

PART TWO

PERMITTING/CLOSURE OF TSD UNITS/GROUPS

ARTICLE VI. FINDINGS AND DETERMINATIONS

23. The following paragraphs of this Article constitute a summary of the facts upon which EPA and Ecology are proceeding for purposes of Part Two of this Agreement. None of the facts related herein shall be considered admissions by any Party. This Article contains findings by EPA and Ecology, and shall not be used by any person related or unrelated to this Agreement for purposes other than determining the basis of this Agreement.

A. In and/or before 1943, the United States acquired approximately 560 square miles of land, now known as the Hanford Reservation. The DOE and its predecessors have operated Hanford continuously since 1943, mainly for the production of special nuclear materials for the national defense.

B. On or about August 14, 1980, DOE submitted a Notice of Hazardous Waste Activity to EPA pursuant to Section 3010 of RCRA, identifying DOE as a generator, transporter and owner and operator of a TSD Facility. On or about November 1980, DOE submitted Part A of its permit application to EPA qualifying for interim status pursuant to Section 3005 of RCRA. DOE's Part A has been modified by DOE and submitted to EPA and/or Ecology on several occasions. A revised Part A application submitted on May 20, 1988, related to activities involving Mixed Waste.

C. DOE operates and has operated since November 19, 1980, a hazardous waste management facility engaged in the treatment, storage, and disposal of Hazardous Wastes which are subject to regulation under RCRA and/or the Washington State Hazardous Waste Management Act, Ch. 70.105 RCW.

D. Since the establishment of the Hanford Site in 1943, materials subsequently defined as Hazardous Substances, pollutants and contaminants by CERCLA, materials defined as Hazardous Waste and constituents by RCRA and/or Ch. 70.105 RCW, have been produced, and disposed of or released, at various locations at the Hanford Site, including TSD Units.

24. Based upon the Finding of Fact set forth in Paragraph 23, and the information available, and without admission by DOE, EPA and Ecology have determined the following:

A. Pursuant to Sec. 6001 of RCRA, 42 U.S.C. Section 6961, DOE is subject to and must comply with RCRA and the Washington State Hazardous Waste Management Act, Ch. 70.105 RCW.

B. The Hanford Site includes certain hazardous waste treatment, storage, and disposal Units authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. Sec. 6925(e), and is subject to the permit requirements of Section 3005 of RCRA.

C. Certain wastes and constituents at the Hanford Site are Hazardous Wastes or hazardous constituents as defined by Section 1004(5) of RCRA, 42 U.S.C. Sec. 6903(5), and 40 CFR Part 261. There are also Hazardous Wastes or hazardous constituents at the Hanford Site within the meaning of Ch. 70.105 RCW and WAC 173-303.

D. The Hanford Site constitutes a facility within the meaning of Sections 3004 and 3005 of RCRA, 42 U.S.C. Secs. 6924 and 6925, and RCW 70.105.

E. The DOE is the owner of the Hanford Site.

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

ARTICLE VII. WORK

26. DOE agrees to perform the work described in this Article VII in accordance with the Action Plan. The Action Plan delineates the actions to be taken, schedules for such actions, and establishes the overall plan to conduct RCRA permitting and closures, and remedial or corrective action under CERCLA or RCRA. The Action Plan lists the Hanford TSD Units and TSD Groups which are subject to permitting and closure under this Agreement. Additional TSD Units may be listed as they are identified. Units listed in Appendix B of the Action Plan are subject to regulation under RCRA and Ch. 70.105 RCW. Ecology agrees to provide DOE with guidance and timely response to requests for guidance to assist DOE in the performance of its work under Part Two of this Agreement.

27. DOE shall comply with RCRA Permit requirements for TSD Units specifically identified for permitting or closure by the Action Plan and shall submit permit applications in accordance with the Action Plan. EPA shall issue the HSWA provisions of such permits until such authority is delegated to Ecology pursuant to Section 3006 of RCRA. The lead regulatory agency shall review such permit applications in accordance with applicable law. The RCRA Permit, whether issued by Ecology and EPA, or Ecology alone after delegation of HSWA authority, shall reference the terms of this Agreement, and provide that compliance with this Agreement and corrective action permit conditions

developed pursuant to this Agreement shall satisfy all substantive corrective action requirements of RCRA/HSWA.

