UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

1650 Arch Street

Philadelphia, Pennsylvania 19103

In the Matter of:	:	
	:	**Docket No. CAA-03-2020-0118FF**
	:	
National Aeronautics and Space Administration	:	
Respondent	:	
(Wallops Flight Facility)	:	
	:	**Federal Facility Compliance Agreement**
.	:	

I. SCOPE AND PURPOSE

1. The express purpose of the undersigned Parties in entering into this Federal Facility Compliance Agreement ("FFCA" or "Agreement") is to address the failure to comply with certain federally enforceable regulations promulgated under the Clean Air Act ("the Act" or "CAA"), 42 U.S.C. §§ 7401-7671q, applicable to the National Aeronautics and Space Administration's ("NASA" or "Respondent") Wallops Flight Facility located at 34200 Fulton Street, Wallops Island, Virginia 23337 ("NASA WFF" or the "Facility"). It is the express objective of all provisions and obligations of this Agreement to cause NASA to maintain full compliance with all provisions of the CAA and regulations promulgated thereunder, as referenced herein, governing the operation and maintenance of diesel power generators.

II. JURISDICTION

2. The United States Environmental Protection Agency, Region III ("EPA") and NASA enter into this Agreement pursuant to the CAA and Executive Order No. 12088 (Oct. 13, 1978). This Agreement contains a "plan," as described in Section 1-601 of Executive Order No. 12088, to maintain compliance with the CAA.

III. PARTIES

3. The Parties to this FFCA are EPA and NASA.
4. The undersigned representative of each Party to this Agreement certifies that s/he is fully authorized by the Party whom s/he represents to enter into the terms and conditions of the Agreement and to execute and legally bind that Party to it. On EPA's behalf, Karen Melvin, Director, Enforcement and Compliance Assurance Division, U.S. EPA Region III is delegated the authority to enter into this FFCA under Section 113(a) of the CAA. On NASA's behalf, David

Pierce, Director, NASA Wallops Flight Facility, is the responsible authority to enter into the FFCA on behalf of NASA.

5. NASA officers, agents, contractors, employees, and all persons, departments, agencies, firms, and corporations in active concert or participation with them will take all necessary steps to ensure compliance with the provisions of this FFCA.

IV. STATUTES AND REGULATIONS

6. Section 112 in Title I of the CAA, 42 U.S.C. § 7412, governs the federal control program for Hazardous Air Pollutants ("HAPs") and directs EPA to define the categories of sources that are required to control emissions of HAPs. HAPs include any air pollutant listed in Section 112(b) of the CAA, 42 U.S.C. § 7412(b). Section 112(d) of the CAA, 42 U.S.C. § 7412(d), directs EPA to establish National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), for sources in each category to limit the release of HAPs from specific industrial sectors.
7. Pursuant to Section 112(a) of the CAA, 42 U.S.C. § 7412(a), a "major source" is a stationary source that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPs. An "area source" pursuant to Section 112(a) of the CAA, 42 U.S.C. § 7412(a), means any stationary source of HAP that is not a major source.
8. The Facility is an area source of HAPs because it is a stationary source which emits or has the potential to emit HAPs including, but not limited to, lead, hydrazine, hydrochloric acid, dichloromethane, ethyl benzene, formaldehyde, trichloroethylene, toluene, xylene, phenol, methanol, and chromium at levels below major source thresholds.
9. By final rule of June 15, 2004 [69 FR 33506], as amended at 73 FR 3604, Jan. 18, 2008; 75 FR 9674, Mar. 3, 2010; 75 FR 37733, June 30, 2010; 75 FR 51588, Aug. 20, 2010; and 78 FR 6700, Jan. 30, 2013, EPA issued the RICE Rule pursuant to Section 112 of the CAA, 42 U.S.C. § 7412.
10. The RICE Rule "establishes national emission limitations for hazardous air pollutants…emitted from stationary reciprocating internal combustion engines ["RICE"]…located at major and area sources of HAP emissions. . .[and] establishes requirements to demonstrate initial and continuous compliance with the emission limitations and operating limitations." 40 C.F.R. § 63.6580.
11. The RICE Rule applies to owners and operators of "stationary RICE at a major or area source of HAP emissions." 40 C.F.R. § 63.6585. As defined above at paragraph 7, the Facility is an area source of HAPs.
12. Pursuant to 40 C.F.R. § 63.6585(a), "[a] stationary RICE is any internal combustion engine which uses reciprocating motion to convert heat energy into mechanical work and which is not mobile."
13. Pursuant to 40 C.F.R. § 63.6590(a)(2)(iii), a stationary RICE located at an area source of HAP emissions is new if construction of the stationary RICE commenced on or after June 12, 2006.
14. Pursuant to 40 C.F.R. § 63.6590(c)(1), a new or reconstructed stationary RICE located at an area source must meet the requirements of this part by meeting the requirements of NSPS Subpart IIII for compression ignition ("CI") engines.

