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Memorandum of Agreement
Between the
United States Environmental Protection Agency Region 5 and the
Ohio Environmental Protection Agency

This Memorandum of Agreement (MOA) is entered into between the Regional Administrator, United States Environmental Protection Agency (U.S. EPA), Region 5, and the Director, Ohio Environmental Protection Agency (Ohio EPA) to move toward implementing the U.S. EPA's One Cleanup Program (OCP) initiative and to promote the cleanup and redevelopment of contaminated or potentially contaminated properties (brownfields) in Ohio. This MOA is intended to help property owners, developers, consultants, public officials, and the general public to understand the roles and responsibilities of U.S. EPA and Ohio EPA and the potential utilization of the MOA track of Ohio EPA's Voluntary Action Program (VAP) to assess and address environmental contamination. This MOA replaces and supersedes the July 31, 2001 Superfund MOA, as amended on July 24, 2004 and February 13, 2006.

I. Purpose and Scope

A. General.

U.S. EPA Region 5 and Ohio EPA agree to exercise their respective legal authorities in order to:

1) facilitate timely implementation of the hazardous waste cleanup requirements of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901 et seq. (RCRA); and the environmental cleanup requirements of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9601 et seq. (CERCLA, also known as Superfund);

2) assist U.S. EPA in meeting the federal Government Performance and Results Act of 1993, Pub. L. No. 103-62, 31 U.S.C. § 1115 et seq. (GPRA) implementation schedule;

3) facilitate the cleanup and productive redevelopment of brownfields and other contaminated properties in Ohio;

4) meet each agency's mandate to protect human health and the environment; and

5) recognize Ohio EPA's MOA Track VAP program for grant funding eligibility purposes under § 128(a) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9628(a).

B. Applicability.

1) Except as provided in paragraph I.B.2) of this MOA, contaminated or potentially contaminated properties (brownfields) in Ohio, including facilities operating under the interim status standards subject to RCRA subtitle C requirements, that are cleaned up under Ohio EPA's oversight and meet both of the following criteria are covered by this MOA:

   a) MOA Track VAP Participants provide notice to Ohio EPA of entry into the MOA Track of the VAP; and

b) MOA Track VAP participants agree to comply with the procedures and complete the requirements of the MOA Track of the VAP.

2) This MOA does not apply to sites or facilities that are:

a) subject to hazardous waste closure requirements under a Federally-issued RCRA operating permit or RCRA or ORC Chapter 3734 and rules adopted thereunder; or subject to hazardous waste cleanup requirements under a Federally-issued RCRA operating permit;

b) listed on U.S. EPA's National Priorities List (NPL), proposed to be listed on the NPL (i.e., publication of notice in the Federal Register), or a site where U.S. EPA, after performance of a preliminary assessment or site inspection and after consultation with Ohio EPA, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the NPL (unless U.S. EPA determines that no further federal action will be taken);

c) subject to cleanup under the Underground Injection Control Program of the Safe Drinking Water Act or ORC Chapters 6111 or 3734 (not including Class V wells unless required to be cleaned up under an order or a permit);

d) the subject of federal enforcement or response action under RCRA or CERCLA, including but not limited to an administrative order, a judicial order, a permit, an injunction, a consent decree, or a CERCLA general or special notice letter;

e) subject to RCRA corrective action via a state or federal permit, order or agreement (not including interim status facilities unless required to perform corrective action under a permit, order or agreement) under RCRA or ORC Chapter 3734 and rules adopted thereunder, i.e., OAC Chapter 3745-55;

f) subject to solid waste closure requirements under ORC Chapter 3734 and rules adopted thereunder;

g) subject to Petroleum Underground Storage Tank or Hazardous Substance Storage Tank System assessment, removal or remediation under ORC Chapter 3737 and rules adopted thereunder;

h) subject to oil or gas well site assessment, removal or remediation under ORC Chapter 1509 and rules adopted thereunder;

i) subject to state enforcement relating to the release or threat of release of hazardous substances or petroleum under ORC Chapter 3704, 3734 or 6111;

j) a site for which an investigation has been completed and a remedy has been initiated under ORC Chapter 3746 and rules adopted thereunder; or

k) subject to requirements for site assessment, removal or remediation pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., as amended, or 40 C.F. R. part 761, regarding polychlorinated biphenyls (PCBs) and PCB-contaminated materials or items.

