DRAFT

Formatted: Highlight

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

THE DEPARTMENT OF HEALTH
STATE OF HAWAII

IN THE MATTER OF:

RED HILL BULK FUEL STORAGE FACILITY, OAHU, HAWAII,	)	
THE UNITED STATES DEPARTMENT OF THE NAVY AND	)	EPA DKT NO. RCRA 7003-R9-2015-01 DOH DKT NO. 14-UST-EA-01
DEFENSE LOGISTICS AGENCY	)	
RESPONDENTS	)	

ADMINISTRATIVE ORDER ON CONSENT

1. INTRODUCTION

(a) This administrative order on consent ("AOC") is entered into voluntarily by the DEPARTMENT OF HEALTH, STATE OF HAWAII ("DOH"); the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA") Region 9; the UNITED STATES DEPARTMENT OF THE NAVY ("NavyAVY"), acting by and through the COMMANDER, NAVY REGION HAWAII ("CNRH"); and DEFENSE LOGISTICS AGENCY ("DLA"). DOH, EPA, NavyAVY, and DLA are collectively referred to as the "Parties." DOH and EPA are collectively referred to as the "Regulatory Agencies." This AOC is a joint administrative action taken by the DOH and EPA concurrently and pursuant to their respective state and federal authorities to regulate underground storage tanks ("USTs") and waste and to protect drinking water, natural resources, human health, and the environment.

(b) This AOC provides for the performance by NavyAVY and DLA of a release assessment, response to release, and actions to minimize the threat of future releases in

connection with the field constructed underground bulk fuel storage tanks, surge tanks, pumps, and associated piping at the Red Hill Bulk Fuel Storage Facility ("Facility"), located near Pearl Harbor, on the island of Oahu in the State of Hawaii, and on any property that may be affected now or in the future by petroleum or other substances released from the Facility, as specified in Attachment A ("Statement of Work" or "SOW"). The term "Site" as used in this AOC includes the Facility and any area where petroleum or other substances released from the Facility comes to be located. The primary object of this AOC is to take steps to ensure that the groundwater resource in the vicinity of the Facility is protected.

(c) Navy and DLA's participation in this AOC shall not constitute or be construed as an admission of liability. Navy and DLA neither admit nor deny the factual allegations and legal conclusions set forth in this AOC (Sections 4 and 5, Findings of Fact and Conclusions of Law).

(d) The Parties acknowledge that this AOC has been negotiated in good faith and that this AOC is fair, reasonable, protective of human health and the environment, and is in the public interest.

2. JURISDICTION

(a) The State of Hawaii obtained EPA state program approval, effective on September 30, 2002, for Hawaii's UST program to operate in lieu of EPA's UST program under Subtitle I of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 United States Code ("U.S.C.") § 6901 *et. seq*. DOH enters into this AOC in accordance with its authority, vested in the Director of Health, to regulate underground storage tanks in conformance with EPA state program approval and the provisions of chapters 340E and 342L of the Hawaii Revised Statutes ("HRS") and the rules promulgated pursuant thereto.

(b) EPA Region 9 enters into this AOC pursuant to the authority vested in the Administrator of EPA by Section 7003 of RCRA, 42 U.S.C. § 6973, which authority has been delegated to the Regional Administrators of EPA by Delegations 8-22-A and 8-22-C (April 20, 1994), and redelegated to, among others, the Director of the Waste Management Division (now the Land Division) of EPA Region 9 by Delegations R9-8-22-A (February 11, 2013) and R9-8-22- (February 11, 2013).

ED_006532_00011847-00002

(c) Navy~~AVY~~ and DLA agree to undertake and complete all actions required by the terms and conditions of this AOC.

(d) In any action to enforce the terms of this AOC, Navy~~AVY~~ and DLA consent to and agree not to contest the authority or jurisdiction of the Regulatory Agencies to issue or enforce this AOC, and agree not to contest the validity of this AOC, its terms or conditions, or the procedures underlying or relating to them in any action brought by the Regulatory Agencies to enforce its terms or seek penalties for its violation. Navy~~AVY~~ and DLA further waive their opportunity to confer with the Administrator of EPA pursuant to 42 U.S.C. § 6961(b)(2) and any right to an administrative hearing or further review of the issuance of this AOC pursuant to any provisions of state and federal law.

(e) Navy~~AVY~~ and DLA retain their right to assert claims or defenses against any third parties with respect to the Site, and nothing in this AOC shall be interpreted as an admission of fact or law in any dispute with a third party.

3. PARTIES BOUND

(a) This AOC shall apply to and be binding upon the Parties. Navy~~AVY~~ and DLA are jointly and severally liable under this AOC.

(b) The Navy~~AVY~~ and DLA shall notify the Regulatory Agencies in writing at least sixty (60) days, or as soon as notice of the transfer is known, whichever comes first, prior to the transfer or sale of any property covered by this AOC. In addition, Navy~~AVY~~ and DLA shall provide a copy of this AOC to any successor to the Site prior to the effective date of such change. No change in ownership or operation of any property covered by this AOC or in the status of Navy~~AVY~~ and DLA shall in any way alter, diminish, or otherwise affect Navy~~AVY~~ and DLA's obligations and responsibilities under this AOC, except that such responsibility may be transferred to successor governmental organizations upon approval by the Regulatory Agencies. Approval by the Regulatory Agencies shall not be unreasonably withheld.

(c) Navy~~AVY~~ and DLA shall provide a copy of the AOC, or a website address for accessing this AOC, to all of its supervisory personnel who work on actions related to this AOC and contractors or consultants retained to conduct or monitor any portion of work ~~on-site~~ performed pursuant to this AOC within seven (7) days of the date that the last Party signs the AOC ("Effective Date") or date of such retention, whichever is later. Navy~~AVY~~ and DLA shall

ED_006532_00011847-00003

condition all contracts with the aforementioned on compliance with the terms and conditions of this AOC. NavyAVY and DLA shall instruct all supervisory personnel who work on actions related to this AOC and contractors or consultants retained to conduct or monitor any portion of work on-site to perform such work in accordance with the requirements of this AOC.

4. FINDINGS OF FACT

(a) CNRH is a division of the NavyAVY. CNRH is the command responsible for providing, maintaining, and improving shore infrastructure, service, support, and training to enable fleet operations; CNRH oversees, and shall be interpreted to include, all NavyAVY supporting commands involved in the operation or maintenance of the Red Hill Facility.

(b) DLA is a combat logistics support agency of the United States Department of Defense (DoD) providing the military services with the full spectrum of logistics, acquisition, and technical services. As the DoD executive agent for bulk petroleum, DLA executes the integrated materiel management responsibility for petroleum including: procurement, transportation, ownership, accountability, budgeting, quality assurance, and quality surveillance. Additionally, DLA plans, programs, budgets, and provides funding for maintenance and repair of certain petroleum storage and distribution facilities, including the Facility.

(c) NavyAVY is the owner of the Facility.

(d) NavyAVY and DLA are the operators of the Facility.

(e) The Facility is located near Pearl Harbor on the island of Oahu, State of Hawaii.

(f) The Facility includes twenty (20) field-constructed steel underground bulk fuel storage tanks ("tanks").