15. Respondent operates at the Facility three Subject Generators: two "U-12" stationary generators (model years 2011 and 2014), rated at approximately 4,500 horsepower, and one "D-8" stationary generator (model year 2014), rated at approximately 4,000 horsepower, each of which constitute a CI stationary RICE under the RICE Rule. Respondent commenced construction of the Subject Generators after June 12, 2006.

16. Respondent is subject to the RICE Rule because it owns and operates stationary RICEs, the Subject Generators, at an area source of HAP emissions. 40 C.F.R. § 63.6585. The Subject Generators must be operated in compliance with the requirements of NSPS Subpart IIII because they constitute new CI stationary RICE. 40 C.F.R. § 63.6590(c)(1).

17. Section 111 of the CAA, 42 U.S.C. § 7411, authorizes the Administrator of EPA to promulgate rules establishing standards of performance for new and modified sources in significant source categories. On July 11, 2005, the Administrator of EPA proposed a rule pursuant to Section 111 of the CAA, 42 U.S.C. § 7411, establishing standards of performance for Stationary Compression Ignition Internal Combustion Engines (SCIICE Standard). This rule was initially promulgated on July 11, 2006 and became effective on September 11, 2006, with subsequent amendments by final rule of June 28, 2011, effective August 29, 2011, and subsequent final rule of July 7, 2016, effective September 6, 2016. NSPS Subpart IIII is codified at 40 C.F.R. Part 60, Subpart IIII, §§ 60.4201 - 4219.

18. Pursuant to 40 C.F.R. § 60.4200, the provisions of NSPS Subpart IIII are applicable to manufacturers, owners, and operators of stationary CI internal combustion engines ("ICE") and other persons as specified in paragraphs (a)(1) through (4), set forth below.

    (a)(1) Manufacturers of stationary CI ICE with a displacement of less than 30 liters per cylinder where the model year is:

    (i) 2007 or later, for engines that are not fire pump engines;

    (ii) The model year listed in Table 3 to this subpart or later model year, for fire pump engines.

    (a)(2) Owners and operators of stationary CI ICE that commence construction after July 11, 2005, where the stationary CI ICE are:

    (i) Manufactured after April 1, 2006, and are not fire pump engines, or

    (ii) Manufactured as a certified National Fire Protection Association (NFPA) fire pump engine after July 1, 2006.

    (a)(3) Owners and operators of any stationary CI ICE that are modified or reconstructed after July 11, 2005 and any person that modifies or reconstructs any stationary CI ICE after July 11, 2005.

    (a)(4) The provisions of § 60.4208 of this subpart are applicable to all owners and operators of stationary CI ICE that commence construction after July 11, 2005.

19. The Subject Generators are subject to NSPS Subpart IIII because they are stationary CI ICE for which construction was commenced after July 11, 2005, and they were manufactured after April 1, 2006. 40 C.F.R. § 60.4200(a)(2)(i).

20. Pursuant to 40 C.F.R. § 60.4219, an [e]mergency stationary ICE means any stationary ICE that meets all of the criteria in paragraphs (1) through (3) of the definition (set forth below). All

emergency stationary ICE must comply with the requirements specified in 40 C.F.R. § 60.4211(f) in order to be considered emergency stationary ICE. If the engine does not comply with the requirements specified in 40 C.F.R. § 60.4211(f), then it is not considered to be an emergency stationary RICE.

1. The stationary ICE is operated to provide electrical power or mechanical work during an emergency situation. Examples include stationary ICE used to produce power for critical networks or equipment (including power supplied to portions of a facility) when electric power from the local utility (or the normal power source, if the facility runs on its own power production) is interrupted, or stationary ICE used to pump water in the case of fire or flood, etc.