28. DOE shall bring its facility into compliance with RCRA requirements specified in the Action Plan according to the schedule set forth therein. DOE shall comply with RCRA closure requirements under applicable regulations for those TSD Units specifically identified in the Action Plan. DOE shall implement closures in accordance with the Action Plan. Closures under this Article shall be regulated by Ecology under applicable law, but shall, as necessary, be coordinated with remedial action requirements of Part Three.

29. If Ecology determines that DOE is violating or has violated any RCRA requirement of this Agreement, and that formal enforcement action is appropriate, it will notify DOE in writing of the following: the facts of the violation(s); the regulation(s) or statute(s) violated; and Ecology's intention to take formal enforcement action; provided, however, that no such notice will necessarily be given for violations that Ecology considers egregious. The purpose of providing this notice is to allow DOE an opportunity to identify any facts it believes are erroneous. This notice shall be sent to the Director for DOE's Office of Environmental Assurance, Permits & Policy no later than seven (7) days before Ecology intends to take formal enforcement action. This notice (or the failure to give notice of violations that Ecology considers egregious) shall not be subject to Dispute Resolution under this Agreement. If Ecology takes formal enforcement action, the adequacy of the notice provided pursuant to this paragraph may not be challenged in any appeal. For purposes of this paragraph, taking "formal enforcement action" means issuing an order and/or penalty under chapter 70.105

RCW.

ARTICLE VIII. RESOLUTION OF DISPUTES

30. Except as otherwise specifically provided in this Agreement, if DOE objects to any Ecology disapproval, proposed modification, decision or determination made pursuant to Part Two of this Agreement (or Part Three requirements for which Ecology is the lead regulatory agency) it shall notify Ecology in writing of its objection within seven (7) days of receipt of such notice. Thereafter, DOE and Ecology shall make reasonable efforts to informally resolve disputes at the project manager level. These Dispute Resolution provisions shall not apply to Dangerous Waste permit actions which are otherwise subject to administrative or judicial appeal. These Dispute Resolution provisions shall not apply to enforcement actions which are otherwise subject to administrative or judicial appeal, except that these Dispute Resolution provisions shall apply in the event of the assessment of stipulated penalties under Article IX.

A. If resolution cannot be achieved at the project manager level within thirty (30) days of the receipt of DOE's objection, the dispute may be elevated to the Interagency Management Integration Team (IAMIT). Prior to the expiration of the thirty (30) day period DOE shall submit a written statement of dispute to the IAMIT thereby elevating the dispute to the IAMIT for resolution. This statement shall set forth the nature of the dispute, DOE's position on the dispute, supporting information and the history of the attempted resolution. The IAMIT will serve as a forum for resolution of disputes for which agreement has not been reached through informal Dispute Resolution. The Parties agree to utilize the Dispute Resolution process only

in good faith and agree to expedite, to the extent possible, the Dispute Resolution process whenever it is used. Any challenge as to whether a dispute is raised in good faith shall be subject to the provisions of this Article and addressed as part of the underlying dispute.

B. The Ecology designated member of the IAMIT is the Program Manager for the Nuclear Waste Program. DOE's designated member shall be the Assigned Executive Manager. Notice of any delegation of authority from a Party's designated member on the IAMIT shall be provided to the other Party.

C. During the period preceding the submittal of the written statement to the IAMIT, the Parties may engage in informal Dispute Resolution among the project managers. During this informal Dispute Resolution period, the Parties may meet as many times as necessary to discuss and attempt resolution of the dispute.

D. Following elevation of a dispute to the IAMIT, the IAMIT shall have twenty-one (21) days to unanimously resolve the dispute. If the IAMIT is unable to unanimously agree on a resolution of the dispute, the Director of Ecology shall make a final written decision or written determination no more than thirty-five (35) days after submission of the written statement of the dispute to the IAMIT. Upon request and prior to resolution of the dispute, Ecology's Assistant Director for Waste Management shall meet with the Deputy Manager of U.S. Department of Energy, Richland Operations Office (DOE-RL) to discuss the matter. Any such meeting shall not extend the deadline by which the Director of Ecology shall make a final decision or determination. All Parties agree that this final decision or determination shall be deemed to have been decided as an adjudicative proceeding and that DOE may challenge Ecology's final decision or determination as provided by and subject to the