(g) Each tank has a fuel storage capacity ranging from approximately12.5 to 12.7 million gallons for a total of approximately 250 million gallons of fuel. However, as of the Effective Date, two (2) of the twenty (20) tanks are not currently in operation.

(h) The Facility was constructed and became operational in the 1940s.

(i) Federal and State programs for the management of underground storage tanks were first published in the 1980s. In January 2000, the State of Hawaii promulgated rules requiring owners and operators of such facilities to report suspected or confirmed releases from underground storage tanks. EPA granted final approval for the State of Hawaii's underground storage tank program on September 30, 2002, in lieu of Federal rules regarding USTs.

(j) The tanks at the Facility have been used at various times to store the following fuels: diesel marine fuel, diesel oil, NavyAVY Special Fuel Oil ("NSFO"), NavyAVY distillate ("ND"), aviation gasoline ("AVGAS"), motor gas ("MOGAS"), Jet Propulsion Fuel No. 5 ("JP-5") and Jet Propulsion Fuel No. 8 ("JP-8").

(k) As of the Effective Date of the AOC, the NavyAVY stores three types of fuels at the Facility: JP-5, JP-8, and diesel marine fuel.

(l) The Waimalu and Moanalua aquifers ("Aquifer identification and classification for Oahu: Groundwater protection strategy for Hawaii", February 1990), Aquifer #160 and Aquifer #171, which are underground sources of drinking water, are located near the Facility. The WaimaluAquifer #160 aquifer covers an area of 15,193 acres and the Moanalua aquiferAquifer #171 covers an area of 4,442 acres.

(m) NavyAVY's well 2254-02 is located west and hydraulically downgradient from the Facility. This well feeds into the Joint Base Pearl Harbor-Hickam Water System.

(n) The Honolulu Board of Water Supply's ("BWS") Halawa Shaft, which is part of a public water system, is near the Facility.

(o) The BWS's Moanalua well, which is part of a public water system, is near the Facility.

(p) The first report by the NavyAVY to DOH of a release from the Facility occurred on November 10, 1998, when petroleum-stained basalt cores were discovered beneath the tanks.

(q) In the early 2000s, NavyAVY performed transverse cores beneath each tank and discovered evidence of staining beneath nineteen (19) of twenty (20) tanks.

(sr) On December 9, 2013, the NavyAVY placed one of the tanks (Tank #5) at the Red Hill Facility back into service after it had undergone routine scheduled maintenance. The maintenance work consisted of cleaning, inspecting, and repairing multiple sites within the tank. Upon placing Tank #5 back into service, the NavyAVY commenced filling the tank with petroleum.

(ts) On January 13, 2014, NavyAVY discovered a loss of fuel from Tank #5 and immediately notified DOH and EPA. On January 13, 2014, NavyAVY began transferring fuel from Tank #5 to other storage tanks. The transfer of all fuel from Tank #5 was completed on January 18, 2014. On January 16, 2014, NavyAVY verbally notified DOH and EPA of a

confirmed release from Tank #5. On January 23, 2014, NavyAVY provided written notification to DOH. NavyAVY estimates the fuel loss at approximately 27,000 gallons.

(ui) The total amount released to the environment, both attributable to the January 2014 event and historical releases is unknown.

(vii) Following the January 2014 release, NavyAVY has increased the frequency of monitoring and will performed additional monitoring of NavyAVY Well 2254-01. Current dDrinking water monitoring results confirmed compliance with Maximum Contaminant Levelssafe drinking water standards both before and after the January 2014 release.

(wv) Marine diesel and jJet fuels in general, and Jet Propulsion Fuels 5 and 8 (JP-5 and JP-8) in particular, are composed of a broad, dynamic and heterogeneous mixture of chemical constituents that naturally degrade in the environment. Chronic exposure to these constituents can be harmful to human health.

5. CONCLUSIONS OF LAW AND DETERMINATIONS

(a) Hawaii Conclusions of Law and Determinations:

(i) NavyAVY and DLA are "persons" as defined in HRS §342L-1 [40 C.F.R. § 280.12].

(ii) NavyAVY is the "owner" of the Facility as defined in HRS §342L-1 [40 C.F.R. § 280.12].

(iii) NavyAVY and DLA are the "operators" of the Facility as defined in HRS §342L-1 [40 C.F.R. § 280.12].

(iv) Aquifer # 160 and #171 are "underground sources of drinking water" as that term is used in HRS chapter 340E.

(v) BWS's Halawa Shaft and Moanalua Well are parts of a "public water system" as defined in HRS §342E-1.

(vi) There have been "releases" of "regulated substances" into the environment from USTs at the Facility, as those terms are defined by HRS §342L-1 [40 C.F.R. § 280.12].

(vii) There have been releases of "contaminants" into the environment from USTs at the Facility, as that term is defined in HRS §340E-1.

(viii) NavyAVY and DLA, as the owner and/or operator of the Facility are

subject to requirements regarding response and remediation in HRS chapter 342L and HAR chapter 281-11 [40 C.F.R. § 280 Subpart E] and are subject to orders which may be necessary to protect the health of persons who are or may be users of a public water system as provided in HRS chapter 340E and the rules promulgated pursuant thereto including, but not limited to, HAR §11-19 and 11-20. Additionally, the Facility, which is federally owned and operated, is subject to "all administrative orders and all civil and administrative penalties or fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations in the same manner and to the same extent as any person is subject to such requirements," as codified in 42 U.S.C. § 6991f.

(ix) The actions Navy~~A/Y~~ and DLA have agreed to perform in accordance with this AOC are necessary to address potential impacts to human health, safety and the environment, as envisioned by HRS §§ 340E-4, 342L-9 and 342L-52, due to historical, recent and potential future releases at the Facility.

(b) EPA Conclusions of Law and Determinations:

(i) Navy~~A/Y~~ and DLA are "persons" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

(ii) EPA has determined that any fuel released from the Facility would be a "solid waste" within the meaning of Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

(iii) EPA has determined that Navy~~A/Y~~ and DLA have contributed to or are contributing to the handling, storage, treatment, transportation or disposal of solid waste at the Facility.

(iv) EPA has determined that Navy~~A/Y~~ and DLA's handling, storage, treatment, transportation, or disposal of solid waste may present an imminent and substantial endangerment to health or the environment.

(v) The actions required by this AOC may be necessary to protect ~~public~~ health and the environment.

(vi) Navy~~A/Y~~ and DLA are departments, agencies or instrumentalities of the Executive Branch of the federal government, and as such, are persons subject to the requirements of Sections 6001 of RCRA, 42 U.S.C. § 6961.

6. WORK TO BE PERFORMED

(a) Based upon the administrative record for the Site and the Findings of Fact (Section 4) and Conclusions of Law and Determinations (Section 5) set forth above, and in consideration of the promises set forth herein, it is hereby agreed to and ordered that NavyAVY and DLA comply with all provisions of this AOC, including, the Statement of Work (SOW) which is incorporated into and an enforceable part of this AOC. In addition, all Work is incorporated into and made enforceable under this AOC. The term "Work" as used in this AOC means all requirements and activities specified in the AOC, including the SOW.

