ENVIRONMENTAL SERVICES COOPERATIVE AGREEMENT
COVERING
MARE ISLAND NAVAL SHIPYARD
BETWEEN
THE UNITED STATES OF AMERICA
DEPARTMENT OF THE NAVY
AND
THE CITY OF VALLEJO

Environmental Services Cooperative Agreement Number N 68711-01-M-DC-1047

Southwest Division, Naval Facilities Engineering Command
San Diego, California

April 14, 2001
GENERAL PROVISIONS

This Environmental Services Cooperative Agreement ("Agreement"), is made by and between the United States of America, acting by and through the Naval Facilities Engineering Command ("Navy") and the City of Vallejo ("City"), a local public authority legally empowered to enter into this Agreement.

The Federal Government, for and on behalf of the citizens of the United States of America, acts as the steward of certain real property on which it operates and maintains military facilities necessary for the Defense of the United States of America. Certain military facilities are no longer required for that mission, and, in accordance with the authority of the Defense Base Closure and Realignment Act of 1990, Public Law 101-510 (10 U.S.C. Section 2687 note, as amended), the Department of Defense ("DOD") closed and plans to dispose of real and personal property at those facilities. The Department of Defense is authorized to dispose of real and personal property on the Mare Island Naval Shipyard ("MINS") to the City.

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9620(h)(3)(C), Federal property may be transferred prior to the completion of all remedial action necessary to protect human health and the environment. Under this early transfer authority, DOD may transfer portions of MINS (hereinafter the "Eastern Early Transfer Parcel"; as said term is defined in Section 205 below, along with associated easements appurtenant to parcels) to the City, which may assume responsibility for certain environmental response activities (hereinafter the "Environmental Services," as defined in Section 212 below) generally at and around the Eastern Early Transfer Parcel. The geographic area in which work will be performed under this Agreement is set forth in Appendix 1, and is identified as the "Areas Covered by Environmental Services," or "ACES." This Agreement provides the vehicle under which the City will perform the Environmental Services in the ACES.

Cleanup of the MINS is currently governed by a Federal Facilities Site Remediation Agreement ("FFSRA") among the Navy, California Environmental Protection Agency, Department of Toxic Substances Control ("DTSC") and Regional Water Quality Control Board, San Francisco Region ("RWQCB"). The Navy has conducted investigations and site characterization under the FFSRA and its own authorities under CERCLA and the Defense Environmental Restoration Program ("DERP") and has identified both contaminated areas as well as uncontaminated areas. The execution of this Agreement does not alter the FFSRA.

It is in the public interest and will be beneficial for the City to cause to be performed the Environmental Services at the ACES. This Agreement does not reduce or alter in any way the responsibilities of the United States under CERCLA or Section 330 of Public Law 102-484 ("Section 330"). These responsibilities as between the parties are set forth below in Section 711 of this Agreement.

This Agreement is of mutual benefit to the Navy and the City because it facilitates early transfer and immediate reuse of the Eastern Early Transfer Parcel by allowing the City to perform certain environmental remediation activities and redevelopment simultaneously as defined herein. This
Agreement, executed in anticipation of an early transfer, facilitates provision to the City of full access and control of the Eastern Early Transfer Parcel in conjunction with implementation of the City's Reuse Plan. In addition, early transfer will allow the Navy to transfer fee title to the Eastern Early Transfer Parcel in compliance with CERCLA requirements at an earlier date than could otherwise be achieved. This Agreement is a Cooperative Agreement within the meaning of 31 U.S.C. Section 6305 and 10 U.S.C. Section 2701(d)(1).

The Navy and the City have entered into this Agreement for the purpose of establishing the terms and conditions necessary to obtain Regulatory Closure with respect to Known Conditions within each Investigation Area ("IA") within the ACES and ensure the execution of Long-Term Obligations associated with the Regulatory Closure of each respective IA and to additionally remediate Insured Unknown Conditions. The Navy agrees to provide funds to the City in accordance with and subject to the provisions of this Agreement and to address certain Navy-Retained Conditions. The City agrees to cause to be performed the Environmental Services in accordance with and subject to the provisions of this Agreement.
ARTICLE I
SCOPE AND PURPOSE

Section 101. Performance of Environmental Services

The City shall cause to be performed the Environmental Services, in consideration of the payment of a fixed sum in accordance with and subject to the provisions of this Agreement. The Environmental Services shall satisfy the requirements of CERCLA by satisfying the cleanup requirements under applicable State law ("Equivalent State Compliance"), as provided in the Consent Agreement and the Order and shall otherwise support the City's remedial objectives within the ACES.

The Navy shall remain responsible for failures of any and all environmental remedies selected by the Navy, if any, for the Eastern Early TransferParcel and ACES, and for Navy-Retained Conditions as defined in this Agreement.

Section 102. Performance Method

The Consent Agreement and Order establish the process for obtaining Regulatory Closure within the ACES. By the execution of this Agreement, the Navy concurs with the process set forth in the Consent Agreement, Land Use Covenants required by the Consent Agreement, Order, and all documents and approvals referenced therein; however, this concurrence in no way limits the City's responsibility to achieve CERCLA compliance by satisfaction of Equivalent State Compliance requirements in the Consent Agreement, and to achieve Resource Conservation and Recovery Act and Clean Water Act compliance by satisfaction of Equivalent State Compliance requirements in the Order. Furthermore, this Agreement in no way restricts the parties to the Consent Agreement or parties subject to the Order from modifying the Consent Agreement or Order and documents referenced therein, pursuant to the terms thereof, before or after the Environmental Services at the ACES have begun; however, any such modifications shall not eliminate or change the City's or Navy's obligations under this Agreement.
ARTICLE II
DEFINITIONS

Section 201. Cooperative Agreement

The term "Agreement" means this Cooperative Agreement.

Section 202. Navy's Representative

The Navy's representative for administrative purposes is Southwest Division, Naval Facilities Engineering Command, which is responsible to the office of the Secretary of the Navy, for environmental remediation within the Eastern Early Transfer Parcel.

Section 203. The City of Vallejo ("City")

The term "City" means the City of Vallejo, an entity that is within the meaning of the term "local government agency" as such term is used in 10 USC Section 2701(d)(1), with which the Navy is entitled to enter into "agreements on a reimbursable or other basis".

Section 204. Mare Island Naval Shipyard

The term "Mare Island Naval Shipyard" ("MINS") means that real property shown on the map attached as Appendix 1 and incorporated herein by reference.

Section 205. Eastern Early Transfer Parcel

The term "Eastern Early Transfer Parcel" means that portion of Mare Island Naval Shipyard which is anticipated to be transferred pursuant to 42 U.S.C. Section 9620(h)(3)(C) and which is anticipated to be largely coterminous with the ACES, but which will be specifically identified in the deed to be executed by the Navy.

Section 206. Navy- Retained Conditions

The term "Navy-Retained Conditions" means any condition associated with Radiological Material; chemical or biological warfare agents; Unexploded Ordnance; Abandoned Ordnance; Sediments; Wetlands; Offshore Conditions; natural resource damages to the extent not arising from actions of the City or its contractors; all Unknown Conditions other than Insured Unknown Conditions; and any Known Conditions in an Investigation Area or portion thereof for which Regulatory Closure has not been achieved before the date that the total cost of performing the portion of Environmental Services associated with Known Conditions with respect to the entire ACES has exceeded $114,300,000. The term also includes specified conditions and sites for which the Termination Plan (Appendix 5), identifies the required Navy Action as attaining closure. The term also includes investigation, remediation, Long-Term Obligations and reporting, as required, associated with the total petroleum hydrocarbons, chlorinated benzenes, chlorinated ethenes, metals and PCBs in sediment and water at storm drain lines directly discharging to outfalls STS 26 and STS 27, or
associated with the source or sources of the aforementioned contaminants provided that the source or sources are not Known Conditions.

