

law, including any claim for damages for liability to destruction of, or loss of natural resources.

144. This Agreement shall not restrict EPA and/or Ecology from taking any legal or response action for any matter not specifically part of the work covered by this Agreement.

ARTICLE XLVII. FORCE MAJEURE

145. A 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 reasonably anticipated, or unusual delay in transportation;

D. restraint by court order or order of public authority;

E. inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses due to action or inaction of any governmental agency or authority other than DOE;

F. delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence; and

G. insufficient availability of appropriated funds, if DOE shall have made timely request for such funds as part of the budgetary process as set forth in Article XLVIII (Cost, Schedule, Scope, Integration, Planning and Reporting) of this Agreement.

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

147. DOE and Ecology agree that Subparagraph B (entirely), Subparagraph C ("delay in transportation"), Subparagraph D ("order of public authority"), Subparagraph E ("at reasonable cost"), and Subparagraph G (entirely), of Paragraph 145 do not create any presumptions that such events arise from causes beyond the control of a Party. Ecology specifically reserves the right to withhold its concurrence to any extensions which are based on such events pursuant to the terms of Article XL, or to contend that such events do not constitute Force Majeure in any action to enforce this Agreement.

ARTICLE XLVIII. COST, SCHEDULE, SCOPE, INTEGRATION, PLANNING AND REPORTING

148. DOE shall take all necessary steps to integrate Hanford programs and to obtain timely funding in order to fully meet its obligations under this Agreement. This shall be accomplished in the following manner:

A. In its annual budget request, DOE shall include estimated funding levels required to achieve full compliance with this Agreement.

B. In the process of formulating its annual budget request, DOE may be subject to target funding guidance directed by the OMB. When DOE's target budget case differs from its full compliance funding case, the Parties agree to attempt to reach agreement regarding workscope, priorities, schedules/milestones, and Activity Data Sheet (ADS) funding levels required to accomplish the purpose of the Agreement, provided satisfactory progress has been made in controlling costs in accordance with the cost efficiency

initiatives. These discussions shall be conducted before DOE-RL submits its annual budget request and supporting ADSs to DOE Headquarters (DOE-HQ) under signature of the DOE-RL manager.

C. DOE-RL will submit its budget request with detailed ADSs, identifying both target and compliance funding levels, to DOE-HQ and identify any unresolved issues raised by Ecology and EPA. If these issues are not subsequently resolved prior to DOE's submission of its budget request to OMB, DOE-HQ will also identify these issues and the funding required for compliance to OMB.

D. In determining the workscope, priorities, and schedules, the Parties shall consider the values expressed by the Hanford stakeholders.

E. The Parties recognize that successful implementation of this Agreement is dependent upon the prudent use of resources, and that resource requirements and constraints should be considered during the work planning, budget formulation, and budget execution process. To ensure the development of responsible budget requests, consistent with the requirements of this Agreement and applicable federal/state statutes, the Parties will work cooperatively and in good faith.

149. The purpose of this paragraph is to establish a mechanism that will help assure adequate progress toward meeting the requirements of this Agreement. It provides for communication and consultation on work scope, priorities, schedules/milestones, and cost/funding matters. It further provides a means for performance measurement and for early identification of problems which could jeopardize compliance with the schedules and milestones of the Agreement.

A. Within two weeks after DOE Headquarters (DOE-HQ) issuance of Environmental Management planning and/or budget guidance, including target level funding guidance, to the Richland Operations Office (DOE-RL), DOE-RL

shall provide a copy of it to Ecology and EPA along with a preliminary assessment of its impacts. DOE-RL shall also provide a copy of its initial contractor budget guidance to Ecology and EPA within two weeks after issuance.

B. EPA and Ecology agree not to release confidential budget information to any other entities prior to submission by the President of his budget request to Congress, unless authorized by DOE or required to do so by court order. DOE shall seek to intervene in any proceeding brought to compel or enjoin the release of this information. If allowed to intervene, DOE shall assert its interest in, and the legal basis for, maintaining the confidentiality of this information.