(b) The Work undertaken pursuant to this AOC shall be conducted in compliance with all applicable EPA and DOH guidance, policies and procedures, and with this AOC, and is subject to approval. by the Regulatory Agencies. Approvals, disapprovals, or approvals with modification, under this AOC shall not be unreasonably withheld or delayed.

Formatted: Highlight

(c) NavyAVY and DLA shall undertake and complete all of the Work to the satisfaction of the Regulatory Agencies.

(d) The obligations of tThe NavyAVY and DLA shall commence to performing their obligations under this AOC upon itsWork shall be effective upon the Effective Date of this AOC.

(e) The DOH Project Coordinator shall be DOH's designated representative for the Site. As of the effective date of the AOC, the DOH Projector Coordinator shall be:

Steven Y.K. Chang, P.E., Chief
Solid and Hazardous Waste Branch
Department of Health
919 Ala Moana Blvd., Room 212
Honolulu, Hawaii 96814
(808) 586-4226
Steven.Chang@doh.hawaii.gov

The EPA Project Coordinator shall be EPA's designated representative for the Site. As of the Effective Date of the AOC, the EPA Project Coordinator shall be:

Bob Pallarino
U.S. EPA Region 9
Underground Storage Tank Program Office
75 Hawthorne Street (LND-4-3)
San Francisco, California 94105
(415) 947-4128
Pallarino.Bob@epa.gov

The NavyAVY and DLA Project Coordinator shall be NavyAVY and DLA's representative for the Site. As of the Effective Date of the AOC, the NavyAVY and DLA Project Coordinator shall be:

Formatted: Colorful List - Accent 11

Jimmy Miyamoto
Deputy Operations Officer
NAVFAC Hawaii
400 Marshall Road
JBPHH, HI 96860-3139
(808) 471-0196
james.miyamoto@navy.mil

Any of the Parties may change their Project Coordinators at any time. Any of the Parties making such change will provide the other Parties with written notice within fourteen (14) days of such a change.

(b) Unless otherwise provided in this AOC, all reports, correspondence, notices, or other submittals relating to or required under this AOC shall be in writing and shall be sent to the "Project Coordinators" at the addresses specified above. Unless otherwise specified in the SOW, all reports, correspondence, notices or other submittals related to or required under this AOC shall be delivered by U.S. Postal Service or private courier service to address above, or, if agreed to by the Parties, electronic mail. All correspondence shall include a reference to the "Red Hill Administrative Order on Consent."

7. REGULATORY AGENCIES' APPROVAL OF DELIVERABLES

(a) Deliverables required by this AOC shall be submitted to the Regulatory Agencies for approval or modification pursuant to Subparagraph (b). The Regulatory Agencies must receive all deliverables by the due date specified in this AOC or by schedules developed pursuant to this AOC.

(b) After review of any deliverable that is required pursuant to this AOC, the Regulatory Agencies will: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that NavyAVY and DLA modify the submission; or (e) any combination of the above. However, the Regulatory Agencies will not modify a submission without first providing the NavyAVY and DLA at least one notice of

deficiency and an opportunity to cure within thirty (30) days, except where the Regulatory Agencies determine that to do so would cause serious disruption to the Work or where the Regulatory Agencies have disapproved previous submission(s) due to material defects and the Regulatory Agencies determine that the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

(c) In the event of approval, approval upon conditions, or modification by the Regulatory Agencies, pursuant to Subparagraph (b), NavyAVY and DLA shall proceed to take any action required by the deliverable, as approved or modified by the Regulatory Agencies subject only to Navy and DLA's right to invoke the Dispute Resolution procedures set forth in Section 14 (Dispute Resolution) with respect to the modifications or conditions made by the Regulatory Agencies. In the event that the Regulatory Agencies modify the submission to cure the deficiencies pursuant to Subparagraph (b) and the Regulatory Agencies determine the submission has a material defect, the Regulatory Agencies retain their right to seek stipulated penalties, as provided in Section 15 (Penalties).

(d) Upon receipt of a notice of disapproval, in whole or in part, NavyAVY and DLA shall, within thirty (30) days or such longer time as specified by the Regulatory Agencies in such notice, correct the deficiencies with respect to any disapproved part and resubmit the deliverable for approval. Any stipulated penalties applicable to the submission, as provided in the stipulated penalty provisions of Section 15 (Penalties), shall be stayed during the thirty (30) day opportunity to cure period or other specified period. A written explanation will accompany any disapproval, in whole or in part, by the Regulatory Agencies, including the identification of a material defect.

(e) Notwithstanding the receipt of a notice of disapproval, NavyAVY and DLA shall proceed, at the direction of the Regulatory Agencies, to take any action required by any unrelated non-deficient portion of the submission. Implementation of any unrelated non-deficient portion of a submission shall not relieve NavyAVY and DLA of liability for stipulated penalties for the disapproved portion under Section 15 (Penalties).

(f) In the event that a resubmitted deliverable, or portion thereof, is disapproved by the Regulatory Agencies, the Regulatory Agencies may again require NavyAVY and DLA to correct the deficiencies, in accordance with the preceding Paragraphs. The Regulatory Agencies

also retain the right to modify or develop the plan, report or other item, consistent with Subparagraph (b). NavyAVY and DLA shall implement any action as required in a deliverable which has been modified or developed by the Regulatory Agencies, subject only to the NavyAVY and DLA's right to invoke the procedures set forth in Section 14 (Dispute Resolution).

(g) If upon resubmission, a deliverable is disapproved or modified by the Regulatory Agencies due to a material defect previously identified by the Regulatory Agencies in accordance with Subsection 7(d), NavyAVY and DLA shall be deemed to have failed to submit such deliverable timely and adequately unless NavyAVY and DLA invoke the dispute resolution procedures set forth in Section 14 (Dispute Resolution) and the Regulatory Agencies' action to disapprove or modify a deliverable is overturned pursuant to that Section. The provisions of Section 14 (Dispute Resolution) and Section 15 (Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If the Regulatory AgenciesEPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section 15 (Penalties).

(h) The content and purpose ofAll deliverables required to be submitted to the Regulatory Agencies under this AOC, shall, upon approval or modification by the Regulatory Agencies, be incorporated into and made enforceable under this AOC. In the event the Regulatory Agencies approve or modify a portion of a deliverable required to be submitted to the Regulatory Agencies under this AOC, the approved or modified portion shall be enforceable under this AOC. Navy and DLA shall implement all deliverables in accordance with the schedule and provisions approved by the Regulatory Agencies.

8. MODIFICATION OF THE SOW AND THIS AOC AND ADDITIONAL WORK[]

(a) Modification of the Work in the SOW

(i) If at any time during the implementation of the SOW, NavyAVY and DLA identify a need for a compliance date modification or modification of the Work in the SOW, NavyAVY and DLA shall submit a memorandum documenting the need for the modification to the Project Coordinators of the Regulatory Agencies. The Project Coordinators of the Regulatory Agencies will determine if the modification is warranted and will provide

written approval or disapproval. If disapproved, the Regulatory Agencies will provide a written explanation of the reason for the disapproval. Any approved, written modification of a compliance date or modification of Work required by this AOC shall be incorporated by reference into this AOC.

