

OPTION 1 (BASED ON MCCLELLAN AFB)

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

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

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

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

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

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

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

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

- B. “Administrative Order on Consent” or “AOC” shall mean the agreement dated [DATE] among [Parties, including EPA and the Entity performing the work] [DOCKET NO.] that provides for performance of response activities by [Entity performing the work], including but not limited to, all response actions at the Property that are not [Federal Agency] Retained Conditions.
- C. “Amendment No. 1 to the [year] FFA,” or “Amendment,” or “FFA Amendment” shall mean this document, which supplements and revises the [year] FFA, among EPA, the [Federal Agency], and [State (where an FFA party)] for the Property only.
- D. [Include only where Federal Agency Retains Conditions] “Federal Agency Retained Conditions” or “Retained Conditions” shall mean any of the following environmental conditions or response actions, for which the [Federal Agency] remains fully responsible, as defined in the ESCA and the AOC, regarding the Property: [List]
- E. “Property” shall mean those parcels of real property that the [Federal Agency] is conveying to [Transferee], as described in the Finding of Suitability for Early Transfer (“FOSET”) attached hereto.
- F. “Land Use Controls” or “LUCs” shall mean, enforceable restriction or administrative action, including engineering and institutional controls, implemented to reduce risk to human health and the environment.
- G. “Property Transfer” shall mean the transfer of the Property by deed<sup>1</sup> from the [Federal Agency] to [Transferee].
- H. “Completion of Remedial Action” shall mean the point when [Entity performing the work] has performed all necessary response actions on the Property, including implementation of LUCs, except for Long-Term Obligations and EPA has certified completion of remedial action pursuant to Section [?] of the AOC.
- I. “Long-Term Obligations” shall mean the performance of any long-term review, monitoring, and operation and maintenance activities and reporting. This includes LUC implementation and enforcement obligations that are required following the EPA’s approval of the Completion of Remedial Action.

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<sup>1</sup> Reminder: the transfer deed must retain the Federal agency’s, EPA’s, and the state’s right of access to address any Retained Conditions and the regulators’ oversight of the implementation of such conditions.

II. Section 6 of the [year] FFA (WORK TO BE PERFORMED)<sup>2</sup> is amended to add the following:

6.6 PERFORMANCE OF WORK ON PROPERTY by [Entity performing the work].<sup>3</sup>

6.6.1 Under the terms of the ESCA [or other appropriate name of the agreement], the [Federal Agency] has agreed to provide funds to [Transferee] in exchange for [Transferee]'s agreement to assist the [Federal Agency] in performing certain CERCLA response actions, including but not limited to remedial investigation and feasibility studies and remedial actions selected in Records of Decision for the Property. [If applicable, add the following statement] The [Federal Agency] is also retaining certain CERCLA response obligations at the Property: "Federal Agency Retained Conditions" as defined in the ESCA [or name of the relevant agreement]).

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

The Federal Agency Retained Conditions for the Property transaction are [List]:

6.6.2 In the event that there is a dispute between [Transferee/Entity performing the work] and the [Federal Agency] or between [Entity performing the work] and EPA concerning whether a particular required response action is a [Transferee/Entity performing the work] responsibility under the ESCA [or relevant agreement] or a Federal Agency Retained Condition, the [Federal Agency]'s continuing obligations under the FFA are not suspended and the [Federal Agency] remains responsible for such response activities pending the resolution of the dispute between [Entity performing the work] and the [Federal Agency] and EPA. The [Federal Agency] agrees that, in the event the response action is determined to be a Federal Agency Retained Condition, it will conduct the necessary response in accordance with the FFA and this Amendment 1.

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<sup>2</sup> FFAs, while quite similar generally, can differ in terms of numbering, order, and the inclusion of certain non-model provisions. If an FFA does not include a "Work to be Performed" section, for example, "Performance of Work on Property by [Entity performing the work]" would be added to the FFA as a separate, new provision. Such an approach would apply to all the suggested provisions for amendment. For convenience, this model FFA amendment uses the section numbers used in the McClellan Air Force Base FFA amendment. EPA recognizes that the section numbers may need to be revised to conform to the FFA at issue.

<sup>3</sup> If a transferee performs the work the proposed amendment language would need to be adjusted accordingly. In addition, where the transferee is doing the work, the AOC would be issued to the transferee. Typically, this FFA amendment approach would apply to 1. a third-party contractor doing the work (who does not have a stake in the property which is the scenario this version of the FFA amendment presents) or 2. the transferee doing the work.

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

6.6.4 As long as the conditions listed in Subsection 6.6.3 above are met, the following obligations and rights of the [Federal Agency] with respect to the Property shall be suspended or otherwise modified as provided in this Amendment: [Section 6] (WORK TO BE PERFORMED), [Section 10] (FORCE MAJEURE), [Section 11] (EMERGENCIES AND REMOVALS), [Section 14] (STIPULATED PENALTIES), [Section 15] (FUNDING), [Section 16] (EXEMPTIONS), [Section 20] (QUALITY ASSURANCE), provided however, that none of these Sections shall be suspended with respect to any Federal Agency Retained Conditions.

6.6.5 The Parties agree that in the event one of the conditions listed in subsection 6.6.3 above is not met, the [Federal Agency] shall resume responsibility under the [year] FFA. In the event that EPA issues a Finding of Default under [Section] of the AOC, the [Federal Agency]'s obligation to resume work may be limited to the same degree as the Finding of Default. Such responsibilities may include, but are not limited to (i) implementation of any selected response actions that have not yet been fully performed and (ii) completion of any investigations and preparation of any such deliverables not yet completed to reach a final response decision.