The term does not include any Unknown Conditions for which the City or other named insured is not paid by the insurer pursuant to the Environmental Liability Policy because of any dishonest, fraudulent, specifically intentional or malicious act or those of a knowingly wrongful nature, or the intentional, willful or deliberate non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any government agency or body by or at the direction of an insured party.  The term also does not include any naturally occurring substance on, at, under, or coming from the ACES, in its unaltered form, or altered solely through natural occurring processes or phenomena.

Section 207.  Consent Agreement

The term "Consent Agreement" means the Consent Agreement dated April 16, 2001, between the City, DTSC, and Lennar Mare Island LLC regarding environmental investigation and remediation activities at the ACES.

Section 208.  Regulatory Closure

The term "Regulatory Closure" means issuance of a certification or closure approval letter, e.g., a "no further action" letter, from DTSC with respect to the activities set forth in the Consent Agreement and from the RWQCB with respect to the activities set forth in the Order, documenting that any necessary remedial action has been implemented with respect to a particular IA or portion thereof, subject to any necessary Long-Term Obligations.

Section 209.  Navy and Government

The terms "Navy" and "Government" are used interchangeably herein.

Section 210.  Long-Term Obligations

The term "Long-Term Obligations" means any long term review, monitoring and operation and maintenance requirements that are required in support of Regulatory Closure of a respective IA.

Section 211.  Offshore Conditions

The term "Offshore Conditions" means any condition located in, on, or under the soil, waters, fish or wildlife at any point bayward, deltaward or seaward of the Mean High Water ("MHW") elevation line at Mare Island.  This definition shall not include such conditions to the extent the condition results from an act or omission of the City or its contractors in performing the Environmental Services.

Section 212.  Environmental Services
The term "Environmental Services" means activities with respect to Known Conditions (except to the extent such conditions are Navy-Retained Conditions) or Insured Unknown Conditions necessary to obtain Regulatory Closure of each IA and associated Long-Term Obligations. The term also means all activities necessary to obtain a certification or closure approval letter and to perform associated Long-Term Obligations with respect to any particular Insured Unknown Condition discovered within a particular IA after Regulatory Closure has been obtained for that entire IA.

Section 213. Known Conditions

The term "Known Conditions" means those environmental conditions set forth in Appendix 3 to this Agreement. Except as expressly provided in the definition of "Navy Retained Conditions" in Section 206, the term "Known Conditions" does not include any "Navy-Retained Conditions." The term "Known Conditions" also includes "Reasonably Expected Environmental Conditions."

Section 214. Unknown Conditions

The term "Unknown Conditions" means those environmental conditions that are not Known Conditions.

Section 215. Wetlands

The term "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, the location of which is generally indicated on the map attached at Appendix 2.

Section 216. Radiological Materials

The term "Radiological Materials" means those materials identified as being derived from the Navy's work on nuclear propulsion plants for ships and submarines, Nuclear Regulatory Commission licensed radioactive material, radiographic and instrument calibration sources, and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products manufactured for non-military applications such as radioluminescent signs, tungsten welding electrodes and household smoke detector components.

Section 217. Environmental Insurance Policies


Section 218. Remediation Stop Loss Policy
The term “Remediation Stop Loss Policy” means the remediation stop loss policy referred to in Section 217.

Section 219. Environmental Liability Policy

The term “Environmental Liability Policy” means the environmental liability policy referred to in Section 217.

Section 220. Insured Unknown Conditions

The term “Insured Unknown Conditions” means Unknown Conditions to the extent the City or other named insured is paid by the insurer pursuant to the Environmental Liability Policy for costs associated with such Unknown Conditions.

Section 221. Unexploded Ordnance

The term “Unexploded Ordnance” or “UXO” means Military Munitions that have been primed, fused, armed, or otherwise prepared for action, and have been fired, dropped, launched, projected, or placed in such manner as to constitute a hazard to military or non-military operations, installations, personnel, or material and remain unexploded either by malfunction, design, or any other cause.

Section 222. Military Munitions

The term “Military Munitions” means all ammunition products and components produced or used by or for the United States Department of Defense (“DOD”) or the United States Armed Services for national defense and security, including military munitions under the control of DOD, the United States Coast Guard, the United States Department of Energy (“DOE”) and National Guard personnel. The term “Military Munitions” includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof. The term “Military Munitions” does not include wholly inert items, non-standard explosive devices made from either military or non-military materials by non-military personnel, and nuclear devices and nuclear components thereof. However, the term “Military Munitions” does include non-nuclear components of nuclear devices managed under DOE’s nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 et seq., have been completed.

Section 223. Small Arms Munitions

The term “Small Arms Munitions” means expended small-arms (.50 caliber or less) Military Munitions.

Section 224. Abandoned Ordnance
The term “Abandoned Ordnance” means Military Munitions that have been (1) abandoned, (2) disposed of, (3) burned or incinerated, or (4) accumulated, stored, treated (but not recycled) prior to or instead of being abandoned by being disposed of, burned or incinerated.

Section 225. Investigation Area

The term “Investigation Area” or “IA” means one of the subareas within the ACES defined as such in the Consent Agreement. For the purpose of preparing remedial action plans to obtain Regulatory Closure, each IA is a single discrete unit for all sites within the IA where contaminants of concern were discovered as well as for all other parts of the IA where contaminants of concern were not discovered. The sum of the areas contained in the IAs is equal to the area contained in the entire ACES. The boundaries of each IA are identified in the Consent Agreement, but may be amended from time to time pursuant to procedures set forth in the Consent Agreement.

Section 226. Order

The term "Order" means the final order or orders issued by the RWQCB setting forth the site cleanup requirements for the ACES.

Section 227. Reuse Plan

The term “Reuse Plan” means the Mare Island Final Reuse Plan (Volumes I and II) adopted by the City of Vallejo in 1994.

Section 228. Reasonably Expected Environmental Conditions

The term “Reasonably Expected Environmental Conditions” means those environmental conditions that can be reasonably expected in consideration of the specific sources and resulting environmental conditions set forth in Appendix 3. By way of example and not limitation, whether an environmental condition may be reasonably expected or not is illustrated as follows: Environmental conditions that are reasonably expected include (i) the concentration of a contaminant at a site is greater than the concentration for that respective contaminant specified in Appendix 3, (ii) a contaminant at a site is, based upon the state of scientific knowledge at the time this Agreement is executed, a scientifically-accepted “break-down” constituent of a contaminant specified in Appendix 3 as being present at that respective site, and (iii) the physical extent of a contaminant at a site is greater than the extent of that contaminant specified in Appendix 3 as being present at that respective site, except that the greater physical extent of such contaminant would not be reasonably expected where the increase in extent is the result of an unknown man-made subsurface condition, e.g., a water well. Environmental conditions that are not reasonably expected include (i) any contaminant, other than a scientifically accepted “break-down” constituent, not specified in Appendix 3 being present at a particular site, (ii) any contaminant, regardless of whether it is specified in Appendix 3, that results from a source that is not specified in Appendix 3.

Section 229. Area Covered by Environmental Services
The term "Area Covered by Environmental Services" or "ACES" means that area identified on the map in Appendix 1.

Section 230. Sediment

The term "Sediment" means any and all solid materials present within the San Pablo Bay and Mare Island Strait below the Mean High Water line, defined on the eastern side of Mare Island by the quay wall, and shall also mean those solid materials that have been deposited within the drydocks or other areas of surface water intrusion from the San Pablo Bay or Mare Island Strait or from other parcels on Mare Island.
ARTICLE III
OBLIGATIONS OF THE PARTIES

Section 301. Obligations of the City

A. In consideration of the Navy's agreement to pay the sum of $77.67 million for performing the Environmental Services and any additional funds received for replacing missing data in accordance with Section 302.B, the City assumes responsibility for the Environmental Services in accordance with and subject to the terms of this Agreement. The City agrees that it shall complete or cause to be completed the Environmental Services even if the costs associated therewith exceed the funds provided by the Navy hereunder unless the increase in the cost of those Environmental Services is caused by anything for which the Navy is responsible under this Agreement or otherwise under applicable law. The parties agree to meet and confer as soon as practicable if and after the cost of performing the portion of Environmental Services associated with Known Conditions exceeds $100 million. The parties further agree to meet and confer as soon as practicable and if and after the sum of the cost of performing the portion of Environmental Services associated with Insured Unknown Conditions and payments made under the Environmental Liability Policy associated with third party liability claims exceeds $120 million.

