. All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or immediate supervisor level. If resolution cannot be achieved informally, the procedures of this Part shall be implemented to resolve a dispute.

21.2 Within thirty (30) days after: (1) the period established for review of a draft final primary document pursuant to Parts XX and XXIV of this Agreement; or (2) any action which leads to or generates a dispute, the disputing Party shall submit to the Dispute Resolution Committee ("DRC") a written statement of dispute setting forth the nature of the dispute, the work affected by the dispute, the disputing Party's position with respect to the dispute and the technical, legal, or factual information the disputing Party is relying upon to support its position.

1 21.3 Prior to any Party's issuance of a written
2 statement of dispute, the disputing Party shall engage the other
3 Party in informal dispute resolution among the Project Managers
4 and/or their immediate supervisors. During this informal dispute
5 resolution period the Parties shall meet as many times as are
6 necessary to discuss and attempt resolution of the dispute.

7 21.4 The DRC will serve as a forum for resolution
8 of disputes for which agreement has not been reached through
9 informal dispute resolution. The Parties shall each designate
10 one individual and an alternate to serve on the DRC. The
11 individuals designated to serve on the DRC shall be employed at
12 the policy level (SES or equivalent) or be delegated the
13 authority to participate on the DRC for the purposes of dispute
14 resolution under this Agreement. The U.S. EPA representative on
15 the DRC is the Hazardous Waste Division Director ("Division
16 Director") of U.S. EPA's Region 10. The Navy's designated member
17 is the Commanding Officer, Engineering Field Activity, Northwest,
18 Western Division Naval Facilities Engineering Command
19 ("WESTNAVFACENGCOM"). Ecology's designated member is the Ecology
20 Program Manager for Hazardous Waste Investigation and Cleanup
21 ("HWIC"). Written notice of any delegation of authority from a
22 Party's designated representative on the DRC shall be provided to
23 all other Parties.

24 21.5 Following elevation of a dispute to the DRC,
25 the DRC shall have twenty-one (21) days to unanimously resolve
26 the dispute and issue a written decision. If the DRC is unable to

1 unanimously resolve the dispute within this twenty-one (21) day
2 period, the written statement of dispute shall be forwarded to
3 the Senior Executive Committee ("SEC") for resolution, within
4 seven (7) days after the close of the twenty-one (21) day
5 resolution period.

6 21.6 The SEC will serve as the forum for
7 resolution of disputes for which agreement has not been reached
8 by the DRC. The U.S. EPA representative on the SEC is the
9 Regional Administrator of U.S. EPA's Region 10. The Navy's
10 representative on the SEC is the Commander, WESTNAVFACENGCOM.
11 Ecology's representative on the SEC is the Assistant Director for
12 Waste Management. The SEC members shall, as appropriate, confer,
13 meet, and exert their best efforts to resolve the dispute and
14 issue a written decision. If unanimous resolution of the dispute
15 is not reached within twenty-one (21) days, U.S. EPA's Regional
16 Administrator shall issue a written position on the dispute. The
17 Navy or Ecology may, within fourteen (14) days of the Regional
18 Administrator's issuance of U.S. EPA's position, issue a written
19 notice elevating the dispute to the Administrator of U.S. EPA for
20 resolution in accordance with all applicable laws and procedures.
21 In the event that the Navy or Ecology elect not to elevate the
22 dispute to the Administrator within the designated fourteen (14)
23 day escalation period, the Navy and/or Ecology shall be deemed to
24 have agreed with the Regional Administrator's written position
25 with respect to the dispute.

26 21.7 Upon escalation of a dispute to the

1 Administrator of U.S. EPA pursuant to Subparagraph 21.6, the
2 Administrator will review and resolve the dispute within
3 twenty-one (21) days. Upon request, and prior to resolving the
4 dispute, the U.S. EPA Administrator shall meet and confer with
5 the Navy's Secretariat Representative and a representative from
6 Ecology to discuss the issue(s) under dispute. The Administrator
7 will provide notice to all Parties of any Party's request to meet
8 or confer with respect to any such dispute and will provide an
9 adequate opportunity for all Parties to participate in any
10 meeting or conference convened to resolve such dispute. Upon
11 resolution, the Administrator shall provide the Navy and Ecology
12 with a written final decision setting forth resolution of the
13 dispute. The duties of the Administrator set forth in this Part
14 shall not be delegated.

15 21.8 The pendency of any dispute under this Part
16 shall not affect the Navy's responsibility for timely performance
17 of the work required by this Agreement, except that the time
18 period for completion of work affected by such dispute shall be
19 extended for a period of time usually not to exceed the actual
20 time taken to resolve any good faith dispute in accordance with
21 the procedures specified herein. All elements of the work
22 required by this Agreement which are not affected by the dispute
23 shall continue and be completed in accordance with the applicable
24 schedule.