2. The stationary ICE is operated under limited circumstances for situations not included in paragraph (1) of this definition, as specified in § 60.4211(f).

3. The stationary ICE operates as part of a financial arrangement with another entity in situations not included in paragraph (1) of this definition only as allowed in 40 C.F.R. § 60.4211(f)(3)(i).

21. Pursuant to 40 C.F.R. § 60.4211(f), the owner or operator of an emergency stationary ICE, must operate the emergency stationary ICE according to the requirements in paragraphs (f)(1) through (3), set forth below. In order for the engine to be considered an emergency stationary ICE under NSPS Subpart IIII, any operation other than emergency operation, maintenance and testing, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (f)(1) through (3) of this section, is prohibited. If the engine is not operated in accordance with the requirements in 40 C.F.R. § 60.4211(f)(1) through (3) below, the engine will not be considered an emergency engine under NSPS Subpart IIII and must meet all requirements for non-emergency engines.

(f)(1) There is no time limit on the use of emergency stationary ICE in emergency situations.

(f)(2) An emergency stationary ICE may be operated for any combination of the purposes specified in paragraphs (f)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by 40 C.F.R. § 60.4211(f)(3) counts as part of the 100 hours per calendar year allowed by this paragraph.

(i) Emergency stationary ICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the EPA for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that federal, state, or local standards require maintenance and testing of emergency ICE beyond 100 hours per calendar year.

(ii) [vacated by court order]

(iii) [vacated by court order]

(f)(3) Emergency stationary ICE may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in 40 C.F.R. § 60.4211(f)(2) of this section. Except as provided in 40 C.F.R. § 60.4211(f)(3) of this section, the 50 hours per calendar year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator;

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

22. Pursuant to 40 C.F.R. § 60.4211(c), owners or operators of a 2007 model year and later stationary CI internal combustion engine subject to the emission standards specified in 40 C.F.R. § 60.4204(b), must comply by purchasing an engine certified to the emission standards in 40 C.F.R. § 60.4204(b) for the same model year and maximum (or in the case of fire pumps, NFPA nameplate) engine power. The engine must be installed and configured according to the manufacturer's emission-related specifications, except as permitted in 40 C.F.R.§ 60.4211(g) (not applicable here).

23. Pursuant to 40 C.F.R. § 60.4204(b), owners and operators of 2007 model year and later non-emergency stationary CI ICE with a displacement of less than 30 liters per cylinder must comply with the emission standards for new CI engines in 40 C.F.R. § 60.4201 for their 2007 model year and later stationary CI ICE, as applicable.

24. Pursuant to 40 C.F.R. § 60.4201(c), stationary CI internal combustion engine manufacturers must certify their 2011 model year and later non-emergency stationary CI ICE with a maximum engine power greater than 2,237 KW (3,000 HP) and a displacement of less than 10 liters per cylinder to

the certification emission standards for new nonroad CI engines in 40 CFR 1039.101, 40 CFR 1039.102, 40 CFR 1039.104, 40 CFR 1039.105, 40 CFR 1039.107, and 40 CFR 1039.115, as applicable, for all pollutants, for the same maximum engine power.

25. Of the Subject Generators at the Facility, the model year 2011 U-12 generator is required to meet the standard set forth in Table 7 at 40 C.F.R. § 1039.102; the model year 2014 U-12 generator and the model year 2014 D-8 generator are required to meet the standard set forth in Table 1 at 40 C.F.R. § 1039.101. Both standards are commonly referred to as Tier 4 standards for purposes of NSPS Subpart IIII.

26. Section 113 of the Act, 42 U.S.C. § 7413, authorizes the EPA to take action to ensure that air pollution sources comply with all federally applicable requirements of a NESHAP and/or NSPS.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

27. For the purposes of this Agreement, the following constitutes a summary of the findings upon which this Agreement is based. The facts related herein shall not be considered admissions by any Party. This section contains findings of fact determined solely by the Parties and shall not be used by any person related or unrelated to this Agreement for purposes other than determining the basis of this Agreement.

28. Respondent is an independent agency of the United States Federal Government headquartered at Two Independence Square, 300 E Street SW, Washington D.C.

29. As an agency of the United States, Respondent is a "person" within the meaning of Section 113(a) of the Act, 42 U.S.C. § 7413(a), and as defined by Section 302(e) of the Act, 42 U.S.C. §7602(e).

