



Management Memo #EO-93-036-MM

TITLE: Operation and Maintenance Enforceable Agreement

AFFECTED PROGRAMS: Site Mitigation
Office of Legal Counsel

BACKGROUND:

Historically, when Project Managers drafted Operation and Maintenance (O&M) Agreements, they had to rely on previously issued agreements for suitable language. Through the efforts of Region 2, the Site Mitigation Enforcement Workgroup, and the Office of Legal Counsel (OLC), a model O&M enforceable agreement has been developed. Therefore, when a site's Final Remedial Action Plan (RAP) and approved Remedial Design (RD) require long-term O&M, Project Managers are required to use the attached model enforceable agreement.

The model agreement covers the O&M and monitoring of remediation systems pursuant to Section 25355.5(a)(1)(C) of the Health and Safety Code. Cover form letters for the draft and final O&M agreement are also part of the package. The language in this model agreement is based on the boilerplate in the Imminent and/or Substantial Endangerment (I/SE) order and determination (Official Policy and Procedure #EO-93-009-PP). The model O&M agreement also contains guidance and instructions to the Project Manager. For additional guidance on the roles and responsibilities for oversight of phased cleanup activities, Project Managers should refer to: "Oversight and Supervision of Investigations and Removal and Remedial Actions at Hazardous Substance Sites" (formerly document SM #92-1, now #EO-92-002-PP).

ACTION:

Effective immediately, the model O&M agreement and cover letters shall be used as the basis for the development of an enforceable agreement at sites where the final RAP and the approved RD require O&M. The Department shall either issue an order or enter into an O&M agreement with the

Respondents prior to certification of the site. The model O&M agreement and cover letters will be distributed to the Regional Offices on diskettes via each of the Regional Site Mitigation Enforcement Workgroup representatives. A hard copy of the O&M Agreement is attached.

Your current Enforcement Workgroup representative is:

Region 1: Jim Tjosvold Region 2: Barbara Coler
(Clovis): Tom Kovac

Region 3: Harlan Jeché Region 4: Haissam Salloum

OLC: Susan Bertken Headquarters: Kathleen
Hartshorne

ROLES AND RESPONSIBILITIES:

- Regional Operation Project Managers

! Use the attached model enforceable agreement when sites enter into the final remediation phase;

! Draft the model agreement by inserting specific site and respondent information. Remove guidance/instructions and suggested language from the model agreement prior to initiating negotiations with the respondents. Guidance and instructions appear in boldface and brackets [].

! Retain Section 23.0, Financial Assurance, in the first draft of the agreement as instructions to respondents.

! Provide the respondents with a copy of the draft agreement (in Wordperfect version 5.1) on a floppy disk.

- Regional Operations

! All O&M agreements must be accompanied by, and routed for sign-off in accordance with an O&M Agreement Sign-Off Sheet, which is attached to the model agreement.

! Regional Branch Chiefs have been delegated signature authority for O&M agreements. (Refer to Management

Memo #EO-93-022-MM, formerly SM 92-2 and SM 92-2R,
"Authority to Issue Site Mitigation Documents."

! Regional Offices are responsible for concurrently routing copies of the signed O&M agreement to the Department's Office of Legal Counsel (OLC), and the Site Mitigation Program's Planning and Policy Unit.

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- **Office of Legal Counsel (OLC)**

! All O&M agreements must be reviewed (prior to initiation of negotiations) and approved by the OLC.

CONTACT:

Vicki L. Vandergriff, Chief
Planning and Policy Unit
Site Mitigation Program
(916) 255-2118 or CALNET 494-2118

Date

MARGARET C. FELTS
Deputy Director
Site Mitigation Program

Attachment

DATE

[NAME AND ADDRESS OF RESPONDENT(S)]

Dear [RP REPRESENTATIVE]:

[SITE NAME] - DRAFT OPERATION AND MAINTENANCE AGREEMENT

Enclosed for [RESPONDENT(S)' NAME(S)] review and comment is the draft Operation and Maintenance Agreement (OMA) for the [SITE NAME]. The draft incorporates language drafted by our legal staff and is based on California statutes and Department policy. Therefore, any proposed changes to the draft should be extremely limited.

