

Coordinated Approaches to Addressing Environmental Liability in Oregon

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House Committee on Economic Development and Trade

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DEQ is a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.



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Executive Summary

In 2017 House Bill 2968 required the Oregon Department of Environmental Quality to study and propose recommendations on legislative, regulatory, and other actions needed to develop a program that will allow parties to conduct voluntary removal or remedial actions¹ for underutilized contaminated properties. The study must consider a coordinated regulatory process that would provide certain legal protections from liability for past environmental hazardous substance releases under Oregon Revised Statutes 465, 466 and 468B. The proposed process must satisfy requirements of applicable federal laws administered by the U.S. Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act; the Resource Conservation and Recovery Act; and the Toxic Substances Control Act as they apply to a facility. Furthermore, as part of the study, DEQ is required to consult with EPA and consider other states' actions related to voluntary removal or remedial actions intended to create or expand affordable housing on brownfields. A "brownfield" is generally defined in CERCLA and Oregon environmental cleanup law as: real property where expansion or redevelopment is complicated by the actual, potential, or perceived presence of environmental contamination.² This definition differs from "contaminated site" by adding sites where contamination may only be suspected, and by leaving out sites with no known interest in expansion or redevelopment.

Study Scope

DEQ's study involved the following elements:

- A survey of external stakeholders to learn about federal and state liability concerns.
- Research on other states' actions related to voluntary removal or remedial actions intended to create or expand affordable housing on brownfields.
- Consultation with EPA on the feasibility of a Memorandum of Agreement concerning federal and state roles, authorities and coordination of site actions in Oregon.
- Outreach through the Northwest Environmental Business Council and the Oregon Brownfield Coalition.

Study Highlights

The Oregon stakeholder survey indicated a substantial number of survey respondents were more concerned with federal liability than state liability. These results likely reflect the uncertainties on the scope of federal liability related to the pending Portland Harbor cleanup as the majority of poll respondents are located in the Portland metropolitan area. Perceived fears of federal involvement can create obstacles to the redevelopment and reuse of brownfields.

Oregon's cleanup law was designed to be generally consistent with CERCLA process and establishes acceptable risk criteria that are more strenuous than CERCLA. It is unlikely that EPA would take federal action on a completed site cleanup that meets Oregon laws and requirements. However, DEQ has proposed an MOA with EPA that would provide general assurances to mitigate this concern.

¹The terms "removal," "remedial action," and "facility" are defined in ORS 465.200(25), (23), and (13), respectively.

² This general definition of a brownfield site is based on ORS 285A.185(1) and CERCLA 42 U.S. Code § 9601(39)(A).

It is important to recognize that MOAs between other states' cleanup programs and EPA do not provide liability releases from federal law. Rather, the MOAs provide general assurances that EPA does not plan or anticipate pursuing enforcement at a voluntary cleanup site that was cleaned up consistent with requirements of applicable state and federal law.

Oregon law has existing provisions that provide liability releases and protections from third party claims. Most voluntary cleanup sites do not pursue an agreement under the settlement statute, which is typically used in more complex cases involving off-site contamination. The process requires public notice prior to filing the agreement with the Court. In practice, most sites receive a "No Further Action" letter upon completion of cleanup, and that is typically sufficient for lenders where the property serves as collateral for a loan.

Oregon has a popular prospective purchaser program under ORS 465.327 that is used by parties acquiring contaminated property requiring cleanup or long-term care. These Prospective Purchaser Agreements establish the limits of a purchaser's cleanup obligations and due care provisions to maintain the liability protections provided in the PPA.

Providing broad liability releases to completed voluntary cleanup sites has implications to private parties and local governments in addressing both foreseen and unforeseen circumstances. Broad liability releases leave communities and affected off-site property owners impacted by contamination with uncompensated damages. The most common example is state or local governments performing infrastructure maintenance of utilities located in contaminated zones extending into public rights-of-way and incurring costs to dispose of contaminated soil and groundwater removed for these maintenance activities.

Recommendations

- Develop and implement best management practices to improve the efficiency of DEQ Cleanup Program review and approval of investigation and cleanup of contaminated sites.
- Reconvene the Environmental Cleanup Advisory Committee to explore rulemaking to clarify the meaning of certain terms used in Oregon's liability statute under ORS 465.255 and better align our protections and defenses with federal requirements. This could include extending Bona Fide Prospective Purchaser protections to tenants operating on a contaminated site.
- The Environmental Cleanup Advisory Committee should consider the merits of providing liability releases from DEQ through a No Further Action determination for sites cleaned up for unrestricted use. For sites that require long-term engineering or institutional controls (e.g., land or water use restrictions) to protect human health and the environment, liability releases should continue to be addressed under the provisions of ORS 465.325. Oregon cleanup law may need to be revised through legislation to provide for sites with unconditional NFAs.
- Improve awareness of Oregon's current regulatory framework, which allows parties to obtain general or de-minimis settlement agreements from DEQ. This can be accomplished by adding information to DEQ's Environmental Cleanup Program [web page](#) and conducting broader

outreach. DEQ could broaden its current practice of using settlement funds to address watershed scale cleanups. For example, settlement funds could be used to address contamination discovered at sites after liability releases were issued. The fund could also be used to fund DEQ's technical assistance work at brownfield sites.

- Maintain the current provisions under ORS 465.327 that allow prospective purchasers of contaminated property to obtain liability releases. DEQ should continue to support and promote its PPA Program.
- Replace the outdated MOA with EPA with a new agreement that clarifies interagency coordination under CERCLA, RCRA, and TSCA to provide assurances that EPA would not pursue a party to require further action at a site cleaned up under state law that meet the requirements of applicable federal law.
- Continue funding the Business Oregon's Brownfield Redevelopment Fund, which assists local governments and private parties with assessing, cleaning up, and planning for redevelopment of brownfields.
- Continue supporting legislation, such as HB 4084 (2015) that provides local governments with authority to adopt incentives to facilitate redevelopment of brownfields to affordable housing.
- Continue allocating funds in the legislative budget for projects with a brownfield component that can help address the need for affordable housing.
- Continue supporting local governments' efforts to develop and apply incentives that aid the return on the investment for brownfield cleanup and redevelopment to affordable housing. For example, consider incentives involving property tax abatement or credits funded by local governments.
- Continue to support DEQ and other state agencies' engagement with local communities, property owners, and developers, including funding for technical assistance, to help parties address concerns regarding redevelopment of brownfields sites and the unique considerations for residential development and affordable housing.

For More Information

For a full copy of the report, contact DEQ Senior Legislative Advisor, Annalisa Grunwald at 503-229-6800 or DEQ's Environmental Cleanup and Emergency Response Program Manager, Bruce Gilles at 503-229-6391. The full report is also available online at <https://www.oregon.gov/deq/Data-and-Reports/Pages/Reports-to-Legislature.aspx>.

Acronyms

AAI	All Appropriate Inquiry
BFPP	Bona Fide Prospective Purchasers
BRF	Brownfields Redevelopment Fund
BRLF	Brownfields Revolving Loan Fund
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
DEQ	Department of Environmental Quality
ECSI	Environmental Cleanup Site Information
EPA	U.S. Environmental Protection Agency
ICP	Independent Cleanup Pathway
IPG	Integrated Planning Grants
LUST	Leaking Underground Storage Tank
MBHA	Mount Baker Housing Association
MOA	Memorandum of Agreement
NEBC	Northwest Environmental Business Council
NFA	No Further Action
ORS	Oregon Revised Statutes
PCB	Polychlorinated Biphenyl
PPA	Prospective Purchaser Agreements
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
ROZ	Redevelopment Opportunity Zones
RST	Regional Solutions Team
TSCA	Toxic Substances Control Act
TSDFs	Treatment/Storage/Disposal Facilities
UST	Underground Storage Tanks
VCP	Voluntary Cleanup Pathway
VCTC	Voluntary Cleanup Tax Credit

Introduction

During its 2017 legislative session, the Oregon Legislature passed, and the Governor signed House Bill 2968, relating to brownfields. A "brownfield site" is generally defined in federal and state law as: real property where expansion or redevelopment is complicated by the actual, potential, or perceived presence of environmental contamination.³ This definition differs from "contaminated site" by adding sites where contamination may only be suspected, and by leaving out sites with no known interest in expansion or redevelopment.

The legislation requires the Oregon Department of Environmental Quality to study and propose recommendations on legislative, regulatory, and other actions needed to develop a program allowing parties to conduct voluntary removal or remedial actions at a facility⁴ under a coordinated regulatory process that, upon successful completion, would provide certain legal protections from liability for past environmental hazardous substance releases. Furthermore, as part of the required study, DEQ must consult with the U.S. Environmental Protection Agency and consider other states' actions related to voluntary removal or remedial actions intended to create or expand affordable housing on brownfield sites.

State laws that establish liability for cleanup of hazardous substance releases to the environment include:

- **ORS 465.255** – Imposes strict liability on owners, operators, and certain other parties, for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility for injury or destruction of natural resources caused by a hazardous substance release⁵ to the environment, with limited exceptions.
- **ORS 466.640** – Imposes strict liability on owners and persons having control over oil or hazardous material spilled or released to the environment or threatened of spill or release, with certain exceptions.
- **ORS 468B.310** – Imposes strict liability on owners having control over oil entering waters of the state in violation of ORS 468B.305, with certain exceptions.

Federal laws administered by the EPA or the State through federal delegation where substantive requirements would need to be considered included:

- **Comprehensive Environmental Response, Compensation, and Liability Act** as amended, 42 U.S.C. 9601 et seq., P.L. 96-510 and P.L. 99-499. This is the federal cleanup law, administered by EPA. CERCLA imposes strict liability on parties responsible for the presence of hazardous substances at a facility.
- **Resource Conservation and Recovery Act**, 42 U.S.C. 6901 to 6992, P.L. 94-580, as amended). This is the federal hazardous waste law, which regulates the handling, transportation, storage, and disposal of defined hazardous wastes.
- **Toxic Substances Control Act**, 15 U.S.C. 2601 to 2671. This law regulates the production, importation, use, and disposal of specific chemicals that may pose health risks. Though TSCA covers an array of chemicals, the law's effect on DEQ's Cleanup Program has been limited to sites contaminated with Polychlorinated Biphenyls.

³ This general definition of a brownfield site is based on ORS 285A.185(1) and CERCLA 42 U.S. Code § 9601(39)(A).