30. Respondent operates the Facility, known as Wallops Flight Facility, located at 34200 Fulton Street, Wallops Island, Virginia 23337.

31. The Facility has been operated as a rocket launch site to support science and exploration missions for NASA and other Federal agencies, including launches of sounding rockets; small expendable suborbital and orbital rockets; and high-altitude balloon flights carrying scientific instruments for atmospheric and astronomical research.

32. On April 26 and 27, 2017, authorized representatives of EPA conducted an inspection at the Facility.

33. EPA has received information on Subject Generator usage from Respondent during its April 26 and 27, 2017 inspection and through regular communications thereafter.

34. The Subject Generators at the Facility are certified to meet Tier 2 standards set forth at 40 C.F.R. § 89.112, as is provided in 40 C.F.R. § 60.4205(b).

35. NASA petitioned EPA in February of 2016 for an overall increase of 100 hours/year/engine for "maintenance and testing" under 40 C.F.R. § 60.4211(f)(2)(i). EPA Region 3 denied this request in writing on October 11, 2016, given that the proposed hours would be for non-emergency use in providing primary launch power, and not for maintenance and engine readiness testing, which are the allowable bases for such an exemption.

36. NASA requested an exemption for national security purposes under the provisions of 40 C.F.R. § 1068.225 from EPA's Office of Transportation and Air Quality ("OTAQ") on July 11, 2017. On

May 17, 2019, OTAQ sent NASA a formal response stating that EPA "cannot make a final decision regarding that request as the information provided by NASA does not provide sufficient information or explanation for OTAQ to evaluate whether the regulatory requirements have been met for EPA to issue a NSE to NASA for the Subject Engines."

37. Respondent operated the two U-12 Subject Generators for 60.8 and 61.2 hours, respectively, for launch power in calendar year 2016, which is categorized as a non-emergency use. Respondent operated the two U-12 Subject Generators for 70.9 and 77.1 hours, respectively, and the D-8 Subject Generator for 71.4 hours, for launch power in calendar year 2019. Under 40 C.F.R. § 60.4211(f), "emergency" generators are limited to 50 hours per year of non-emergency use, with a maximum of 100 hours per year of total non-emergency use (including maintenance checks and readiness testing). Total non-emergency use for the Subject Generators in 2019 (including maintenance checks and readiness testing) is 104.4 (U-12 #1), 104.7 (U-12 #2), and 102.9 (D-8) hours.

38. In August 2015, Respondent used the two U-12 Subject Generators each for 2.3 hours for what documentation provided to EPA appears to identify as peak shaving under a demand response agreement with EnerNOC, Inc. Under 40 C.F.R. § 60.4211(f)(3), "emergency" generators cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity. NASA discontinued the demand response agreement with EnerNOC, Inc. in May 2016.

39. The Subject Generators, which are certified to meet the Tier 2 emissions standards applicable to emergency stationary internal combustion engines as defined at 40 C.F.R. § 60.4219, have been consistently operated (since at least 2014) by Respondent to provide power during launches due to inherent unreliability of local grid power and high risks posed by possible power failure during launch. Respondent has failed, in calendar years 2016 and 2019, to comply with the non-emergency use limitations in 40 C.F.R. § 60.4211(f). Accordingly, given the Subject Generators' use in excess of the regulatory limits set forth in 40 C.F.R. § 60.4211(f), NASA has been in violation of 40 C.F.R. §60.4211 and 40 C.F.R. § 63.6590(c)(1), which are enforceable by EPA as violations of the Act pursuant to Section 113(a)(3), 42 U.S.C. § 7413(a)(3).

40. On December 11, 2019, EPA issued to Respondent a Notice of Noncompliance/Notice of Opportunity to Confer ("NON") which set forth the statutory and regulatory authorities, jurisdiction and findings of fact and conclusions of law in a manner substantially identical to that set forth herein.

41. On February 10, 2020, Respondent submitted to EPA a written response to the December 11, 2019 NON and requested an opportunity to confer regarding the matters alleged in the NON.