3) For sites or facilities that have completed a voluntary action in compliance with the MOA

Track VAP procedures, ORC Chapter 3746 and OAC Chapter 3745-300 and have received a covenant not to sue (that is still in effect) from the State of Ohio, consistent with the provisions of the Superfund MOA, as amended, U.S. EPA Region 5 does not plan or anticipate taking action under CERCLA or RCRA while that facility remains in compliance with the MOA Track VAP requirements, except as provided in Section IV.B below.

C. Reservation of Rights.

This MOA does not have any legally binding effect, does not create any legal rights or obligations, and does not in any way alter the authority or ability of Ohio EPA or U.S. EPA Region 5 under state or federal law. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity against Ohio EPA or U.S. EPA, their officers or employees, or any other person. This MOA, in and of itself, does not relieve any facility from compliance with any applicable requirement of RCRA or the authorized RCRA program. This MOA does not replace or amend the RCRA MOA for Ohio's authorized RCRA program. U.S. EPA Region 5 retains its authority to bring enforcement action under federal law and Ohio EPA retains its authority to bring enforcement action under state law.

Nothing in this MOA modifies federal or state statutory requirements (or regulations promulgated thereunder) or Ohio EPA's agreement to fully implement Ohio's authorized hazardous waste management program under RCRA.

Entry into this MOA makes Ohio EPA eligible for grant funding under CERCLA § 128(a)(1)(A)(ii). However, this MOA does not obligate Federal funds. Any U.S. EPA funding decision will be based on funding priorities specified in U.S. EPA's guidelines for the CERCLA §128 Brownfields State and Tribal Response Program grants. In addition, all activities U.S. EPA may take in furtherance of this MOA are subject to the availability of appropriated funds.

II. Authority

A. Environmental Protection Agency, Region 5.

U.S. EPA Region 5 enters into this MOA in furtherance of its statutory and regulatory responsibilities and authorities under:

- RCRA Subtitle C cleanup requirements, 42 U.S.C. § 6901 et seq.; and
- CERCLA, commonly known as Superfund, 42 U.S.C. § 9601 et seq.

B. Ohio EPA.

Ohio EPA enters into this MOA in furtherance of its statutory and regulatory responsibilities and authorities under:

- ORC chapter 3734 and OAC chapters 3745-50 through 57, 65 through 69, 204, 205, 255, 266, 270, 273 and 279:
- ORC chapter 6111;
- ORC chapter 3746 and OAC chapter 3745-300;
- The MOA Track VAP established pursuant to the Superfund MOA entered by U.S.EPA and Ohio EPA on July 31, 2001, as amended;
- ORC Section 3745.01; and
- Ohio's authority as an authorized state under RCRA, 42 U.S.C. §6926.

III. Background

A. Mandate, Authorization and Purpose.

Ohio EPA and U.S. EPA Region 5 are mandated to protect human health and the environment. U.S. EPA Region 5 and Ohio EPA have worked together cooperatively to facilitate the clean up of contaminated properties and environmental media in Ohio. U.S. EPA has authorized Ohio to administer the base RCRA program and the Corrective Action program. On July 31, 2001, U.S. EPA Region 5 and Ohio EPA entered into the Superfund MOA. The Superfund MOA established the MOA Track of the VAP with additional oversight and public participation requirements that enabled U.S. EPA to clarify the intentions and expectations of U.S. EPA Region 5 and Ohio EPA with respect to sites potentially subject to CERCLA and addressed by Ohio EPA. The Superfund MOA was subsequently amended on July 24, 2004 and February 13, 2006. The MOA Track VAP requirements are described in detail in Ohio EPA's MOA Track Program Support Document and in the MOA Track Procedures for Participation available at Ohio EPA's web site: http://www.epa.state.oh.us/derr/vap/moa/mo.html.

U.S. EPA Region 5 and Ohio EPA acknowledge the potential benefits that can be achieved by clarifying the intentions and expectations of U.S. EPA Region 5 and Ohio EPA regarding the cleanup and reuse of contaminated properties that are addressed by Ohio EPA under Ohio law. To the extent possible, U.S. EPA Region 5 and Ohio EPA seek to facilitate the productive reuse of industrial and commercial properties in Ohio by minimizing regulatory impediments to the acquisition, cleanup, transfer and appropriate use or reuse of those properties. This MOA is intended to implement the efficiencies and innovations contained in U.S. EPA's OCP initiative and to achieve cleanups that comply with federal cleanup requirements.