Also enclosed is a floppy disk with a copy of the OMA in WordPerfect version 5.1 format. Please use this as a basis for proposing any changes to the OMA by submitting a revised document with strikeouts of the original language, or similar demarcations. Proposed additions to the OMA must be indicated with underlining or bold-face type. Please submit the OMA by [INSERT DATE].

If you have any questions or comments, please contact [PROJECT OFFICER'S NAME] at [PROJECT OFFICER'S TELEPHONE NUMBER].

Sincerely,

[NAME OF SUPERVISOR]
Unit Chief
Site Mitigation Branch

Enclosure(s)

cc: [NAME OF DTSC ATTORNEY]
Office of Legal Counsel
P.O. Box 806
Sacramento, California 95812-0806

[DATE]

CERTIFIED MAIL, RETURN RECEIPT REQUESTED
[NAME/ADDRESS OF RESPONDENT(S)]

Dear [RP REPRESENTATIVE]:

[SITE NAME] - OPERATION AND MAINTENANCE AGREEMENT

Enclosed are two copies of the final Operation and Maintenance Agreement (OMA) for the [SITE NAME]. The final OMA incorporates language that was agreed upon during our conference call/meeting of _____. Please have [RESPONSIBLE PARTY SIGNING AGREEMENT] sign both copies of the OMA and return both copies to the Department by [INSERT DATE].

If you have any questions, please call [PROJECT OFFICER] at [PROJECT OFFICER'S PHONE NUMBER]. Thank you for your cooperation in this matter.

Sincerely,

[NAME OF SUPERVISOR]
Unit Chief
Site Mitigation Branch

Enclosure

cc: [NAME OF DTSC ATTORNEY]
Office of Legal Counsel
P.O. Box 806
Sacramento, California 95812-0806

In the matter of:)	Docket No. _____
)	
)	
)	
[SITE NAME])	ENFORCEABLE AGREEMENT
[SITE ADDRESS])	
)	
A Hazardous Waste Site)	Health and Safety Code
_____)	Section 25355.5(a)(1)(C)
)	

AGREEMENT
 OPERATION AND MAINTENANCE
[SITE NAME]
[CITY], CALIFORNIA

This Agreement is made and entered into, by and between the State Department of Toxic Substances Control ("Department") and **[NAME OF ENTITY OR INDIVIDUAL]**, **[RESPONDENT(S) ADDRESS]**.

W H E R E A S;

1.0 Certain operation and maintenance of the **[TYPE OF REMEDIATION SYSTEM(S), e.g., groundwater treatment system, soil vapor extraction system, cap, etc.]** remain to be performed on the **[SITE NAME]** for the remediation of **[AFFECTED MEDIUM OR MEDIA]**. The Site is currently owned by **[SITE OWNER NAME]**. The **[SITE NAME]** is located at **[SITE ADDRESS, COUNTY NAME]**. A site location map and the assessor's parcel map are attached as Exhibit A. **[In addition, in the case where the O&M agreement covers less than the full site, a legal description and map of the area covered should be included in Exhibit A, a legal description and map of the site should be**

included in Exhibit B. All other Exhibit numbers should be revised accordingly.] A site map showing the location(s) of [TYPE OF REMEDIATION SYSTEM, LISTING IMPORTANT COMPONENTS] is/are attached as Exhibit B.