standards contained in Ch. 34.05 RCW. If DOE objects to the decision or determination, DOE may file an appeal, at DOE's discretion, in either the Pollution Control Hearing Board (PCHB) or in the courts. If DOE elects to file an appeal from the decision directly in the courts, Ecology agrees that it will not raise an argument that initial jurisdiction of the matter should lie with the PCHB. For all disputes requiring a final decision or determination by the Director of Ecology, Ecology shall prepare an agency record in accordance with RCW 34.05.476. The agency record for review of such final decision or determination shall consist of the following documents: (1) the Ecology disapproval that DOE disputes; (2) the written notice of objection initiating the dispute; (3) the written statement of dispute, including all attachments; (4) any correspondence between project managers concerning the dispute; (5) IAMIT meeting minutes concerning the dispute, with attachments; (6) all other documents identified by Ecology as being considered before the final decision or determination and used as a basis for the decision or determination; (7) the Director of Ecology's final written decision or determination; and (8) this Agreement. The agency record shall constitute the basis for judicial review regarding the director's final decision or determination in accordance with RCW 34.05.558.

E. Any deadline in the Dispute Resolution process may be extended with the consent of Ecology and DOE.

F. The pendency of any dispute under this Article shall not affect DOE's responsibility for timely performance of the work required by this Agreement, except that, when DOE has delivered a signed change request to Ecology ninety (90) days or more in advance of when a milestone or other enforceable schedule or deadline under this Agreement is due and Ecology's

action on the change request has been disputed under this Article, the time period for completion of work directly affected by such dispute shall be extended for at least a period of time equal to the actual time taken to resolve any good faith dispute beyond seventy-four (74) days. In accordance with the procedures specified in Section 12 of the Action Plan, the Parties may agree to extend or postpone any milestone or other enforceable schedule or deadline under this Agreement during the pendency of any dispute. All elements of the work required by this Agreement which are not directly affected by the dispute shall continue and be completed in accordance with this Agreement.

G. In the event that Ecology assesses stipulated penalties under Article IX and DOE disputes the matter under this Article VIII, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of the Agreement. In the event that DOE does not prevail on the disputed issue, stipulated penalties may be assessed and shall be paid as provided in Article IX.

H. When Dispute Resolution is in progress, work affected by the dispute will immediately be discontinued if the Ecology project manager requests in writing that such work be stopped because, in Ecology's opinion, such work is inadequate or defective, and such inadequacy or defect is likely to yield an adverse affect on human health and environment, or is likely to have a substantial adverse affect on the remedy selection or implementation process. To the extent possible, Ecology shall give DOE prior notification that a work stoppage request is forthcoming. After stoppage of work, if DOE

believes that the work stoppage is inappropriate, DOE may meet with Ecology to discuss the work stoppage. Within fourteen (14) days of this meeting, the Ecology project manager will issue a final written decision with respect to the stoppage. Upon receipt of this final written decision of the Ecology project manager, DOE may initiate Dispute Resolution at the IAMIT level.

I. DOE shall abide by all terms and conditions of a final resolution of any dispute. Within twenty-one (21) days of the final resolution of any dispute under this Article, or under any appeal action, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule or procedure(s) and proceed to implement this Agreement according to the amended plan, schedule or procedure(s). DOE shall notify Ecology as to the action(s) taken to comply with the final resolution of a dispute.

J. Under the applicable portions of the Action Plan attached to this Agreement, Ecology will make final written decisions or determinations regarding compliance with Ch. 70.105 RCW. Disputes regarding these decisions or determinations shall be resolved utilizing the procedures described above, except as otherwise specifically provided in this Agreement. Ecology will also be making certain decisions and determinations as lead regulatory agency at certain CERCLA units pursuant to the Action Plan. Disputes involving Ecology's CERCLA decisions or determinations shall be resolved utilizing the Dispute Resolution process in Part Two, Article VIII except as otherwise provided in Part Four.

K. When DOE submits RCRA Permit applications, closure plans, and post-closure plans required under Ch. 70.105 RCW which are deficient, Ecology, as appropriate, may respond with a Notice of Deficiency (NOD) documenting

revisions necessary for compliance, or may, in the event the submission is found by Ecology to be not in good faith or to contain significant deficiencies, assess stipulated penalties in accordance with Article IX. In the event that NOD(s) are issued, the first two NODs on any submittal shall not be subject to the formal Dispute Resolution process. Any subsequent NOD may be so subject. Ecology and DOE may agree, however, to subject any NOD to Dispute Resolution.