⁴The terms "removal," "remedial action," and "facility" are defined in ORS 465.200(25), (23), and (13), respectively.

⁵The term "release" is defined in ORS 465.200(22).

Study Scope

DEQ's study involved the following elements:

- DEQ conducted a survey of external stakeholders to learn about federal and state liability concerns.
- DEQ researched other states' actions related to voluntary removal or remedial actions intended to create or expand affordable housing on brownfield sites.
- DEQ consulted with EPA regarding entering a Memorandum of Agreement concerning federal and state roles, authorities and coordination of site actions in Oregon.
- DEQ conducted outreach through the Northwest Environmental Business Council and the Oregon Brownfield Coalition.

Liability Risks and Reduction Options

The Issue

DEQ conducted a survey in August 2017 of over 3,000 Cleanup Program stakeholders. (See Appendix A for a summary of questions and responses.) The survey revealed state and federal liability concerns that could create barriers to redeveloping brownfield sites. Stakeholders (e.g., owners, operators, prospective purchasers, developers, and lenders) may hesitate to get involved with contaminated properties due to fear of being held liable under federal laws. Perceived fears of federal involvement can create obstacles to the redevelopment and reuse of brownfields.

Over the past 30 years, EPA's CERCLA, RCRA, and TSCA programs have only been involved in a small percentage of cleanup sites in Oregon. Subsequent EPA involvement has been limited to a few Superfund sites.

A large majority of stakeholders are concerned with federal liability at the Portland Harbor Superfund site. Potential Responsible Parties at the Portland Harbor Superfund site are concerned over their potential scope of federal liability at the site. While PRPs may avoid being held joint and several liability if they can prove that the harm it caused can be separated from the harm caused by other PRPs, this is hard or impossible to prove due to the co-mingling of wastes at Superfund sites. This is particularly the case with the Portland Harbor Superfund site because of the large physical size of the site (i.e., over ten river miles), extensive industrialization of the harbor over the past 100 years, and stormwater sources from hundreds of industrial and commercial facilities on both sides of the river. PRPs have ongoing liability concerns because of the unresolved allocation of cleanup costs. DEQ has a Portland Harbor Memorandum of Agreement with EPA to clarify agency responsibilities for the uplands and in-water portions of the site. The MOA did not include a provision for EPA to document that DEQ upland source control decisions were considered complete by EPA. Therefore, parties conducting source control actions under DEQ oversight have little assurance that their DEQ-approved source control action is complete, creating concerns that EPA could require further site-specific cleanup actions in the future.

DEQ's Environmental Cleanup Site Information⁶ database has data for over 5,500 sites in Oregon. Over 2,000 have a DEQ No Further Action determination that the site conditions are protective of human health and the environment. There are about 400 sites currently under active Cleanup Program oversight. About 3,100 sites that have known or suspected contamination are not active in the program. Most inactive sites are lower on the priority list for DEQ follow-up, and the remainder are given medium priority.

Of the 5,500 sites in ECSI, about 620 have had CERCLA involvement, and of those, 280 (existing CERCLA sites) occurred prior to enactment of the Oregon cleanup statutes. Since 1990, about 340 new ECSI sites have had CERCLA involvement, and most of these were at DEQ's request (to access federal preliminary assessment funding or to get help for needed removals). There are just 14 federal Superfund sites in Oregon, one of which is Portland Harbor.⁷ Since the 2002 brownfield amendments to CERCLA, known as the Bona Fide Prospective Purchaser provision amendments, EPA has largely taken a hands-off approach to CERCLA enforcement in states with robust cleanup programs.

DEQ currently has data from 23 active RCRA Corrective Action sites in its ECSI database. DEQ's Cleanup Program is or has overseen the investigation and cleanup of these sites, and coordinates with EPA on remedial progress and satisfaction of federal requirements. Over the years, DEQ and EPA have agreed that RCRA Corrective Actions are complete on a number of these sites.

EPA's TSCA footprint is very small in Oregon, even though EPA cannot formally delegate TSCA authority to states. ECSI shows that about 10 percent of its sites, about 550 have/had PCBs contamination but only a handful of these sites have met the TSCA regulatory thresholds and EPA has taken the lead on those sites in close coordination with DEQ's Cleanup Program.

Liability under Federal Law

The following discussion outlines the liability framework under federal law. In 2014, EPA issued a revitalization [handbook](#) that summarizes the statutory, policy and guidance and regulatory provisions to assist parties with liability risks associated with redevelopment of contaminated sites.

CERCLA

CERCLA imposes strict, joint and several liability on parties responsible for, in whole or in part, the presence of hazardous substances at a site.

Superfund liability is triggered if:

- Hazardous wastes are present at a facility,
- There is a release (or a possibility of a release) of these hazardous substances,
- Response costs have been or will be incurred, and

⁶ECSI tracks sites in Oregon with known or suspected contamination from hazardous substances, and documents sites with "no further action" designations. ECSI includes all Oregon sites with EPA CERCLA, RCRA, or TSCA involvement. Created in 1988, ECSI is the primary source of public information about Voluntary Cleanup and other contaminated sites, both past and present. See DEQ's [ECSI web page](#) for details. DEQ has a separate database and [web page for leaking underground storage tanks](#), though DEQ manages both types of sites under a single, coordinated program.

⁷ For details on Superfund sites in Oregon see: <http://www.oregon.gov/deq/Hazards-and-Cleanup/env-cleanup/Pages/Superfund.aspx>.

- The defendant is a liable party.

There are four classes of Superfund liable parties:

- Current owners and operators of a facility,
- Past owners and operators of a facility at the time hazardous wastes were disposed,
- Generators and parties that arranged for the disposal or transport of the hazardous substances, and
- Transporters of hazardous waste that selected the site where the hazardous substances were brought.

In 2018, Congress amended CERCLA through legislation known as the BUILD Act, which the President signed into law. The BUILD Act clarifies and provides further CERCLA liability exemptions, CERCLA liability defenses, exemptions, and protections for:

- **State and Local Governments** – State and local governments are not liable for costs resulting from an emergency response to a hazardous substance release or threatened release (unless gross negligence or intentional misconduct is involved). Prior to the federal 2018 BUILD Act, a state or local government who "involuntarily" acquires a Superfund site or other contaminated property could be protected from liability provided it did not cause or contribute to the contamination. Under the BUILD Act, local governments are no longer subject to CERCLA liability as "owners or operators" when they acquire real property by taking title through enforcement activity, seizures, bankruptcy, tax delinquency, or other circumstances. The big change is that the BUILD Act removed the term "involuntary" as a qualifier for local government protection from CERCLA liability if it takes ownership of contaminated property. This allows local governments to be more proactive in taking ownership of brownfield to promote redevelopment without triggering CERCLA liability.
- **Potential Responsible Parties Divisible Liability** – A PRP may avoid joint and several liability if it can prove that the harm it caused can be separated from the harm caused by other PRPs (this is rare due to the co-mingling of wastes at Superfund sites). Although a cleanup is often divided among PRPs to perform or pay for, that does not mean that the harm caused by each PRP's waste can be separated.
- **Lenders** – Generally, public and private lenders have some protection from owner/operator liability for loans made for facilities that may become contaminated. Further information on EPA's lender liability policy is contained in the [Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities](#) (6/30/1997).
- **Landowners** – In 2002, Congress added liability protections for landowners who meet certain criteria. Specifically, landowners who meet the criteria of a BFPP, innocent landowner, or contiguous property owner are now protected from Superfund liability.
- **Good Samaritans** – Section 107(d) of the Superfund law provides that persons shall not be liable for costs or damages for actions or inactions taken in the course of "rendering care, assistance, or advice in accordance with the National Contingency Plan (NCP) [National Oil and Hazardous Substances Pollution Contingency Plan] or at the direction of an on-scene coordinator. . . ." These non-liable parties are frequently referred to as "Good Samaritans." EPA

has issued guidance relating to Good Samaritans performing removal work at hard rock mine sites.

- **Cleanup Contractors** – Companies and individuals that have been contracted to perform investigation or cleanup activities at Superfund sites are protected from Superfund liability, except in cases of negligence or intentional misconduct.
- **Municipal Solid Waste** – Provisions in the 2002 amendments to the Superfund statute give a qualified exemption from Superfund liability to certain residential, small business, and non-profit generators of municipal solid waste at Superfund sites.
- **Recycling** – Those who arranged for the recycling of certain materials are exempt from Superfund generator and transporter liability, providing they meet certain criteria.

Similar to Oregon Cleanup Law, Superfund liability **defenses include:**

- An act of God (CERCLA §107(b)(1));
- An act of war (CERCLA §107(b)(2)); or
- The act or omission of a third party whom a PRP has no contractual relationship (CERCLA §107(b)(3)).

Third-party Defense

A third-party defense can be used by landowners that fit one of the following categories.

- Purchasers who acquire property without knowledge of contamination and who have no reason to know about the contamination, CERCLA §101(35)(A)(i);
- Governments acquiring a facility “by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation,” CERCLA §101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA §101(35)(A)(ii).

To invoke CERCLA’s §107(b)(3) third party defense, the party’s act or omission must not occur “in connection with a contractual relationship.” Moreover, an entity asserting CERCLA §107(b)(3) defense must show that it: 1) exercised due care with respect to the contamination; and 2) took precautions against the third party’s foreseeable acts or omissions and the consequences that could reasonably result from such acts or omissions.

Bona Fide Prospective Purchaser Protections

The BFPP liability protection is a self-implementing protection. EPA is not required to determine whether specific parties qualify for BFPP status at specific sites. Parties can achieve and maintain BFPP status without a Prospective Purchaser Agreement, as long as they meet criteria in CERCLA §101(40) and §107(r). These criteria include the performance of “[All Appropriate Inquiries](#)” before acquiring a property. A person wishing to assert BFPP status cannot otherwise be a PRP at the site or have a prohibited “affiliation” with a PRP at the site. However, the BUILD Act provides a clearer path for tenants to claim BFPP defense. Historically, EPA has used enforcement discretion to extend BFPP to

tenants. The BUILD Act now formalizes that protection into the law. Tenants can avoid liability by meeting AAI requirements and the following additional requirements.