C. As soon as possible after DOE-HQ issuance of its initial planning guidance but no later than two weeks prior to DOE-RL's submission of its budget request and supporting Activity Data Sheets to DOE-HQ, Ecology and EPA shall be given: 1) a management level briefing at the ADS level on the budget, including an integrated sitewide assessment of impacts on the requirements of this Agreement; and 2) the opportunity to review, comment and make integrated recommendations on that budget request, including workscope, priorities, schedules/milestones, and five year target and compliance cost/funding projections. DOE-RL shall, to the extent it deems appropriate, revise its budget request and ADSs, including workscope, to address or resolve Ecology and EPA comments prior to transmittal to DOE-HQ. DOE-RL shall notify DOE-HQ in its budget request of any comments not fully resolved to the satisfaction of all Parties, and shall identify full compliance funding levels.

D. Within 30 days after the President's submission of the budget to Congress, DOE-RL shall brief Ecology and EPA on the President's budget request at the ADS level detail. At this briefing, DOE-RL shall notify Ecology and EPA of any differences between the target and compliance case workscope and

cost/funding levels submitted in accordance with subparagraph C. above, and the actual workscope and funding levels included in the President's budget request to Congress. DOE-RL shall also provide Ecology and EPA its assessment of the impacts such differences may have on DOE's ability to meet milestones or satisfy other requirements of this Agreement.

E. DOE shall notify and discuss with Ecology and EPA, prior to transmittal to OMB, any budget amendment, supplemental appropriation request or reprogramming request and any corresponding impacts upon the workscope, and schedules, and DOE's ability to meet milestones or other requirements of this Agreement with and without the amendment, supplemental appropriation or reprogramming request.

F. Within 30 days after congressional budget appropriation, DOE-RL shall brief Ecology and EPA on the budget appropriation and subsequent funding allocations for the new fiscal year at ADS level detail. If there is a delay in congressional appropriation after the start of the fiscal year, DOE-RL shall inform Ecology and EPA of any congressional continuing resolution action, and the potential impacts, if any, on progress to achieve milestones and other requirements of the Agreement. Ecology and EPA will be given timely opportunity to review and comment on these budget appropriation and funding allocation actions, and to make recommendations for reallocation of available funds.

G. If the congressional budget appropriation differs from the funding levels required to comply with any milestones or other requirements of the Agreement, DOE-RL shall take whatever action is appropriate under the Agreement. Such action may include submitting a change request in accordance with the Action Plan, Section 12.0 entitled Changes to the Agreement. The Parties shall attempt to reach agreement on adjustments in workscope or milestones consistent with the congressional appropriation which will minimize

impacts on the requirements of this Agreement. If agreement cannot be reached, Ecology and EPA reserve the right to take appropriate action as provided for in this Agreement.

H. Ecology, DOE, and EPA Executive Managers shall meet periodically throughout the budget execution year to discuss the status of projects to be funded for the current fiscal year, the integration of programs, and events that have affected, or may affect milestones or activity within such milestones.

I. In order to ensure continuing, effective and timely interface between DOE, Ecology and EPA regarding work scope planning/scheduling, program integration, budget/funding, current year performance status, milestone tracking, and notification of problem areas, DOE shall, unless otherwise agreed to, provide the following, or their equivalent, to EPA and Ecology:

1. Annual Multi-Year Program Plans, including ADS level funding projections, as soon as possible after their development;

2. Annual Fiscal Year Work Plans, including ADS level funding profiles, as soon as possible after start of each fiscal year;

3. The monthly Approved Funding Plan (AFP), at ADS level detail, within two weeks following the start of each month;

4. Monthly Site Management System (SMS) reports shall be provided to EPA and Ecology to identify: any anticipated delays in meeting time schedules, the reason(s) for such delay and actions taken to prevent or mitigate the delay, and any potential problems that may result in a departure from the requirements and time schedules. In accomplishing this, the SMS reports shall, as a minimum, include for each program: monthly and cumulative budget, actual monthly and cumulative costs, performance measurement information including explanations of cost/schedule variances, progress in achievement of milestones, and notification of problems and program/project

delays. The appropriate contractor program managers shall sign the monthly SMS report. The signature block shall contain the statement: "The information contained within this report is complete and accurate to the best of my knowledge." At the monthly milestone review meetings, the appropriate DOE project managers will provide DOE's assessment of milestone progress and the extent to which DOE agrees or disagrees with the preceding month's SMS report. The assessment will be documented in meeting minutes signed by DOE and the lead regulatory agency. With regard to these assessments, signature of the minutes by Ecology and EPA shall indicate only that the assessment information was provided by DOE. The monthly SMS report shall also be placed in the Public Information Repositories as identified in Section 10.2 of the Action Plan.