The City's obligation to perform Environmental Services is expressly conditioned upon the Navy providing the sum of $77.67 million for performing the Environmental Services in accordance with the schedule set forth in Section 302.A, and any additional funds received for replacing missing data in accordance with Section 302.B, and upon the Navy's agreement to fulfill its obligations under Section 302.G with respect to Navy-Retained Conditions in a manner that will not unreasonably delay the City's performance of Environmental Services or the development activities contemplated by the City's Reuse Plan; provided, however, that to the extent the Navy pays a portion of the funding set forth in Section 302.A but fails to pay the full amount set forth in that Section or in the event the Agreement terminates pursuant to Section 303, the City's obligations shall be limited to the portion of Environmental Services which have been performed by use of the funds actually provided by the Navy. These conditions shall be subject to dispute resolution pursuant to Section 1001. The City shall make reasonable progress toward performing Environmental Services and shall provide quarterly progress reports to the Navy.

The City shall perform the Environmental Services in a manner that will not unreasonably delay the Navy's performance of actions necessary to achieve Regulatory Closure with respect to Navy-Retained Conditions.

B. The City shall indemnify the Navy pursuant to the terms of Section 711.E hereof.

C. The City agrees to use reasonable best efforts in obtaining Regulatory Closure at each IA within the ACES using the Navy's underlying data provided to the City or data of the City's own generation. However, the Parties agree that there are a number of instances where (i) original data is referenced in the Navy's final and draft reports and analytical database but such original data is missing from the Navy's underlying documentation, and/or (ii) original data had been referenced in the Navy's final and draft reports and analytical database and had subsequently been deleted by the Navy from the database because the Navy had completed a removal action associated with such data
or for other reasons, but such original data is missing from the Navy’s underlying documentation, and/or (iii) original data has been represented by the Navy to exist but such original data is missing from the Navy’s underlying documentation. If, in such instances of missing underlying documentation and after the City consults either with the regulators or the Navy, Regulatory Closure cannot be reasonably achieved without replacement of such original data, the Navy is responsible for and the City may take reasonable steps necessary to replace the missing underlying documentation, including but not limited to re-sampling activities and the City may allocate the cost of such replacement to the Navy under this Agreement. Such costs shall be paid to the City in two payments as set forth in Section 302.B, and shall be in addition to the funds the Navy is obligated to provide to the City in accordance with Section 302.A. The City shall place in a separate account (the “Missing Documentation Account”) all funds provided by the Navy under Section 302.B. Such funds shall be used solely for costs associated with reviewing or confirming the Navy’s missing document inventory, replacing missing documents, or meeting and conferring with regulators or the Navy about the missing document inventory or missing document replacement activities. Once the City has expended 75% of the total of the two payments described in Section 302.B, the parties shall, within a reasonable time thereafter, meet and confer regarding the adequacy of the remaining amount and whether additional funds are required to be placed in the Missing Documentation Account, including the time of the deposit of such funds. Any disagreement related to or resulting from such “meet and confer” discussion(s) with respect to amounts or timing of additional funds that are necessary to replace missing data shall be subject to the dispute resolution provisions set forth in Section 1001. Any funds remaining in the Missing Documentation Account on September 30, 2002 shall be credited against the Navy’s payment obligations from fiscal year 2003 funds pursuant to Section 302A. Within a reasonable time prior to September 30, 2002, the parties shall meet and confer regarding the impending termination of the Missing Documentation Account.

D. The City shall provide the Navy notice within ninety (90) days of receiving notice of a claim by federal or local regulators, or other third parties, of the existence of any condition at the Eastern Early Transfer Parcel or the ACES that suggests an action is necessary for which the Navy is responsible under this Agreement. If the City is served with a complaint or written notice of a claim by the federal, state or local regulators, the City shall provide the Navy with a copy of such document no later than fifteen (15) days following service of such document.

E. In the event the City discovers Navy-Retained Conditions at or affecting the ACES, the City shall notify the Navy of such conditions within thirty (30) days of receiving actual notice of such conditions, except that the City shall notify the Navy of the discovery of UXO, biological warfare agents, chemical warfare agents or Radiological Materials within twenty-four (24) hours of such discovery. In the event Navy-Retained Conditions are discovered within a particular IA before Regulatory Closure has been obtained for that IA, the City may request that the regulatory agency(ies) with jurisdiction under applicable law divide the affected IA in a manner that separates the portion of the IA affected by the Navy-Retained Conditions from the remainder of the existing IA. In that event, the Navy shall retain full responsibility to perform all actions, including all administrative actions and Long-Term Obligations, necessary to obtain Regulatory Closure for the separated-out IA that contains the Navy-Retained Conditions. The parties may agree to terms on which the Navy may provide funds to the City or the City’s contractors in amounts sufficient to implement such Long-Term Obligations.
F. Notwithstanding the provisions of the preceding Section 301.E., the City shall have the right but not the duty to take or cause to be taken the following actions within the ACES with respect to Navy-Retained Conditions:

1. Investigation Activities. Any activity necessary to determine the existence, nature, character and extent of conditions that may constitute Navy-Retained Conditions.

2. Imminent Threat. Any immediate action to address an imminent threat to human health or the environment required by a regulatory agency, or if in the City’s reasonable judgment, such action is necessary to address an imminent threat to human health or the environment. The City shall have a right to take action and seek reimbursement from the Navy where (a) notification cannot practicably be provided to the Navy before such action needs to be taken, or (b) notification is provided to the Navy before such action needs to be taken and the Navy agrees to permit the City to take such action under terms agreed to by the parties. In the event that notification is provided to the Navy by the City before such action needs to be taken but the Navy cannot or will not provide a timely response to such threat, the parties reserve their rights but will expedite dispute resolution provided in Section 1001. To the extent the City takes or causes to be taken actions in accordance with Section 301.F.1 or in accordance with Section 301.F.2.(a), the City shall provide notice of such action to the Navy as soon as practicable. If the Navy disputes a City action taken under this Section 301.F, the Navy may engage in dispute resolution in accordance with Section 1001.

G. If the City discovers a condition it reasonably believes is a Navy Retained Condition other than a condition subject to Section 301.F.2, it shall use its reasonable best efforts to avoid incurring costs or obligations with respect to the condition by seeking to ascertain whether such condition is in fact a Navy-Retained Condition before incurring such costs or obligations. To the extent the City incurs costs or obligations with respect to a Navy-Retained Condition despite the City’s use of reasonable best efforts to avoid incurring such costs, the City may seek reimbursement from the Navy, subject to the dispute resolution provisions of Section 1001. Nothing in this Agreement shall be construed to authorize the City to seek reimbursement from the Navy for costs solely associated with the initial investigation needed to ascertain whether a newly discovered condition is properly categorized as a Known Condition, Unknown Condition, or Navy-Retained Condition.

H. In the event Navy-Retained Conditions are discovered, the City shall provide to the Navy all information obtained or developed by the City with respect to such Conditions.

I. Notwithstanding any other provision of this Agreement, if the City undertakes Environmental Services within the ACES while the portion of the ACES within which the City is undertaking Environmental Services is still owned by the United States, the City shall not perform actions that are inherently governmental. The City shall have no responsibility for such inherently governmental functions. Examples of these inherently governmental functions include, but are not limited to the selection of the remedy and acting on behalf of the Navy before the regulators in a manner that could result in the accrual of a legal obligation on the part of the Navy. Examples of non-inherently governmental functions that City may undertake within the ACES while the portion of the ACES within which the City is undertaking Environmental Services is still owned by the United States are: gathering
information for or providing advice, opinions, recommendations, or ideas to the Navy, including but not limited to any activity in coordination with the Navy to determine the existence, nature, character and extent of any contamination or suspected contamination, such as drilling soil borings, installing monitoring wells, and digging test pits; and performing Environmental Services outside of the Eastern Early Transfer Parcel with respect to contaminants that originated within the Eastern Early Transfer Parcel, such as contaminants at any portion of IR 10 outside of the Eastern Early Transfer Parcel.

