Voluntary Remediation Program Memorandum of Agreement
Between the
United States Environmental Protection Agency Region III and the
West Virginia Department of Environmental Protection

This Memorandum of Agreement (MOA) is entered into between the Regional Administrator, United States Environmental Protection Agency (U.S. EPA), Region III and the Cabinet Secretary, West Virginia Department of Environmental Protection (WVDEP) to support and strengthen efforts to achieve cleanups that are protective of human health and welfare and the environment through the appropriate use of the State voluntary remediation program. 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 WVDEP and the potential utilization of the WVDEP Voluntary Remediation Program (VRP) to assess and address environmental contamination.

I. Purpose and Scope

A. General

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

1) facilitate timely implementation of 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, 31 U.S.C. §1115 *et seq.* (GPRA) implementation schedule;

3) facilitate the cleanup and productive redevelopment and sustainable reuse of brownfields and other contaminated properties in West Virginia;

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

5) recognize the WVDEP VRP program for grant funding eligibility purposes under § 128(a) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act of 2002, 42 U.S.C. § 9628(a).

B. Applicability

1) Except as provided in Paragraph I.B.2) below, this MOA addresses contaminated or potentially contaminated properties (brownfields) that are "eligible response sites," as defined in CERCLA § 101(41) and that are cleaned up under WVDEP's oversight pursuant to the VRP:

(a) after the effective date of this MOA; or

(b) in accordance with the VRP authorities (described in Paragraph II.B.) in effect as of the date of this MOA and the terms of any agreement with WVDEP.

2) This MOA does not apply to:

(a) A facility for which any plan, report, or other document required to be submitted under the VRP is "deemed" approved, within the meaning of 60CSR3-10c of West Virginia's Voluntary Remediation and Redevelopment Rule; and

(b) Any site that is the subject of a federal enforcement or response action under CERCLA, including, but not limited to, an administrative order, a judicial order, a permit, an injunction, a consent decree, a CERCLA general or special notice letter, or an information request under CERCLA § 104(e).

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 WVDEP or U.S. EPA Region III under state or federal law. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity against WVDEP or U.S. EPA, their officers or employees, or any other person. U.S. EPA Region III retains its authority to bring enforcement action under federal law and WVDEP retains its authority to bring enforcement action under state law.

Nothing in this MOA modifies federal or state statutory requirements (or regulations promulgated there under) or WVDEP's agreement to fully implement West Virginia's authorized hazardous waste management program under RCRA Subtitle C or West Virginia's authorized underground storage tank program under RCRA Subtitle I.

By statute, entry into this MOA makes the State of West Virginia 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 III

EPA enters into this MOA in furtherance of its statutory and regulatory responsibilities and authorities under CERCLA.

B. West Virginia Department of Environmental Protection

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

- The Water Pollution Control Act, W. Va. Code §22-11-1 *et seq.*;
- The Groundwater Protection Act, W. Va. Code §22-12-1 *et seq.*;
- The Solid Waste Management Act, W. Va. Code §22-15-1 *et seq.*;
- The Underground Storage Tank Act, W. Va. Code §22-17-1 *et seq.*;
- The Hazardous Waste Management Act, W. Va. Code §22-18-1 *et seq.*;
- The Voluntary Remediation and Redevelopment Act, W. Va. Code §22-22-1 *et seq.*; and
- The Voluntary Remediation and Redevelopment Rule, 60CSR3.

III. Background

A. Mandate, Authorization and Purpose

The State of West Virginia and U.S. EPA Region III are mandated to protect human health and the environment. U.S. EPA Region III and WVDEP have a history of working cooperatively to clean up contaminated properties and environmental media.

U.S. EPA Region III and WVDEP acknowledge the potential benefits that can be achieved by clarifying the intentions and expectations of U.S. EPA Region III and WVDEP regarding the cleanup and reuse of contaminated properties that are addressed by WVDEP under West Virginia law. To the extent possible, U.S. EPA Region III and WVDEP seek to facilitate the productive redevelopment and sustainable reuse of industrial and commercial properties in West Virginia by minimizing regulatory impediments to the acquisition, cleanup, transfer and appropriate use or reuse of those properties.

Both the WVDEP and U.S. EPA Region III acknowledge their mutual respect, positive working relationship, and commitment to the successful implementation of this MOA. In particular, the WVDEP and U.S. EPA Region III seek to clarify the roles and responsibilities of U.S. EPA Region III and the WVDEP with respect to contaminated properties, so as to increase the numbers and timeliness of cleanups that will result in the protection of human health and welfare and the environment by:

1) Supporting the use of the WVDEP's VRP 60CSR3 comprehensive cleanup rules at properties where this approach is appropriate for achieving timely and protective cleanups;

2) Providing coordinated and consistent technical assistance and information to allow for informed decision making by property owners, prospective purchasers, lenders, public and private developers, citizens, local units of government, and elected officials;

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

4) Facilitating the effective use of all available authorities and resources and selecting the optimum programmatic tools to increase the pace, efficiency, and quality of cleanups.

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 comply with requirements for the site or media of concern.

B. Specific CERCLA Program Goals

The WVDEP and U.S. EPA Region III intend to ensure that CERCLA cleanup program goals are met for sites addressed by this MOA. WVDEP and U.S. EPA Region III intend to 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 welfare and the environment.

IV. MOA Implementation

A. Program Adequacy and Relevant State Authorities

1) Background

a) U.S. EPA Region III recognizes that WVDEP has successfully implemented cleanups at sites subject to federal environmental cleanup authorities.

b) In particular, the WVDEP's VRP is responsible for implementing West Virginia's portion of the federal CERCLA program, brownfields, and state response initiatives. The WVDEP's various programs, laws, and regulations work together to achieve appropriate environmental remediation objectives and program goals as mentioned in Paragraph III of this MOA.

c) WVDEP intends to use, as appropriate, WVDEP VRP's processes and standards for implementation of requirements at sites that may also be subject to CERCLA.

