

One Cleanup Program Memorandum of Agreement

One Cleanup Program

Memorandum of Agreement Between the Commonwealth of Pennsylvania Department of Environmental Protection and Region 3 of the United States Environmental Protection Agency

I. Purpose

A. The Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") and Region 3 of the United States Environmental Protection Agency ("EPA" or "Region 3") (collectively; "the Agencies") enter into this Memorandum of Agreement ("MOA" or "Agreement") to (1) facilitate DEP's implementation of Pennsylvania's Voluntary Cleanup Program ("VCP") under the authority of the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. Sections 6026.101 et seq.; (2) recognize the VCP for grant funding eligibility purposes pursuant to § 128(a) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, ("CERCLA"), 42 U.S.C. §§ 9601 et seq.; and (3) express how the Agencies generally intend to exercise their authorities under CERCLA; Sections 3004(u) and 3008(h) of the Resource Conservation and Recovery Act of 1976, as amended, ("RCRA"), 42 U.S.C. Sections 6924(u) and 6928(h), Section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. Section 2605(e), and Act 2 in the Commonwealth of Pennsylvania ("Commonwealth") at properties addressed by the VCP. With respect to RCRA facilities, this MOA applies only to those facilities that are subject to, or potentially subject to, RCRA Section 3004(u) or 3008(h), and shall hereinafter be referred to as "RCRA Corrective Action Facilities."

- B. Region 3 and DEP seek to promote the "One Cleanup Program" initiative by working together to achieve cleanups that protect human health and the environment by making greater use of all available authorities, and selecting the optimum programmatic tools to increase the pace, effectiveness, efficiency, and quality of cleanups.
- C. Region 3 and DEP seek to coordinate cleanup programs to promote sound and protective remedies, shared science and technological approaches.
- D. Region 3 and DEP believe the revitalization of existing contaminated or potentially contaminated industrial brownfield properties will provide a significant benefit to both the environment and the economy of affected local communities. In addition, the cleanup of such properties will protect the public health of communities affected by the release of hazardous substances at the properties. The Agencies therefore enter into this Agreement to promote and facilitate the cleanup and appropriate reuse of such contaminated properties, thereby maximizing the use of existing infrastructure, and minimizing the development of green space or pristine open space.

II. General Provisions

- A. Region 3 has reviewed and evaluated the VCP and has determined that the VCP, as implemented under this MOA, includes each of the elements of a state response program listed in CERCLA Section 128(a)(2).
- B. RCRA Corrective Action: Region 3 and DEP acknowledge that the Commonwealth has not applied for, nor has it received, authorization for the Corrective Action Program under Section 3006 of RCRA. Nothing in this MOA shall be construed as an evaluation of Act 2 for RCRA Corrective Action authorization purposes. Therefore, EPA retains all authority in the Commonwealth for RCRA Corrective Action. Moreover, nothing in this MOA relieves any VCP remediator or any other person of any RCRA Corrective Action responsibilities or requirements.
- C. Maintenance of CERCLA Section 128(a)(2) Elements: DEP agrees to maintain all of the elements of a state response program, listed in CERCLA Section 128(a)(2). Generally, the four elements are:
1. Timely survey and inventory of brownfield properties in the Commonwealth;
 2. Oversight and enforcement authorities or other mechanisms, and resources, adequate to ensure that a response action will protect human health and the environment; and be conducted in accordance with applicable Federal and State law, and that if the person conducting the response activities fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed;
 3. Mechanisms and resources to provide meaningful opportunities for public participation, as listed in CERCLA Section 128 (a)(2)(C); and
 4. Mechanisms for approval of every cleanup plan and a requirement for verification and certification or other similar documentation that the response is complete.
- D. Review and Approval: With respect to properties and RCRA Corrective Action Facilities undergoing remediation under the VCP and subject to this MOA, DEP agrees to review every Remedial Investigation Report, Risk Assessment Report, Cleanup Plan, Final Report, and Post Remediation Care Plan required by law and, to the extent DEP approves any such plan or report, to put such approval in writing.
- E. Brownfields Cleanup Facilitated: Based on such review and further discussions between Region 3 and DEP, Region 3 has determined that implementation of this MOA will help facilitate the cleanup of brownfields in the Commonwealth.