Section 302. Obligations of the Navy

A. Except as otherwise provided herein, the Navy shall pay the City $36.57 million as soon as practicable but no later than ten days after the execution of this Agreement, which payment shall signify progress towards achieving the final goal of CERCLA compliance by satisfaction of Equivalent State Compliance requirements. Further, subject to the availability of funds and the contingencies set forth below in this Section 302.A, the Navy agrees to pay the City $23 million appropriated to the Navy within sixty (60) days after passage of the Military Construction Act or Continuing Resolution Authority or other legislation providing the Navy for Fiscal Year 2002 with funds from which this amount will be transferred and $18.1 million within sixty (60) days after passage of the Military Construction Act or Continuing Resolution Authority or other legislation providing the Navy for fiscal year 2003 with funds from which this amount will be transferred. The Navy shall use its best efforts to ensure that all such funds are made available. The parties acknowledge that the Navy has no legal obligation to pay the Fiscal Year 2002 or Fiscal Year 2003 funds until the amounts for each respective fiscal year are made available, and that the City has no legal obligation to continue performance of Environmental Services, beyond those Environmental Services performed using funds actually provided by the Navy and which have been expended or obligated, until the Navy pays these amounts.

B. (1) The Navy shall provide to the City the documents and information referenced in the Transition Plan (Appendix 4) in accordance with the schedules described therein. Additionally, the Navy shall pay the City one million dollars ($1,000,000) for initial deposit into the Missing Documentation Account. Sixty days after the effective date of this agreement, the parties shall meet and confer about the completeness of the Navy’s provided documents and negotiate additional amounts to be paid, if any, to replace missing documents based in part on an extrapolation of the percentage of missing documents in the documents provided as of such meeting to the remaining data to be provided. Any additional amount agreed upon pursuant to this meet and confer process shall be paid to the City for deposit into the Missing Documentation Account at the same time the Navy makes the payment from Fiscal Year 2002 funds specified in Section 302.A. If, prior to receipt of agreed-upon additional funds, if any, from the Navy for deposit into the Missing Documentation Account, the City incurs costs related to missing documents which may be paid from funds deposited the Missing Documentation Account pursuant to Section 301.C in excess of the amount initially deposited in the Missing Documentation Account, the City may use funds from the amounts provided pursuant to Section 302.A for such replacement. When the Navy provides additional agreed-upon funds, if any, for deposit into the Missing Documentation Account, the City may accordingly reduce the amount actually deposited into the Missing Documentation Account by the amount spent for document replacement in excess of the amount initially deposited. Further, the
parties shall meet and confer as provided in Section 301.C when 75% of the funds provided under the initial two payments have been expended.

(2) In addition to the documents and information referenced in the Transition Plan, the City may request that the Navy provide additional information concerning site conditions for the Eastern Early Transfer Parcel and ACES, and if such information is reasonably obtainable and releasable by the Navy in accordance with applicable law, the Navy shall deliver such requested information to the City as soon as possible after such request is made.

C. The Navy shall be responsible for all items identified as requiring Navy Action in the Termination Plan (Appendix 5).

D. The Navy shall be responsible for Known Conditions to the extent the City’s cost of performing the portion of Environmental Services associated with Known Conditions exceeds $114,300,000.

E. The Navy shall issue the warranty for a particular IA or portion thereof required by Section 120(h) of CERCLA ("CERCLA Section 120") within 60 days of the City providing a written request to the Navy for the issuance of the warranty, provided that such written request includes proof that Regulatory Closure has been obtained for that IA or portion thereof. To the extent new legal descriptions must be prepared for an IA or portion thereof in order for the warranty to be recorded, the City shall bear the costs of preparing such legal descriptions.

F. The Navy shall indemnify the City and perform its obligations under CERCLA Section 120 as provided by this Agreement and applicable law.

G. The Navy shall perform any inherently governmental functions pursuant to Section 301.I and all actions necessary with respect to Navy-Retained Conditions within the ACES to enable Regulatory Closure of each IA or as otherwise required by applicable law in a manner that will not unreasonably delay the performance of the Environmental Services. The Navy shall, upon request, promptly provide the City and any party performing Environmental Services with all rights to access onto or into any real property, buildings or equipment for which the Navy has legal authority to provide such rights, and with all rights to conduct any activities necessary to perform the Environmental Services upon such real property, buildings or equipment for which the Navy has legal authority to provide such rights. The Navy may condition the provision of such rights on reasonable restrictions on the time and manner of access and conduct of activities.

The Navy shall employ engineering controls necessary to eliminate explosive safety quantity arcs associated with UXO clearance activities where such safety arcs originate off of and may intersect with the ACES and to minimize to the maximum extent feasible any explosive safety quantity arcs associated with UXO clearance activities within the ACES. The Navy shall use best efforts to timely complete the clearance of unexploded ordnance at the Defense Reutilization Marketing Service site.

H. Within five (5) days after receiving notice from the City pursuant to Sections 301.D or 301.E, the Navy shall confer with the City with regard to the Navy-Retained Conditions at issue; provided,
However, that with respect to receiving notice concerning the presence of UXO, biological warfare agents, chemical warfare agents or Radiological Materials, or under Section 301.F, the Navy shall confer with the City as soon as possible but in no event later than twenty-four (24) hours after receiving such notice. The Navy and the City, in consultation with regulatory agencies, as appropriate, shall attempt to agree on necessary actions to be taken by the Navy with respect to the Navy-Retained Conditions. In the alternative, the Parties shall attempt to agree on the funds to be provided by the Navy to the City to enable the City to take such actions. To the extent the Parties disagree as to whether an environmental condition constitutes Navy-Retained Conditions, or as to the action required in response to such Navy-Retained Condition (including the timing of such action in consideration of the City's Reuse Plan), the matter may be submitted to dispute resolution in accordance with Section 1001, and the City may take any action necessary in accordance with Section 301.F and, as part of dispute resolution, seek reimbursement for the costs associated with such actions, subject to the provisions of Section 302.G.

I. Notwithstanding Section 302.H, to the extent Navy-Retained Conditions are discovered within a particular IA, and actions necessary to address such Conditions will interfere with Environmental Services being or to be performed by the City, the Navy, subject to mutual agreement with the City, shall either (i) provide the City with, or if otherwise agreed to by the Parties, reimburse the City for, funds necessary to enable the City to obtain Regulatory Closure with respect to such Navy-Retained Conditions, or (ii) take all actions necessary to obtain Regulatory Closure with respect to such Navy-Retained Conditions and the Known Contamination for which the City has otherwise agreed to perform Environmental Services but such services are interfered with due to the presence of the Navy-Retained Conditions. To the extent that the Navy takes action with respect to Known Conditions in accordance with this Section, the reasonable costs of such action shall be credited against future reimbursement or funds to be paid by the Navy to the City under this Agreement.

J. If the death of or injury to any person, or the loss of or damage to any property, is caused by the Government in the course of its use of the property, the liability, if any, of the Government therefore shall be determined in accordance with the applicable provisions of the Federal Tort Claims Act (28 U.S.C. Section 2671, et seq., as amended) or otherwise provided by law.