B. General One Cleanup Program Goals.

Ohio EPA and U.S. EPA Region 5 acknowledge their mutual respect, positive working relationship, and commitment to the successful implementation of this MOA. In particular, Ohio EPA and U.S. EPA Region 5 seek to clarify the roles and responsibilities of U.S. EPA Region 5 and Ohio EPA with respect to contaminated properties, so as to increase the number of cleanups and improve the timeliness and efficiency of cleanups that will protect human health and the environment by:

1) supporting the use of Ohio EPA's MOA Track VAP at properties where this approach is appropriate for achieving timely and protective cleanups;

2) providing coordinated and consistent technical assistance and information to facilitate informed decisions by property owners, prospective purchasers, lenders, public and private developers, consultants, local governments, public officials and the general public;

3) ensuring that timely cleanup of sites and facilities protects human health and the environment, and promotes revitalization of contaminated property for appropriate use;

4) facilitating the effective use of all available authorities and resources in ways that are mutually complementary and not redundant to increase the pace, efficiency and quality of cleanups; and

5) promoting processes by which cleanups that are carried out under state authority are performed in a manner that is consistent with federal objectives and complies with requirements for the site, facility or media of concern.

C. Specific RCRA Corrective Action and CERCLA Cleanup Program Goals.

Ohio EPA and U.S. EPA Region 5 intend to ensure that the following RCRA Corrective Action and CERCLA Cleanup program goals are met at sites or facilities addressed by this MOA:

1) For facilities subject to RCRA Corrective Action requirements, Ohio EPA and U.S. EPA Region 5 intend to:

   a) require the owner or operator (or other parties acting on their behalf) to conduct facility-wide assessments to determine the full nature and extent of all releases of hazardous wastes or hazardous constituents;

   b) ensure that all releases of hazardous wastes or hazardous constituents into the environment from all Solid Waste Management Units and Areas of Concern are addressed (on and off-site) where necessary to protect human health and the environment;

   c) provide meaningful opportunities for public involvement throughout the cleanup process; and

   d) ensure that remedies are protective of human health and the environment.

2) For sites that may be subject to CERCLA cleanup requirements, Ohio EPA and U.S. EPA Region 5 will work together to ensure that adequate and timely investigation and cleanup of brownfield sites are conducted, consistent with reasonably anticipated future use, to ensure that the necessary environmental response actions are taken in accordance with applicable federal and state law and are protective of human health and the environment.

IV. OCP Implementation

A. Program Adequacy and Relevant State Authorities.

1) Background.

   a) U.S. EPA Region 5 recognizes that Ohio EPA has successfully facilitated cleanups at sites and facilities subject to federal environmental cleanup authorities.

   b) In particular, Ohio EPA's Division of Emergency and Remedial Response is responsible for implementing the state's portion of the federal CERCLA program and for implementing brownfields initiatives, state response initiatives, and the MOA Track VAP. Ohio EPA's Division of Hazardous Waste Management is responsible for implementing the RCRA Subtitle C Corrective Action program. Ohio EPA's various programs, laws, and regulations enable Ohio EPA to achieve appropriate environmental remediation objectives and program goals as listed in Section III of this MOA.

   c) Where appropriate, Ohio EPA intends to use the process provided in the MOA Track VAP and the standards provided in the VAP rules, found at OAC chapter 3745-300, for facilities and sites addressed by this MOA that may be subject to the RCRA Subtitle C Corrective Action program or CERCLA.

2) Evaluation of Ohio EPA's MOA Track VAP under CERCLA Section 128(a).

   a) U.S. EPA Region 5 has evaluated the MOA Track VAP for purposes of grant eligibility

under CERCLA § 128(a) and determined that the MOA Track VAP includes each of the four elements of a state response program as described in CERCLA § 128(a)(2). Ohio EPA agrees to maintain all of these elements for the MOA Track VAP as follows:

i) Timely survey and inventory of Brownfields sites in Ohio.
Ohio EPA has initiated efforts to evaluate all previously identified brownfields sites to determine the priority of those sites for follow up. In addition, Ohio EPA is undertaking an initiative to locate historic brownfields properties not previously identified, in cooperation with local governments.

ii) Adequate oversight and enforcement authorities and resources. Cleanups under the MOA Track VAP will result in timely and appropriate response actions that protect human health and the environment and are conducted in accordance with applicable state and federal laws. Ohio EPA has adequate enforcement resources and authority to ensure timely completion of response actions, including operation and maintenance or long-term monitoring if the responsible party fails or refuses to complete the required actions. If Ohio EPA determines, either through an audit or a property inspection, that a property which has been issued a covenant not to sue under the VAP does not meet applicable standards or that institutional or engineering controls have failed, Ohio EPA is obligated to insure that applicable standards are achieved or to revoke the covenant pursuant to ORC Section 3746.12(B).