(ii) In the event that during the performance of this AOC, the Navy~~AVY~~ and/or DLA encounters any condition or situation that constitutes an emergency situation or may present an immediate threat to human health or the environment, Navy~~AVY~~ and DLA shall immediately take all appropriate actions to prevent and/or minimize such emergency or threat, and shall immediately notify the DOH Project Coordinator and the EPA Project Coordinator. Navy~~AVY~~ and DLA shall take such immediate and appropriate actions in consultation with the DOH Project Coordinator and the EPA Project Coordinator. Navy~~AVY~~ and DLA shall then submit to DOH and EPA written notification of such emergency or threat at the Site within twenty-four (24) hours of such discovery and, if further action is required, submit a plan to further mitigate the threat within seven (7) days of sending the written notification of the emergency. After approval or approval with modification of the plan by the Regulatory Agencies, Navy~~AVY~~ and DLA shall implement the plan as approved or modified and the plan shall be incorporated by reference into and made part of this AOC and be enforceable as such. In the case of an extreme emergency, Navy~~AVY~~ and DLA may act as they deem appropriate, at their own risk, to protect human health or the environment. In the case where Navy~~AVY~~ and DLA have acted as they deem appropriate due to extreme emergency, the Navy~~AVY~~ and DLA shall notify EPA of the nature of the extreme emergency within twenty-four (24) hours of such discovery and within seven (7) days of taking the action, submit a report detailing such steps taken to prevent and/or mitigate the extreme emergency and identify for approval by the Regulatory Agencies any future actions that the Navy~~AVY~~ and DLA intend to take to prevent and/or mitigate the extreme emergency. In the event that Navy~~AVY~~ and DLA fail to take appropriate response action as required by this Paragraph, either or both of the Regulatory Agencies may take a response action consistent with their statutory and regulatory authorities and may require Navy~~AVY~~ and DLA to reimburse them for their response costs pursuant to those authorities.

(b) Modification of this AOC

(i) This AOC may be modified only by the mutual agreement of the Parties. Any agreed modifications shall be in writing; be signed by all the Parties; have as their effective date the date on which the last Party signs the modification; and be incorporated into and be enforceable under this AOC.

(ii) No informal advice, guidance, suggestion, or comment by the Regulatory Agencies regarding deliverables submitted by NavyAVY and DLA shall relieve NavyAVY and DLA of their obligation to obtain such formal approval as may be required by this AOC, and to comply with all requirements of this AOC unless it is modified as provided under this AOC. Any deliverables, required by this AOC are, upon approval by the Regulatory Agencies, incorporated into and enforceable under this AOC.

c. Additional Work. The Regulatory Agencies may determine, or NavyAVY and DLA may propose, that certain tasks or activities are necessary in addition to or in lieu of the Work when such additional performance is necessary to meet the objectives set forth in section I (Introduction). The Regulatory Agencies may determine that NavyAVY and DLA shall perform any additional work and the Regulatory Agencies will specify, in writing, the basis for the determination that any additional work is necessary. Within thirty (30) days after the receipt of such determination, NavyAVY and DLA shall have the opportunity to meet or confer with the Regulatory Agencies to discuss any additional work. Upon meeting or conferring, the Parties shall agree on a schedule for submitting a work plan for additional work; the NavyAVY and DLA shall submit the schedule for approval within the finalization of a finalization of such a but such submission schedule shall be no longer than thirtysixty (360) days from the NavyAVY and DLA's meeting or conferring on the additional work, unless otherwise agreed to by the Parties. Upon approval of a work plan, NavyAVY and DLA shall implement the work plan in accordance with the schedule and provisions contained therein. The work plan shall be incorporated by reference into and made a part of this AOC and be enforceable as such.

9. DOCUMENT CERTIFICATION[]

(a) Any deliverable submitted by NavyAVY and DLA pursuant to this AOC which makes recommendations as to whether or not further actions are necessary, or makes any representation concerning Respondent's compliance or noncompliance with any requirement of

~~this AOC~~ shall be certified by the Commander of Navy~~AVY~~ Region Hawaii or the Regional Engineer for CNRH or designee but no lower than the Deputy Regional Engineer.

(b) The certification required by Paragraph 9.a. above, shall be in the following form:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is, to be the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fines and imprisonment for knowing violation.

Signature:_____

Name:_____

Title:_____

Date:_____

10. SAMPLING, ACCESS AND DOCUMENT AVAILABILITY

(a) Sampling and Analysis

(i) All results of sampling, testing, modeling or other data generated (including raw data, which shall be made available if requested) by Navy~~AVY~~ and DLA, or on Navy~~AVY~~ and DLA's behalf, during implementation of this AOC shall be submitted to the Regulatory Agencies within thirty (30) calendar days of Navy~~AVY~~ and DLA's receipt of the data. Data shall be provided in the same format that it was provided to the Navy unless a different~~the~~ format is otherwise agreed to by the Parties. Upon request, the Regulatory Agencies will make available to Navy~~AVY~~ and DLA data generated by DOH or EPA for the purposes of oversight of the Work unless it is exempt from disclosure by any federal or state law or regulation. All sampling and analysis shall be subject to a quality assurance and control process included in the SOW and in plans developed under the SOW.

Formatted: Not Highlight

(ii) Navy~~AVY~~ and DLA shall provide written notice to the Regulatory

Agencies at least seven (7) calendar days prior to conducting field sampling, or as otherwise agreed to by the Parties. At the Regulatory Agencies' request, NavyAVY and DLA shall allow split or duplicate samples to be taken by the Regulatory Agencies.

(b) Access for Areas Controlled by NavyAVY and/or DLA

(i) EPA has the authority to enter the Site under federal law and DOH has the authority to enter the Site under state law. The Regulatory agencies and/or their representatives have the

authority to enter the Site under federal and state law.

Formatted: Indent: Left: 0.5", First line: 0.5"

(ii) The Navy and DLA shall provide the Regulatory Agencies and/or their representatives with access to the Site at all reasonable times for the purposes consistent with the provisions of this AOC. Such access shall include, but not be limited to: inspecting records, logs, contracts, and other documents relevant to implementation of this Agreement; reviewing and monitoring the progress of the NavyAVY an d DLA, its contractors, and lessees in carrying out the activities under this AOC; conducting tests that the Regulatory Agencies deem necessary; assessing the need for planning additional response actions at the Site; and verifying data or information submitted to the Regulatory Agencies.

(iii) NavyAVY and DLA shall honor all requests for access to the Site made by the Regulatory Agencies subject to the requirements in Subparagraph v. NavyAVY and DLA may require presentation of credentials showing the bearer's identification and that he/she is an employee or agent of the Regulatory Agencies, including contractors employed by either of the Regulatory Agencies. NAVY and DLA's Project Coordinator or his/her designee shall provide briefing information, coordinate access and escort to restricted or controlled-access areas, arrange for base passes, and coordinate any other access requests that arise. NavyCNRH and DLA shall use their best efforts to ensure that conformance with the requirements of this Subsection do not delay access.