AGREEMENT

2.0 The parties hereto, based upon the foregoing and in exchange for the mutual performances and forbearances described below, agree as follows:

2.1 Obligations of [NAME OF ENTITY OR INDIVIDUAL]

2.2 Implementation of Operation and Maintenance Plans.

Respondent(s) shall implement the Operation and Maintenance Plan(s) (OMP) dated _____ (Exhibit __) for the remediation of [AFFECTED MEDIUM OR MEDIA, e.g., SOIL, GROUNDWATER, ETC.] [TYPE OF CONTAMINANT(S)] at the [SITE NAME]. [Briefly describe the requirements in the OMP. Any conflicting agency requirements and the agreed upon resolution should also be discussed.] The [TYPE OF REMEDIATION SYSTEM(S)] systems shall be left in place and operated by Respondent(s) until and except to the extent that the Department authorizes Respondent(s) in writing to discontinue, move or modify some or all of the [REMEDICATION SYSTEMS] because Respondent(s) has met the cleanup goals for the site, or because the modifications would better achieve the cleanup goals, or because the [TYPE OF REMEDIATION SYSTEM(S)] could not achieve the cleanup goals and other cleanup methods will be implemented or it has been demonstrated that the maximum

achievable cleanup has occurred. A table of the cleanup levels for [AFFECTED MEDIUM OR MEDIA] is attached as Exhibit ---.

2.3 Modifications. Respondent(s) shall give the Department at least sixty (60) days advance written notice prior to the intended date of any proposed modifications, discontinuation or other disruption of the **[TYPE OF REMEDIATION SYSTEM(S)]**.

The written notice shall be sent by certified mail to the Department at the address set out in Paragraph 8.0 of this Agreement. The written notice to the Department shall include a detailed description of the work to be done or modifications to be made and a map showing the exact location of the proposed work and the reasons for modification, disruption or discontinuation.

2.4 Environmental Monitoring. Respondent(s) shall implement the **[GROUNDWATER, AIR QUALITY, ETC.]** monitoring plan(s) and reporting requirements approved by the Department. The current monitoring plan(s) are attached as Exhibit(s) _____.

Respondent(s) shall also comply with the monitoring requirements of other agencies, as attached or as shown in Exhibit [__].

2.5 [Quarterly] Summary Reports: Within thirty (30) days of the initial operation (completion of construction) of the **[TYPE OF REMEDIATION SYSTEM]**, and on a [quarterly] basis thereafter, Respondent(s) shall submit a [Quarterly] Summary Report of its activities under the provisions of this

Agreement. The report must be received by the Department by the fifteenth (15th) day of the first month after each [quarter] ends and shall describe:

- a) Specific actions taken by or on behalf of Respondent(s) during the previous [quarter];
- b) Actions expected to be undertaken during the current [quarter];
- c) All planned activities for the next [quarter];
- d) Any requirements under this Agreement that were not completed;
- e) Any problems or anticipated problems in complying with this Agreement; and
- f) All results of sample analyses, tests, and other data generated under the Agreement, and any significant findings from these data.

2.6 Five-Year Review. **[Guidance to project managers: In accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), if a remedy allows for unrestricted use of the site, a five (5) year review is not required.]** Respondent(s) shall review and reevaluate the remedial action after a period of five (5) years from the completion of construction and startup and every 5 years thereafter. The review and reevaluation shall be conducted pursuant to Section 121 (c) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. 99-499. Within

thirty (30) calendar days before the end of the 5 year period, Respondent(s) shall submit a remedial action review workplan to the Department for review and approval. Within sixty (60) days of the Department's approval of the workplan, Respondent(s) shall implement the workplan and shall submit a comprehensive report of the results of the remedial action review. The report shall describe the results of all sample analyses, tests and other data generated or received by Respondent(s) and evaluate the adequacy of the implemented remedy in protecting public health, safety and the environment.

2.7 Emergency Response Action/Notification. In the event of any action or occurrence (such as a fire, earthquake, explosion, or human exposure to hazardous substances caused by the release or threatened release of a hazardous substance) during the course of this Agreement, Respondent(s) shall immediately take all appropriate action to prevent, abate, or minimize such emergency, release, or immediate threat of release and shall immediately notify the Project Manager. Respondent(s) shall take such action in consultation with the Project Manager and in accordance with all applicable provisions of this Agreement. Within seven days of the onset of such an event, Respondent(s) shall furnish a report to the Department, signed by Respondent(s)' Project Coordinator,

setting forth the events which occurred and the measures taken in the response thereto. In the event that Respondent(s) fail to take appropriate response and the Department takes the action instead, Respondent(s) shall be liable to the Department for all costs of the response action. Nothing in this section shall be deemed to limit any other notification requirement to which the Respondent(s) may be subject.