42. NASA and EPA subsequently met on several occasions to discuss the nature and terms of this FFCA.

VI. COMPLIANCE PROGRAM

43. As of the effective date of this agreement, NASA has not exceeded the allowable hours of use of the subject generators at the Facility for 2020. It is the intention of the parties that implementation of the compliance program set forth in this Section VI of this Agreement will result in NASA's

maintaining compliance with the conditions set forth at 40 C.F.R. § 60.4211(f) at the Facility for the life of this Agreement and beyond.

44. As currently operated, the Subject Generators are emergency engines as provided for in paragraphs 20 and 21 above, and they are not subject to Tier 4 standards. Operation of the Subject Generators to provide primary power during launches typically constitutes non-emergency use under NSPS Subpart IIII. In a nominal launch, there are no emergency use hours. However, in the event of an unplanned issue (such as detanking, hang fire, or other emergency situation), use of the Subject Generators to provide launch power may constitute emergency use. For each such event, NASA Wallops shall specify in its semi-annual report described in paragraph 49, which portions of the launch in question were counted as emergency use hours, and identify the type of unplanned issues upon which NASA has based its determination that the period constituted emergency use. All launch hours not identified as emergency use shall be deemed non-emergency use for purposes of determining compliance with NSPS Subpart IIII. If the non-emergency use hourly limits described in paragraphs 20 and 21 are exceeded, the Subject Generators must comply with Tier 4 standards, or NASA must use an alternative power source as described in the Compliance Plan provided for by Section VI of this agreement.

45. Effective immediately upon issuance of this FFCA, NASA will operate its Subject Generators at the Facility only during the Terminal Count of the launch sequence through the point at which the public safety is assured during vehicle flight. This approach is expected to minimize the non-emergency operating time of each engine to 2-5 hours/launch, depending on the mission.

    a. The Terminal Count is defined as the period in the launch countdown when the launch vehicle or launch system transitions to operations which represent additional hazards to personnel or property. For liquid fueled vehicles, this is generally when the vehicle begins fueling and for solid fuel vehicles, it is generally when the vehicle begins "Flight Termination System" (FTS) checks and/or moves to internal power. This Terminal Count period exists until either the vehicle is successfully launched and transitions out of control of the Range Safety Officer, or in the event of a launch scrub which occurs after transitioning into terminal count, until the vehicle transitions back out of the higher hazard condition. The entry conditions may be different for each vehicle and perhaps different from mission to mission.

46. Within 45 days of the effective date of this Agreement, NASA will submit a Compliance Plan for EPA approval that describes how NASA will proceed in the event that the thresholds set forth in paragraph 48 are met or are at risk of being met. The Compliance Plan shall describe alternative power source(s) which may be used exclusively, or in conjunction with each other, to avoid an exceedance of applicable regulatory requirements to include, but not be limited to:

    a. EPA-certified nonroad engines as defined under 40 C.F.R. § 1068.30 meeting the federal emissions standards applicable to the current model year; and/or

    b. Uninterruptible power supply(ies).

47. Once approved, this Compliance Plan shall be made part of this Agreement as an attachment.

48. Should Respondent operate the Subject Generators for 40 hours of the applicable 50-hour non-emergency threshold, or 80 hours of the 100-hour total annual operating hour threshold under 40 C.F.R. § 60.4211(f), within 15 days of reaching either the 40-hour or 80-hour threshold, as applicable, Respondent shall notify EPA and indicate which alternate power source(s) as described in the Compliance Plan it will operate in the event that the applicable 50-hour non-emergency threshold or 100-hour total annual operating hour threshold is reached. Notice provided to EPA pursuant to this paragraph shall include detailed information on the proposed alternative power sources including, but not limited to, proposed time-frames for installation, equipment manufacturer and model name, engine manufacturer, engine model year, engine family, engine per-cylinder displacement, fuel type, and photos of the equipment and its engine (to include any labels), as applicable.

49. Beginning on February 1, 2021, and continuing within one month of each semi-annual period thereafter for the life of this Agreement, Respondent shall submit to EPA Region III, in accordance with Section VII of this FFCA, semi-annual reports of the monthly and, as appropriate, annual totals of each generator's operating hours, including testing/maintenance, emergency, and any planned non-emergency use. Respondent shall also provide EPA with semi-annual updates on any future infrastructure changes which are expected to reduce reliance on these generators. Such reports shall be addressed to isin.amelie@epa.gov.