Section 303. Integration with Disposal Process

This Agreement shall terminate for convenience on September 30, 2001, unless:

A. The Navy's request for deferral of the CERCLA covenant and the Mare Island Property Settlement Agreement and Exchange Agreement with the California State Lands Commission is approved by the Governor of California prior to September 30, 2001, and there are no other legal impediments to the completion of the transfer of Eastern Early Transfer Parcel from the Navy to the City and subsequently from the City to Lennar Mare Island at that time; or

B. The City extends the Agreement by providing the Navy with written notice of such an extension prior to September 30, 2001. Such a written extension shall cite this Section. Such an extension shall extend the Agreement, and therefore the time within which the conditions set forth in Section 303.A must occur, to December 31, 2001, and shall extend for three months the time by which the
Navy must make the respective fiscal year 2002 or 2003 payments as otherwise required in accordance with Section 302.A; or

C. The parties otherwise agree in writing prior to the termination of this Agreement pursuant to this Section 303.

Upon such termination, the City shall immediately proceed with the following obligations:

1. Stop work.
2. Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities.
3. Terminate all subcontracts.
4. With approval or ratification to the extent required by the Navy, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final.
5. Take any action that may be necessary, or that the Grant Officer may direct, for the protection of human health or the environment from imminent or substantial endangerment or for the protection and preservation of property at the ACES.
6. Return any unexpended funds to the Navy.

The City agrees to insert such provisions in its contracts, and to require such provisions be placed in subsequent subcontracts between the City’s contractors and their subcontractors, so as to effect the provisions above.
ARTICLE IV
FUNDING LIMITATION AND BUDGETING

Section 401. Navy's Funding Limitation

The funding obligation of the Navy for Environmental Services to be performed by the City under this Agreement is limited to an award amount of $77.67 million plus any funds provided under the Missing Documentation Account pursuant to Section 302.B. Except as may otherwise be provided in this Agreement, should the cost of the Environmental Services exceed the amounts described in Section 302.A and 302.B, the additional costs will not be reimbursed or otherwise paid by the Navy. The statements contained in this Agreement are not intended to create an actual or coercive deficiency in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq., and the agreement shall be interpreted to avoid such deficiencies. The City incurs additional costs at its own risk and any statements in this Agreement regarding the City's ability to seek reimbursement for those costs or to negotiate any additional amounts to be paid do not in and of themselves create an obligation by the Navy to pay those costs.

Section 402. City's Funding Limitation

The funding obligation of the City for Environmental Services performed under this Agreement is limited to: (1) funds available to the City from the award amount of 77.67 million dollars, plus funds provided in the Missing Documentation Account; plus (2) funds available to the City or named insured for the performance of Environmental Services associated with Known Conditions pursuant to the Remediation Stop Loss Policy; plus (3) funds available to the City or other named insured from the insurer for the performance of Environmental Services associated with Insured Unknown Conditions pursuant to the Environmental Liability Policy. The City shall have no obligation under this Agreement to reimburse or pay costs which exceed such funding limitation.
ARTICLE V
PAYMENT SCHEDULE

Section 501. General

The City shall be paid in accordance with Section 302.A and 302.B.

Section 502. Payments

A. The City may, from the funds provided pursuant to Section 302.A and 302.B, provide payment for costs to be incurred pursuant to duly executed contracts with subsequent transferees of the Eastern Early Transfer Parcel and/or with environmental service contractors that shall cause to be performed, in whole or in part, the Environmental Services for which the City is responsible in accordance with this Agreement. Such payments may be made directly by the City or by an independent third party holder of a separate account established, in part, for the benefit of such subsequent transferees, into which the City pays part or all of the funds provided pursuant to Section 302. Interest earned on funds held in such an account may be used to pay for the fee of the independent third party and/or to pay subsequent transferees, environmental contractors, insurers or other appropriate parties for purposes consistent with this Agreement, but such interest may not be used to make payments to the City. The City is the sole grantee of this Agreement and there are no subgrantees contemplated under this Agreement; nor shall any party, including but not limited to the City, a subsequent transferee, an environmental contractor or an insurer issuing the Environmental Insurance Policies or other insurance policies, be deemed to be a contractor of the Government by virtue of their receipt of funds provided pursuant to this Agreement or their undertaking of obligations related to this agreement.

B. The provisions of Title 32 of the Code of Federal Regulations and applicable OMB Circulars pertaining to allowable costs, payment, changes, and audits and post-grant closeout shall apply to the Grantee’s obligations under this Agreement.
ARTICLE VI
PAYMENT

Section 601. General

Upon request by the City, the Navy shall pay the City as provided in this Agreement and in compliance with the provisions of 32 CFR Part 33, OMB Circular A-87 and OMB Circular A-102.

Section 602. Relation to Prompt Payment Act.

This Agreement is not a contract as defined under OMB Circular A-125 which implements the Prompt Payment Act of 1982 (31 U.S.C. Section 3901, et seq.) and that Act does not apply to this Agreement.

Section 603. Direct Navy Payment of City Obligations

In no event will the Navy make direct payment to City contractors, City employees, or City vendors for any costs incurred by the City under this Agreement. The City's contractual obligations are its own exclusively and are not shared in or guaranteed in any manner by the Navy. Neither does the Navy have any obligation hereunder to assume the City's contractual obligations to third parties in the event that the City might fail or refuse to carry out those obligations, and the City hereby agrees to defend and hold the Navy harmless from such claims that the Navy do so.
ARTICLE VII
GENERAL PROVISIONS

Section 701. Term of Agreement

Subject to earlier termination pursuant to Sections 303 or 1003, this Agreement shall remain in effect until Regulatory Closure for each IA within the ACES has been achieved, and the warranty required by the CERCLA Section 120 has been issued, provided however, that, subject to the City's funding limitation in Section 402 (i) the obligations of the City required to maintain compliance under the Consent Agreement and compliance with any applicable Closure Plans, (ii) the City's obligations to perform the Environmental Services associated with Insured Unknown Conditions; and (iii) the City and Navy's obligations under Section 711 (including the relevant provisions of Sections 101, 102, 302, 703, 706, 707, and 801, cross-referenced in Section 711); and (iv) Section 715 shall all survive the termination of this Agreement.

Section 702. Amendment of Agreement

Only an instrument in writing signed by the parties hereto may amend this Agreement.

Section 703. Successors and Assigns

All obligations and covenants made by the parties under this Agreement will bind and inure to the benefit of any successors and assigns of the respective parties, whether or not expressly assumed by such successors or assigns, and may not be assigned in whole or in part without the written consent of the other party.

Section 704. Entire Agreement

This Agreement constitutes the entire Agreement between the parties. All prior discussions and understandings on this matter are superseded by this Agreement. The FOSET shall not be used to interpret the obligations under or conditions set forth in this Agreement. Furthermore, the Environmental Insurance Policies shall not be used to interpret any aspect of this Agreement.

Section 705. Severability

If any provision of this Agreement is held invalid, the remainder of the Agreement will continue in force and effect to the extent not inconsistent with such holding.

Section 706. Waiver of Breach

No Party shall be deemed to have waived any material provision of this Agreement upon any event of breach by the other party and no “course of conduct” shall be considered to be such a waiver, absent such a writing.
Section 707. Notices

Any notice, transmittal, approval, or other official communication made under this Agreement will be in writing and will be delivered by hand, facsimile transmission, electronic mail, or by mail to the other party at the address or facsimile transmission telephone number set forth below, or at such other address as may be later designated:

Commander
Southwest Division
Naval Facilities Engineering Command
1220 Pacific Highway
San Diego, CA 92132-5190

City Manager, City of Vallejo
555 Santa Clara Street
Vallejo, CA 94590

Section 708. Conflict of Interest

The City shall ensure that its employees are prohibited from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others.

Section 709. Access to and Retention of Records

The City shall afford any authorized representative of the Navy, the Department of Defense, the Comptroller General, or other officially concerned Federal Government agency access to and the right to examine all records, books, papers, and documents, including records in automated forms ("Records") that are within the City’s custody or control and that relate to its performance under this Agreement. This right of access to records shall not include attorney client communications, attorney work product or other legally privileged documents. The City shall retain all such records intact in such form, if not original documents, as may be approved by the Navy, which approval shall not be unreasonably withheld, for at least three (3) years following completion or termination of this Agreement. Access to the City’s records will be during normal business hours, and the Navy will give the City seventy-two (72) hours prior notice of its intention to examine the City’s records, unless the Navy determines that more immediate entry is required by special circumstances. The City will have no claim due to such entries against the Navy or any officer, agent, employee, or contractor thereof.