3.0 Obligations of the Department: The Department agrees to review and oversee the measures to be performed by Respondent(s) pursuant to this Agreement.

4.0 Project Coordinator. The responsibilities of the Respondent(s)' Project Coordinator **[INSERT NAME OF PROJECT COORDINATOR]** will be to receive and submit all notices, comments, approvals, and other communications from and to the Department. Respondent(s) shall promptly notify the Department of any change in the identity of the Project Coordinator.

5.0 Project Engineer. The work performed pursuant to this Agreement shall be under the direction and supervision of a qualified professional engineer in the State of California with expertise in hazardous substance site cleanup. Within [5] calendar days from the date the Agreement is signed by the Department, Respondent(s) must submit: a) The name and

address of the project engineer chosen by the Respondent(s); and b) in order to demonstrate expertise in hazardous substance cleanup, the resume of the engineer, and the statement of qualifications of the consulting firm responsible for the work. Respondent(s) shall promptly notify the Department of any change in the identity of the Project Engineer.

6.0 Quality Control/Quality Assurance (QC/QA). All sampling and analysis conducted by Respondent(s) under this Agreement shall be performed in accordance with QC/QA procedures submitted by Respondent(s) and approved by the Department pursuant to this Agreement.

7.0 Submittals: All submittals and notifications from Respondent(s) that are required by this Agreement shall be sent simultaneously to:

[NAME]
Regional Branch Chief
Attn: **[PROJECT MANAGER]** (2 copies)
Site Mitigation Branch
Department of Toxic Substances Control
[CAL/EPA - DTSC REGIONAL OFFICE ADDRESS]

[NAME]
Executive Officer
Attn: **[Project Officer, if known]**
Regional Water Quality Control Board
[RWQCB ADDRESS]

[ADD OTHER AGENCY CONTACTS, AS APPROPRIATE]

8.0 Communications: All approvals and decisions of the Department made regarding submittals and notifications will be communicated to Respondent(s) in writing by the Site Mitigation Branch Chief, Department of Toxic Substances Control, or his/her designee. Confirmation of a designation shall be provided in writing by the Department in order to validate any approvals or decisions made by a Branch Chief's designee. No informal advice, guidance, suggestions or comments by the Department regarding reports, plans, specifications, schedules or any other writings by Respondent(s) shall be construed to relieve Respondent(s) of the obligations to obtain such formal approvals as may be required.

9.0 Department Review and Approval: (a) If the Department determines that any report, plan, schedule or other document submitted to the Department for approval pursuant to this Agreement fails to comply with this Agreement or fails to protect public health or safety or the environment, the Department may: (1) modify the document as deemed necessary and approve the document as modified; or (2) return comments to Respondent(s) with recommended changes and a date by which Respondent(s) must submit to the Department a revised document incorporating the recommended changes. (b) Any modifications, comments or other directive issued pursuant to (a) above, are incorporated into this Agreement. Any noncompliance with these modifications or directives shall be deemed a failure or refusal to comply with this Agreement.

10.0 Stop Work Order. In the event that the Department determines that any activity (whether or not pursued in compliance with this Agreement) may pose an imminent or substantial endangerment to the health or safety of people on the Site or in the surrounding area or to the environment, the Department may order Respondent(s) to stop further implementation of this Agreement for such period of time needed to abate the endangerment. In the event that the Department determines that any activities (whether or not pursued in compliance with this Agreement) are proceeding

without Department authorization, the Department may order Respondent(s) to stop further implementation of this Agreement or activities for such period of time needed to obtain Department authorization, if such authorization is appropriate. Any deadline in this Agreement directly affected by a Stop Work Order, under this section, shall be extended for the term of the Stop Work Order.