25 21.9 When dispute resolution is in progress, work
26 affected by the dispute will immediately be discontinued if the

1 Division Director for U.S. EPA's Region 10 or Ecology request, in
2 writing, that work related to the dispute be stopped because, in
3 U.S. EPA's or Ecology's opinion, such work is inadequate or
4 defective, and such inadequacy or defect is likely to yield an
5 adverse effect on human health or the environment, or is likely
6 to have a substantial adverse effect on the remedy selection or
7 implementation process. To the extent possible, U.S. EPA and
8 Ecology shall consult with all Parties prior to initiating a work
9 stoppage request. After stoppage of work, if the Navy believes
10 that the work stoppage is inappropriate or may have potential
11 significant adverse impacts, the Navy may meet with the U.S. EPA
12 Division Director and Ecology equivalent to discuss the work
13 stoppage. Following this meeting, and further consideration of
14 the issues, the U.S. EPA Division Director will issue, in
15 writing, a final decision with respect to the work stoppage. The
16 final written decision of the U.S. EPA Division Director may
17 immediately be subjected to formal dispute resolution. Such
18 dispute may be brought directly to either the DRC or the SEC, at
19 the discretion of the Navy or Ecology.

20 21.10 Within twenty-one (21) days of resolution of
21 a dispute pursuant to the procedures specified in this Part, the
22 Navy shall incorporate the resolution and final determination
23 into the appropriate plan, schedule, or procedures, and proceed
24 to implement this Agreement according to the amended plan,
25 schedule, or procedures.

26 21.11 Resolution of a dispute pursuant to this Part

1 of the Agreement constitutes a final resolution of that dispute
2 arising under this Agreement. All Parties shall abide by all
3 terms and conditions of any final resolution of dispute obtained
4 pursuant to this Part of this Agreement.

5
6 XXII.

7 ENFORCEABILITY

8 22.1 The Parties agree that:

9 (a) Upon its effective date, this Agreement is
10 enforceable by any person pursuant to Section 310 of CERCLA,
11 42 U.S.C. § 9659, and any violation of such standard, regulation,
12 condition, requirement, or order contained herein will be subject
13 to civil penalties under Sections 310(c) and 109 of CERCLA,
14 42 U.S.C. §§ 9659 and 9609;

15 (b) All timetables or deadlines associated with the
16 RI/FS shall be enforceable by any person pursuant to Section 310
17 of CERCLA, 42 U.S.C. § 9659, and any violation of such timetables
18 or deadlines will be subject to civil penalties under Sections
19 310(c) and 109 of CERCLA, 42 U.S.C. §§ 9659 and 9609;

20 (c) All terms and conditions of this Agreement which
21 relate to interim actions or final remedial actions, including
22 corresponding timetables, deadlines, or schedules, and all work
23 associated with the interim actions or final remedial actions,
24 shall be enforceable by any person pursuant to Section 310(a) of
25 CERCLA, 42 U.S.C. § 9659(a), and any violation of such terms and
26 conditions will be subject to civil penalties under Sections

1 310(c) and 109 of CERCLA, 42 U.S.C. §§ 9659 and 9609; and

2 (d) Any final resolution of a dispute pursuant to Part
3 XXI of this Agreement which establishes a term, condition,
4 timetable, deadline, or schedule shall be enforceable by any
5 person pursuant to Section 310(a) of CERCLA, 42 U.S.C.
6 § 9659(a), and any violation of such term, condition, timetable,
7 deadline or schedule will be subject to civil penalties under
8 Sections 310(c) and 109 of CERCLA, 42 U.S.C. §§ 9659 and 9609.

9 22.2 Nothing in this Agreement shall be construed
10 as authorizing any person to seek judicial review of any action
11 or work where review is barred by any provision of CERCLA,
12 including Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

13 22.3 The Parties agree that all Parties shall have
14 the right to enforce the terms of this Agreement.

15
16 XXIII.

17 STIPULATED PENALTIES

18 23.1 In the event that the Navy fails to submit a
19 primary document to U.S. EPA and Ecology pursuant to the
20 appropriate timetable or deadline in accordance with the
21 requirements of this Agreement, or fails to comply with a term or
22 condition of this Agreement which relates to an interim action or
23 final remedial action, U.S. EPA may assess, after consultation
24 with Ecology, a stipulated penalty against the Navy. A
25 stipulated penalty may be assessed in an amount not to exceed
26 five thousand dollars (\$5,000) for the first week (or part

1 thereof), and ten thousand dollars (\$10,000) for each additional
2 week (or part thereof) for which a failure set forth in this
3 Paragraph occurs.