Parties seeking BFPP status must also satisfy these additional obligations for the duration of site ownership:

- Comply with any land use restrictions and not impede effectiveness/integrity of institutional controls, if any;
- Exercise appropriate care with respect to hazardous substances found at the property by taking “reasonable steps” to stop any continuing release and to prevent any threatened future release;
- Provide cooperation, assistance, and access;
- Comply with information requests and administrative subpoenas;
- Provide legally required notices; and
- Not impede the performance of a response action or natural resource restoration work.

BFPPs are not liable as owners/operators for CERCLA response costs, but the property they acquire may be subject to a windfall lien if EPA’s response action has increased the property’s fair market value. The property lien may be the lesser of unrecovered response costs or the increase in fair market value attributable to cleanup. The windfall lien provision, found in CERCLA §107(r), does not supplant the lien provision found in CERCLA §107(l).

Contiguous Property Owner Defense

The Brownfields Amendments added a statutory defense for contiguous property owners, excluding from the “owner or operator” definition a person who owns property that is “contiguous,” or otherwise similarly situated to, a facility that is the only source of contamination found on the person’s property. This provision protects parties who are victims of contamination caused by a neighbor’s actions.

To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA §107(q)(1)(A). A contiguous property owner must perform AAI before acquiring the property and demonstrate that it is not affiliated with a liable party. Like BFPPs, contiguous property owners must also satisfy ongoing obligations. Persons who know, or have reason to know, before purchase that the property is or could be contaminated cannot qualify for contiguous property owner liability protection. However, they may still be entitled to the BFPP liability protection discussed above.

In 2004, EPA issued its [Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners](#), which discusses CERCLA §107(q). In 2009, EPA issued the [Model CERCLA § 107\(q\)\(3\) Contiguous Property Owner Assurance Letter](#) in accordance with the 2004 enforcement discretion guidance mentioned above. Because CERCLA §107(q) is self-implementing, EPA anticipates that use of enforcement tools will be limited.

RCRA

In 1976, Congress enacted RCRA, 42 U.S.C. §§6901 et seq., authorizing EPA to establish programs to regulate hazardous waste (Subtitle C), solid waste (Subtitle D), and underground storage tanks (Subtitle I). RCRA’s goals include:

- Protecting human health and the environment from hazards posed by waste disposal;
- Conserving energy and natural resources through waste recycling and recovery;

- Reducing the amount of waste generated; and
- Ensuring management of wastes in an environmentally safe manner.

Through RCRA Subtitle C, Congress authorized EPA to manage hazardous wastes from “cradle to grave.” There are Subtitle C regulations for generation, transportation, and treatment/storage/disposal of hazardous waste. These regulations first identify criteria to determine which solid wastes are hazardous, and then establish various requirements for the three categories of hazardous waste handlers (generators, transporters, and treatment/storage/disposal facilities. Subtitle C regulations also set technical standards for the design and safe operation of TSDFs, which are the basis for developing and issuing required TSDF permits. Unlike CERCLA, RCRA has no BFPP provision or similar liability protections.

RCRA Subtitle I gives EPA the authority to establish regulatory and technical requirements to prevent, detect, and clean up releases from underground storage tanks. These tank systems are commonly found at convenience stores, service stations, small and large manufacturing facilities, and airports. The UST program has technical and administrative requirements that are distinct from RCRA Subtitle C, including notification, design and installation standards, and closure requirements.

Under RCRA Subtitle C, EPA has developed a comprehensive program to manage hazardous wastes and prevent future environmental problems resulting from hazardous waste. It also oversees the cleanup of current environmental problems caused by mismanagement of wastes, a process known as “corrective action.” EPA uses several corrective action authorities to compel cleanup. Owners and operators of facilities with releases caused by mismanagement of wastes must perform cleanup. The bullets below show all corrective action components. Since cleanup completion at a facility depends on site-specific conditions, the corrective action process is flexible. The components below may occur in any order, and some components may not be needed for a no further action decision.

- Initial Site Assessment (RCRA Facility Assessment);
- Release Assessment and Site Characterization (RCRA Facility Investigation);
- Interim Actions to control/abate risks to human health and the environment (Interim Measures);
- Evaluation of different alternatives to remediate the site (Corrective Measures Study);
- Remedy selection for a thorough cleanup of the hazardous release (Statement of Basis); and
- Design, construction, operation, maintenance, and monitoring of the chosen remedy (Corrective Measures Implementation).

States are an integral part of the RCRA program. EPA may approve a state or territory’s RCRA program to operate in lieu of EPA’s program. EPA generally approves a state-administered RCRA corrective action program if the state requirements are no less stringent than federal requirements and the state has the ability to take adequate enforcement actions. In authorized states, facilities must comply with the state requirements rather than the corresponding federal requirements. After authorization, both the state and EPA can enforce those requirements.

EPA has granted authority to implement the RCRA base program to all 50 states and territories. EPA has also granted authority to operate the RCRA corrective action program to 42 states (including Oregon) and the territory of Guam. EPA granted corrective action authority to DEQ’s RCRA program in the 1990s, and for efficiency purposes, DEQ decided it would be best to manage RCRA corrective action sites in its Cleanup Program. However, EPA would not agree to this without formally reviewing DEQ’s Cleanup Program. Because of the costs and resources required for this review, DEQ decided against it, and in its place has worked with EPA to develop RCRA **Post-Closure Permits** covering DEQ activities and authorities at corrective action sites.

The [RCRA state authorization program](#), the [RCRA corrective action cleanup enforcement program](#), and [Office of Underground Storage Tank](#) websites provide additional information.

TSCA

TSCA prohibits the manufacture of PCBs, controls the phase-out of their existing uses, and sees to their safe disposal. EPA has regulatory authority for TSCA, and does not delegate it to states or territories. Thus, all PCB incidents in Oregon **meeting TSCA thresholds** require EPA involvement and direction.

Prohibitions and requirements for handling PCB-containing items and materials appear in Title 40 CFR Part 761, PCBs Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions. These federal regulations are promulgated under Sec. 6(e) of TSCA [15 USC 2605].

Cleanup requirements for spills of PCBs with concentrations of 50 parts per million (ppm) or greater are contained in Title 40 CFR 761, Subpart G, PCB Spill Cleanup Policy. The current cleanup policy is based on the concentration of PCBs in the spilled material and the location of the spill. The PCB Spill Cleanup Policy applies to spills occurring after May 4, 1987. Spills that occurred before that date are excluded from the Subpart G requirements and are regulated by the regional EPA office.

Disposal options for PCB waste depend on the type of waste. Generally, incineration (destruction) is the preferred method. Other options include placement in a municipal solid waste or chemical waste landfill, or disposal in a high-efficiency boiler.

Disposal options for PCB remediation wastes are implemented in 40 CFR 761.61. This section includes instructions for self-implementing cleanup and disposal of PCB remediation waste for a moderately sized site where there should be low residual environmental effects from remedial activities. No prior written approval from EPA is needed to implement these procedures. For larger sites, the self-implementing procedures may be used in consultation with EPA. For more information on managing remediation waste from PCB cleanups, go to EPA's web page at <https://www.epa.gov/pcbs/managing-remediation-waste-polychlorinated-biphenyls-pcbs-cleanups>.

Liability under Oregon Law

ORS 465 - Environmental Cleanup Statutes

Liability and cleanup requirements under ORS 465 are generally consistent with CERCLA with a few exceptions. Under ORS 465.255, a person is strictly liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release, if that person:

- **Owned or operated** the facility when acts or omissions resulting in the release occurred; or
- **By any acts or omissions** (other than those in compliance with applicable laws, standards, regulations, licenses or permits), actually caused, contributed to or worsened the release; or

- **Learned of the release** at the facility while owning or operating at the facility, and later transferred facility ownership or operation to another person without disclosing the release; or
- **Unlawfully hinders or delays state entry** to the facility for investigative or remedial actions.

Unlike CERCLA, ORS 465.255 does not designate generators or transporters of hazardous waste as liable parties, unless these parties are owners or operators of a facility where a release has occurred or a threat of a release exists. Transporters, however, become liable when there is a release of a hazardous substance during transport of the material. In addition, parties that acquire a contaminated site will become liable if they acquire the property knowing or should have known the site was contaminated at the time of acquisition.

ORS 465.255 provides categorical liability **exemptions** for the following parties:

- Units of state or local government that acquire ownership or control of a facility “involuntarily,” i.e., via escheat, bankruptcy, tax delinquency or abandonment, or via purchase or condemnation using eminent domain authority; and
- Persons who acquire a facility by inheritance or bequest; and
- Fiduciaries exempted from liability according to ORS 465.440.

These **exclusions** become void for parties who:

- Cause, contribute to, or worsen a release;
- Fail to disclose a release to subsequent owners/operators;
- Hinder or delay state entry to the facility for investigative or remedial actions;
- Fail to notify DEQ upon learning of a release, and fail to exercise appropriate due care related to the hazardous substance(s) involved; or
- Fail to take precautions commensurate with reasonably foreseeable acts/omissions of a third party and the likely consequences of such acts/omissions.

ORS 465.255 includes several defenses to liability similar to CERCLA. Persons may assert a **defense** to liability if they:

- Became an owner or operator after any acts or omissions resulting in a release, and did not know of and reasonably should not have known of the release; or
- Are subject to releases caused by: “Acts of God” (unforeseeable natural disasters); an act of war; or acts or omissions of a third party with whom the person has no affiliation.

Oregon Cleanup Law under ORS 465.255 uses the terms “**due care**” and “**AAI**”, “**BFPP-type**” requirements for parties to maintain Oregon environmental cleanup liability defenses. ORS 465.255(4)(a) requires parties to exercise due care, and ORS 465.255(6) requires parties conduct AAI.

DEQ provides a similar liability protection under its **PPA Program**. Under DEQ’s PPA Program parties can enter an agreement with DEQ that provides the party with a release from liability to the state and third parties provided they satisfy certain cleanup obligations and undertake “due care” for remaining contamination at the property.

No Further Action Determinations

The vast majority of sites that undergo cleanup in Oregon are conducted under DEQ’s streamlined cleanup process (i.e., Independent and Voluntary Cleanup Pathways) and result in DEQ issuing a “no

further action" determination. This type of determination does not provide parties a release from liability.