(iv) The rights granted in this Section to the Regulatory Agencies regarding access shall be subject to regulations and statutes, as may be necessary to protect national security information ("classified information") as defined in Executive Order 12958, and comply with health and safety requirements. Such requirement shall not be applied so as to

unreasonably hinder the Regulatory Agencies from carrying out their responsibilities and authority pursuant to this AOC.

(v) The ~~entire~~ Facility is a controlled access area and subject to safety and security requirements. Other parts of the Site may be controlled or restricted. Navy~~AVY~~ and DLA shall provide an escort whenever the Regulatory Agencies require access to controlled or restricted areas for purposes consistent with the provision of this AOC. The Regulatory Agencies shall provide reasonable notice to the Navy~~AVY~~ and DLA Project Coordinator, or his or her designee, to request any necessary escorts for such areas. Navy~~AVY~~ and DLA shall not require an escort to any area of the Site unless it is a restricted or controlled-access area. Upon request of the Regulatory Agencies, Navy~~AVY~~ and DLA shall promptly provide a written list of current restricted or controlled-access areas of the Site.

(vi) The Regulatory Agencies shall have the right to enter all areas of the Site that are entered by contractors.

(vii) Upon a denial of any aspect of a request of access, Navy~~AVY~~ and DLA shall provide an immediate explanation of the reason for the denial, including reference to any applicable regulations, and upon request, a copy of such regulations. Within forty-eight (48) hours, Navy~~AVY~~ and DLA shall provide a written explanation for the denial. To the extent possible, Navy~~AVY~~ and DLA shall expeditiously provide a recommendation for accommodating the requested access in an alternate manner.

(viii) Pursuant to this Section, any ~~unreasonable~~ denial of access contrary to the terms of this AOC at reasonable times to any portion of the Site, where a request for access was made for the purposes of enforcing the requirements of federal or state law, or implementing or enforcing this AOC, shall be construed as a violation of the terms of this AOC subject to the penalty provisions outlined in Section 15 (Penalties) of this AOC.

Formatted: Indent: Left: 0.5", First line: 0.5"

(c) Access for Areas Not Controlled by Navy~~AVY~~ and/or DLA

~~(i)~~ Where action under this AOC is to be performed in areas owned by, or in possession of, someone other than Navy~~AVY~~ or DLA, Navy~~AVY~~ and DLA shall use their best efforts to obtain all necessary access agreements in a timely manner. Navy~~AVY~~ and DLA shall commence efforts to obtain such agreements within thirty (30) days of approval of any Work for which access is necessary. Any such access agreement shall provide for access by

Formatted: Indent: First line: 0.5", Pattern: Clear

the Regulatory Agencies and their representatives to move freely in order to conduct actions that the Regulatory Agencies determine to be necessary. The access agreement shall specify that NavyAVY and DLA are not the Regulatory Agencies' representative(s) with respect to any liabilities associated with activities to be performed. NavyAVY and DLA shall provide DOH's Project Coordinator and EPA's Project Coordinator with copies of any access agreements. NavyAVY and DLA shall immediately notify the Regulatory Agencies if after using NavyAVY and DLA's best efforts, they are unable to obtain such agreements within the time required. Best efforts as used in this paragraph shall include, at a minimum, a certified letter from NavyAVY and DLA to the present owner of such property requesting access agreements to permit NavyAVY and DLA, the Regulatory Agencies, and the Regulatory Agencies' authorized representatives to enter such property, and the offer of payment of reasonable sums of money in consideration of granting access. NavyAVY and DLA shall, within ten (10) calendar days of receipt of a denial of access, submit in writing, a description of their efforts to obtain access. The Regulatory Agencies may, at their discretion, assist NavyAVY and DLA in obtaining access. Where access on state owned property is needed, DOH will make best efforts to assist NavyAVY and DLA with access.

Formatted: Underline

(d) Document Availability. All data, information, and records created or maintained relating to the Site shall be made available to the Regulators upon request unless Respondent asserts a claim that such documents are legally privileged from disclosure and meets the burden of demonstrating to the Regulators that such a privilege exists. NavyAVY and DLA may assert a claim that certain documents or portions of documents are protected from public disclosure under federal or state law. (e.g., disclosure of documents will compromise national security, or reveal procurement sensitive information). NavyAVY and DLA shall clearly mark the material in which such a claim is asserted (e.g., documents shall be marked on each page and shall be reasonably segregated) and cite to the legal authority allowing withholding. If no such claim accompanies the information when it is submitted to the Regulatory Agencies, it may be made available to the public by EPA or DOH without further notice to NavyAVY and DLA. Respondent agrees not to assert such claims with respect to any data related to Site conditions, including but not limited to, sampling, analytical, monitoring, hydrogeologic, scientific, chemical or engineering data or any other documents or information evidencing conditions at or around

the Site.~~(e) All data, information, and records created or maintained relating to any Solid or Hazardous Waste found at the Site shall be made available to the Regulators upon request unless Respondent asserts a claim that such documents are legally privileged from disclosure. Respondent shall have the burden of demonstrating to the Regulators that such privilege exists.~~

(~~f~~e) Nothing in this AOC shall be construed to limit the Regulatory Agencies' right of access, entry, inspection, and information gathering pursuant to applicable law.

11. COMPLIANCE WITH OTHER LAWS[]

~~(a)~~ Navy~~AVY~~ and DLA shall perform all actions required pursuant to this AOC in accordance with all applicable local, state, and federal laws and regulations. Navy~~AVY~~ and DLA shall use best efforts to obtain or cause their representatives to obtain all permits and approvals necessary under such laws and regulations in a timely manner so as not to delay the Work required by this AOC.

[]12. FUNDING OF THE WORK

(a) It is further agreed to and ordered that Navy~~AVY~~ and DLA timely seek sufficient funding through their budgetary processes to finance and perform all the Work. It is the expectation of the Parties to this AOC that all obligations of Navy and DLA arising under this AOC will be fully funded.

(b) Any requirement for the payment or obligation of funds, including stipulated penalties, by Navy~~AVY~~ or DLA, established by the terms of this AOC may be subject to the availability of appropriated funds. 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.

(c) Should funds be inadequate in any year to meet the requirements of this AOC, Navy~~AVY~~ and DLA shall, in consultation with the Regulatory Agencies, prioritize and allocate that year's funds ~~that can be applied to the Facility in~~ a manner which maximizes the protection of human health and the environment, consistent with policy and regulations of the Parties. In addition, if funds are not available to fulfill Navy~~AVY~~ and DLA's obligations under this AOC, DOH and EPA reserve their respective rights to initiate any action against any person, including an action to assess stipulated penalties under Section 15 (Penalties), or an action to invoke dispute resolution under Section 14 (Dispute Resolution), or to take any response action, which would be appropriate.