4 23.2 Upon determining that the Navy has failed in
5 a manner set forth in Paragraph 23.1, U.S. EPA shall so notify
6 the Navy in writing. Ecology may, as it deems appropriate,
7 recommend that U.S. EPA issue a stipulated penalty pursuant to
8 this Part. If the failure in question is not already subject to
9 dispute resolution at the time such notice is received, the Navy
10 shall have fifteen (15) days after receipt of the notice to
11 invoke dispute resolution on the question of whether the failure
12 did in fact occur. The Navy shall not be liable for the
13 stipulated penalty assessed by U.S. EPA if the failure is
14 determined, through the dispute resolution process, not to have
15 occurred. No assessment of a stipulated penalty shall be final
16 until the conclusion of dispute resolution procedures related to
17 the assessment of the stipulated penalty.

18 23.3 The annual reports required by Section
19 120(e)(5) of CERCLA, 42 U.S.C. § 9620(e)(5), shall include, with
20 respect to each final assessment of a stipulated penalty against
21 the Navy under this Agreement, each of the following:

- 22 (a) The facility responsible for the failure;
- 23 (b) A statement of the facts and circumstances
24 giving rise to the failure;
- 25 (c) A statement of any administrative or other
26 corrective action taken at the relevant facility,

1 or a statement of why such measures were
2 determined to be inappropriate;

3 (d) A statement of any additional action taken by or
4 at the facility to prevent recurrence of the same
5 type of failure; and

6 (e) The total dollar amount of the stipulated penalty
7 assessed for the particular failure.

8 23.4 Stipulated penalties assessed pursuant to
9 this Part shall be payable to the Hazardous Substances Response
10 Trust Fund only in the manner and to the extent expressly
11 provided for in Acts authorizing funds for, and appropriations
12 to, the Department of Defense.

13 23.5 In no event shall this Part give rise to a
14 stipulated penalty in excess of the amount set forth in Section
15 109 of CERCLA, 42 U.S.C. § 9609.

16 23.6 This Part shall not affect the Navy's ability
17 to obtain an extension of a timetable, deadline, or schedule
18 pursuant to Part XXV of this Agreement.

19 23.7 Nothing in this Agreement shall be construed
20 to render any officer or employee of the Navy personally liable
21 for the payment of any stipulated penalty assessed pursuant to
22 this Part.

23
24 XXIV.

25 DEADLINES

26 24.1 Pursuant to this Agreement, the following

deadlines have been established in conjunction with Ecology for
submittal of draft primary documents:

Operable Unit No. 1 (Unit A)

DATE

Area 5 - Highway 20/Hoffman Road Landfill
Area 6 - Current Landfill

(a)	RI/FS Scope of Work	Received
(b)	RI/FS Management Plan	8/15/90
(c)	Risk Assessment	11/1/91
(d)	RI Report, including the Initial Screening of Alternatives	11/1/91
(e)	FS Report	3/16/92
(f)	Record of Decision	7/1/92

Operable Unit No. 4 (Unit F and I)

DATE

Area 39 - Auto Repair and Paint Shop
Area 41 - Building 25 & 26 Disposal Area
Area 44 - Seaplane Base Nose Hangar
Area 48 - Seaplane Base Salvage Yard
Area 49 - Seaplane Base Landfill

(a)	RI/FS Scope of Work	8/1/90
(b)	RI/FS Management Plan	1/1/91
(c)	Risk Assessment	6/1/92
(d)	RI Report including the Initial Screening of Alternatives	6/1/92
(e)	FS Report	9/14/92
(f)	Record of Decision	2/1/93

Operable Unit No. 2 (Unit B & D)

DATE

Area 2 - Western Highlands Landfill
Area 3 - 1969-1970 Landfill
Area 4 - Walker Storage Barn
Area 14 - Pesticide Rinsate Area
Area 29 - Clover Valley Fire School

(a)	RI/FS Scope of Work	1/1/91
(b)	RI/FS Management Plan	6/29/91
(c)	Risk Assessment	11/27/92
(d)	RI Report, including Initial Screening of Alternatives	11/27/92
(e)	FS Report	2/14/93
(f)	Record of Decision	7/1/93

Operable Unit No. 3 (Unit C)

DATE

Area 16 - Runway Ditches
Area 31 - Runway Fire School

(a)	RI/FS Scope of Work	7/1/91
(b)	RI/FS Management Plan	12/28/91
(c)	Risk Assessment	5/28/93
(d)	RI Report, including Initial Screening of Alternatives	5/28/93
(e)	FS Report	8/15/93
(f)	Record of Decision	1/1/94

24.2 The following is a list of Unit Areas that will be investigated by the Navy for potential inclusion in the NAS Whidbey Island RI/FS process:

Unit E - Area 13	Fuel Farm 3
Unit F - Area 36	Fuel Farm 1
Area 40	Seaplane Base Coal Pile
Area 45	TCE Tank
Unit G - Area 7	Old Waste Storage Tank Spills
Area 8	Sewage Sludge Disposal Area
Area 9	Asphalt Disposal Area
Area 11	Fuel Farm 4
Unit H - Area 35	Fuel Farm 2

Unit J - Area 32	Bldg. 889 Transformer Service Area
Unit K - Area 27	1966 Fire School
Area 28	Chapel Fire School
Unit L - Area 10	Bldg. 2536 PCP Dip Tank
Area 24	Bldg. 283 PCP Dip Tank
Area 25	Bldg. 120 Transformer Service Area
Unit M - Area 22	Hangar 5
Area 23	Northwest Apron Area
Unit N - Area 18	Ault Field Nose Hangar
Area 19	Fuel Truck Depot
Area 20	Ault Field Sewage Clarifier
Unit O - Area 1	Beach Landfill
Area 52	Jet Engine Test Cell
Unit P - Area 17	Old Ault Field Coal Pile
Unit Q - Area 15	PD-680 Spill Area
Unit R - Area 34	Machine Gun Range Berm

By March 30, 1992, the Navy shall submit a draft Hazardous Waste Evaluation Report to U.S. EPA and Ecology. The Parties will then determine which hazardous waste units are to be remediated as operable units within the scope of the NAS Whidbey Island RI/FS process. Within thirty (30) days of the operable unit determination, the Navy, in consultation with U.S. EPA and Ecology, shall incorporate the newly identified operable units into the existing schedule or propose a separate schedule for the newly identified operable units. Additional Unit Areas will be added to this list upon discovery of the presence of hazardous substances in such Unit Areas.

24.3 The final deadlines established in this Part

1 shall be published by U.S. EPA, in conjunction with Ecology.

2 24.4 Within twenty-one (21) days of the effective
3 date of this Agreement, the Navy shall propose target dates for
4 submittal of the draft secondary documents identified in
5 Paragraph 20.7(a) - (h).

6 24.5 Within fifteen (15) days of issuance of the
7 ROD(s), the Navy shall propose target dates for submittal of
8 draft secondary documents identified in Paragraph 20.7(i) - (l),
9 and deadlines for completion of the following draft primary
10 documents:

11 (a) RD Report

12 (b) RA Work Plan

13 24.6 Within fifteen (15) days of receipt,
14 U.S. EPA, in conjunction with Ecology, shall review and provide
15 comments to the Navy regarding the deadlines and targets proposed
16 in Paragraphs 24.4 and 24.5. Within fifteen (15) days following
17 receipt of the comments the Navy shall, as appropriate, make
18 revisions and reissue the proposal. The Parties shall meet as
19 necessary to discuss and finalize the proposed deadlines. If the
20 Parties agree on proposed deadlines, the finalized deadlines
21 shall be incorporated into the appropriate Work Plans. If the
22 Parties fail to agree within thirty (30) days on the proposed
23 deadlines, the matter shall immediately be submitted for dispute
24 resolution pursuant to Part XXI of this Agreement.

25 24.7 The deadlines set forth in this Part, or to
26 be established as set forth in this Part, may be extended

1 pursuant to Part XXV of this Agreement. The Parties recognize
2 that one possible basis for extension of the deadlines for
3 completion of the Remedial Investigation and Feasibility Study
4 Reports is the identification of significant new conditions
5 during the performance of the Remedial Investigation.

7 XXV.

8 EXTENSIONS

9 25.1 Either a timetable and deadline or a schedule
10 shall be extended upon receipt of a timely request for extension
11 and when good cause exists for the requested extension. Any
12 request for extension by the Navy shall be submitted in writing
13 to the Project Managers and shall specify:

- 14 (a) The timetable and deadline or the schedule that is
15 sought to be extended;
16 (b) The length of the extension sought;
17 (c) The good cause(s) for the extension; and
18 (d) Any related timetable and deadline or schedule
19 that would be affected if the extension were
20 granted.

21 25.2 Good cause exists for an extension when
22 sought in regard to:

- 23 (a) An event of force majeure;
24 (b) A delay caused by another Party's failure to meet
25 any requirement of this Agreement;
26 (c) A delay caused by the good faith invocation of
27 dispute resolution or the initiation of judicial
28 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; and

- (e) Any other event or series of events mutually agreed to by the Parties as constituting good cause.