iii) Mechanisms and resources to provide meaningful opportunities for public participation. Ohio EPA's MOA Track VAP sets forth a process for public participation in cleanup decisions, the public has access to site-specific documents that Ohio EPA will rely on in making cleanup decisions or conducting site activities, and such documents regarding the site or facility cannot be withheld under any State audit law privileges.

iv) Mechanisms for approval of cleanup plans and verification of completed response actions. U.S. EPA Region 5 has determined that the MOA Track VAP provides for Ohio EPA review of all Phase I and Phase II Property Assessment Reports, Sampling Plans, Risk Assessment Reports, proposed Remedial Action Work Plans, no further action letters and requests for covenants not to sue, and provides for Ohio EPA's written decisions approving or disapproving the investigation and cleanup activities. U.S. EPA Region 5 has also determined that a party's participation in the MOA Track VAP does not prevent Ohio EPA from taking enforcement action concerning such party's failure to make progress under the MOA Track VAP prior to receipt of a state Covenant Not to Sue, or concerning such party's failure to meet ongoing compliance obligations, or to address releases that were not disclosed during the MOA Track VAP process.

b) U.S. EPA Region 5 has reviewed and evaluated the MOA Track VAP and determined that it provides adequate access to information and meets the public record requirement described in CERCLA Section 128(b)(1)(C). In accordance with the Ohio Public Records Law, Ohio EPA will continue to maintain its files and make its public records available to the public.

3) Recognition of MOA Track VAP and standard-setting processes and standards.

a) Based on the assessment of Ohio EPA's capabilities and authorities as listed above, U.S. EPA Region 5 has determined that the standards and processes used in the MOA Track VAP are adequate, and that active coordination between Ohio EPA's RCRA

Corrective Action and Remedial Response programs and the MOA Track VAP will result in cleanups that meet the objectives and requirements of the RCRA Subtitle C Corrective Action program and CERCLA for facilities and sites subject to this MOA.

b) Ohio EPA acknowledges its responsibility with respect to RCRA Corrective Action and CERCLA to ensure that any party participating in the MOA Track VAP will comply with the requirements of the MOA Track VAP as approved by this MOA.

c) U.S. EPA Region 5 has reviewed and evaluated the Ohio EPA's MOA Track VAP program, rules, public record and participation requirements and guidances, and has determined that the MOA Track VAP program is adequate to ensure that the federal objectives identified in Section III.C. are met at sites subject to this MOA.

B. Future EPA Action.

1) Generally, U.S. EPA Region 5 does not plan or anticipate taking action under the authorities listed in Section II.A at a site or facility subject to this MOA as described in Section I.B. and being addressed or overseen by Ohio EPA while that site or facility remains in compliance with the MOA Track VAP and the authorities listed in Section II.B. except where one or more of the following circumstances apply:

a) Ohio EPA requests that U.S. EPA Region 5 provide assistance in the performance of a response action or information provided by Ohio EPA indicates that a site or facility is not making progress under the MOA Track VAP, that a site or facility has not continued to meet the standards or conditions of its covenant not to sue from Ohio EPA, or that corrective action is necessary for releases that were not disclosed during the MOA Track VAP process;

b) U.S. EPA Region 5 determines that contamination has or will migrate across the state line, or U.S. EPA Region 5 determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the federal property;

c) after considering the response activities already taken at the site or facility, U.S. EPA Region 5 determines under the authorities listed in Section II.A. that the site or facility may present an imminent and substantial endangerment to public health or welfare or the environment;

d) Ohio EPA fails to respond in a timely manner to a known situation where institutional controls, engineering controls, land use restrictions, or other conditions placed on a property as required by the remedy approved by Ohio EPA are no longer protective of public health or the environment, given the current conditions at the property, except where inconsistent with CERCLA § 128;

e) the site or facility owner or operator fails to implement a course of action required by Ohio EPA; or

f) U.S. EPA Region 5, after consultation with Ohio EPA, determines that information not known by Ohio EPA at the time a covenant not to sue from Ohio EPA was granted has been discovered regarding the contamination or conditions at the site or facility such that the contamination or conditions at the site or facility present a threat requiring further remediation to protect public health or welfare or the environment.

2) CERCLA § 128(b) provides limitations regarding federal enforcement actions at "eligible response sites," as defined in CERCLA § 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 at least annually a public record, as required by CERCLA § 128(b)(1)(C). These limitations operate as a matter of law and are subject to the exceptions listed in CERCLA §128(b). Thus, subject to the exceptions provided in CERCLA § 128(b), U.S. EPA does not plan or anticipate taking an administrative or judicial enforcement action under CERCLA §§ 106(a) or 107(a) against a person regarding a specific release at an eligible response site that is being addressed by that person in compliance with the MOA Track VAP.