Section 710. Change of Circumstances

Each party will promptly notify the other party of any legal impediment, change of circumstances, pending litigation, or any other event or condition that may adversely affect such party’s ability to carry out any of its obligations under this Agreement.

Section 711. Liability and Indemnity
A. Navy Indemnification Under Section 330 of P.L. 102-484, as amended

(1) Subject to Paragraph 711.E, the Navy shall hold harmless, defend and indemnify, in full, the City; any other person or entity that acquires ownership or control of the Eastern Early Transfer Parcel or any portion thereof from the City; or any successor, assignee, transferee, lender, or lessee of the City, (hereinafter referred to collectively and individually as “Indemnitee(s)”), from and against any suit, claim, demand, action, liability, judgment, cost or fee, arising out of any claim for personal injury or property damage (including death, illness, loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance, pollutant, contaminant, petroleum or petroleum derivative from or within the Eastern Early Transfer Parcel as a result of DOD activities at or within the Eastern Early Transfer Parcel.

(2) In any case in which Navy determines that it may be required to indemnify an Indemnitee(s) for any suit, claim, demand, action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage referred to in Paragraph 711.A(1), the Navy may settle or defend on behalf of that Indemnitee(s), the claim for personal injury or property damage.

(3) If any Indemnitee(s) does not allow Navy to settle or defend the claim, such Indemnitee(s) will not be afforded indemnification with respect to that claim.

(4) Navy will not indemnify the Indemnitee(s) unless such Indemnitee(s):

(a) Notifies Navy in accordance with Section 301.D. An Indemnitee(s) claim for indemnification accrues when an Indemnitee(s) receives written notice from a claimant of any suit, claim, demand, action, liability, judgment, cost or other fee, which relates to personal injury or property damage, that the Indemnitee(s) knows or may be deemed reasonably to have known, may have been caused or contributed to by DOD activities. Indemnitee(s) right to indemnification shall not expire due to late notice unless Navy’s ability to defend or to settle is materially and adversely affected;

(b) Furnishes Navy copies of pertinent papers the Indemnitee(s) receives;

(c) Furnishes, to the extent it is in the possession or control of Indemnitee(s), evidence or proof of any claim, loss, or damage covered by Section 711.A; and

(d) Provides, upon request of Navy, reasonable access to the records and personnel of the Indemnitee(s) for purposes of defending or settling the claim or claims.

(5) Navy will not indemnify an Indemnitee(s) to the extent such Indemnitee(s) caused or contributed to any release or threatened release of any hazardous substance, pollutant, contaminant, petroleum or petroleum derivative from or on the Eastern Early Transfer Parcel. Navy is entitled to contribution from Indemnitee(s) to the extent Navy shows that such Indemnitee(s) caused or contributed to any release. However, the availability of contribution shall not affect the requirement of Navy to defend an Indemnitee(s), unless such Indemnitee(s) is solely responsible for the release or

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threatened release giving rise to the claim for indemnity, in which case the Navy’s duty to defend will not exist as to that claim.

B. CERCLA Response Claims

(1) Navy Obligations

(a) Subject to Paragraph 711.E, the Navy herein provides assurances that subject to the City’s obligations under this Agreement, the Navy shall remain responsible for: (i) all necessary remediation or corrective actions described in the FOSET, except those actions for which the City specifically has assumed responsibility under the terms of this Agreement; (ii) any necessary additional remediation or corrective action required to address Navy- Retained Conditions; and (iii) additional remedial action that is required for Navy selected remedies, if any, as a result of the enactment or promulgation of new or revised legally enforceable Federal environmental standards that are applicable to Federal cleanups, that are based upon new scientific or health data, and that are more stringent than those upon which the initial remedial action selection decision was based at the time of obtaining Regulatory Closure so that the initial remedial action is no longer protective of human health and the environment.

(b) The Navy herein provides assurances that the Navy shall remain responsible for:

(i) failures of any other remedies selected by the Navy, if any, for the Eastern Early Transfer Parcel, and

(ii) Navy- Retained Conditions, as provided in this Agreement.

(2) For matters for which the Navy remains responsible, and subject to the terms of this Agreement, the Navy will timely:

(a) Assess, inspect, investigate, study and remove or remediate, as appropriate, the release of a hazardous substance, pollutant, or contaminant, from or on the Eastern Early Transfer Parcel; and

(b) Settle or defend any claim, demand, or order made by federal, state, or local regulators or third parties in connection with any release of a hazardous substance, pollutant, or contaminant from or on the Eastern Early Transfer Parcel.

(3) The City shall:

(a) Notify the Navy in accordance with Section 301.D, as required under this Agreement. Indemnitee’s rights under CERCLA Section 120 shall not expire due to late notice unless the Navy’s ability to undertake and complete its obligations under CERCLA Section 120 is materially and adversely affected;

(b) Furnish the Navy copies of pertinent papers the City receives; and
(c) Provide, upon request of the Navy, reasonable access to the records and personnel of the City for purposes of defending or resolving the need for additional response action.

(4) For purposes of 42 U.S.C. Section 9620(h)(3), the City’s status as owners following the conveyance of title of the Eastern Early Transfer Parcel to the City will not make City a potentially responsible party or relieve the Navy of its obligations hereunder and under 42 U.S.C. Section 9620(h) unless and only to the extent the City’s activities cause a release or a threatened release resulting in response costs to the Government.

(5) The Navy will not indemnify an Indemnitee(s) when additional remediation is required on or within the Eastern Early Transfer Parcel as a result of a change in land use from that upon which the initial remedial action selection decision is based at the time of completion of Regulatory Closure.

C. Petroleum Release Claims

(1) In accordance with and to the extent required by applicable federal, state and local laws and subject to the terms of this Agreement, the Navy will timely:

   (a) Assess, inspect, investigate, study, and remove or remediate, as appropriate, the release or threatened release of petroleum or a petroleum derivative from or within the Eastern Early Transfer Parcel, caused by DOD activities at or within the Eastern Early Transfer Parcel, and
   
   (b) Settle or defend any claim, demand, or order made by federal, state, or local regulators or third parties in connection with a release or threatened release of petroleum or a petroleum derivative, from or within the Eastern Early Transfer Parcel, caused by DOD activities at or within the Eastern Early Transfer Parcel.

(2) The City, upon learning of any previously unidentified release or threatened release of petroleum or petroleum derivative that may have been caused by DOD activities at or within the Eastern Early Transfer Parcel, will notify the Navy by following the notification procedures set forth in Section 301.D and Section 711.B(3)(a).

D. Definitions

For the purpose of the provisions of this Section 711, the following terms have the meaning indicated below:

(1) The terms “release”, “threatened release”, “hazardous substance,” “pollutant,” “contaminant,” “removal,” “remedial action,” and “response” have the meanings given such terms under CERCLA and United States Environmental Protection Agency (“EPA”) regulations implementing CERCLA.

(2) The term “Department of Defense activities” or “DOD activities” means the Department of Defense’s: construction, installation, placement, operation, maintenance, misuse,
abandonment or failure to maintain the buildings and equipment and land at or within the Eastern Early Transfer Parcel; or failure to satisfy any otherwise legally applicable obligation to investigate or remediate any environmental conditions existing at or within the Eastern Early Transfer Parcel. "Department of Defense activities" does not mean the release or threatened release of a hazardous substance, pollutant, contaminant, petroleum or a petroleum derivative, to the extent that Navy shows that the release or threatened release is caused or contributed to by the Indemnitee(s).

(3) The term "Action ... arising out of any claim for ... property damage" includes, but is not limited to, any judicial, administrative or private cost recovery proceeding brought against an Indemnitee(s) (i) for response costs arising under CERCLA, (ii) for costs incurred to enjoin or abate the presence or migration of contamination from or within the Eastern Early Transfer Parcel under the Resource Conservation and Recovery Act, 40 U.S.C. Section 6901, et seq., as amended, ("RCRA"), or (iii) for costs incurred to comply with the requirements of similar federal or state laws and regulations (or the laws of any political subdivision of the state) which arise from the environmental conditions at or within the Eastern Early Transfer Parcel.