50. No later than 60 days from the Effective Date of this Agreement, Respondent shall submit accurate and complete applications to the Virginia Department of Environmental Quality ("VADEQ") seeking to incorporate as "applicable requirements" the compliance measures identified in paragraphs 44 through 49 of this FFCA into any of its federally enforceable CAA permits. The Parties agree that the incorporation of these requirements into its permit shall be in accordance with the applicable federal, state, or local statutes and regulations. Respondent shall not challenge the inclusion in the permit of the requirements expressly prescribed by this Agreement.

VII. REPORTING

51. NASA shall submit a written status report to EPA, in conjunction with the reports required pursuant to paragraph 49, above. The status report shall be submitted no later than thirty (30) days from the end of the six-month period. The status report shall be submitted in addition to any other reporting or certification required under this Agreement or pursuant to law, regulation, or the Facility's federally enforceable CAA permits. At a minimum, the status report shall include: (l) the deadlines and other milestones which NASA was required to meet during the reporting period; (2) the progress it made toward meeting them; (3) the reasons for any noncompliance with this Agreement or applicable regulations; and (4) a description of any other matters relevant to the status of its compliance with this Agreement. The status report shall state and describe the cause of any failure to comply with this Agreement and any requested timeline adjustments.

52. Notification to EPA of any noncompliance with any provision of the Agreement or anticipated delay in performing any obligation under the Agreement shall not excuse NASA's noncompliance or anticipated delay.

53. Unless specified otherwise, when written notification to or communication with EPA is required by the terms of the Agreement, it shall be addressed as follows:

    Chief, Air Section (3ED21)
    Air, RCRA & Toxics Branch
    Enforcement & Compliance Assurance Division
    U.S. Environmental Protection Agency - Region III
    1650 Arch Street
    Philadelphia, PA 19103-2029

Written communication with NASA shall be addressed as follows:

    Kimberly Finch, P.E.
    Chief, Medical and Environmental Management Division
    NASA Goddard Space Flight Center, Code 250
    Bldg. 26, Room N250K
    8800 Greenbelt Road
    Greenbelt, MD 20771
    Kimberly.s.finch@nasa.gov

With a copy to:

    Robert Jameson
    NASA Wallops Flight Facility
    34200 Fulton Street
    Building F-6, Room 206
    Wallops Island, VA 23337
    Robert.e.jameson@nasa.gov

54. Each notification or communication to EPA shall be deemed submitted on the date it is postmarked, and shall be sent by certified mail, return receipt requested, unless otherwise mutually agreed to by the parties. NASA shall maintain records of each notification or communication for the duration of the Agreement.

55. All submissions provided pursuant to this Agreement shall be signed by a duly authorized representative of NASA who has personal knowledge of the submission's contents. A person is a "duly authorized representative" and/or the installation commanding officer only if: (a) the authorization is made in writing; (b) the authorization specifies either an individual or position having responsibility for overall operation of the regulated facility or activity (a duly authorized representative may thus be either a named individual or any individual occupying, whether on an acting or permanent basis, a named position). Each submission shall be admissible as evidence in any proceeding to enforce this Agreement. Each submission shall include the following certification:

    "I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

VIII. COMPLIANCE WITH OTHER LAWS AND REGULATIONS

56. Compliance with the terms of this Agreement in no way affects or relieves NASA of its obligation to comply with all applicable requirements of the Act, and regulations promulgated there under, or other applicable requirements of Federal, state, or local law. This Agreement does not constitute a permit or permit modification and does not relieve NASA of any obligation to comply with its existing CAA permits.

IX. RIGHT OF ENTRY

57. EPA, its contractors, and other authorized representatives shall have the right to enter the facility to conduct any inspection, including but not limited to records inspection, sampling, testing, or monitoring that EPA believes is necessary to determine NASA's compliance with the Agreement.

X. DISPUTE RESOLUTION

58. In the event of any conflict involving violations of this Agreement, EPA and NASA shall meet promptly and work in good faith in an effort to reach a mutually agreeable resolution of the dispute.

59. If a dispute arises under this Agreement, the procedures of this Section shall apply. In addition, during the pendency of any dispute, NASA agrees that it shall continue to implement those portions of this Agreement which are not in dispute.

60. The pendency of any dispute under this Section shall not affect NASA's responsibility to perform the work required by this Agreement in a timely manner, except that the time period for completion of work affected by such dispute may, at EPA's sole discretion, be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein. All elements of the work required by this Agreement which are not affected by the dispute shall continue and be completed in accordance with the applicable schedule.