The term "no further action" is mentioned once in Oregon Cleanup Law, under ORS 465.230(1)(b), relating to removing a site from the Confirmed Release List and Inventory of facilities. This statutory provision requires DEQ to remove a facility from the list and inventory if DEQ determines:

- a) Actions taken at the facility have attained a degree of cleanup and control of further releases that assures protection of present and future public health, safety, welfare and the environment.
- b) **"No further action"** is needed to assure protection of present and future public health, safety, welfare and the environment; or
- c) The facility satisfies other appropriate criteria for assuring protection of present and future public health, safety, welfare and the environment.

In practice, DEQ issues NFA letters after determining that a site poses no unacceptable risks to human health or the environment. The NFA letter indicates that DEQ will not require additional remedial action, based on the agency's knowledge of site conditions when it issues the NFA. Some NFAs specify conditions for maintaining institutional or engineering controls to prevent exposure to any remaining contaminants. These sites receive a conditional NFA determination and remain on the Confirmed Release List and Inventory until conditions are no longer necessary to ensure protection of public health.

DEQ's intention is that all sites in the Cleanup Program reach an NFA decision following investigation and any removal or remedial action needed. DEQ-initiated actions to rescind NFAs are very uncommon. DEQ may rescind an NFA if:

- A new contaminant release or a previously unknown past release is found; or
- Site use changes so the original exposure assumptions are no longer applicable;
- Contaminant toxicity changes such that the site is no longer protective of public health, safety, welfare and the environment; or
- Conditions linked to the NFA are not implemented or maintained as expected.

Since 1988, DEQ has rescinded less than five percent of previously issued NFAs. Some of these sites were reopened solely at the owner's or prospective purchaser's request, in order to validate an "old" NFA in anticipation of a real estate transaction or to allow entry into the PPA program, which by law may accept only those sites needing remedial action.

Certain states such as Pennsylvania provide state liability releases with NFAs. This would likely require new laws and rules for Oregon to provide liability releases with NFAs.

DEQ has experience administering Oregon's Dry Cleaner Program, which provides broad releases from liability under ORS 465.503 in exchange for payment of fees and performing spill prevention to prevent future releases of hazardous substances to the environment. Based on DEQ's experience administering cleanups under this program, communities and affected off-site property owners impacted by contamination are left with uncompensated damages. The most common example is state or local governments performing infrastructure maintenance of utilities located in contaminated zones extending into public rights-of-way and incurring costs to manage and dispose of contaminated soil and groundwater removed for these maintenance activities.

Settlement Agreements

Currently, PRPs are able to receive liability releases pursuant to terms under ORS 465.325 (general and de-minimis settlements). DEQ has supported PRPs interested in entering a general or de-minimis settlement agreement. Implementing cleanups under ORS 465.325 has largely involved complex area-wide sites that create significant liability exposure to owners and operators of contaminated facilities. These agreements often require complicated negotiations and can involve substantial costs to reach a settlement in cases where aggrieved parties intervene in court proceedings to approve the judgment. The complexity makes this option less favorable than going through DEQ's ICP or VCP to obtain an NFA.

For complex sites involving multiple PRPs and off-site contamination, DEQ currently has adequate tools for resolving a PRP's liability under ORS 465.325. The liability protections are triggered by DEQ's decision certifying that the respondent has successfully completed the remedial action for the facility, but include a provision that allows DEQ to revisit the decision if the remedy fails. DEQ has included releases by the state for CERCLA and RCRA liability in settlement agreements that do not affect EPA rights.

General Settlements under ORS 465.325(7)

ORS 465.325(7) allows DEQ to enter into general settlement agreements with parties to provide a release from state liability, including future liability, resulting from a release of a hazardous substance addressed in the agreement if the following conditions are met:

- (A) The settlement is in the public interest.
- (B) The settlement would expedite removal or remedial action consistent with rules adopted by the commission under ORS 465.400 (Rules) (2).
- (C) The person is in full compliance with a consent judgment under ORS 465.325(4)(a) for response to the release concerned.
- (D) DEQ removal or remedial action has been approved by DEQ's director.

In determining whether a settlement would be in the public interest, DEQ must consider the following factors:

- (A) The effectiveness and reliability of the remedial action, in light of the other alternative remedial actions considered for the facility concerned.
- (B) The nature of the risks remaining at the facility.
- (C) The extent to which performance standards are included in the order or judgment.
- (D) The extent to which the removal or remedial action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.
- (E) The extent to which the technology used in the removal or remedial action is demonstrated to be effective.
- (F) Whether the fund or other sources of funding would be available for any additional removal or remedial action that might eventually be necessary at the facility.
- (G) Whether the removal or remedial action will be carried out, in whole or in significant part, by the RP themselves.

De-minimis Settlements

ORS 465.325(8) directs DEQ to enter into settlement agreements with potentially liable parties for de-minimis contributions of contamination at a facility whenever practicable and in the public interest. De-minimis contributions are: (a) the amount of the hazardous substance contributed by that person to the facility and (b) the toxic or other hazardous effects of the substance contributed by that person to the facility. De-minimis settlements provide parties with a release from liability to the state and third party contribution claims. These settlement agreements must be in the form of a consent judgment or order.

DEQ has developed cash-out settlement frameworks for resolving liability for contamination to surface water and sediments where many potential sources may have contributed to the degraded conditions. DEQ has streamlined this process and has begun to apply the process to other situational settings.

Over the past decade, DEQ has used this statutory provision to develop regional watershed cleanup strategies to address sediment contamination from historical releases of hazardous substances to surface waters that resulted in impairment of the beneficial uses of the watershed. Contributions to sediment contamination resulted from hundreds of facilities discharging wastewater or stormwater containing suspended sediments through private or municipal storm sewer systems. Settlement agreements in these cases involved a cash-out payment to remediate a de-minimis area of contribution to the area-wide contamination. DEQ developed a settlement remediation fund to cover the cost of contaminated sediment hot spot clean up in the Columbia Slough located in Portland. The settlement agreements include provisions for natural resource damage payments to fund habitat restoration within the watershed. The agreements provide liability releases and third party contribution protection for in-water contamination, with protections extending to their property once they have satisfactorily cleaned up their upland releases.

DEQ recently expanded the settlement framework to address sediment contamination in Lake Ewauna in Klamath Falls associated with a former mill site being subdivided and redeveloped. There may be additional opportunities to use de-minimis settlements to create a more robust response fund to address contamination cleanup issues arising from facilities that received liability releases. Municipalities and the Oregon Department of Transportation often encounter contamination within their rights-of-way during installation and maintenance of public utilities and would be barred from recovering their costs to manage this contamination.

Prospective Purchaser Agreements under ORS 465.327

Oregon's [PPA Program](#), authorized by the 1995 state legislature and codified in ORS 465.327, is an important release from potential liability under ORS 465 administered by the DEQ Cleanup Program. In a wide-ranging survey of DEQ Cleanup Program stakeholders in August 2017 (see Appendix A for details), many respondents cited PPAs as DEQ's most useful tool to enhance cleanup and reuse of brownfields in Oregon. DEQ has completed nearly 200 PPAs since 1997.

The PPA statute, amended several times since 1995, authorizes DEQ to provide prospective buyers of contaminated property with written agreements that include releases of liability, as long as purchasers meet qualifying criteria (listed below) and agree to conduct needed cleanup or provide the state with other "substantial public benefits." Depending on the type of agreement negotiated (administrative agreement, administrative consent order, or judicial consent judgment), PPAs can release signatories from state liability, as well as from contribution and third-party claims. Protection from state liability covers the three statutes addressed in Section 2.2 above. When complete, PPAs are recorded on county

property deeds, and all benefits and burdens of the agreement “run with the land,” meaning they apply to future property owners who exercise due care.

Qualifying criteria for PPAs:

- The party is not currently liable for an existing release of a hazardous substance;
- Removal or remedial action is necessary to protect human health or the environment;
- Proposed redevelopment or reuse of the property will not contribute to, or exacerbate existing contamination, cause increased health risk or interfere with necessary remedial measures;
- A substantial public benefit results from the agreement including, but not limited to:
 - The generation of substantial funding or other resources to facilitate remedial measures;
 - A commitment to perform substantial remedial actions;
 - Productive reuse of vacant or abandoned industrial or commercial facilities;
 - Development by a governmental entity or nonprofit organization to address an important public purpose.

PPAs do not release the party from claims arising from:

- Failure to implement all terms of the agreement;
- Releases after acquisition;
- Contribution or exacerbation of releases;
- Interference or failure to cooperate with DEQ or persons conducting remedial measures;
- Failure to exercise due care to take reasonable precautions at the facility; or
- Any violation of federal, state, or local law.

While PPAs cannot release parties from federal liability, PPAs are written as intended to be approved settlements under CERCLA, and provide any protection that might be available from third party claims for contribution.

ORS 466 - Oil or Hazardous Materials Spills to Land and Water

A person owning or controlling any oil or hazardous material spilled or released is strictly liable, irrespective of fault, for the spill. However, the party is not held strictly liable for natural resource damages if the person can prove the spill was caused by: 1) an act of war or sabotage or “Act of God”; 2) negligence by the U.S. or the State of Oregon; or 3) an act or omission of a third party, whether or not it was negligent.

If a person liable under ORS 466.640 does not immediately begin cleanup or complete it to DEQ’s satisfaction, DEQ may complete the cleanup using its own contractors. This may include any actions that DEQ deems appropriate. DEQ may also, directly or by contract, undertake planning, fiscal, economic, engineering and other studies and investigations needed to plan and direct cleanup actions, and recover the costs thereof, including any legal expenses.

ORS 468B - Oil Spills to “Waters of the State”

According to ORS 468B.305, it is unlawful for oil to enter the waters of the state from any ship or fixed or mobile facility or installation, offshore or onshore, whether publicly or privately operated, regardless

of the cause of the entry or the fault of the person having control over the oil. Such entry constitutes pollution of waters of the state. Any person owning oil or having control over oil entering waters of the state is strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry.

ORS 468B.315 requires any person owning or having control over oil entering waters of the state to collect and remove the oil immediately, or if that is not feasible, take all practicable actions to contain, treat, and disperse the oil without using chemicals or other dispersant or treatment materials that DEQ believes would harm the public interest.

According to ORS 468B.320, if any person fails to collect, remove, treat, contain, or disperse oil immediately, DEQ may, itself or by contract, take all actions needed to protect the public interest or public property, by collecting, removing, treating, containing, or dispersing oil that enters waters of the state. The person failing to take appropriate action is responsible for expenses the state incurs in taking such actions. In addition, ORS 468B.325 authorizes DEQ to enter public or private property, premises, ships, or places as needed to address a spill or release of oil or hazardous material (with some limitations on ship entry).