C. Coordination Between Ohio EPA and U.S. EPA Region 5.

1) U.S. EPA Region 5 and Ohio EPA have developed a process for prioritizing sites or facilities and determining which agency is primarily responsible for a particular site or facility. U.S. EPA Region 5 and Ohio EPA will continue to communicate frequently regarding RCRA Subtitle C Corrective Action facilities, CERCLA sites, and overall program implementation. As part of this process, Ohio EPA or U.S. EPA Region 5 may request, and U.S. EPA Region 5 or Ohio EPA may transfer to the other Party to this MOA, primary responsibility for overseeing activities at a federal or state-lead site or facility within the legal parameters of that program. U.S. EPA Region 5 and Ohio EPA will continue to implement and improve this process.

2) Frequent communication between U.S. EPA Region 5 and Ohio EPA is critical to the success of this MOA. U.S. EPA Region 5 and Ohio EPA will continue to share information on sites or facilities, implementation priorities, new program initiatives, cleanup criteria decisions, federal grant opportunities and other relevant issues.

3) In order to achieve this level of communication, Ohio EPA and U.S. EPA Region 5 will conduct semi-annual meetings or telephone conferences to discuss progress in implementing this MOA, Ohio EPA's overall cleanup program, achieving state and federal commitments, funding opportunities and facility- or property-specific concerns.

4) On an annual basis, Ohio EPA will report to U.S. EPA Region 5 on the following:

   a) number of sites or facilities that have entered the MOA Track in the previous year;

   b) number of sites or facilities for which No Further Action Letters (NFAs) have been issued under the VAP and consistent with the MOA Track procedures in the previous year;

   c) number of sites or facilities for which covenants not to sue (CNSs) have been issued under the VAP and consistent with the MOA Track procedures in the previous year;

   d) location and address, and U.S. EPA Identification Number, if applicable, of sites or facilities for which a covenant not to sue has been issued under the VAP MOA Track and subsequently revoked;

   e) number of sites or facilities for which NFAs and CNSs have been issued under the VAP, but not in accordance with the MOA Track procedures (i.e., conventional VAP), in the previous year;

   f) number of VAP sites audited;

g) location and address, and U.S. EPA Identification Number, if applicable, of each site or facility in the MOA Track; and

h) status of each site or facility in the MOA Track (i.e., where each site is in the process).

V. Entry, Modification and Termination

This MOA has been developed by mutual cooperation and consent and hereby becomes an integral part of the working relationship between U.S. EPA Region 5 and Ohio EPA.

U.S. EPA Region 5 enters into this MOA based upon review of Ohio EPA's cleanup criteria and processes. Ohio EPA agrees to provide U.S. EPA Region 5, and U.S. EPA Region 5 agrees to provide Ohio EPA, with prompt notice of significant changes to the laws, regulations, and guidance and practices relevant to this MOA. Ohio EPA and U.S. EPA Region 5 agree to review this MOA, if U.S. EPA promulgates new regulations or develops relevant guidance after the effective date of this MOA.

This MOA may be modified only by the mutual written agreement of Ohio EPA and U.S. EPA Region V. This MOA may be terminated either by the mutual written agreement of Ohio EPA and U.S. EPA Region V, or forty-five (45) days after receipt by a signatory to this MOA (or his or her successor) of written notice of termination signed by the other signatory to this MOA (or his or her successor).

For the Ohio Environmental Protection Agency

Chris Korleski
Director
Ohio EPA

11/5/07
Date

For the U.S. Environmental Protection Agency, Region 5

Mary A. Gade
Regional Administrator
U.S. EPA Region 5

11/08/07
Date

CONCURRENCE OF OECA

The U.S. Environmental Protection Agency Office of Enforcement and Compliance Assurance (OECA) concurs with the execution of the Memorandum of Agreement Between the United States Environmental Protection Agency and the Ohio Environmental Protection Agency concerning use of the Ohio MOA-Track Voluntary Action Program to facilitate timely implementation of corrective action requirements.

Date: 9-24-07

Granta Y. Nakayama
Assistant Administrator
Office of Enforcement and Compliance Assurance

CONCURRENCE OF OSWER

The U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response (OSWER) concurs with the execution of the Memorandum of Agreement between the United States Environmental Protection Agency and the Ohio Environmental Protection Agency concerning use of the Ohio MOA-Track Voluntary Action Program to address environmental contamination.

Date: 9-12-07

Susan Parker Bodine
Assistant Administrator
Office of Solid Waste and Emergency Response