11.0 Department Required Modifications. The Department may require modification, replacement, or additions to remediation facilities if those facilities are not achieving remediation objectives or protecting public health, safety or the environment, including those identified in the Remedial Action Plan or Remedial Design. The Department may require additional evaluations, designs and the construction and operation of facilities to achieve these objectives.

12.0 Compliance With Applicable Laws: Respondent(s) shall carry out this Agreement in compliance with all applicable local, state, and federal requirements, including, but not limited to, requirements to obtain permits and to assure worker safety.

13.0 Respondent(s) Liabilities. Nothing in this Agreement shall constitute or be construed as a satisfaction or release

from liability for any conditions or claims arising as a result of past, current or future operations of Respondent(s).

Nothing in this Agreement is intended or shall be construed to limit the rights of any of the parties with respect to claims arising out of or relating to the deposit or disposal at any other location of substances removed from the Site.

Nothing in this Agreement is intended or shall be construed to limit or preclude the Department from taking any action authorized by law to protect public health or safety or the environment and recovering the cost thereof. Notwithstanding compliance with the terms of this Agreement, Respondent(s) may be required to take further actions as are necessary to protect public health and the environment.

14.0 Site Access: Access to the Site shall be provided at all reasonable times to employees, contractors and consultants of the Department. Access to laboratories (if owned by Respondent(s) consultants) used for analyses of samples under this Agreement shall also be provided as outlined above. Nothing in this paragraph is intended or shall be construed to limit in any way the right of entry or inspection that the Department or any other agency may otherwise have by operation of any law. The Department and its authorized representatives shall have the authority to enter and move freely at the Site at all reasonable times for purposes including, but not

limited to: inspecting records, operating logs, sampling and analytical data, and contracts relating to the Site; reviewing the progress of Respondent(s) in carrying out the terms of this Agreement; conducting such tests as the Department may deem necessary; and verifying the data to the Department by Respondent(s). Respondent(s) shall ensure **[IF RESPONDENT(S) ARE NOT THE LAND OWNER, INSERT THE FOLLOWING WORDING HERE: "(through negotiations and legal agreement with property owners of the Site)"]** that no conveyance of title, easement or other interest in the property shall be executed (consummated) without incorporating the continued right of entry by the Department.

15.0 Site Access for Respondent(s). **(Optional Section) [This Section could be used in the case of a multiple RP Site where one RP is the Site owner.]** The Site owner Respondent(s) shall grant access to [other Respondent(s)] who are in compliance with this Agreement for the purpose of conducting activities pursuant to this Agreement or for activities deemed necessary by the Department to meet the objectives of this Agreement.

16.0 Sampling, Data and Document Availability: Respondent(s) shall permit the Department and its authorized representatives to inspect and copy all sampling, testing, monitoring or other data generated by Respondent(s) or on Respondent(s) behalf in

any way pertaining to work undertaken pursuant to this Agreement. Respondent(s) shall submit all such data upon the request of the Department. Respondent(s) shall inform the Department at least [seven] [7] days in advance of all field sampling under this Agreement, and shall allow the Department and its authorized representatives to take duplicates of any samples collected by Respondent(s) pursuant to this Agreement.

Respondent(s) shall maintain a central repository of the data, reports, and other documents prepared pursuant to this Agreement.

17.0 Record Retention. All such data, reports and other documents shall be preserved by Respondent(s) for a minimum of ten (10) years after the conclusion of all activities under this Agreement. If the Department requests that some or all of these documents be preserved for a longer period of time, Respondent(s) shall either comply with that request or deliver the documents to the Department, or permit the Department to copy the documents prior to destruction. Respondent(s) shall notify the Department in writing at least six (6) months prior to destroying any documents prepared pursuant to this Agreement.