ORS 468B.310 states that its provisions do not limit the right of a person owning or having control of oil to seek recovery of damages from another person whose act or omission caused oil to enter waters of the state for which the person owning or having control of such oil is liable.

DEQ One Cleanup Program Approach

DEQ's One Cleanup Program approach provides a single coordinated program that addresses the varying types of cleanup sites, which allows for efficiencies in staffing and consistency in the level of cleanup achieved under different authorities. Under this approach, the Cleanup Program oversees environmental cleanup at hazardous substance sites, sites subject to RCRA authorities including Leaking Underground Storage Tank sites, solid waste landfills, and spill sites that require continued cleanup beyond the emergency response phase of the incident.

Oregon Cleanup Law was modeled after and is generally consistent with CERCLA. Oregon's cleanup standards are also consistent with criteria established under CERCLA. DEQ develops its risk-based concentrations for environmental media using the same exposure and toxicity criteria developed by the federal government. As a result, it is uncommon for EPA to conduct independent reviews of DEQ cleanup decisions.

DEQ's Cleanup Program process is described in detail in its [2018 Annual Legislative Report](#). A brief summary of the program elements is provided below.

Hazardous Substance Sites

CERCLA caliber sites and RCRA facilities are managed under an enforceable agreement or order. The majority of cleanup sites, however, are managed through DEQ's Voluntary Cleanup Pathway, rather than enforcement. Nearly all new sites entering DEQ's program are through the VCP.

DEQ created its VCP in 1991 to provide oversight to property owners and others wishing to investigate and clean up hazardous substance sites in a cooperative manner. The VCP is designed to increase the

number of remediated sites by streamlining cleanup methods and costs while still meeting Oregon's risk standards. Projects range from simple sites with a limited amount of contaminated soil to larger sites that may involve contaminants in soil, groundwater, surface water, sediment, or air. DEQ offers two voluntary options for cleaning up contaminated sites, the Independent Cleanup Pathway and the traditional VCP. Both offer the flexibility to allow efficient investigation and cleanup approaches, usually to facilitate the use, sale, refinancing, or redevelopment of contaminated property, while protecting human health and the environment.

The traditional VCP provides DEQ review and oversight throughout site investigation and cleanup work, usually resulting in a DEQ NFA determination. The ICP, implemented in 1999 for uncomplicated sites with low to moderate contamination, limits DEQ oversight to reviews of final reports from site representatives. DEQ usually (but not always) determines that these final ICP reports warrant NFAs. A common element of both cleanup pathways is the early assignment of a DEQ project manager who establishes a collaborative working relationship with the site representatives.

Whether going through a VCP or ICP process, site representatives hire consultants to do investigative and cleanup work, and also pay for DEQ's oversight/review hours. Based on the higher level of DEQ involvement, the VCP option can cost more than ICP, but is quite likely to lead to an NFA. The ICP option is usually less expensive and may be quicker, but if DEQ disagrees with the methods or conclusions presented in ICP final reports, more work may be required to obtain an NFA, resulting in higher costs than PRP anticipated.

Spills/Emergency Response Sites – ORS Chapter 466 for Oil or Hazardous Materials Spills to Land or Water

DEQ receives notification of spills of hazardous materials exceeding a reportable quantity (e.g. 42 gallons for oil) through the Oregon Emergency Response System. DEQ requires spilling parties to submit a report documenting that the cleanup of spills meets protective levels. A DEQ on-scene coordinator oversees cleanup actions in cases involving significant releases that directly impact or threaten waters of the state or pose significant exposure to the public. DEQ closes out the spill case upon review of the spiller's cleanup report but does not issue an NFA letter to the spiller.

According to ORS 466.645, a person liable for a spill or release under ORS 466.640 must initiate cleanup immediately, and perform cleanup under DEQ's direction. DEQ may require the RP to undertake whatever actions are needed to:

- Identify the extent of the spill/release;
- Identify the source and nature of oil or hazardous material involved; and
- Evaluate the nature and magnitude of threats to human health and the environment.

If a person liable under ORS 466.640 does not immediately begin cleanup or complete it to DEQ's satisfaction, DEQ may complete the cleanup using its own contractors. This may include any actions that DEQ deems appropriate. DEQ may also, directly or by contract, undertake planning, fiscal, economic, engineering and other studies and investigations needed to plan and direct cleanup actions, and recover the costs thereof, including any legal expenses.

Spills/Emergency Response Sites – ORS Chapter 468B for Oil Spills to “Waters of the State”

According to ORS 468B.305, it is unlawful for oil to enter the waters of the state from any ship or fixed or mobile facility or installation, offshore or onshore, whether publicly or privately operated, regardless of the cause of the entry or the fault of the person having control over the oil. Such entry constitutes pollution of waters of the state. Any person owning oil or having control over oil entering waters of the state is strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry.

ORS 468.315B requires any person owning or having control over oil entering waters of the state to collect and remove the oil immediately, or if that is not feasible, to take all practicable actions to contain, treat, and disperse the oil without using chemicals or other dispersant or treatment materials that DEQ believes would harm the public interest.

According to ORS 468B.320, if any person fails to collect, remove, treat, contain, or disperse oil immediately, DEQ may, itself or by contract, take all actions needed to protect the public interest or public property, by collecting, removing, treating, containing, or dispersing oil that enters waters of the state. The person failing to take appropriate action is responsible for expenses the state incurs in taking such actions. In addition, ORS 468B.325 authorizes DEQ to enter public or private property, premises, ships, or places as needed to address a spill or release of oil or hazardous material (with some limitations on ship entry).

ORS 468B.310 states that its provisions do not limit the right of a person owning or having control of oil to seek recovery of damages from another person whose act or omission caused oil to enter waters of the state for which the person owning or having control of such oil is liable.

Leaking Underground Storage Tank Sites

As in the VCP and ICP, to obtain NFA letters, LUST site representatives must hire a consultant and pay DEQ oversight costs. LUST and VCP/ICP project managers work cooperatively in the same management units across the state.

EPA has authorized DEQ to operate a LUST Program and has adopted statute and rules to implement federal requirements. EPA recognizes that, because of the size and diversity of the regulated community, state and local governments are in the best position to oversee USTs. DEQ's LUST Subprogram handles issues related to:

- Cleanup of soil and groundwater contamination from spills and releases from regulated underground storage tanks.
- Contractor licensing authorizing working on LUST assessments, decommissioning and corrective action.
- Enforcement of state and federal LUST rules.

OAR 340-122-0205 to 0360 provides LUST cleanup requirements and approval criteria. Formal DEQ approval is only required for corrective action plans and NFA determinations. Approval is not needed for actions to mitigate imminent hazards, prevent additional leaks, investigate site contamination, remove free product, or proceeding with site cleanup. Sites qualify for NFA determinations when there is no longer unacceptable risks to human health or the environment at the site.

DEQ and EPA Coordination

In 1989, the EPA prepared the Interim Final Guidance on Preparation of Superfund Memoranda of Agreement⁸. The guidance was developed to enhance EPA-State partnerships, to minimize duplication of efforts, and to document their operating and interaction procedures in the Superfund program. Although a Superfund Memorandum of Agreement is not required under CERCLA, its purpose is to improve the quality of communication and mutual understanding of the roles and responsibilities between EPA and a state during CERCLA response activity.

A Superfund MOA details both parties' roles and responsibilities in the agreement. MOAs may be adapted to the needs of a particular state and the respective EPA region. However, the states can recommend a remedy for EPA concurrence and adoption only when an MOA is established.

26 states have MOAs with EPA:

- Region 3: Delaware, Maryland, Pennsylvania, Virginia, West Virginia.
- Region 4: Florida, Kentucky.
- Region 5: Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin.
- Region 6: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.
- Region 7: Iowa, Kansas, Missouri, Nebraska.
- Region 8: Colorado, Wyoming.
- Region 10: Alaska, Idaho (RCRA, UST, Risk Assessment).

Although initially, MOAs related solely to CERCLA, some states (Pennsylvania, Ohio, Kansas and Wisconsin) have developed MOAs that cover three EPA programs (CERCLA, RCRA, and TSCA). Copies of the Pennsylvania and Wisconsin MOAs are in Appendix B and C respectively.

DEQ entered an MOA with EPA in 1988 that covered coordination between the two agencies on CERCLA sites. This MOA established a framework for coordination on CERCLA sites in Oregon. Current DEQ and EPA officials are unfamiliar with this MOA but have been working collaboratively nonetheless. Both DEQ and EPA no longer coordinate response actions under the terms of this MOA.

As part of this study, DEQ consulted with EPA regarding a new MOA to establish conditions for EPA to provide a release of liability or assurance that EPA would not pursue a federal response against a party who successfully completes environmental cleanup under State law.

EPA Region 10 cautions against developing a state-level MOA because it would require caveats that preserve EPA's rights under CERCLA that allows EPA to make case-by-case determinations on whether a site will be required to follow the MOA process or a site-specific process.

Recommendations to Address Liability Concerns

The goal of the recommendations is to reduce the overall cost of cleanup and DEQ oversight by streamlining investigation and cleanup actions. Additional processes and costs to secure a liability

⁸EPA Interim Final Guidance on Preparation of Superfund Memoranda of Agreement <https://www.epa.gov/sites/production/files/2013-10/documents/prep-sfmoa-mem.pdf>

release is justified on certain complex sites and DEQ has existing authorities that can provide broad liability protections upon cleanup completion.

Develop and Employ Best Management Practices

Continue to implement a One Cleanup Program approach and VCP process that allows parties to obtain liability releases. The Cleanup Program continuously assesses its program and considers ways to make the process efficient, cost effective, and consistent statewide. **DEQ considers successful completion of a coordinated process to entail:**

1. A predictable decision-making model for site decisions based on a site development plan;
2. Sufficient site characterization to identify hot spots of contamination and management plan to address engineering, institutional and source controls, if needed for residual contamination;
3. Selection and implementation of a removal or remedial action that satisfies Oregon Cleanup Law and substantive requirements of CERCLA, RCRA, and TSCA where applicable.
4. Issuance of a NFA determination, or certification of completion for a settlement judgment or PPA.