E. The City Obligations and Limited Waiver of Statutory Rights

(1) Notwithstanding the foregoing provisions of this Section 711, the City and the Navy agree that the City will be responsible for and shall cause to be performed the Environmental Services in accordance with this Agreement. In consideration of the City agreeing to be responsible for performance of Environmental Services, the Navy shall pay the amounts specified in Section 302 and address Navy-Retained Conditions in accordance with this Agreement in full satisfaction of the Navy’s obligations to the City for the performance of the Environmental Services.

(2) In consideration of the payment by the Navy to the City as specified in § 302 and other terms of this Agreement, the City, subject to the City’s funding limitation in Section 402, agrees that it shall, upon receipt of the $36.32 million, indemnify the Navy for:

(a) any response cost claims for known and unknown soil and groundwater contamination in the ACES, including hazardous substances, pollutants and chemicals, petroleum, and petroleum derivatives, but only to the extent such response cost claims result from and are associated with the performance of Environmental Services. The City’s indemnification obligation shall exist only with respect to: (1) Known Conditions that are not also Navy-Retained Conditions; and (2) Insured Unknown Conditions;

(b) oversight costs for any remedy implemented by the City to the extent the City is responsible for such costs in accordance with the terms of this Agreement;

(c) all personal injury or property damage claims caused by the City or its contractors in the course of performing the Environmental Services;

(d) all natural resource damage claims pursuant to 42 U.S.C. Section 9607(a)(4)(C)) pertaining to releases of hazardous substances, pollutants or contaminants but only to the extent that such damages were caused or contributed to by the actions of the City or its successors in interest.
(e) all costs associated with or arising from any faulty performance or consequence of the Environmental Services.

(f) all costs associated with additional remediation required on or within the ACES as a result of a change in land use from that upon which the initial remedial action selection decision is based at the time of completion of Regulatory Closure.

(g) all costs associated with correction of a failure of any remedy implemented by the City.

(4) The Parties agree that the City has provided financial assurances reasonably acceptable to the Navy to enable the Navy to meet the Navy’s requirements of 42 U.S.C. Section 9620(h)(3)(C).

(5) Except as otherwise expressly provided by this Agreement, this Agreement shall not be construed to limit, expand or otherwise affect any right the City may have in the absence of this Agreement to take legal action to require the Navy to act with respect to Navy-Retained Conditions or to seek damages resulting from the Navy’s performance or failure to perform any actions with respect to Navy- Retained Conditions, nor shall it be construed to limit, expand or otherwise affect any right the Navy may have in the absence of this Agreement to take legal action against the City.

(6) Notwithstanding the preceding Section 711E(5), the City hereby waives any potential claims against, and covenants not to sue, the Navy for consequential damages related to development delays caused by the Navy’s performance of, or failure to perform, investigation or remediation activities with respect to Known Conditions that are Navy- Retained Conditions.

F. General Provisions

(1) Any Indemnitee may implement or enforce the terms of this Section 711 in its own right at its own discretion without obtaining permission from or joining any of the other Indemnitees.

(2) Prior to taking any action or reaching any final settlement under this Section 711 that could adversely impact Indemnitee’s(s’) use of the Eastern Early Transfer Parcel, the Navy shall consult with Indemnitee(s) to minimize any such impact.

(3) Nothing in this Section 711 creates rights of any kind in any person or entity other than the Navy and Indemnitees.

(4) The provisions of this Section 711 shall be included in any deed or lease from the City of all or any portion of the subject property and shall be binding upon any successor in interest.

(5) The City and the Navy agree that the Environmental Services to be caused to be performed by the City in accordance with the terms of this Agreement does not include any work relating to nor is the City responsible for indemnification of the Navy for any work related to Navy-
Retained Conditions.

Section 712. Liability and Insurance

A. The City shall either self-insure or shall carry and maintain general liability insurance, to afford protection with limits of liability in amounts approved from time to time by the Navy, but not less than $500,000.00 in the event of bodily injury and death to any number of persons in any one accident.

B. The City shall use reasonable efforts to cause its transferees and/or contractors to carry and maintain environmental insurance through the Environmental Insurance Policies to afford protection for the risks set forth in Section 301 and Section 711(E) of this Agreement. Any such insurance policy will provide a waiver of subrogation regarding any waiver, as applicable, by the City of claims associated with matters addressed in this Agreement which the City may have against the Navy, its officers, agents, or employees except for those asserted by third parties in their own right. In no circumstances will the City be entitled to assign to any third party rights of action that the City may have against the Navy, subject to the provisions of Section 711.A.1. If environmental insurance is obtained whereby all or a portion of the premiums paid with funds provided by this Agreement are returned to the City or any of its contractors, those sums may be retained by the City or any of its contractors but must be used solely for purposes of environmental restoration or mitigation. The Navy shall be listed as an Additional Insured with respect to the coverage provided in the Environmental Liability Policy for remediation of Insured Unknown Conditions. The Navy shall not otherwise be deemed an insured of, nor have any rights with respect to, any other grant of coverage under the Environmental Insurance Policies.

C. If and to the extent required by applicable law, the City will either self-insure or carry and maintain worker’s compensation or similar insurance in form and amounts required by law. Any such insurance policy will provide a waiver of subrogation regarding any waiver by the City of any claims the City may have against the Navy, its officers, agents, or employees except for those asserted by third parties in their own right. In no circumstances will the City be entitled to assign to any third party rights of action that the City may have against the Navy.

D. General Liability Policy Provisions: All general liability insurance which the City carries or maintains or causes to be carried or maintained pursuant to this Section 712 will be in such form, for such amounts, for such periods of time and with such insurers as the Navy may approve, which approval shall not be unreasonably withheld or delayed. All policies issued by the respective insurers for general liability insurance required by this Agreement will provide that no cancellation will be effective until at least thirty (30) days after receipt by the Navy of written notice thereof; and provide a waiver of subrogation regarding any waiver by the City of any claims the City may have against the Navy, its officers, agents, or employees. In no circumstances will the City be entitled to assign to any third party rights of action which the City may have against the Navy. The Navy acknowledges and accepts the City’s self-insurance coverage for general liability and/or worker’s compensation or similar coverage.

E. Delivery of Policies: the City will provide to the Navy a certificate of insurance evidencing the insurance required by the City and will also deliver, no later than thirty (30) days prior to the
expiration of any such policy, a certificate of insurance evidencing each renewal policy covering the same risks.

Section 713. Reports

In order to assure appropriate documentation for the Navy to execute the CERCLA covenant, the Navy may request that the City provide additional information concerning the environmental condition of the ACES, and if such information is reasonably obtainable and releasable by the City, the City shall provide access to any documents containing such requested information to the Navy as soon as possible after such request is made. The City agrees to provide such access within a reasonable time of request therefore.

Section 714. Officials Not to Benefit

The City acknowledges that no member or delegate to the United States Congress, or resident Commissioner, shall be permitted to share in any part of this Agreement or receive any benefit that may arise therefrom.

Section 715. Representations

A. The Navy represents that:

   (1) it is fully authorized to enter into this Agreement;

   (2) the City can fully rely on the data provided to the City or its contractors by the Navy or the Navy's contractors for purposes of performing the Environmental Services and making disclosures required under applicable law; and

   (3) The information contained in the Tables in Appendix 3 fairly and accurately represents the Navy's actual knowledge of the nature and extent of contamination within the ACES, subject to the screening criteria set forth in the footnotes to the Tables. The information contained in the Figures in Appendix 3 generally represents the Navy's actual knowledge of the nature and extent of contamination within the areas depicted in the Figures.