III. Applicability of the MOA

- A. This MOA applies only to remediations of properties conducted pursuant to Act 2 provisions in effect as of the date of this Agreement, and which remediations are conducted in accordance with the terms of this MOA.
- B. Region 3 and DEP agree that the following properties are not eligible for consideration under the MOA:
1. permitted hazardous waste management units ("HWMU") regulated under 25 Pa. Code Sections 260a-270a, 40 C.F.R. Sections 260-270, of the

federal hazardous waste regulations (if the HWMU is located within a larger property, then only that portion of the property inside the HWMU boundary is ineligible);

2. properties that have been proposed in the Federal Register to be placed on the National Priorities List (however, properties that are proposed to be placed on the National Priorities List, but which are determined not to be appropriate for listing, will become eligible if not otherwise ineligible);
 3. properties that have been placed on the National Priorities List (however, such properties become eligible if they are subsequently removed from the National Priorities List and are not otherwise ineligible); and
 4. properties which have been permitted under the Pa. Solid Waste Management Act and the Pa. Clean Streams Law and to which relevant permit conditions continue to apply and properties for which cleanup standards different than those of the VCP are specified in regulations promulgated pursuant to those statutes.
- C. Notwithstanding a property's eligibility to participate in the VCP, Region 3 and DEP agree that this MOA does not apply to:
1. any property where a hazardous ranking package has been submitted to EPA Headquarters, after consultation with the Commonwealth, proposing its inclusion on the National Priorities List;
 2. any property for which a remediation report is "deemed approved" within the meaning of 35 P.S. Sections 6026.302(e)(3), 6026.303(h)(3), 6026.304(n)(2), and/or 6026.305(d);
 3. RCRA Corrective Action Facilities for which DEP has approved a Final Report under the VCP prior to the effective date of this MOA; and/or
 4. properties or RCRA Corrective Action Facilities that are subject to a formal or informal enforcement action by any Federal agency or DEP regarding a contaminant at the property or facility, and action has not been taken to remedy the alleged violations to the issuing agency's satisfaction.

IV. Implementation

A. Region 3 and DEP agree to work in a coordinated manner to avoid to the maximum extent possible duplication of effort at properties, and to ensure that the remediation of properties continues in a timely fashion. DEP agrees to notify Region 3 when properties are being addressed under the VCP and provide written documentation for properties in Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS") that are being addressed under the VCP. If a property listed in the CERCLIS is being addressed under the VCP and under this MOA, Region 3 agrees to code that property in CERCLIS to reflect that property's status. Once DEP determines that all remediation activities at the property are complete, Region 3 agrees to archive from CERCLIS those properties remediated under the VCP and for which the DEP has approved the Final Report. At a minimum, DEP and Region 3 agree to discuss the status of properties annually.

B. RCRA Corrective Action/VCP Coordination Between Region 3 and DEP:

1. While DEP has not yet sought authorization for Corrective Action authority under RCRA, since 1995, DEP has participated in the corrective

action process through negotiated work-sharing agreements that are embodied as grant conditions in the annual RCRA Section 3011 grant. Through these work-sharing agreements, DEP has contributed to the investigation and remediation of RCRA Corrective Action Facilities. EPA and DEP plan to expand this work sharing arrangement through this MOA to streamline the approach to RCRA Corrective Action Facilities in the Commonwealth.