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

25.4 Within seven (7) days of receipt of a request for an extension of a timetable and deadline or a schedule, U.S. EPA and Ecology shall advise the Navy in writing of their respective position on the request. Any failure by U.S. EPA or Ecology to respond within the seven (7) day period shall be deemed to constitute concurrence in the request for extension. If U.S. EPA or Ecology does not concur in the requested extension, it shall include in its statement of nonconcurrence an explanation of the basis for its position.

25.5 If there is written consensus among the Project Managers that the requested extension is warranted, the Navy shall extend the affected timetable and deadline or schedule accordingly. If there is no consensus among the Project Managers 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 determination resulting from the dispute resolution process.

25.6 Within seven (7) days of receipt of a statement of nonconcurrence with the requested extension, the

Navy may invoke dispute resolution.

25.7 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 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 and 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.

XXVI.

FORCE MAJEURE

26.1 Force Majeure shall mean any event arising from causes 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:

(a) acts of God; fire, war; insurrection; civil disturbance; or explosion;

(b) unanticipated breakage or accident to machinery, equipment, or lines of pipe despite reasonably diligent maintenance;

(c) adverse weather conditions that could not be

1 reasonably anticipated, or unusual delay in transportation;

2 (d) restraint by court order or order of public
3 authority;

4 (e) inability to obtain, at a reasonable cost and
5 after exercise of reasonable diligence, any necessary
6 authorizations, approvals, permits, or licenses due to action or
7 inaction of any governmental agency or authority other than the
8 Navy;

9 (f) delays caused by compliance with applicable
10 statutes or regulations governing contracting, procurement, or
11 acquisition procedures, despite the exercise of reasonable
12 diligence; and

13 (g) insufficient availability of appropriated funds,
14 if the Navy shall have made timely request for such funds as part
15 of the budgetary process as set forth in Part XXVII of this
16 Agreement. If such an event occurs, Ecology may exercise its
17 rights as provided in Paragraph 27.6, but U.S. EPA shall be bound
18 by this Force Majeure and shall not assess stipulated penalties.

19 26.2 Force Majeure shall also include any strike or
20 other labor dispute, whether or not within the control of the
21 Parties affected thereby. Force Majeure shall not include
22 increased costs or expenses of response actions, whether or not
23 anticipated at the time such response actions were initiated.

24 26.3 Any claim of Force Majeure shall be subject to
25 dispute resolution and, where applicable, to the limitations of
26 Paragraph 27.6.

1 XXVII.

2 FUNDING

3 27.1 It is the expectation of the Parties to this
4 Agreement that all obligations of the Navy arising under this
5 Agreement will be fully funded. The Navy agrees to seek
6 sufficient funding through the United States Department of
7 Defense budgetary process to fulfill its obligations under this
8 Agreement.

9 27.2 In accordance with Section 120(e)(5)(B) of
10 CERCLA, 42 U.S.C. § 9620(e)(5)(B), the Navy shall provide to the
11 United States Department of Defense for its annual report to
12 Congress the specific cost estimates and budgetary proposals
13 associated with the implementation of this Agreement.

14 27.3 Funds authorized and appropriated annually by
15 Congress under the "Environmental Restoration, Defense"
16 appropriation in the U.S. Department of Defense Appropriation Act
17 and allocated by the Deputy Assistant Secretary of Defense
18 (Environment) to the Navy will be the source of funds for
19 activities required by this Agreement consistent with Section 211
20 of SARA, 10 U.S.C. Chapter 160. However, should the
21 Environmental Restoration, Defense appropriation be inadequate in
22 any year to meet the total Navy CERCLA implementation
23 requirements, United States Department of Defense shall employ
24 and the Navy shall follow a standardized United States Department
25 of Defense prioritization process which allocates that year's
26 appropriations in a manner which maximizes the protection of

human health and the environment. A standardized United States Department of Defense prioritization model shall be developed and utilized with the assistance of U.S. EPA and the states.

27.4 Any requirement for the payment or obligation of funds, including stipulated penalties, by the Navy established by the terms of this Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where payment or obligation of funds, including stipulated penalties, would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

27.5 If appropriated funds are not available to fulfill the Navy's obligations under this Agreement, U.S. EPA and Ecology reserve the right to initiate an action against any other person or to take any response action which would be appropriate absent this Agreement.