2) Evaluation of WVDEP's VRP under CERCLA § 128(a)

a) U.S. EPA Region III has evaluated the VRP for purpose of grant eligibility under CERCLA § 128(a) and determined that the VRP includes each of the four elements of a state response program as described in CERCLA § 128(a)(2). WVDEP agrees to maintain all of these elements for the VRP as follows:

(i) Timely survey and inventory of brownfield sites in West Virginia. WVDEP is evaluating historic lists of sites to determine the priority of those sites for follow up. In addition, WVDEP is undertaking an initiative to locate historic brownfield properties not previously identified.

(ii) Adequate oversight and enforcement authorities and resources. Cleanups under the VRP 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. WVDEP 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 WVDEP determines, either through an audit or a property inspection, that a property which has been issued a certificate of completion under the VRP pursuant to 60CSR3-12 does not meet applicable standards, or that institutional or engineering controls have failed, WVDEP is obligated to ensure that applicable standards are achieved or to revoke the Certificate of Completion pursuant to 60CSR3-16.

(iii) Mechanisms and resources to provide meaningful opportunities for public participation. WVDEP's VRP sets forth a process for public participation on cleanup decisions, and the public has access to site-specific documents that WVDEP will rely on in making cleanup decisions or conducting site activities, and such documents cannot be withheld under any state privileges, unless the Director certifies such information to be confidential information related to state secrets.

(iv) Mechanisms for approval of cleanup plans and verification of completed response actions. U.S. EPA Region III has determined that the cleanup program under the VRP provides for WVDEP reviews of all site assessments, work plans, risk assessment reports, final reports, and requests for case closure or a Certificate of Completion, and provides for WVDEP's written decision approving the investigation and cleanup activities. The term "approval" does not include a "deemed" approval within the meaning of 60CSR3-10. EPA has also determined that a party's participation in the VRP does not prevent WVDEP from taking enforcement action after WVDEP withdraws its approval of a work plan, which has the effect of terminating a Voluntary Remediation Agreement. Enforcement action can then be taken by WVDEP concerning such party's failure to make progress under the VRP prior to receipt of a Certificate of Completion or concerning such party's failure to meet ongoing compliance obligations, or to address releases that were not disclosed during the VRP process.

b) U.S.EPA Region III has reviewed and evaluated the VRP and determined that it provides adequate access to information and meets the public record requirement described in CERCLA § 128(b)(l)(C). Through West Virginia's Freedom of Information Law and WVDEP's web page, WVDEP will maintain, update this at least annually, and continue to make this record available to the public.

3) Recognition of WVDEP's standard-setting processes and standards

U.S. EPA Region III has reviewed and evaluated West Virginia's cleanup standard-setting processes, and its capabilities and authorities as listed above and has determined that the standards and processes in the WVDEP VRP will result in cleanups that meet the objectives of CERCLA for sites subject to this MOA.

4) Recognition of WVDEP's VRP's processes

a) The cleanup criteria specified in the WVDEP VRP provide for land use-based cleanups which may entail deed restrictions, placement on WVDEP's GIS (Geographical Informational Systems) Registry of Certificate of Completion sites, a combination of those institutional controls, or other restrictions in order to meet the criteria specified for each land use category.

b) WVDEP will utilize criteria specified in the WVDEP VRP when reviewing and approving institutional controls.

c) WVDEP acknowledges its responsibility with respect to CERCLA to ensure that any investigation and cleanup conducted under state authority meets the objectives and requirements of the federal programs addressed by this MOA.

d) Based on the assessment of WVDEP's capabilities and authorities, U.S. EPA Region III has determined that the processes in the WVDEP VRP will result in cleanups that meet the objectives of CERCLA for sites subject to this MOA.

e) U.S. EPA Region III has reviewed and evaluated the WVDEP VRP rules, public record and participation requirements, and guidance, and has determined that the VRP program is adequate to ensure that the federal objectives identified in Paragraph III.B. are met at sites subject to this MOA.

B. Future EPA Action

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 (a) specifically governs response actions for the protection of public health and the environment and (b) maintains and updates a public record, as required by CERCLA § 128(b)(l)(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 in CERCLA § 128(b), U.S. EPA does not 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 VRP requirements.

C. Coordination Between WVDEP and EPA

1) U.S. EPA Region III and WVDEP have developed a process for prioritizing sites or facilities and determining which agency is primarily responsible for a particular site. Key to the success of this process is frequent communication between U.S. EPA Region III and WVDEP regarding CERCLA sites and overall program implementation. As part of this process, the WVDEP may request, and the U.S. EPA Region III may transfer to WVDEP, primary responsibility for overseeing activities at a federal-lead facility within the legal parameters of that program.

2) Frequent communication between U.S. EPA Region III and WVDEP is critical to the success of this MOA. U.S. EPA Region III and WVDEP intend to continue sharing 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, WVDEP and the U.S. EPA Region III will conduct annual meetings or conference calls to discuss progress in implementing this MOA, WVDEP's overall cleanup program, achieving state and federal commitments, funding opportunities and facility- or property-specific concerns.

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

   a) Number of sites that have entered the VRP in the previous year; and

   b) Number of sites which have submitted requests for case closure and for which such requests have been granted consistent with the VRP procedures in the previous year.

V. Entry and Modification

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 III and WVDEP.

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

This MOA may only be modified by the mutual written agreement of both parties. This MOA may be terminated by either the mutual written agreement of the parties, or forty-five (45) days after receipt by a signatory of 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 West Virginia Department of Environmental Protection

2/24/10
Date

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

2/24/10
Date