61. The Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or First Line Supervisor level. With respect to EPA, which does not have a Project Manager, per se, "First Line Supervisor" means the Chief, Air Section, Air, RCRA & Toxics Branch, Enforcement and Compliance Assurance Division, EPA Region III or any duly identified successor. With respect to NASA, "Project Manager" means the NASA Goddard Space Flight Center, Chief, Medical and Environmental Management Division Chief, or any duly identified successor. If resolution cannot be achieved informally, the procedures of this Section shall be implemented to resolve a dispute.

62. If the Parties are unable to informally resolve a dispute within thirty (30) days after any action which leads to or generates a dispute, NASA shall within fourteen (14) days thereafter submit to EPA a written statement of dispute setting forth the nature of the dispute, NASA's position with respect to the dispute, and the information NASA is relying upon to support its position. If NASA does not provide such written statement to EPA within this fourteen (14) day period, NASA shall be deemed to have agreed with EPA's position with respect to the dispute.

63. Upon EPA receipt of a written statement of dispute from NASA as provided for above, the Parties shall engage in formal dispute resolution among the Project Managers, First Line Supervisor, and/or their immediate supervisors. The Parties shall have fourteen (14) days from the receipt by EPA of the written statement of dispute to resolve the dispute. During this period, the Project

Managers shall meet or confer as many times as necessary to discuss and attempt resolution of the dispute. If agreement cannot be reached on any issue within this fourteen (14) day period, NASA may, within ten (10) days after the conclusion of the fourteen (14) day formal dispute resolution period, submit a written notice to the relevant Division Director (EPA Region III Enforcement and Compliance Assurance Division [and add appropriate NASA official once known]). If NASA does not elevate the dispute to the relevant Director within this ten (10) day period, NASA shall be deemed to have agreed with EPA's position with respect to the dispute.

64. The relevant Directors for each agency will serve as a forum for resolution of any disputes for which agreement has not been reached pursuant to the foregoing paragraphs in this Section. Following elevation of a dispute to the relevant Directors, the Directors shall have thirty (30) days to unanimously resolve the dispute.

65. If unanimous resolution by the respective Directors is not achieved within this thirty (30) day period, NASA may, within twenty-one (21) days after the conclusion of the thirty (30) day dispute resolution period, submit a written Notice of Dispute to the Regional Administrator of U.S. EPA Region III for final resolution of the dispute. In the event that the dispute is not elevated to the Regional Administrator of U.S. EPA Region III within the designated twenty-one (21) day period, NASA shall be deemed to have agreed with the original EPA position with respect to the dispute. In the event that the dispute is elevated to the Regional Administrator of U.S. EPA Region III, the Regional Administrator shall provide a written statement of EPA's decision to NASA, which shall be final and binding upon the parties.

66. Within twenty-one (21) days of resolution of a dispute pursuant to the procedures specified in this Section, NASA shall incorporate the resolution and final determination into the appropriate statement of work, plan, schedule, or procedures and proceed to implement this Agreement according to the amended statement of work, plan, schedule, or procedures.

67. Resolution of a dispute pursuant to this Section of the Agreement constitutes a final resolution of any dispute arising under this Agreement, the Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Section of this Agreement.

XI. FORCE MAJEURE

68. NASA's obligations under the Compliance Program section of this Agreement shall be performed as set forth in this Agreement unless performance is prevented or delayed by a force majeure event. For purposes of this Agreement, "force majeure" is defined as any event arising from causes beyond the control of NASA or of entities controlled by NASA, including but not limited to contractors and subcontractors, which could not be overcome by the due diligence of NASA or the entities controlled by NASA, which delays or prevents the performance of any obligation under this Agreement, including acts of God or war, labor unrest, civil disturbance and any judicial orders which prevent compliance with the provisions of this Agreement. Force majeure shall not include increased costs of performance of any activity required by this Agreement, the failure to apply for any required permits or approvals or to provide all information required therefore in a timely manner, nor shall it include the failure of contractors or employees to perform or the avoidable malfunction of equipment.