18.0 Government Liabilities: The State of California shall not be liable for any injuries or damages to persons or property

resulting from acts or omissions by Respondent(s), or related parties specified in paragraph 30.0, Parties Bound, in carrying out activities pursuant to this Agreement, nor shall the State of California be held as a party to any contract entered into by Respondent(s) or its agents in carrying out activities pursuant to this Agreement.

19.0 Additional Actions. By entering into this Agreement, the Department does not waive the right to take any further actions authorized by law.

20.0 Extension Requests. If Respondent(s) is unable to perform any activity or submit any document within the time required under this Agreement, Respondent(s) may, prior to expiration of the time, request an extension of the time in writing. The extension request shall include a justification for the delay.

All such requests shall be in advance of the date on which the activity or document is due.

21.0 Extension Approvals. If the Department determines that good cause exists for an extension, it will grant the request and specify a new schedule in writing. Respondent(s) shall comply with the new schedule, which is incorporated in this Agreement.

22.0 Financial Assurance: Respondent(s) must assure that sufficient monies are available to: implement the OMP; conduct the Five-Year Review as outlined in paragraph 3.5; and pay costs as outlined in paragraph 24.0. Financial assurance mechanisms are outlined in Title 22 of the California Code of Regulations section 66264.140 et seq. Respondent(s) shall select a mechanism and propose language to this Agreement which meets the criteria set forth in the regulations for the selected mechanism.

23.0 Cost Recovery: Respondent(s) is liable for all of the Department's costs incurred in responding to the contamination at the Site (including costs of overseeing response work performed by Respondent(s)) or costs to be incurred in the future. Cost recovery may also be pursued by the Department under CERCLA, Health and Safety Code Section 25360, or any other applicable state or federal statute or common law. The Department will invoice Respondent(s) for Department's costs on a quarterly basis.

24.0 Severability: The requirements of this Agreement are severable, and Respondent(s) shall comply with each and every provision hereof notwithstanding the effectiveness of any other provision.

25.0 Incorporation of Plans, Schedules and Reports. All plans, schedules, reports, specifications and other documents that are submitted by Respondent(s) pursuant to this Agreement are incorporated in this agreement upon the Department's approval or as modified pursuant to Paragraph 10.0, Department Review and Approval, and shall be implemented by Respondent(s). Any noncompliance with the documents incorporated in this Agreement shall be deemed a failure or refusal to comply with this Agreement.

26.0 Modification and Termination. Respondent(s) may, upon written request, seek modification or termination of this Agreement at any time. In addition to modification as provided elsewhere in this Agreement, this Agreement may be modified or terminated by mutual written agreement of the parties at any time.

27.0 Time Periods: Unless otherwise specified, time periods begin from the effective date of this Agreement and "days" means calendar days. The effective date of this Agreement is the date the Agreement is signed by the Department.

28.0 Parties Bound: This Agreement applies to and is binding upon Respondent(s) and its officers, directors, agents,

employees, contractors, consultants, receivers, trustees, successors and assignees, including but not limited to individuals, partners, and subsidiary and parent corporations, and upon any successor agency of the State of California that may have responsibility for and jurisdiction over the subject matter of this Agreement.

29.0 Effective Date: The effective date of this Agreement is the date of signature by the Department's authorized representative.

30. Representative Authority. Each undersigned representative of the parties to this Agreement certifies that she or he is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind the parties to this Agreement.

Signed on the _____ day of _____, 199_.

[NAME OF REGIONAL BRANCH CHIEF],

Chief

Site Mitigation Branch, Region [__]
Department of Toxic Substances

Control

I acknowledge receipt of the foregoing Agreement and consent to its terms and conditions.

[NAME]

[TITLE]

For Respondent(s)

**OPERATION AND MAINTENANCE AGREEMENT
SIGN-OFF SHEET**

Site Name

Project Manager

Date

Senior Specialist/Engineer

Date

Office of Legal Counsel

Date

Site Mitigation Branch Chief

Date

Deputy Director/Director

Date

(Signature authority has been delegated to specific Branch Chiefs; however on a site-specific basis either the Deputy Director or Director may elect to sign)