27.6 The Navy maintains that any requirement for the payment or obligation of funds under this Agreement is subject to the availability of appropriated funds, and that the unavailability of such funds constitutes a valid defense to any judicial action that might be brought to enforce the terms of this Agreement. Notwithstanding Paragraphs 27.1, 27.2, 27.3, 27.4, and 27.5 above, Ecology does not agree that lack of appropriation or funding constitutes a valid defense to

1 performance by the Navy. However, the Parties agree and
2 stipulate that it is premature to raise and adjudicate the
3 validity of such a defense at this time. If sufficient funds are
4 not available to fulfill the Navy's obligations under this
5 Agreement, the Parties shall meet to discuss the funding
6 shortfall, the ways of resolving it, and whether it is
7 appropriate to adjust the deadlines set forth pursuant to Part
8 XXIV affected by the funding shortfall. Any Party may elevate
9 the issue(s) directly to the SEC for resolution. Six (6) months
10 following the failure of the Navy to meet a deadline because of
11 lack of funding, Ecology shall have the right to seek judicial
12 enforcement of this Agreement. This Paragraph is not subject to
13 Part XXI, but does not exclude the consensual use of Part XXV.
14 Acceptance of this Paragraph 27.6 does not constitute a waiver by
15 the Navy of the applicability of any appropriate provisions of
16 the Anti-Deficiency Act, 31 U.S.C. § 1341, to the terms of this
17 Agreement.

18
19 XXVIII.

20 RECOVERY OF EXPENSES

21 28.1 The Navy and U.S. EPA agree to amend this
22 Part at a later date in accordance with any subsequent resolution
23 of the currently contested issue of cost reimbursement.

24 28.2 The Navy agrees to request funding and
25 reimburse Ecology, subject to the conditions and limitations set
26 forth in this Part; and subject to Part XXVII, for all reasonable

1 costs it incurs in providing services in direct support of the
2 Navy's environmental restoration activities at the Site pursuant
3 to this Agreement.

4 28.3 Reimbursable expenses shall consist only of
5 actual expenditures required to be made and actually made by
6 Ecology in providing the following assistance to the Navy:

7 (a) Timely technical review and substantive comment on
8 reports or studies which the Navy prepares in support of its
9 response actions and submits to Ecology;

10 (b) Identification and explanation of unique state
11 requirements applicable to military installations in performing
12 response actions, especially state ARARs;

13 (c) Field visits to ensure cleanup activities are
14 implemented in accordance with appropriate state requirements, or
15 in accordance with agreed upon conditions between Ecology and the
16 Navy that are established in the framework of this Agreement;

17 (d) Support and assistance to the Navy in the conduct
18 of public participation activities in accordance with federal and
19 state requirements for public involvement;

20 (e) Participation in the review and comment functions
21 of the Navy Technical Review Committees; and

22 (f) Other services specified in this Agreement.

23 28.4 Within ninety (90) days after the end of each
24 quarter of the federal fiscal year, Ecology shall submit to the
25 Navy an accounting of all state costs actually incurred during
26 that quarter in providing direct support services under this

1 Part. Such accounting shall be accompanied by cost summaries and
2 be supported by documentation which meets federal auditing
3 requirements. The summaries will set forth employee hours and
4 other expenses by major type of support service. All costs
5 submitted must be for work directly related to implementation of
6 this Agreement and not inconsistent with either the NCP or the
7 requirements described in OMB Circulars A-87 (Cost Principles for
8 State and Local Governments) and A-128 (Audits for State and
9 Local Cooperative Agreements with State and Local Governments)
10 and Standard Forms 424 and 270. The Navy has the right to audit
11 cost reports used by Ecology to develop the cost summaries.
12 Before the beginning of each fiscal year, Ecology shall supply a
13 budget estimate of what it plans to do in the next year in the
14 same level of detail as the billing documents.

15 28.5 Except as allowed pursuant to Paragraphs 28.6
16 and 28.7, within ninety (90) days of receipt of the accounting
17 provided pursuant to Paragraph 28.4, the Navy shall reimburse
18 Ecology in the amount set forth in the accounting.

19 28.6 In the event the Navy contends that any of
20 the costs set forth in the accounting provided pursuant to
21 Paragraph 28.4 are not properly payable, the matter shall be
22 resolved through a bilateral dispute resolution process set forth
23 at Paragraph 28.9.

24 28.7 The amount of reimbursement from the Navy to
25 Ecology for oversight activities associated with the Site shall
26 not exceed Three Hundred and Forty Thousand Dollars (\$340,000.00)

1 during the lifetime of this Agreement and not more than
2 Eighty-five Thousand Dollars (\$85,000.00) during any single
3 fiscal year. Either the Navy or Ecology may request, on the
4 basis of significant upward or downward revisions in the Navy
5 estimate of its total lifetime costs through construction used
6 above, a renegotiation of the Cap. Failing an agreement, either
7 the Navy or Ecology may initiate dispute resolution in accordance
8 with Paragraph 28.9. Circumstances could arise whereby
9 fluctuations in the Navy estimates or actual final costs through
10 the construction of the final remedial action creates a situation
11 where Ecology receives reimbursement in excess of the estimated
12 amount of these costs. Under these circumstances, Ecology
13 remains entitled to payment for services rendered prior to the
14 completion of a new estimate if the services are within the
15 ceiling applicable under the previous estimate. This negotiated
16 reimbursement amount reflects the judgment of the Navy and
17 Ecology that:

18 (a) Funding of support services must be constrained so
19 as to avoid unnecessary diversion of the limited Defense
20 Environmental Restoration Account funds available for the overall
21 cleanup; and

22 (b) Support services should not be disproportionate to
23 overall project costs and budget.