Formatted: Highlight

13. REIMBURSEMENT OF DOH COSTS

(a) NavyAVY and DLA shall make good faith efforts to negotiate a separate cooperative agreement or make other arrangements with DOH for reimbursement of reasonable oversight costs incurred by DOH with respect to the Work. Oversight costs shall mean reasonable and necessary costs above and beyond normal regulatory responsibilities (i.e., required overtime or contracted effort) that DOH incurs in monitoring NavyAVY's and DLA's performance under this AOC to determine whether such performance is consistent with the requirements of this AOC, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this AOC. Reasonable DOH oversight costs shall be limited to no more than fifty thousand dollars ($50,000) per calendar year unless otherwise agreed in writing by Navy and DLA. DOH shall advise NavyAVY and DLA prior to accruing any costs for which it intends to seek reimbursement pursuant to this section and shall obtain concurrence that such costs are reasonable. If the NavyAVY, DLA and DOH cannot agree on the reasonableness of the proposed costs, DOH, Navy and DLA shall attempt to resolve any disputes under this section among themselves. IfNavy, DOH and DLA are unablewill attempt to resolve a dispute arising under this Section, Navy, DLA, or DOHmay invokeamong themselves prior to invoking the dispute resolution procedures of Section 14 (Dispute Resolution).

(b) DOH reserves the right to bring an action against NavyAVY and DLA under any applicable law for recovery of all reasonable response costs, including oversight costs, incurred by DOH with respect to the Site that have not been reimbursed by NavyNAVY and DLA if the NavyAVY and DLA and DOH fail to enter into a separate cooperative agreement or make other arrangements for reimbursement of reasonable oversight costs incurred by DOH with respect to the Work.

14. DISPUTE RESOLUTION

(a) The Parties intend to work cooperatively to avoid disputes in the implementation of the AOC. The Parties shall make reasonable efforts to resolve disputes informally at the lowest level. The process for dispute resolution set forth in this Section shall be the exclusive remedy through which the Parties resolve any and all disputes arising from this AOC and the implementation and execution of the Work. At any point during the dispute resolution process, NavyAVY and DLA may withdraw their dispute and commence or resume the previously

ED_006532_00011847-00019

disputed Work in accordance with direction from the Regulatory Agencies.

(b) A dispute resolution committee ("DRC") shall serve as the initial forum for resolution of disputes for which agreement has not been reached through informal dispute resolution among the Parties. Each Party shall designate one individual and an alternate to serve on the DRC, and may change those designations at will, with written notice to be provided to the other Parties, but shall at all times have persons so designated and available to participate in the dispute resolution process as needed. The persons designated to serve on the DRC shall be employed at the senior management level (e.g., Senior Executive Service (SES) or equivalent) or be delegated the authority in writing to participate on the DRC by an SES or equivalent level official, or higher, for the purposes of dispute resolution under this agreement.

(i) Within thirty (30) days after any action which leads to or generates a dispute, the disputing Party shall submit to the DRC a written statement of dispute setting forth the nature of the dispute, the disputing Party's position with respect to the dispute and the technical, legal and factual information the disputing Party is relying upon to support its position.

(ii) Prior to any Party's issuance of a written statement of dispute, the disputing Party shall engage the other Parties in informal dispute resolution among the Project Coordinators and/or their immediate supervisors. During this informal dispute resolution period, the Parties shall meet and/or confer as many times as are necessary to discuss and attempt resolution of the dispute.

(iii) Within twenty (20) calendar days of receipt by the DRC of the disputing Party's written request for formal dispute resolution, unless additional time is provided by the DRC, the other Parties may submit their own statements of position with respect to the dispute to the DRC for its consideration.

Formatted: Colorful List - Accent 11

(iv) The DRC shall have forty-five (45) calendar days from the date it receives a timely written request from the disputing Party for formal dispute resolution to unanimously resolve the dispute and issue a written decision signed by the designee of each Party then serving on the DRC, except that such designees may agree unanimously to extend the period of time to reach decision if necessary. This decision may include any necessary findings and instructions, as appropriate, to proceed with Work interrupted or delayed by the dispute.

(c) In the event the DRC is unable to unanimously resolve the dispute within the

forty-five (45) day period, the written statement of dispute shall be forwarded to the Senior Executive Committee (SEC) for resolution, within ten (10) days after the close of the forty-five (45) day period. The EPA's representative on the SEC is the Regional Administrator of EPA Region 9. The Hawaii Department of Health's representative on the SEC is the Director of Health. The Navy~~A.V.Y.~~'s representative on the SEC is the Commander Navy Installations Command. The DLA's representative on the SEC is the [DLA's equivalent]. The SEC members shall, as appropriate, confer, meet, and exert their best efforts to resolve the dispute and issue a unanimous written decision signed by all Parties. If unanimous resolution of the dispute is not reached within thirty (30) days of elevation to the SEC, the EPA's Regional Administrator shall issue a written position on the dispute. The Assistant Secretary of the Navy ~~for Energy, Installations, and Environment (ASN (EI&E))~~ , the [Equivalent DLA] or the Governor of Hawaii may, within thirty (30) days of the EPA's Regional Administrator's issuance of the EPA's position, issue a written notice elevating the dispute to the Administrator of EPA for resolution. In the event that Navy~~A.V.Y.~~, DLA or DOH elects not to elevate the dispute to the EPA Administrator within the designated thirty (30) day escalation period, the other Parties shall be deemed to have agreed with the EPA's Regional Administrator's written position with respect to the dispute.

Formatted: Highlight

(d) Upon elevation of the dispute to the Administrator of the EPA pursuant to Paragraph 13.c. above, the EPA Administrator will review and resolve the dispute within thirty (30) days of receipt of the dispute unless the EPA Administrator, in her sole discretion, determines that additional time is required. Upon request, and prior to resolving the dispute, the EPA Administrator will meet and confer with the Secretary of the Navy~~A.V.Y.~~, the [DLA equivalent to the Secretary of the NAVY], and the Governor to discuss the issue(s) under dispute. Upon resolution, the EPA Administrator will provide the other Parties with a written final decision setting forth resolution of the dispute.

(e) The existence of a dispute and the Regulatory Agencies' consideration of matters placed in dispute shall not excuse, toll, or suspend any compliance obligation or deadline required pursuant to this AOC during the pendency of the dispute resolution process except as agreed by the Regulatory Agencies in writing pursuant to Section 9 of this AOC or determined by the Administrator or his or her designee. Stipulated penalties for all matters related to the

issues in dispute shall be tolled from the submission of the written position to the DRC to the resolution of the dispute. In the event that a dispute is resolved in favor of NavyAVY and DLA pursuant to this Section, stipulated penalties incurred with respect to the specific subject of that dispute will not be due and owing.

(f) Within thirty (30) calendar days of receipt of any final decision and instructions with respect to any dispute resolved pursuant to the procedures specified in this Section, unless otherwise specified in the decision, NavyAVY and DLA shall incorporate the final decision and instructions into the appropriate plan, schedule or procedures and implement this AOC in accordance with such plan, schedule or procedures.

(g) Resolution of a dispute pursuant to this Section constitutes a final resolution of any dispute arising under this AOC. All Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Section of the AOC. ~~except as may otherwise be provided by Presidential exemption pursuant to 42 U.S.C. § 6961 or 42 U.S.C. § 6991f.~~

Commented [RR1]: Added this to its own section

15. PENALTIES

(a) In the event that NavyAVY and/or DLA fails to comply with any term, condition, directive or requirement of this AOC, EPA and/or DOH may assess and NavyAVY and DLA shall be liable for stipulated penalties in the amounts set forth in this Section unless a Force Majeure event has occurred as defined in Section 17 (Force Majeure) and the Regulatory Agencies have approved the extension of a deadline as required by that Section. Compliance with this AOC by NavyAVY and DLA shall include completion of any Work in accordance with this AOC, and within the specified time schedules approved under this AOC. A stipulated penalty may be assessed in an amount not to exceed $5,000 for the first week (or part thereof) and $10,000 for each additional week (or part thereof) for which a failure set forth in this subsection occurs.