2. EPA and DEP agree to implement this MOA under the following guidelines:
 - a. For all RCRA Corrective Action Facilities also being remediated under the VCP, DEP intends to provide EPA with a copy of the Notice of Intent to Remediate and a copy of all site investigation reports and cleanup plans submitted to DEP under Act 2.
 - b. EPA and DEP believe that a work-sharing approach to overseeing RCRA Corrective Action Facilities under this Agreement is generally an appropriate and efficient use of both Agencies' resources. To ensure that all RCRA Corrective Action goals are met, EPA intends to participate earlier at Facilities where any of the following conditions are known to exist or are likely to exist:
 1. groundwater contamination is migrating off the property at levels which exceed Pennsylvania residential groundwater Media-Specific Concentrations for used aquifers;
 2. groundwater contamination is undergoing, or is expected to undergo, remediation subject to 25 Pa. Code Section 250.303(c); (d); (e); 25 Pa. Code Section 250.304(e); and/or 25 Pa. Code 250.403;
 3. a pathway elimination remedy is expected;
 4. the property is planned to be subdivided prior to completion of remediation; and/or
 5. the property is undergoing active remediation under RCRA Corrective Action.
 - c. Subject to Section V of this MOA:
 1. For Facilities identified in Paragraph IV.B.2.b, above, EPA and DEP generally intend to work in joint workteams to accomplish cleanup goals. EPA intends to review all available site data to determine if additional characterization or remediation may be required to meet RCRA Corrective Action obligations. If EPA determines that the site characterization is not sufficient to characterize the nature and extent of contamination from the facility; to complete an Environmental Indicators Analysis of "under control," and/or, to make a protective cleanup decision, EPA and DEP intend to work together to resolve the matter. If EPA determines that the proposed cleanup objectives and corrective measure(s) are sufficient, EPA, as appropriate, plans to proceed with remedy selection procedures,

including providing opportunity for public comment and review. Once the remedy is implemented and EPA determines that the media cleanup objectives are met and corrective measure(s) are satisfied, EPA plans to, where appropriate, acknowledge that the Remediator has completed its Corrective Action obligations using approaches such as those outlined in EPA's "Guidance on Completion of Corrective Action Activities at RCRA Facilities" for this acknowledgment, where appropriate.

2. For all other Facilities, EPA intends to review the Act 2 Final Report and, where appropriate, use it as a basis for preparing a final decision under EPA's "Guidance on Completion of Corrective Action Activities at RCRA Facilities." If EPA determines that additional information is required to complete the final decision, EPA and DEP intend to work together to resolve the matter.
- C. CERCLA Section 128(b) provides limitations regarding Federal enforcement actions at "eligible response sites," as defined in CERCLA Section 101(41), that are being addressed in compliance with a state program that (1) specifically governs response actions for the protection of public health and the environment and (2) maintains and updates a public record, pursuant to CERCLA Section 128(b)(1)(C). These limitations operate as a matter of law. Thus, to the extent CERCLA Section 128(b) applies, and subject to the exceptions therein, EPA does not plan or expect to take an administrative or judicial enforcement action under CERCLA Sections 106(a) or 107(a) against a person regarding the specific release that is addressed by that person at an "eligible response site" in compliance with the VCP.
 - D. The parties agree that cleanups of properties contaminated with polychlorinated biphenyls ("PCBs") subject to 40 C.F.R. Part 761 will be performed in accordance with the substantive and procedural requirements of those regulations, including, but not limited to, 40 C.F.R. Sections 761.50 and .61, which establish both numerical and risk-based standards for PCB cleanups.
 - E. DEP agrees to maintain and make available to the public a record of properties addressed under the VCP as required by CERCLA Section 128(b)(1)(C).
 - F. If a VCP remediator does not complete any DEP-approved response activity either in accordance with the VCP or in a timely manner, DEP agrees to ensure that the necessary response actions will be completed. Furthermore, DEP agrees to prioritize the property in its normal course and take all necessary response activities at the property as appropriate, considering the risk posed by the property, funds available to DEP and other factors.
 - G. The DEP agrees to continue to demonstrate, through the reporting requirements of Section VII.A. of this MOA, that DEP has adequate resources under the VCP to

ensure that voluntary response activities are conducted in an appropriate and timely manner, and that meaningful outreach efforts are made to the public.