6.6.6 The effective date for the [Federal Agency] to resume its responsibilities under the [year] FFA, including but not limited to the requirements in Paragraph 6.6.5 immediately above, shall be the date upon which the ESCA [or relevant agreement] terminates or expires, or the date the [Federal Agency] receives a copy of EPA's written Finding of Default issued to [Entity performing the work] pursuant to [Section] of the AOC.

6.6.7 Within 30 days of the effective date for the [Federal Agency's] resumption of responsibilities as described in subsection 6.6.6 above, the [Federal Agency] will provide EPA and [State Agency] with its schedule for the implementation of all response actions remaining to be performed on the Property. To the extent EPA, [State Agency], and the [Federal Agency] disagree on the [Federal Agency]'s proposed implementation schedule, EPA or [State Agency] may initiate Dispute Resolution pursuant to [Section 12] of the [year] FFA.

6.6.8 In the event the [Federal Agency] resumes responsibility under the [year] FFA for the investigation, design, construction, and implementation of some or all CERCLA response actions required at the Property, the [Federal Agency] will continue to perform all CERCLA response actions selected prior to any Finding of Default that have not been completed. For any response action decisions issued prior to the [Federal Agency]'s resumption of the work, the [Federal Agency] may, within [30 days?] of the effective date described in subsection 6.6.6, above, propose to EPA and [State Agency] modifications to the relevant Work Plan(s) but not to the selected remedy decision as it pertains to CERCLA-required responses to a release or threat of release of a CERCLA hazardous substance or pollutant or contaminant.

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

### III. SELECTION OF RESPONSE ACTIONS

The [Federal Agency] agrees that EPA alone will select response actions for the Property, except for actions relating to Federal Agency Retained Conditions, at all times from the effective date of this Amendment to the [year] FFA, unless EPA issues a written Finding of Default to [Entity doing the work] in accordance with Section [?] of the AOC, and any dispute resolution associated with such a Finding of Default has been completed as provided in Section [12.15] hereof. For the Federal Agency Retained Conditions and a Finding of Default, selection of the remedy shall be as provided under the FFA and CERCLA Section 120(e)(4).

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

11.1 Although the [Entity performing the work], under the terms of the AOC, shall be responsible for providing notice on its discovery or awareness of a release or threat of release of a hazardous substance, pollutant, or contaminant or an emergency situation, to the extent that [Federal Agency] personnel or its contractors become aware of an emergency or other situation that may present an endangerment to public health, welfare or the environment at or near the Property, the [Federal Agency] shall notify EPA and [State] in accordance with [Section 11.1] of the FFA. For those situations that involve or pertain to a Federal Agency Retained Condition, the [Federal Agency] will take on all responsibilities outlined in [Sections 11.1 to 11.5] of the FFA upon the [Federal Agency]'s discovery, or after receipt of notice from the [Entity doing the work], EPA or [State Agency], whichever occurs first.

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

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

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

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

31.2 In consideration of the [Federal Agency]'s compliance with this Amendment and the [year] FFA, and based on the information known to the Parties or reasonably available on the effective date of this Amendment, EPA, the [Federal Agency], and [State] agree that compliance with this Amendment and the [year] FFA shall stand in lieu of any administrative, legal, and equitable remedies, as applicable, against the [Federal Agency] available to EPA and [State]

regarding the releases or threatened releases of hazardous substances, pollutants or contaminants at the Site that are the subject of a CERCLA response action conducted pursuant to this Amendment and the [year] FFA by the [Federal Agency], or [Entity performing the work] pursuant to the AOC and ESCA.<sup>4</sup>

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

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

IX. A new Section 38 of the [year] FFA is amended by adding the following:

### 38. LAND USE CONTROLS<sup>5</sup>

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

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

X. Section 39 shall be added to the [year] FFA as follows:

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

39.1 Nothing in this Amendment to the [year] FFA shall modify any term or condition of the

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<sup>4</sup> These express covenants not to sue and reservations of rights are in addition to any such covenants or reservations of rights in existing FFAs and are not intended to replace or supersede them.

<sup>5</sup> This language may need to be modified to reflect applicable state law.

[year] FFA unless expressly set forth herein. Nothing in this Amendment creates any third-party rights.

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

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

39.4 The [Federal Agency] acknowledges its ultimate liability under CERCLA to complete all necessary response actions at the Property, in accordance with CERCLA, including the performance of any transferred operational responsibilities as described in Section 39.3. The Parties acknowledge that the [Entity doing the work] under the AOC is required to perform response actions for the cleanup of the Property pursuant to the ESCA [or relevant agreement] and the AOC. In the event the ESCA [or relevant agreement] is terminated, or either [Transferee] or AOC respondent defaults under the ESCA [or relevant agreement] or AOC, the [Federal Agency] will be responsible for all such remaining obligations under CERCLA and Section 6.6.5 of the [year] FFA, as amended herein. The Parties further agree that it is to the benefit of both the citizens of the State of [state name] and of the United States for the [Federal Agency] to complete its obligations under the [year] FFA. Nothing in this Amendment to the [year] FFA pertaining to the Property will be precedent for agreements concerning any other Superfund Site.

#### Attachment (FOSET)

### AUTHORIZED SIGNATURES

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

IT IS SO AGREED:

by