A successful cleanup process includes the following attributes:

1. No significant delays for appointment of a DEQ project manager;
2. Applicants employ qualified contractors who are able to develop and implement work plans with limited need for DEQ oversight. This can be achieved by:
 - Promoting the use of dynamic work plans that incorporate adaptive management strategies to streamline investigation timelines and transactional costs that occur through multiple work plan iterations;
 - Simplified risk assessments following DEQ risk-based decision making guidance;
 - No beneficial uses of groundwater or surface water have been significantly impaired;
 - DEQ receives quality data for risk-based decision-making criteria that is consistently applied statewide;
 - Investigations are completed efficiently with little to no rework needed to finalize reports;
 - Cleanup decisions are made in a timely fashion and implemented with no significant dispute on the proposed actions and rationale;
 - Remedies employ treatment or removal of hot spots of contamination leaving residual risk at the site that is within EPA's acceptable risk range.

The Cleanup Program should develop and implement best management practices to improve the program.

Develop Rules for Liability Determinations

In 2006, DEQ convened an Environmental Cleanup Advisory Committee to explore various regulatory updates to Oregon cleanup rules as provided under ORS 465.420. DEQ requested the committee to consider the need for adopting rules for AAI and federal BFPP protections. The committee did not recommend that DEQ pursue rulemaking at that time.

DEQ recommends reconvening the advisory committee to explore rulemaking to clarify the meaning of certain terms used in Oregon's liability statute under ORS 465.255 and better align our protections and

defenses with federal requirements. This could include extending BFPP protections to tenants operating on a contaminated site. This might aid defenses from third party claims.

Liability Releases with No Further Action Determinations

Existing regulatory provisions that provide broad liability releases could be expanded consistent with our practice in the past 10 years. DEQ's history of administering cleanups in Oregon has only led to reopening a small percentage of NFAs over the past 30 years.

Given this low rate of NFAs being reopened, DEQ could consider liability releases from DEQ for NFAs for sites that do not require long term engineering or institutional controls (e.g., land or water use restrictions) and are eligible to be removed from the Confirmed Release List and Inventory. Oregon cleanup law would need to be revised through legislation or rulemaking to provide for sites with unconditional NFAs. However, DEQ does not recommend this approach because the state and local governments would be responsible ultimately for the cost of cleanup if contamination is later discovered. The most common example is when contamination is discovered after an NFA has been issued and the state or local government performs infrastructure maintenance of utilities within public rights-of-way and incur costs to dispose of contaminated soil and groundwater removed for these maintenance activities. Furthermore, communities and affected off site property owners impacted by contamination are left with uncompensated damages.

Improve Awareness of Settlement Framework

To improve awareness of Oregon's current regulatory framework for Responsible Parties entering a general or de-minimis settlement agreement, DEQ can update its Environmental Cleanup Program [web page](#) and conduct broader outreach. DEQ could broaden its current practice of using settlement funds to address watershed scale cleanups. For example, settlement funds could be used to address contamination discovered at sites after liability releases were issued. The fund could also be used to fund DEQ's technical assistance work at brownfield sites.

Maintain Prospective Purchaser Agreement Program

Maintain the current provisions under ORS 465.327 that allows prospective purchasers of contaminated property to obtain liability releases. DEQ will continue to support and promote its PPA Program. Stakeholders have express tremendous support for maintaining the program.

Update Memorandum of Agreement with EPA

Replace the outdated MOA with EPA with a new agreement that clarifies responsibilities between agencies and provides assurances around EPA's intent to not pursue a voluntary cleanup site that was previously cleaned up under DEQ oversight and consistent with the requirements of applicable federal law. DEQ will continue to confer with EPA to on the possibility of entering an MOA that includes general assurances with limitations similar to that of other states' MOAs.

Affordable Housing

The Issue and Options

Affordable housing is a primary need in both Oregon and the rest of the U.S. The most widely accepted definition of “affordable housing” is a residential unit requiring no more than 30 percent of a household’s income on rent or mortgage plus taxes (U. S. Housing and Urban Development, 2005). The lack of affordable housing is a growing concern throughout Oregon. Census data verify that housing costs over the past 30 years have outpaced household incomes, increasing the number of people and families unable to afford decent housing. This contributes to the decline of neighborhoods, which may have brownfields that further complicate the search for solutions.

Cleaning up brownfield sites for residential reuse generally costs more than cleanup for industrial or commercial uses. This is because state cleanup programs, including Oregon’s, require a higher standard of cleanup for residential use. Moreover, many private lenders refuse to fund brownfield projects, due to perceived risks. Because of the substantial costs of cleanups and the limited return on investment in redeveloping brownfields to affordable housing, many brownfields are not redeveloped as affordable housing. Ultimately, parties who might consider developing a brownfield site for affordable housing will need a reasonable return on their investment to undertake the project.

Other States’ Initiatives

In July 2017, DEQ researched other states’ programs that aid parties in redeveloping brownfields to affordable housing. Detailed research result are provided in Appendix D. Some of the states with the most robust programs appear to be: Pennsylvania; Washington; Florida; Wisconsin; California; Kansas; Massachusetts; Ohio; and Texas.

States that appear to emphasize interagency collaboration to promote affordable housing developments (including low-income families, seniors, and students) include Washington, Pennsylvania, Florida, Wisconsin and California. These states appear to have established channels of communication to share internal administrative, legislative, and financial tools to assist with brownfields reuse more generally.

The sections below summarize a few of the other states’ affordable housing initiatives.

Washington

The Washington Department of Ecology has a well-funded Brownfields Program. The Ecology's Brownfield Program is funded by the state legislature and Hazardous Substance Tax. Washington cleanup law (Model Toxics Cleanup Act) established the Hazardous Substance Tax, which places a tax on hazardous substances and petroleum when it enters the state. The revenues from the tax are used, in part, to provide grants to local governments. Ecology also receives supplemental funding from EPA through the federal CERCLA §128a State Response Grant Program. It is important to note that Ecology has a higher capacity than DEQ to provide technical assistance to parties on brownfield sites because it receives substantial revenue for its program through the hazardous substance tax.

For the 2017-19 biennium, the Washington Legislature appropriated about \$56 million in the operating budget and \$173 million in the capital budget for Ecology’s Toxics Cleanup Program. In contrast,

DEQ's budget request for 2017-2019 is about \$66 million for its total Land Quality Program comprised of a number of subprograms including hazardous waste management and reduction, materials management, underground storage tank compliance, environmental cleanup, underground storage tank cleanup, and emergency response.

Ecology develops a ten year financing report for remedial action funding needs, which is included in its biennial budget request to the Governor and Legislature. Ecology estimates its budget needs based on input from local governments. The report provides an estimate of the funds needed to clean up sites known to Ecology and identifies cleanups that are likely to occur within the next ten years. Ecology has the flexibility to periodically update the ten-year plan as more sites needing funding are identified and cost estimates are refined.

Ecology prioritizes projects for grant funding using information provided by local governments and criteria found in the rule and Guidance. One consideration is whether a project will provide affordable housing when the property is redeveloped.

Ecology currently offers five types of Remedial Action Grants: Oversight and Independent Remedial Actions, Integrated Planning, Area-wide Groundwater Investigation, and Safe Drinking Water Actions. These grants support redevelopment planning, assessment, and cleanup of brownfields. Oversight Remedial Action Grants help pay for cleanups where the work is being conducted by a local government under a state enforcement order, agreed order, or consent decree. Independent Remedial Action Grants help to offset some of the expense involved in an independent remedial action when a local government conducts a cleanup that is reviewed under Ecology's VCP. Integrated Planning Grants can be used to assess contamination, conduct market studies/economic opportunity analysis, and develop reuse plans. IPGs allow local governments to receive up to \$200,000 for a single site or up to \$300,000 for a study area involving multiple sites. Area-wide Groundwater Investigation Grants are used to investigate potential widespread contamination. Safe Drinking Water Action Grants provide safe drinking water to people living in areas affected by environmental contamination.

In 2013, amendments to Washington's cleanup law established three tools intended to help local governments clean up brownfield sites: 1) Redevelopment Opportunity Zones, 2) Brownfield Renewal Authorities, and 3) the Brownfield Redevelopment Trust Fund Account. Washington envisions ROZs being used as a way to focus local governments' and Ecology's resources within a limited geographic area typically with multiple contaminated sites to accelerate cleanups in these areas so that redevelopment can occur more expeditiously. A brownfield renewal authority may be established by a city, county, or port district, for the purpose of guiding and implementing a property's cleanup and reuse within a ROZ. The Brownfield Redevelopment Trust Fund allows public monies (state and local), as well as private or non-profit moneys, to be set aside for remediation and cleanup of brownfields located within a ROZ. Local governments that designate a ROZ are the beneficiaries of the monies. Funds in the account may be spent only after appropriation by the legislature and approval by Ecology.

As of February 2018, three ROZs and one Brownfield Renewal Authority have been established, including Seattle, Bellingham, and Spokane. For example, the City of Seattle created a Mount Baker McClellan Street ROZ to facilitate redevelopment of several brownfields to affordable housing. This ROZ opened the door for a new partnership between Ecology, Seattle, and the Mount Baker Housing Association. MBHA is the first non-governmental organization to receive funds from the Brownfield Redevelopment Trust Fund. With the consent decree and ROZ in place, Ecology will provide \$400,000 for environmental work on the site. This affordable housing project will leverage several funding

sources, including Low Income Housing Tax Credits, City of Seattle Housing Levy funds, and other sources.

Ecology also has a strong partnerships with EPA and the Washington Department of Commerce to provide technical assistance and funding needed to facilitate brownfield assessment, cleanup, and redevelopment planning. The agencies also works closely with local governments and stakeholders to inform them of available resources and educate them of the state's cleanup process.

In addition to Ecology's Brownfields Program, the Washington Department of Commerce manages the state Brownfields Revolving Loan Fund Program, funded by EPA. This fund allows the department to provide loans and subgrants to parties for cleaning up contaminated sites. The department's BRLF helps local regional governments, non-profit organizations, and private parties to cleanup brownfield sites. It has found that "for every \$1 the state has spent to clean up Brownfields sites, it has generated \$12 in local and state tax revenues, \$14 in payroll value, and \$64 in business revenue."