V. Protectiveness

- A. Pursuant to Act 2, Section 102 and Sections 301-305, DEP agrees to ensure that voluntary response activities conducted under the VCP protect human health and the environment and that the VCP remediator complies with all applicable Federal law.
- B. DEP agrees to require use restrictions and/or deed notices, as appropriate, to be filed in the County Recorder of Deeds Office of the county where the property is located, in cases where the approved property remediation includes such restrictions as institutional controls.
- C. DEP agrees to ensure that investigations and cleanups which are carried out under the VCP at RCRA Corrective Action Facilities will be protective of human health and the environment both in the short and long term, and will, where appropriate:
 - 1. achieve the short-term protection and final cleanup goals of RCRA Corrective Action;
 - 2. require facility-wide assessments, including the RCRA Corrective Action Environmental Indicator Analysis, to determine the full nature and extent of releases;
 - 3. address all releases (both on-site and off-site) of hazardous wastes and hazardous constituents to all media from the facility, including all Solid Waste Management Units and areas of concern;
 - 4. provide meaningful opportunities for public involvement throughout the cleanup process; and
 - 5. achieve EPA's "Current Human Exposure Under Control" and "Migration of Contaminated Groundwater Under Control" environmental indicators.

VI. Community Participation

- A. DEP agrees that, when a VCP remediator submits a Notice of Intent to Remediate ("NIR") and publishes the NIR to the municipality and in a newspaper, DEP will require such notices to include a provision informing the public that any individual so desiring may request to receive a copy of the cleanup plan prior to implementation of the cleanup and have an opportunity to comment on such plan.
- B. NIR and publishes the NIR to the municipality and in a newspaper, DEP will require such notices to include a provision informing the public that any person affected by the release that is the subject of the NIR may request that DEP conduct a site assessment. DEP further agrees that an appropriate DEP official will consider and appropriately respond to such request.

VII. Reporting

- A. In addition to the reporting requirements pursuant to CERCLA Section 128(b)(1)(C), DEP agrees to provide or make available to Region 3 information regarding remediators in the VCP that are addressed under this MOA. No later than January 30, or in accordance with the timeframe specified in the terms and condition of the CERCLA

Section 128(a) grant Cooperative Agreement, of each calendar year, DEP agrees to report or make available to Region 3 the following:

1. Number, names and types of properties participating in the VCP and the status of response actions at those properties in the previous year;
2. Properties that received Final Report approval from the DEP in the previous year;
3. Other reporting requirements contained in applicable brownfields financial assistance cooperative agreements between DEP and Region 3 .

DEP agrees to send to appropriate Region 3 Program Offices copies of all VCP Final Report Approval Letters sent to remediators of RCRA Corrective Action Facilities or other properties eligible for consideration under this MOA.

- C. DEP agrees to provide EPA with all information relevant to the RCRA Corrective Action Program.

VIII. Modification

A. Region 3 and DEP agree to keep the other informed of any relevant proposed modifications to its statutory or regulatory authority, forms, or procedures. The Agencies also agree to revise this MOA upon mutual agreement and as necessary by the adoption of such modifications. If a relevant act or implementing regulations are modified and no mutual agreement can be reached regarding modification of this MOA, this MOA will terminate within sixty (60) days of the effective date of the modifications to the act or regulations.

B. Region 3 and DEP agree to review the MOA annually to determine whether any of the terms should be changed based on their experience operating under the MOA. Such reviews will begin on each yearly anniversary of the signing of the MOA.

C. If either Region 3 or DEP has concerns regarding implementation of this MOA, it agrees to notify the other party of those concerns. In the event a mutual agreement cannot be reached to resolve the issue, within sixty (60) days of receipt of written notice, either party can terminate this MOA. Region 3 and DEP may agree that any such modification will be in writing and signed by the signatories below or their successors or designees to become effective.

This MOA has been developed by mutual cooperation and consent. This MOA does not in any way grant or otherwise create any rights, obligations, responsibilities, expectations, or benefits for any party, and does not in any way alter either DEP's or EPA's authority under state or federal law.

For Commonwealth of Pennsylvania Department of Environmental Protection



Originally signed by: Kathleen A. McGinty, Secretary, Commonwealth of Pennsylvania Department of Environmental Protection

Date: 4/21/2004

For the U.S. Environmental Protection Agency, Region 3



Originally signed by: Donald S. Welsh, Regional Administrator, EPA, Region 3

Date: 4/21/2004