69. If NASA experiences delays in meeting its obligations as set forth in this Agreement due to a force majeure event, it shall notify EPA promptly by telephone of any change in circumstances giving

rise to the suspension of performance or the nonperformance of any obligation under this Agreement. In addition, within fourteen (14) days of the occurrence of circumstances causing such delays, it shall provide a written statement to EPA of the reason(s), the anticipated duration of the event and delay, the measures taken and to be taken to prevent or minimize the time and effects of failing to perform or delaying any obligation, and the timetable for the implementation of such measures. Failure to comply with the notice provisions shall constitute a waiver of any claims of force majeure. NASA shall take all reasonable steps to avoid and/or minimize any such delay.

70. The burden of proving that any delay is caused by circumstances beyond the control of NASA shall rest with NASA.

XII. MODIFICATIONS

71. The requirements, timetables and deadlines under this Agreement may be modified upon receipt of a timely request for modification and when EPA determines that good cause exists for the requested modification. Any request for modification by NASA shall be submitted in writing and shall specify: the requirement, timetable or deadline for which a modification is sought; the good cause for the extension; and any related requirement, timetable, deadline or schedule that would be affected if the modification were granted.

72. Good cause exists for a modification when sought in regard to: a force majeure event; a delay caused, or which is likely to be caused, by the grant of an extension in regard to another timetable, deadline or schedule; a delay caused by failure of a regulatory agency to perform its duties in a timely manner where regulatory action is necessary to proceed with construction and where NASA has made a timely and complete request for action from the regulatory agency; and other event or series of events mutually agreed to by the Parties and constituting good cause.

73. Within twenty-one (21) calendar days of receipt of a request for a modification, EPA shall advise NASA of its position on the request. If EPA does not concur in the modification, it shall include with its statement of nonconcurrence an explanation of the basis for its position. If EPA does not respond within 21 calendar days of receipt of a request for a modification to a timetable or deadline under this Agreement, an extension will be presumed granted for the period of time until EPA concurs or nonconcurs with the request for modification.

XIII. GENERAL PROVISIONS

74. The Parties agree that the terms and conditions of this Agreement are enforceable as appropriate by any person pursuant to Section 113 of the CAA, 42 U.S.C. § 7413.

75. This Agreement was negotiated and executed by the Parties in good faith to ensure compliance with the law. No part of this Agreement constitutes or should be interpreted or construed as an admission of fact or of liability under federal, state or local laws, regulations, ordinances, or common law or as an admission of any violations of any law, regulations, ordinances, or common law. By entering into this Agreement, NASA does not waive, other than as to the enforcement of this Agreement pursuant to the terms contained herein, any claim, right, or defense that it might raise in any other proceeding or action.

76. If any provision or authority of this Agreement or the application of this Agreement to any party or circumstance is held by any judicial or administrative authority to be invalid, the application of

such provisions to other parties or circumstances and the remainder of the Agreement shall remain in force and shall not be affected thereby.

77. The undersigned representative of NASA certifies that he or she is fully authorized by NASA to enter into the terms and conditions of this Agreement and to execute and legally bind NASA to the Agreement.

78. Terms and conditions of this Agreement changed by an agreed upon modification shall be enforceable as changed.

79. The effective date of this Agreement shall be the date on which it is signed by the last signatory.

80. In computing any period of time described as "days" herein, all references to "days" refer to "calendar days." The last day of a time period shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday or a legal holiday.

XIV. **FUNDING**

81. It is the expectation of the Parties to this Agreement that all obligations of NASA will be fully funded. NASA agrees to use every legally available mechanism to seek sufficient funding to fulfill its obligations under this Agreement.

82. Provisions herein shall not be interpreted to require obligations or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted within the terms delineated in this Agreement.

83. If funds are not available to fulfill NASA's obligations under this Agreement, EPA reserves the right to take any action which would be appropriate absent this Agreement.

XV. **TERMINATION**

84. This Agreement shall terminate upon agreement of the Parties that at a date at least two years from the effective date of this Agreement, once NASA has met all of its obligations as described in paragraphs 44 to 50 herein, as determined by the mutual consent of the Parties, and evidenced in writing by EPA.

FOR NASA:

Date: ________________ By:______________________________________

David Pierce
Director, NASA Wallops Flight Facility
National Aeronautics & Space Administration

FOR EPA:

Date: _________________ By:_______________________________________

Karen Melvin
Director, Enforcement and Compliance
Assurance Division
U.S. EPA – Region III
Complainant