24 28.8 Ecology agrees to seek reimbursement for its
25 expenses solely through the mechanisms established in this Part,
26 and reimbursement provided under this Part shall be in settlement

1 of any claims for state response costs relative to the Navy's
2 environmental restoration activities at the Site.

3 28.9 Part XXI notwithstanding, this Paragraph
4 shall govern any dispute between the Navy and Ecology regarding
5 the application of this Part or any matter controlled by this
6 Part including, but not limited to, allowability of expenses and
7 limits on reimbursement. While it is the intent of the Navy and
8 Ecology that these procedures shall govern resolution of disputes
9 concerning Ecology reimbursement, informal dispute resolution is
10 encouraged.

11 (A) The Navy and Ecology Project Managers shall be the
12 initial points of contact for coordination of dispute resolution
13 under Paragraph 28.9.

14 (B) If the Navy and Ecology Project Managers are unable
15 to resolve a dispute, the matter shall be referred to the
16 Commander, WESTNAVFACENGCOM, or his designated representative,
17 and the Assistant Director, Waste Management, Washington
18 Department of Ecology, as soon as practicable, but in any event
19 within five (5) working days after the dispute is elevated by the
20 Project Managers.

21 (C) If the Commander, WESTNAVFACENGCOM, and the
22 Assistant Director, Waste Management, Washington Department of
23 Ecology, are unable to resolve the dispute within ten (10)
24 working days, the matter shall be elevated to the Director,
25 Washington Department of Ecology, and the Deputy Director for the
26 Environment, Office of the Assistant Secretary of the Navy

1 (Installation and Environment) ("I&E").

2 (D) In the event the Director, Washington Department
3 of Ecology, and the Deputy Director for the Environment, Office
4 of the Assistant Secretary of the Navy (I&E), are unable to
5 resolve a dispute, Ecology retains any legal and equitable
6 remedies it may have to recover its expenses. In addition,
7 Ecology may withdraw from this Agreement by giving ninety (90)
8 days notice to the other Parties.

9 28.10 Nothing herein shall be construed to limit
10 the ability of the Navy to contract with Ecology for technical
11 services that could otherwise be provided by a private contractor
12 including, but not limited to:

- 13 (a) Identification, investigation, and cleanup of any
14 contamination beyond the boundaries of the Site;
15 (b) Laboratory analysis; or
16 (c) Data collection for field studies.

17 28.11 The Navy and Ecology agree that the terms and
18 conditions of this Part shall become null and void when Ecology
19 enters into a Defense/State Memorandum of Agreement ("DSMOA")
20 with the U.S. Department of Defense which addresses Ecology
21 reimbursement.

22 XXIX.

23 OTHER CLAIMS

24 29.1 Nothing in this Agreement shall constitute or
25 be construed as a bar or release from any claim, cause of action,
26 or demand in law or equity by or against any persons, firm,

1 partnership, or corporation not a signatory to this Agreement for
2 any liability it may have arising out of, or relating in any way
3 to, this Agreement or the generation, storage, treatment,
4 handling, transportation, release, or disposal of any hazardous
5 substances, hazardous wastes, hazardous constituents, pollutants,
6 or contaminants found at, taken to, or taken from the Site.

7 29.2 The U.S. EPA and Ecology shall not be held as
8 a Party to any contract entered into by the Navy to implement the
9 requirements of this Agreement.

10 29.3 The Navy shall notify the appropriate federal
11 and state natural resource trustees as required by Section
12 104(b)(2) of CERCLA, 42 U.S.C. § 9604(e), and Section 2(e)(2) of
13 Exec. Order 12580. Except as provided herein, the Navy is not
14 released from any liability which they may have pursuant to any
15 provisions of state and federal law, including any claim for
16 damages for liability to destruction or loss of natural
17 resources.

18 29.4 This Agreement shall not restrict the Parties
19 from taking any legal or response action for any matter not
20 specifically part of the work covered by this Agreement.

21
22 XXX.

23 OTHER APPLICABLE LAWS

24 30.1 All actions required to be taken pursuant to
25 this Agreement shall be undertaken in accordance with the
26 requirements of all applicable state and federal laws and

1 regulations unless an exemption from such requirements is
2 specifically provided in this Agreement, CERCLA, or the NCP.