Pennsylvania

The Pennsylvania Department of Environmental Protection's Voluntary Cleanup Program works with parties to remediate and redevelop brownfield properties for affordable housing needs. The department has several success stories of facilitating redevelopment of brownfields to affordable housing in large urban areas and smaller communities. There has been redevelopment of contaminated sites to single and multi-family townhouses/apartments, senior/low-income housing and mixed-use development. For example, the Paseo Verde South Apartments redevelopment project provided 70 market-rate and affordable units, and 30,000 square feet of commercial and community service space.

The Memorial Homes redevelopment project provided 40 units of affordable housing. An environmental site assessment was conducted on the site in 2008 using funds from an EPA Brownfields Assessment Grant. This assessment opened the door to redevelopment. The project has been a six-year, county and city-led partnership to address environmental remediation and community development. Public and private funds leveraged \$19 million. This redevelopment resulted in \$115,000 annually in real estate taxes and served as a catalyst for neighborhood revitalization.

Florida

Florida offers tax credits that provides additional funding for brownfields sites that will be redeveloped for affordable housing. Affordable housing developers can benefit from state environmental tax credits under Florida's Voluntary Cleanup Tax Credit. Under the basic VCTC program, a tax credit on eligible costs for environmental cleanup work is available for sites located in a brownfield area and governed by the terms of a brownfield cleanup agreement. A 50 percent state tax credit is provided, up to a maximum annual \$500,000 per site. Applications are handled by the Florida Department of Environmental Protection. While the VCTC tax credit is available against state corporate income tax, there is also an active third-party market for their sale and transfer.

There is a large additional tax credit bonus for affordable housing sites. A one-time VCTC bonus is available for affordable housing constructed on Brownfields for 25 percent of the environmental costs incurred and paid over the project's lifetime, up to a maximum \$500,000 award. To receive this bonus:

- "The project must qualify as affordable housing under Florida law (for either extremely low income, very low-income, low income, or moderate-income persons); and

- The applicant must provide “a certification letter from the Florida Housing Finance Corporation, the local housing authority, or other governmental agency that is a party to the use agreement indicating that the construction on the brownfield site has received a certificate of occupancy and the brownfield site has a properly recorded instrument that limits the use of the property to housing.”

For sites with contamination, VCTC is a lucrative incentive, returning to developers 50 cents on the dollar for eligible environmental costs, and a 25 percent bonus for affordable housing. Recognizing the strength of the VCTC program, the Florida Legislature in 2011 increased the annual VCTC amount available from \$2 million to \$5 million. The Oregon Brownfield Coalition is also considering how this approach could work in Oregon to help meet the state housing needs.

Oregon Initiatives

Business Oregon

Business Oregon’s Brownfields Program has two funding sources: the Oregon Brownfields Redevelopment Fund from the Oregon Legislature and a BRLF Grant from EPA. The BRF can be used to finance assessments, cleanups, and redevelopment planning. Whereas the BRLF Grant funds can only be used to finance cleanups. Both funds allow Business Oregon to provide loans and grants to public and private parties. Any individual, business, non-profit organization, prospective purchaser, municipality, special district, port or tribe may apply for these funds. Affordable housing is one example of a public benefit that Business Oregon considers in providing grants.

Business Oregon began receiving funds for both the BRF and BRLF in 2000. These funding sources are not recapitalized automatically. Business Oregon regularly assesses its program needs and requests additional funding as needed to ensure it can meet demand. It has periodically requested additional funds from the Oregon Legislature. EPA allows supplemental funding requests annually in the fall. Business Oregon has received about \$22 million in BRF funds and \$8 million in BRLF Grant funds since 2000. Demand for these funds continues to grow in Oregon. Additionally, Business Oregon was awarded about \$500,000 to recapitalize its BRLF this year.

Both funds are primarily revolving loan programs. However, limited grants can be awarded on a case-by-case basis for publicly-owned projects, depending on a financial analysis of the applicant's debt capacity and public benefits of the redevelopment project. Financial analysis of an applicant’s ability to repay a loan is the primary method used to manage and allocate limited grant resources.

Brownfield Coalition

The [Oregon Brownfield Coalition](#) has brought together a variety of public, private, and nonprofit partners to enhance brownfield cleanup and reuse tools. DEQ actively participates in the Coalition to help develop approaches that facilitate cleanup and reuse of brownfields. The Coalition has supported successful recapitalization the Business Oregon’s Brownfields Redevelopment Fund.

The Coalition has approached the creation of new tools through legislative proposals to advance brownfield remediation and cleanup in both rural and urban areas of Oregon. For example, in 2015, the Coalition provided the Oregon Legislature a draft bill asking lawmakers to authorize local governments to create land banks that can acquire and hold polluted properties to aid in their future redevelopment.

This legislation was passed as House Bill 2734 and signed into law. Clackamas County is now working towards creating the first Oregon land bank. One of its intended priorities is to select brownfield sites that can be redeveloped for affordable housing.

The Coalition also championed a bill that would allow local governments create property tax incentives for brownfields. In 2016, the Oregon Legislature passed such as bill (i.e., HB 4084, codified as ORS 307.430. In early 2018, Marion County enacted an ordinance establishing such property tax incentives. The City of Portland is also working on an ordinance to provide brownfield tax incentives. The City is about half way through the process.

Regional Solutions Team

Oregon Regional Solutions Teams work to develop approaches for community and economic development by recognizing the unique needs of each region in the state and working at the local level to identify priorities, solve problems, and seize opportunities to get specific projects completed. The teams are composed of a representative from five state agencies: DEQ, the Departments of Land Conservation and Development, Transportation, Housing and Community Services, and Business Oregon. The teams cover the Portland Metro, North Coast, Mid-Valley, South Valley/Mid Coast, Southern, South Coast, North Central, South Central, Greater Eastern, and Northeast Regions.

Advisory Committees for each of the teams set regional priorities for selecting regional and community-based projects that address the RST's regional projects. The Portland Metro Advisory Committee is in the process of updating its list of regional priorities. One proposed priority is to expedite the cleanup and reuse of brownfields to promote the growth and development of housing and industrial land. This broader focus is in response to a housing crisis in the region. Strategies for achieving this priority may include developing approaches that provide regulatory certainty and streamlining state permitting processes for affordable housing development, as well as providing technical assistance and resources to help increase the supply of affordable housing. The North Coast Regional Solutions Team work plan priorities include supporting comprehensive solutions to barriers limiting business retention and expansion, including the availability of housing. Other RSTs may also consider adopting similar priorities to facilitate redeveloping brownfields for affordable housing throughout Oregon to meet the state need.

In May 2018, Governor Kate Brown announced five affordable housing pilot projects across the state as part of her Future Ready Oregon initiative. The Workforce Housing Initiative, led by the Governor's Regional Solutions Cabinet, was designed to form partnerships between local communities, the business sector, and private developers to address the housing shortage for working families in Oregon.

- In Donald, the local agricultural equipment manufacturer GK Machine and the City of Donald have partnered to propose expanding the community. The first phase of the pilot will include upgrading the city's wastewater and water treatment plants to support 95 new homes, with an eventual planned total of 465 new homes.
- In Pacific City, Nestucca Ridge Development, the locally-owned parent company of Pelican Brewing Company, will construct 12 homes on several acres they currently own. They will pre-lease six of those to their local employees, over half of whom currently commute from outside of Tillamook County.

- In Warm Springs, the Jefferson County School District currently owns eight small homes built in the 1950s that surround the former elementary school. The pilot project will rehabilitate these existing properties and build one new home, making all of them available for local elementary and middle school teachers at the Warm Springs K-8 Academy.
- In Harney County, local officials will run a study to assess local workforce housing needs. The study will inventory existing housing, identify gaps, and create a strategic implementation and business plan to leverage investments, engage employers and create job opportunities.
- In Lincoln County, new income-qualified homebuyers will have opportunities to purchase a home through Proud Ground. Proud Ground uses a land trust model to combine a subsidy to lower the purchase price of homes on the open market with land lease and affordability covenants. Lincoln County, Newport, and Lincoln City will invest matching funds as well as partner with the local school district and other employers.

Recommendations to Incentivize Affordable Housing on Brownfields

In general, DEQ and other states believe the best approach for spurring redevelopment of brownfields to affordable housing is through providing funding and technical assistance to projects that have affordable housing reuse plans. States that have affordable housing initiatives typically provide technical assistance, grants and loans to local governments and nonprofit organizations, and sometimes private parties. These initiatives prioritize or provide additional funding projects that have an affordable housing redevelopment plan.

Furthermore, leverage funding helps to make these types of projects “pencil out” financially. The most innovative approaches involve cooperative efforts between several levels of government, public-private partnerships and community organizations, rather than from state governments alone. Redeveloping brownfields for affordable housing requires strong collaboration. Typically these partnerships involve federal, state, regional, and local governments, such as environmental cleanup, housing, commerce, revenue, and other departments. DEQ supports local government incentives that facilitate redevelopment of brownfields to affordable housing and has successfully worked with local governments on cleanup projects that were developed for affordable housing.

As such, DEQ recommends the following actions to aid parties in redeveloping brownfields to affordable housing:

- Continue funding the Business Oregon’s BRF to assist local governments and private parties with assessing, cleaning up, and planning for redevelopment of brownfields.
- Continue supporting legislation, such as HB 4084 (2015), that provides local governments needed authority to adopt incentives that facilitate redevelopment of brownfields to affordable housing.
- Continue allocating funds in the legislative budget for projects that have a brownfield competent that can help to address the affordable housing crisis.

- Provide funding to address the affordable housing crisis.
- Continue supporting local governments' efforts to develop and apply incentives that aid the return on the investment for brownfield cleanup and redevelopment to affordable housing. For example, incentives involving property tax abatement or credits funded by local governments.
- Continue to support DEQ and other state agencies' engagement with local communities, property owners, and developers, as well as funding for technical assistance to help parties address concerns regarding redevelopment of brownfields sites and the unique considerations for residential development and affordable housing specifically.

Appendix A – Survey of Oregon Cleanup Stakeholders

In August 2017, DEQ and partners Metro and the Northwest Environmental Business Council sent a 16-question survey to about 3,000 stakeholders of DEQ’s Cleanup Program, to gather program feedback and information relevant to House Bill 2968. All responses are anonymous, and neither DEQ nor anyone else knows the participant’s identity – unless the participant chose to reveal that information in the survey.