(b) Stipulated penalties incurred pursuant to this Section shall begin to accrue on the day after complete performance is due or the day the violation occurs and shall continue to accrue until the violation is corrected to the satisfaction of the Regulatory Agencies.

(c) Upon determining that NavyAVY and DLA have failed in a manner set forth in this Subsection, the EPA or the DOH ~~will~~may notify NavyAVY and DLA. Any such notification shall be in writing. If the failure in question is not already subject to dispute resolution at the

time such notice is received, NavyAVY and DLA shall have thirty (30) days after receipt of the notice to invoke dispute resolution on the question of whether the failure did in fact occur and whether there is no mitigating reason for the failure. NavyAVY and DLA shall not be liable for the stipulated penalty assessed by EPA and DOH if the failure is determined, through the dispute resolution process, not to have occurred. Where dispute resolution is invoked, no assessment of a stipulated penalty shall be final until the conclusion of dispute resolution procedures related to the assessment of the stipulated penalty.

(d) No later than sixty (60) days after receipt of a written demand for payment from the Regulatory Agencies, unless the dispute resolution provisions of Section 143 (Dispute Resolution) are invoked, NavyAVY and DLA shall pay the penalty. If the stipulated penalties become payable by the NavyAVY and DLA, they shall pay one half (50%) of the total penalty amount by cashier's or certified check payable to the "State of Hawaii Director of Finance" for deposit into the Hawaii's Leaking Underground Storage Tank Fund [HRS 342L-51] and delivered to the Director's Office, 1250 Punchbowl Street, Honolulu, Hawaii. They shall pay the other half (50%) of the total penalty amount by certified or cashier's check payable to the United States Treasury and delivered to the Cincinnati Finance, US EPA, MS-NMD, 26 W ML King Drive, Cincinnati, OH 4526-0001, St. Louis, MO 63196-9000, or other agreed-to method. All payments by NavyAVY and DLA shall reference the NavyAVY and DLA's name and address, and the docket number for this action.

(e) This Section shall not affect NavyAVY or DLA's ability to obtain an extension of a timetable, deadline, or schedule pursuant to Section 8 of this AOC.

(f) Nothing in this AOC shall be construed to render any officer or employee NavyAVY or DLA personally liable for the payment of any stipulated penalty assessed pursuant to this Section.

16. ENFORCEABILITY

(a) The Parties agree to exhaust their rights under Section 14 (Dispute Resolution), prior to DOH exercising any rights to judicial review that it may have.

(b) Nothing in this AOC shall preclude the State of Hawaii from seeking to enforce the terms and conditions of this AOC as a final order of DOH against the NavyNAVY and DLA in a civil action to collect penalties and/or enforce its provisions pursuant to HRS §§ 340E-4,

ED_006532_00011847-00023

340E-8, 342L-8, 342L-9, 342L-12, and 342L-52, Section 7002 of RCRA, 42 U.S.C. § 6972, or in a civil action for breach of this AOC and ~~seek~~from seeking any other relief as may be necessary to protect the public health, a source of drinking water and the environment.

(c) Failure to diligently conduct the Work may subject Navy~~AVY~~ and DLA to a citizen's suit under Section 7002 of RCRA, 42 U.S.C. § 6972.

Formatted: Highlight

Formatted: Highlight

17. FORCE MAJEURE

(a) Navy~~AVY~~ and DLA agree to perform all requirements under this AOC within the time limits established under this AOC, unless the performance is delayed by a force majeure. For purposes of this AOC, a force majeure is defined as any event arising from causes beyond the control of Navy~~AVY~~ and DLA, or Navy~~AVY~~ or DLA's contractors, which delays or prevents performance of any obligation under this AOC despite Navy~~NAVY~~ and DLA's best efforts to fulfill the obligation. The requirement that Navy~~AVY~~ and DLA exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event: (1) as it is occurring, and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. Force majeure does not include financial inability to complete the Work, increased cost of performance, changes in Navy~~AVY~~ and DLA's business or economic circumstances, or inability to attain media cleanup standards.

(b) If any event occurs or has occurred that may delay the performance of any obligation under this AOC, whether or not caused by a force majeure event, Navy~~AVY~~ and DLA shall orally notify the Regulatory Agencies within forty-eight (48) hours of when Navy~~NAVY~~ or DLA knew or should have known that the event might cause a delay. Such notice shall: (1) identify the event causing the delay, or anticipated to cause delay, and the anticipated duration of the delay; (2) provide Navy~~AVY~~ and DLA's rationale for attributing such delay to a force majeure event; (3) state the measures taken or to be taken to prevent or minimize the delay; (4) estimate the timetable for implementation of those measures; and (5) state whether, in the opinion of Navy~~AVY~~ and DLA, such event may cause or contribute to an endangerment to public health or the environment. Navy~~AVY~~ and DLA shall undertake best efforts to avoid and minimize the delay. Failure to comply with the notice provision of this paragraph and to

undertake best efforts to avoid and minimize the delay shall waive any claim of force majeure by NavyAVY and DLA. NavyAVY and DLA shall be deemed to have notice of any circumstances of which its their contractors had or should have had notice.

(c) If the Regulatory Agencies determine that a delay in performance or anticipated delay in fulfilling a requirement of this AOC is or was attributable to a force majeure, then the time period for performance of that requirement will be extended as deemed necessary by the Regulatory Agencies. If the Regulatory Agencies determine that the delay or anticipated delay has been or will be caused by a force majeure, then the Regulatory Agencies will notify the NavyAVY and DLA, in writing, of the length of the extension, if any, for performance of such obligations affected by the force majeure. Any such extensions shall not alter the NavyAVY and DLA's obligation to perform or complete other tasks required by this AOC which are not directly affected by the force majeure.

(d) If the Regulatory Agencies disagree with NavyAVY and DLA's assertion of a force majeure, then NavyAVY and DLA may elect to invoke the dispute resolution provision, and shall follow the procedures set forth in Section 14 (Dispute Resolution). In any such proceeding, NavyAVY and DLA shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that NavyAVY and DLA's best efforts were exercised to avoid and mitigate the effects of the delay, and that NavyAVY and DLA complied with the requirements of this Section. If NavyAVY and DLA satisfy this burden, then the Regulatory Agencies will extend the time for performance as the Regulatory Agencies determine is necessary.