5. Upon request, EPA and Ecology shall be provided access to available information below the ADS level of detail.

J. During the budget execution year, DOE-RL shall notify Ecology and EPA of any proposed action to internally reallocate funding at ADS levels, if such an action significantly affects workscope and schedules.

K. Within 30 days following the completion of DOE's annual midyear management review (approximately April-May of each year), DOE-RL shall brief Ecology and EPA on any decisions that significantly affect milestones under this Agreement.

L. As soon as possible following the end of each federal fiscal year, DOE-RL shall provide to EPA and Ecology the fiscal year-end SMS report, and a summary briefing on the amount of funds that have been obligated and spent during the fiscal year ended and the work that has been performed. This summary shall include, at ADS level detail, actual versus planned expenditures for the fiscal year end; a summary of carryover amounts including those available for expenditures in the following budget execution year; and

summaries/information explaining the extent of work planned versus work completed or performed during the year.

M. The three parties agree to inform and involve the public and stakeholders at key stages of integrated (cross programmatic) decision making, and at key stages of budget formulation and execution consistent with the Interim Report of the Federal Facilities Environmental Restoration Dialogue Committee. The process for informing and involving the public and stakeholders will be developed and included in the Agreement CRP.

N. The participation by Ecology and EPA in DOE's planning and budget formulation and execution process shall not affect DOE's authority over its budgets and funding level submission.

150. In accordance with Section 120(e) (5) (B) of CERCLA, 42 U.S.C. Sec. 9620(e) (5) (B), DOE shall include in its annual report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement.

151. If appropriated funds are not available to fulfill DOE's obligations under this Agreement, EPA and Ecology reserve the right to initiate any other action which would be appropriate absent this Agreement.

152. EPA and DOE agree that any requirement for the payment or obligation of funds, including stipulated penalties under Article XX (Stipulated Penalties) of this Agreement, by DOE established by the terms of this Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. Sec. 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

153. If appropriated funds are not available to fulfill DOE's

obligations under this Agreement, the Parties shall attempt to agree upon appropriate adjustments to the workscope or milestones which require the payment or obligation of such funds. If no agreement can be reached then Ecology and DOE agree that in any action by Ecology to enforce any provision of this Agreement, DOE may raise as a defense that its failure or delay was caused by the unavailability of appropriated funds. Ecology disagrees that lack of appropriations or funding is a valid defense. However, DOE and Ecology agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense. Acceptance of this Paragraph 153 does not constitute a waiver by DOE that its obligations under this Agreement are subject to the provisions of the Anti-Deficiency Act, 31 U.S.C. Sec. 1341.

ARTICLE XLIX. INCLUSION OF NONREGULATED NUCLEAR MATERIALS

154. The Parties recognize that with the close of the cold war the DOE is reassessing current management practices to ensure sound management and compliance with applicable requirements of a wide range of nuclear materials and chemicals nationwide. Many of these materials in inventory, such as surplus nuclear materials, may no longer be needed for their original purposes and have no clearly identified future use. This recognition, coupled with the Parties recognition that effective management of all Hanford cleanup and waste management activities demands a fully coordinated approach (See Agreement milestone M-33-00), has resulted in agreement to include management of nuclear materials that are not currently regulated under RCRA or CERCLA (nonregulated nuclear materials) within this Agreement.

155. Target dates pertaining to nonregulated nuclear materials are identified within this Agreement by the prefix "MX", e.g., MX-00-00T. Inclusion and management of such nonregulated nuclear materials shall be pursuant to Section 12 of the Action Plan. The Parties recognize and agree