B. The City represents that:

   (1) it is fully authorized to enter into this Agreement; and

   (2) it enters this Agreement cognizant of the requirements and prohibitions set forth in the Anti-Deficiency Act and that any provision of this Agreement that states or implies that the Navy will reimburse the City for specific costs incurred or that the Navy will perform any actions with respect to Navy-Retained Conditions are wholly subject to the Anti-Deficiency Act and that the Navy's obligations are subject to that law.
ARTICLE VIII
APPLICABLE LAWS AND REGULATIONS

Section 801. Applicable Law

This Agreement is incident to the implementation of a Federal program. Accordingly, as it may affect the rights, remedies, and obligations of the United States, this Agreement will be governed by and construed in accordance with Federal law.

Section 802. Governing Regulations

This Agreement shall be enforced and interpreted in accordance with the Federal laws and regulations, directives, circulars, or other guidance cited in this Agreement. This Agreement will be administered according to the Uniform Administrative Requirements for Grants and Cooperative Agreements and other applicable portions of Title 32 of the Code of Federal Regulations and pertinent OMB Circulars. In the event of a conflict between the provisions of this Agreement and the regulations, the regulations will govern.

Section 803. Environmental Protection

Each Party agrees that its performance under this Agreement shall comply with all applicable state, Federal and local environmental laws and regulations.
ARTICLE IX
PROCUREMENT

Section 901. City Contracts

The City's acquisition of goods and services in the performance of this Agreement will be in accordance with the instructions and procedures contained in 32 CFR Section 33.36(b)-(i). The City must not contract with any party which is debarred or suspended or is otherwise excluded from, or ineligible for, participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension" and DOD regulations thereunder.
ARTICLE X
TERMINATION, ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION

Section 1001. Dispute Resolution

A. Except as otherwise provided in this Agreement, these dispute resolution provisions are the sole recourse of any party with respect to disputes and enforcement of any aspect of this Agreement.

B. A dispute shall be considered to have arisen when one party sends the other party written notice of such dispute. Such notice will include, to the extent such information is available: the amount of monetary relief claimed or the nature of other relief requested; the basis for such relief; and documents or other evidence pertinent to the claim. The parties shall attempt to resolve the dispute at the staff level. The parties shall confer at the staff level within fifteen (15) days after the notice of dispute is received. If the staff level negotiators cannot resolve the dispute within such fifteen (15) day period (or longer period if agreed to by the parties), the staff level negotiators shall submit the dispute, with any relevant information, to designated management-level representatives of each party.

C. Within thirty (30) days after a dispute is elevated to the management level, the management level negotiators shall have thirty (30) days (or longer period if agreed to by the parties) to resolve the dispute. If the dispute cannot be resolved at the management level within such time period, the parties can agree to either elevate the matter to senior officials of each party, or submit the matter in writing to the Commander, Naval Facilities Engineering Command for a decision. If the parties cannot agree on whether to elevate the dispute or submit it to the Commander, the dispute shall be submitted to the Commander. Such appeal must be in writing and contain all documents and arguments necessary for a decision on the appeal. Either party can request a hearing, which request shall be granted. Any such hearing will be conducted in such manner and under such procedures as the Commander, Naval Facilities Engineering Command may reasonably prescribe. The Commander shall render a decision in a timely manner.

D. If the City disagrees with the decision of the Commander, the City may, by providing notice to the other party, appeal the Commander’s decision or seek any other remedy available at law or equity in a court of competent jurisdiction in the manner provided by law. Nothing in this Section shall affect standards of review or burdens of proof that may exist in law irrespective of this Section.

E. Prior to or instead of seeking judicial review in accordance with Section 1001.D, either party may choose to submit the dispute to arbitration pursuant to the Alternate Disputes Resolution Act, 5 U.S.C. Section 581, et seq., by giving written notice to the other party. The parties, within their respective authorities, may mutually agree to dispute resolution mechanisms other than arbitration.

F. If either party fails to fully participate in and substantially comply with the dispute resolution procedures set forth in this Section 1001, such party shall be deemed to have waived its dispute resolution procedure rights with respect to the dispute at issue and a decision rendered by the participating party against the absent or recalcitrant party shall be binding on all parties. Unless otherwise provided by law, the recalcitrant party shall have no right to appeal such decision.
G. The City may invite any subsequent transferee, environmental contractor or insurer to accompany the City in any negotiation or proceeding conducted pursuant to this Section 1001.

H. In no event shall dispute resolution result in imposing on the City costs and obligations in excess of the City's funding limitation in Section 402.

Section 1002. Enforcement

Either party may enforce the terms of this Agreement in accordance with the terms of this Agreement. Without limiting either party’s enforcement rights, the Navy’s enforcement rights for material breach by the City, in accordance with the terms of 32 CFR Section 33.43, shall include:

1. Temporarily withholding payments pending correction of the deficiency by the City;

2. Disallowing (denying both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance;

3. Wholly or partially suspending or terminating this Agreement in accordance with the termination procedures set forth in Section 1003;

4. Withholding further awards under this Agreement; and

5. Taking other remedies that may be available in accordance with this Agreement.

Section 1003. Termination

A. This Agreement may terminate on its own terms, in accordance with Sections 303, 701 or in accordance with this Section 1003.

B. In the event of material breach, the non-breaching party, in order to preserve its right to terminate this Agreement, must provide notice of its intent to terminate to the breaching party. The breaching party shall have fifteen (15) days to cure the breach unless a longer period is agreed to in writing by the parties. If the breaching party fails to cure the breach within the fifteen day (or longer, if agreed to) period, the non-breaching party may, in its discretion, terminate this Agreement no sooner than sixty (60) days after the cure period has expired. The existence of a material breach shall be finally determined in accordance with the dispute resolution procedures set forth in Section 1001.

C. If the Agreement is terminated, the City shall take the actions set forth in Section 303.

D. If this Agreement is terminated in accordance with Section 303 or this Section 1003, the status of the parties with respect to environmental conditions at the ACES, shall revert to that as existed immediately preceding the Effective Date.

E. A party’s right to terminate and determination of funds available for reimbursement under this Section 1003 shall be subject to the dispute resolution procedures set forth in Section 1001.
Section 1004. Effects of Suspension and Termination

Costs to the City resulting from obligations incurred by the City during a suspension, or after termination of payments, are not allowable unless the Navy expressly authorizes them in the notice of suspension or termination, or subsequently. Other City costs incurred during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

1. The costs result from obligations which were properly incurred by the City before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, cannot be cancelled; and,

2. The costs would be allowable if the Agreement were not suspended or expired normally at the end of the funding period in which the termination takes effect. The enforcement remedies identified in this section do not preclude the City from being subject to “Debarment and Suspension” under E.O. 12549 (see 32 CFR Section 33.35).
ARTICLE XI
LEGAL AUTHORITY

Section 1101. Legal Authority

The parties hereby represent and warrant that they are under no existing or reasonably foreseeable legal disabilities that would prevent or hinder them from fulfilling the terms and conditions of this Agreement. The parties will promptly notify each other of any legal impediment that arises during the term of this Agreement that may prevent or hinder the party’s fulfillment of its obligations under this Agreement.
IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed.

CITY OF VALLEJO
A Municipal Corporation

By: [Signature]
Name: David R. Martinez
Title: City Manager
Dated: 16 April 2001

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE CITY ATTORNEY

Approved as to form and legality, and as compliant with Section 1101, this 25th day of April 2001

By: [Signature]
Name: John M. Powers
Title: City Attorney
City of Vallejo Resolution No. 01-161 N.C.

Attest:

By: [Signature]
Name: Allison Villarante
Title: City Clerk

THE UNITED STATES OF AMERICA

By: [Signature]
Name: Jim Wright
Title: Director, Environmental Programs
Dated: 16 April 2001

Accounting and Appropriation Data:

SEE ATTACHED
List of Appendices

Appendix 1: Map of ACES and Mare Island Naval Shipyard
Appendix 2: Map of Wetlands
Appendix 3: Tables of Known Conditions and Associated Figures
Appendix 4: Transition Plan
Appendix 5: Termination Plan