L. In computing any period of time prescribed in this Dispute Resolution process, the day a document is received shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which case the period runs until the end of the next day that is neither a Saturday, Sunday nor a legal holiday.

ARTICLE IX. STIPULATED DANGEROUS WASTE PENALTIES

31. In the event that DOE fails to submit a Primary Document pursuant to the appropriate timetable or deadline or fails to comply with a term or condition of Part Two of this Agreement or Part Three Corrective Action requirements including milestones, Ecology may assess a stipulated penalty against DOE. A stipulated penalty may be assessed in an amount up to \$5,000 for the first week (or part thereof), and up to \$10,000 for each additional week (or part thereof) for which a failure set forth in this Paragraph occurs.

If the failure in question is not already subject to Dispute Resolution at the time such assessment is received, DOE shall have seven (7) days after receipt of the assessment to invoke Dispute Resolution on the question of whether the failure did in fact occur. DOE shall not be liable

for the stipulated penalty assessed by Ecology if the failure is determined, through the Dispute Resolution process, not to have occurred. No assessment of a stipulated penalty shall be final until the conclusion of Dispute Resolution procedures on DOE's failure to comply.

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

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

33. Stipulated penalties assessed pursuant to this Article shall be payable to the Hazardous Waste Control and Elimination account of the State Treasury.

34. All funds collected by the State from DOE penalties under this Agreement shall be used by the State as provided by the Federal Facility Compliance Act, Section 102(b).

35. In no event shall this Article give rise to a stipulated penalty in excess of the amount set forth in RCRA Section 3008.

36. This Section shall not affect DOE's ability to request an extension of a timetable, deadline, or schedule pursuant to any Section of this Agreement. No penalty shall be assessed for a violation of a timetable, deadline or schedule caused by an event of force majeure as defined under Article XLVII (Force Majeure).

37. Nothing in this Agreement shall be construed to render an employee or authorized representative of DOE personally liable for the payment of any stipulated penalty assessed pursuant to this Article.

38. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of Ecology to seek any remedies or sanctions available by virtue of DOE's violation of this Agreement or, for matters not specifically addressed by this Agreement, of the statutes and regulations upon which it is based, including but not limited to penalties, pursuant to Ch. 70.105 RCW; provided, however, that the assessment of stipulated penalties shall preclude Ecology from seeking any other penalty payments from DOE under Ch. 70.105 RCW for the same violations.

ARTICLE X. ENFORCEABILITY

39. In the event DOE or Ecology fails to comply with the RCRA provisions of this Agreement, the other Party may initiate judicial enforcement of the Agreement. In enforcing the RCRA provisions of this Agreement, a Party may seek injunctive relief, specific performance, sanctions or other relief available under applicable law. DOE and Ecology, prior to seeking enforcement, shall utilize the Dispute Resolution procedures of Article VIII, except as provided in Article XLVI (Reservation of Rights).

40. Part Two, enforceable major and interim milestones, and other

RCRA provisions of this Agreement including those related to statutory requirements, regulations, permits, closure plans, or corrective action, including record keeping and reporting shall be enforceable by citizen suits under Section 7002(a)(1)(A) of RCRA, including actions by the State of Washington, Ecology or other state agencies. DOE agrees that the State or one of its agencies is a "person" within the meaning of Section 7002(a) of RCRA.

41. The Parties agree that the RCRA provisions set forth in this Agreement which address record keeping, reporting, enforceable milestones (excluding target dates), regulations, permits, closure plans, or corrective action are RCRA statutory requirements and are thus enforceable by the Parties.

ARTICLE XI. SCHEDULE

42. A. Tank Waste Remediation System milestones will be established in accordance with Section 11.8 of the Action Plan.

B. Except as provided above, specific major and interim milestones, as agreed to by the Parties, are set forth in the Action Plan.

ARTICLE XII. COMMON TERMS

43. The provisions of Parts Four, and Five, Articles XXIII through LII below, apply to this Part Two and are incorporated herein by reference.