4 XXXI.

5 CONFIDENTIAL INFORMATION

6 31.1 The Navy may assert, on its own behalf or on
7 behalf of a contractor, subcontractor, or consultant, a
8 confidentiality claim covering all or part of the information
9 requested by this Agreement pursuant to 42 U.S.C. § 9604(e) and
10 applicable regulations. Analytical data shall not be claimed as
11 confidential by the Navy. Information determined to be
12 confidential by U.S. EPA pursuant to 40 C.F.R. Part 2 shall be
13 afforded the protection specified therein and such information
14 shall be treated by Ecology as confidential to the extent
15 permitted by state law. If Ecology is unable to afford the
16 confidentiality protection, the Navy is not required to submit
17 the data to Ecology. If no claim of confidentiality accompanies
18 the information when it is submitted to either regulatory agency,
19 the information may be made available to the public without
20 further notice to the Navy.

22 XXXII. TRANSFER OF PROPERTY

23 32.1 Conveyance of title, easement, or other
24 interest in the Site shall be in accordance with Section 120(h)
25 of CERCLA, 42 U.S.C. § 9620(h), and the Navy shall notify
26 U.S. EPA and Ecology of any such transfer at least ninety (90)

1 days prior to such transfer.

3 XXXIII.

4 AMENDMENT OF AGREEMENT

5 33.1 This Agreement may be amended by unanimous
6 agreement of the Navy, Ecology, and U.S. EPA. Any such amendment
7 shall be in writing, shall have as the effective date that date
8 on which it is signed by all the Parties, and shall be
9 incorporated into this Agreement.

11 XXXIV.

12 SEVERABILITY

13 34.1 If any provision of this Agreement is ruled
14 invalid, illegal, or unconstitutional, the remainder of the
15 Agreement shall not be affected by such ruling.

17 XXXV.

18 RESERVATION OF RIGHTS

19 35.1 U.S. EPA and Ecology reserve the right to
20 issue orders and/or penalties pursuant to available statutory
21 authority, or to take any other enforcement action allowable by
22 law, under the following circumstances:

- 23 (a) In the event or upon the discovery of a release or
24 threatened release not addressed by this Agreement
25 and which the Parties choose not to address by
26 modification of this Agreement;

(b) Upon U.S. EPA's or Ecology's determination that action beyond the terms of this Agreement is necessary to abate an emergency situation which threatens the public health or the environment; or

(c) Upon the occurrence or discovery of a situation beyond the scope of this Agreement, to which U.S. EPA or Ecology would be empowered to take an enforcement action and which the Parties choose not to address by modification of this Agreement.

35.2 The Navy reserves all of its rights to contest any enforcement action brought under this Paragraph.

XXXVI.

TERMINATION

36.1 The provisions of this Agreement shall be deemed satisfied and terminated upon receipt by the Navy of written notice from U.S. EPA and Ecology that the Navy has demonstrated, to the satisfaction of U.S. EPA and Ecology, that all the terms of this Agreement have been completed.


36.2 Upon a showing of satisfaction of this Agreement, the Navy may request that U.S. EPA and Ecology terminate this Agreement.

XXXVII.

EFFECTIVE DATE

37.1 This Agreement is effective upon signature by all the Parties to this Agreement.

Signature sheet for the foregoing Federal Facility
Agreement for the NAS Whidbey Island - Ault Field/Seaplane Base,
among the U.S. Environmental Protection Agency, the
U.S. Department of the Navy, and the Washington State Department
of Ecology.


JACQUELINE E. SCHAFER
Assistant Secretary of the Navy (I&E)

17 September 1990
Date

REPRESENTED BY:

Judy A. Conlow, Esq.

Signature sheet for the foregoing Federal Facility
Agreement for the NAS Whidbey Island - Ault Field/Seaplane Base,
among the U.S. Environmental Protection Agency, the
U.S. Department of the Navy, and the Washington State Department
of Ecology.

Christine O. Gregoire
CHRISTINE O. GREGOIRE, Director
Department of Ecology
State of Washington

10/16/90
Date

Kenneth O. Eikenberry
KENNETH O. EIKENBERRY, Attorney General
State of Washington

Sept. 17, 1990
Date

REPRESENTED BY:

Jerry Ackerman, Esq.

Signature sheet for the foregoing Federal Facility
Agreement for the NAS Whidbey Island - Ault Field/Seaplane Base,
among the U.S. Environmental Protection Agency, the
U.S. Department of the Navy, and the Washington State Department
of Ecology.



9/17/90

THOMAS P. DUNNE, Acting Regional Administrator
U.S. Environmental Protection Agency

Date

REPRESENTED BY:

Cynthia L. Mackey, Esq.