18. RESERVATION OF RIGHTS []

(a) Notwithstanding any other provisions of this AOC, the Regulatory Agencies retain their authority to take, direct, or order any and all actions necessary to protect public health, any source of drinking water or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste or constituents of such wastes, on, at, or from the Facility, including but not limited to the right to bring enforcement actions under RCRA, Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), (CERCLA, the Clean Water Act ("CWA")CWA,

Formatted: Font: (Default) Times New Roman, 12 pt, Not Bold

Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Font: (Default) Times New Roman, 12 pt, Not Bold

Formatted: Font: (Default) Times New Roman, 12 pt

Safe Drinking Water Act ("SDWA"); HRS chapters 340E and 342L; and any other applicable statutes or regulations. However, unless required on an emergency basis, no such action shall be taken in relation to any activity within the scope of this AOC unless the Parties have first had a discussion~~ed~~ about that activity and good faith efforts have been made to address the issue through a modification to this AOC.

(b) The Regulatory Agencies reserve all of their statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, which may pertain to Navy~~AVY~~ and DLA's failure to comply with any of the requirements of this AOC.

(c) Navy~~AVY~~ and DLA reserve all of their statutory and regulatory rights and defenses both legal and equitable, including but not limited to rights and defenses against third parties. Nothing in this AOC shall be taken as an admission of fact or law in any dispute with a third party or in any dispute outside the context of enforcement of this AOC.

(d) This AOC is not intended to be nor shall it be construed to be a permit. Navy~~AVY~~ and DLA acknowledge and agree that EPA or DOH's review and approval of the Work does not constitute a warranty or representation that the Work will achieve the required cleanup or performance standards. Compliance by Navy~~AVY~~ and DLA with the terms of this AOC shall not relieve Navy~~AVY~~ and DLA of their obligations to comply with RCRA or any other applicable local, state, or federal laws and regulations.

19. REGULATORY AGENCIES' COVENANTS

(a) Except as provided in Section 18 (Reservation of Rights), EPA covenants not to take administrative action against Navy~~AVY~~ or DLA pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, for the Work. EPA's covenant shall take effect upon the Effective Date. EPA's covenant is conditioned upon the satisfactory performance by Navy~~AVY~~ and DLA of their obligations under this AOC. EPA's covenant extends only to Navy~~AVY~~ and DLA and does not extend to any other person.

(b) Except as provided in Section 18 (Reservation of Rights), DOH covenants not to take administrative action against the Navy~~AVY~~ or DLA with respect to any Work on the condition that the Work is consistent with the Navy~~AVY~~'s and DLA's obligations under this AOC and that the Work has been satisfactorily completed and approved by the DOH.

20. OTHER CLAIMS[]

(a) By issuance of this AOC, the Regulatory Agencies assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Navy~~AVY~~ and DLA. The Regulatory Agencies shall not be deemed a party to any contract, agreement or other arrangement entered into by Navy~~AVY~~ and DLA or its officers, directors, employees, agents, successors, assigns, heirs, trustees, receivers, contractors, or consultants in carrying out actions pursuant to this AOC.

(b) Navy~~AVY~~ and DLA waive all claims against the Regulatory Agencies relating to or arising out of action conducted pursuant to this AOC, including, but not limited to, contribution and counterclaims.

(c) Navy~~AVY~~ and DLA shall bear their own litigation costs and attorney fees.

21. RECORD RETENTION

(a) Navy and DLA shall preserve all documents related to the Facility in accordance with the appropriate federal records schedule. In addition, Navy~~AVY~~ and DLA shall preserve all documents shared with the Regulatory Agencies relating to the Work performed under this AOC, ~~and~~ monitoring data, and other raw data, related to the Facility, for at least ten (10) years following the termination of the AOC. Navy~~AVY~~ and DLA shall make such records available to DOH or EPA at their request.

(b) All documents ~~shared with the Regulatory Agencies~~ relating to the Work performed under this AOC including~~and~~ monitoring data related to the Facility shall be stored by Navy~~AVY~~ and DLA in a centralized location at the Site, or an alternative location mutually approved by the Project Coordinators to promote easy access by the Regulatory Agencies or their representatives.

22. PRESIDENTIAL EXEMPTION

The Parties recognize that the President may exempt a solid waste management facility from requirements of RCRA pursuant to 42 U.S.C. § 6961(a) or a UST from the requirements of RCRA pursuant to 42 U.S.C. § 6991f for a period of time not to exceed one (1) year after the President grants the exemption. This exemption may be renewed. The Navy and DLA shall obtain access to and perform all actions required by this AOC within all areas inside those

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Line spacing: Double

portions of the Site, which are not the subject of or subject to any such exemption by the President.

23. PUBLIC COMMENT

(a) Upon signature by NavyAVY and DLA, the Regulatory Agencies shall provide public notice, a public meeting and a reasonable opportunity for public comment on the proposed settlement. After consideration of any comments submitted during a public comment period of not less than 30 days (which the Regulatory Agencies may extend), the Regulatory Agencies may sign this AOC, or withhold consent, or seek to amend all or part of this AOC if the Regulatory Agencies determine that comments received disclose facts or considerations which indicate that this AOC is inappropriate, improper, or inadequate.

(b) If a modification is necessary, the Regulatory Agencies shall transmit a modified copy of the AOC to NavyAVY and DLA for review and signature, or further negotiations, as appropriate. If the modification is determined by the Regulatory Agencies to be significant, the process for public comment, described in Section 2122(a), will repeat.

23.

23. SEVERABILITY

(a) If any provision of this AOC or the application of this AOC to any party or circumstances is held by any judicial authority to be invalid, the remainder of the AOC shall remain in full force and effect.

24. EFFECTIVE DATE

(a) After this AOC is signed by each of the Parties and after the public comment period and review as described in Section 21 (Public Comment), this AOC shall become effective. The undersigned representatives of NavyAVY and DLA certify that they are fully authorized to enter into the terms and conditions of this AOC and to bind the party they represent to this document.

25. TERMINATION AND SATISFACTION

(a) The provisions of this AOC shall be deemed fully satisfied upon the Regulatory Agencies' execution of a written acknowledgement ("Acknowledgement") specifying that NavyAVY and DLA have demonstrated to the satisfaction of the Regulatory Agencies that the

terms and conditions of this AOC have been fully and satisfactorily completed. Termination of this AOC shall not terminate Navy~~AVY~~ and DLA's obligation to comply with Sections 10 (Sampling and Access)~~, 18 (Reservation of Rights),~~ and 21 (Record Retention~~).~~) of this AOC or the Regulatory Agencies' reservation of rights in Section 18.

IN WITNESS WHEREOF, the Parties have duly executed this presents as of the day and year subscribed below.

Agreed this ____ day of _____, 2015.

By: _____
Richard L. Williams, Rear Admiral U.S. Navy
Commander Navy Region Hawaii

Agreed this ____ day of _____, 2015.

By: _____
David Rodriguez, Director
Installation Support, Defense Logistics Agency

It is so ORDERED and Agreed this _____day of 2015.

By: _____
GaryARY L. Gill, Deputy Director
Department of Health

APPROVED: _____
AS TO WadeADE H. HargroveARGROVE III, Deputy Attorney General
FORM Hawaii Office of Attorney General

It is so ORDERED and Agreed this _____day of 2015.

By: _____

Jeff Scott~~JEFF SCOTT~~, Director, Land Division
Region 9, U.S. Environmental Protection Agency

Formatted: Not Highlight