Survey results show a wide range of opinions and concerns related to environmental liability and how concerns could be resolved or lessened. The results show that about 66 percent respondents have worked with Cleanup program in the Northwest region (Clackamas, Clatsop, Columbia, Multnomah, Tillamook, Washington), about 50 percent in the Western region (remaining counties south of Metro area and west of Cascades), and about 37 percent in the Eastern region (all counties east of Cascades). Thirteen percent of participants do not affiliate their work with any of these regions.

This appendix provides a high level summary of survey findings.

Contents of this Executive Summary:

1. Who responded to the survey?
2. Concerns about the current state liability regime
3. Some drawbacks to enhanced liability release
4. Should we add Bona Fide Prospective Purchasers protections to Oregon law?
5. What is DEQ’s best cleanup tool – and what’s missing?
6. Enhancing affordable housing in Oregon
7. Opinions about DEQ cleanup-site data on the web
8. Other observations

1. Who Responded to the Survey?

About 150 stakeholders took the survey, describing their affiliations as follows:

- Environmental consultant – 25.6%
- Public employee or official – 22.1%
- Other – 22.1% (citizens, site employees, environmental laboratory employees, brokers, contractors, or researchers)
- Business owner or representative – 13.1%
- Current/former site owner – 7.6%
- Private-sector attorney – 6.2%
- Member of a non-profit or community organization – 2.1%
- Tribal representative – 1.2%

Over 85 percent of respondents indicated direct experience with DEQ’s Cleanup program, most spanning a period of five or more years.

2. Concerns about Environmental Liability in Oregon

About 100 stakeholders ranked six liability types, with their degree of concern weighted in descending order, as follows (scores add up to 100):

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1. EPA Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) liability – **22.5**
2. State regulatory liability (i.e., ORS 465, 466, and 468) – **19.4**
3. EPA RCRA (Hazardous Waste) liability – **18.4**
4. Third-party or contribution liability – **15.9**
5. EPA TSCA (PCB) liability – **12.5**
6. EPA/Coast Guard liability (Oil Pollution Act of 1990 - spills to Waters of U.S.) – **11.3**

Representative comments about liability concerns and understanding:

“All [liability types] are of concern. For highly contaminated sites or spills, federal liability is most important. But for moderately contaminated sites, the key to having owners, sellers and buyers, tenants, lenders feel comfortable with the risk is knowing what the regulatory status is with DEQ.”

“CERCLA is my #1 because of its history nationwide as an attorney feeding frenzy causing financial hardships for municipalities and their taxpayers.”

“Oil spills threaten tribal resources, we were impacted by New Carissa; however, our impacts were not properly addressed through mitigation. We are a coastal Tribe and many of our resources are marine dependent so acute impacts to these resources can have long term effects to Tribal health.”

“As a general rule most contaminated sites in Oregon, especially historic contamination, do not rise to the level of federal concern. Therefore the State/DEQ has primary jurisdiction.”

“Third party liability is the greatest threat to owners. Recovery from them is often difficult, expensive, or very unlikely to occur.”

“Additional training [on environmental liability] isn't needed. What is needed are tools for existing landowners, who want to cleanup up their properties, to have an incentive to do so, such as being able to obtain PPA-type protections so that they pass on their lands to their family without the environmental liability or to be able to sell the land as clean property.”

“No, [additional training is not needed for me] but I'm a consultant. Regular citizens don't have any clue about this. More guidance documents would help.”

To amplify this last comment, 84.4 percent of respondents want new guidance, fact sheets, or other tools to help them understand environmental liability provisions.

3. Some Comments on Potential Drawbacks to Enhanced Liability Releases

“DEQ NFA's and Consent Judgments already include ‘reopeners.’ While I'm open to being convinced otherwise, I'm disinclined to further weaken their liability protections.”

“The value of the property was diminished by the groundwater contamination flowing beneath it and from vapor intrusion from the adjacent property with the DEQ liability release. The facility should still be liable to surrounding properties that they have affected.”

“Responsible Parties should be responsible for cleanup of their releases. Releases from liability for RPs will make recovery of costs by adjacent property owners even more difficult than it is already.”

“...Adjacent properties have in some cases greatly impacted our properties. However, when new development is proposed the offsite 3rd party impacts are generally ignored. Leaving that property owner with no recourse except expensive legal action or dealing with the legacy impacts from

adjacent properties our own. Liability releases should not be issued until impacted 3rd parties are made whole.”

“...Releasing RPs from liability would inhibit adjacent property owners from seeking compensation from an RP if the RP is granted the same release from liability as purchasers are in the PPA program.”

“Yes [a liability release can affect others negatively], but [the release] generally happened in context where all relevant information had been considered so the decision was at least understandable/supportable.”

4. CERCLA’s BFPP Provision

CERCLA was amended in 2002 to ease federal liability for parties who buy contaminated property, as long as they did not cause the contamination, performed due diligence before purchase (i.e., a Phase I ESA), have no affiliations with any entity who is liable, and take due care during property ownership. Such parties may be considered BFPPs, who are protected from federal liability. However, under Oregon law, parties that buy contaminated property in most cases become liable for that contamination, unless they enter into a PPA before buying the property – and fulfill all PPA obligations after purchase. **The survey question was whether Oregon should adopt BFPP provisions similar to CERCLA.**

Survey responses and representative comments: 40 percent of participants want state BFPP liability protections, with 20 percent being unsure, but wanting to learn more about liability-protection approaches. Only 15 percent said Oregon’s law should **not** be revised to add BFPP protections. 25 percent of respondents would like to see new rules or guidance to clarify environmental liability in Oregon.

“Yes [state law needs BFPP], due to the lack of clarity between what triggers liability under state v. federal law. There are inconsistencies in the two liability regimes that are traps for the unwary or unrepresented.”

“Yes, it’s complex and plain language should be provided....”

“The biggest liability problem is one of certainty. Under the federal "innocent landowner" or BFPP exemptions... the average Purchaser isn’t sophisticated enough to know from the beginning whether they relied upon Phase I Environmental Site Assessment sufficiently complies with the applicable ASTM and CFR standards to be accepted by the agencies.... Only with the PPA does the buyer have reasonable certainty upfront that the bargained for protection is present.”

“No [need to add BFPP provision to state law]. A BFPP is only a BFPP once a court has said it is. Not very helpful prospectively. A PPA provides certainty before the fact, and is much more useful.”

5. What is DEQ’s Best Brownfield Tool, and What Do We Lack?

There were 45 comments on this “essay-style” question, with these being representative:

“The PPA is currently the best tool available.” Including some comments below, 11 others echoed this view.

“PPAs [best]. We need to develop a pathway that allows current owners to cleanup their properties and obtain PPA-like protections for their devices, transferee or assignees; and to receive personal releases or waivers from the historical environmental contamination upon DEQ issuance of a Certification of Completion.”

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“The Oregon PPA process is very efficient, usually timely, and provides a clear path forward. DEQ personnel involved can guide and assist, and understand the environmental, social, and economic benefits of a well-crafted program. A direct linkage to CERCLA liability limits, and importantly, a recognition by EPA Region 10 of the PPA process (and by extension CERCLA liability ‘sideboards’ it creates) would be the single biggest advancement of the process here in Oregon.”

“DEQ’s No Further Action determination and the Voluntary Cleanup Program as a means to get there (when this works well, the PPA process is often not necessary). BFPP would be good. Independent Site Certifications (as in Massachusetts) would be good, though I prefer our NFA process so long as DEQ has the personnel needed to meet that demand.”

“The DEQ voluntary cleanup program [best] – but it has very long waits to enter the program and to get submittals reviewed. You need appropriate staffing so that applicants don’t have a long wait to get into the program.”[Seven others complained, directly or indirectly, about long wait times for VCP PMs, including four citing a need for a Licensed Site Remediation Professional program.]

“Brownfield redevelopment grants and loans [best]. [There’s a need for] group training of DEQ and EPA cleanup and redevelopment specialists, with a focus on clear identification of Brownfields redevelopment objectives, transparency, consistency of approach, collaboration across the agencies.”

6. Affordable Housing in Oregon

Of the 96 participants who addressed this topic, just 21 percent cited experience conducting voluntary cleanup actions to redevelop property into affordable housing. Here are some representative comments related to the resources – and challenges – affecting their work:

“In addition to DEQ VCP guidance documents, [the] Center for Creative Land Recycling [[link](#)] is an excellent source of information. In regards to challenges, regulatory concerns associated with redeveloping industrial property into affordable housing units can take significant time and resources when a more streamlined process using generic/standard remedies could achieve the same level of protectiveness.”

“I can’t be too specific for confidentiality reasons, but having a municipal partner that is motivated toward reaching the same goal is absolutely critical for success.”

“Due to liability concerns, we seldom consider residential redevelopment on fully remediated property.”

7. Views about Cleanup Site Data Posted on the Web

Ninety-five people responded to the question of whether they use DEQ’s Environmental Cleanup Site Information web pages (77 said yes). A follow-up question was: **What do you find useful in this database, and how could DEQ improve the information or its display?** Some representative comments from the 56 who weighed in:

“Site summaries are useful. Having key reports available for download (NFA letters, DEQ staff reports, RI reports) are very useful when available - especially for due diligence research.”

“The completeness of the data and its currency is quite variable. A disciplined process and/or responsibility of DEQ personnel to keep the sites under the PM’s management current and complete would be very valuable.”

“ECSI information often cites the highest concentration detected at a site, even when interim remedial measures or natural attenuation have reduced contaminant levels far below initial,

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maximum detections. It would be good if DEQ required its site managers to keep ECSI information current rather than citing sometimes decades-old data.”

“It is useful that DEQ lists the site manager so that I know who to contact with questions. It would be more useful if DEQ was to have their site managers more regularly update the entries.”

[Related:] “I use it all the time. Just keeping it up to date would be greatly appreciated. Some project managers seem to do this well, others not.”

“[I] use ECSI on almost a daily basis. Unfortunately, information on many sites is outdated and non-maintained. ECSI is used by consultants as one of the primary sources of information on cleanup sites during Phase 1 and Phase 2 ESA, etc. ECSI is also used by the public to learn about contamination. Would really be appreciated by many - if information was required to updated on a frequent basis.”

“The database is antiquated. Update with better search functionality, better way finding, and map interactivity.”

8. Other Observations

Regarding a Potential VCP Memorandum of Agreement between DEQ and EPA, **over 75 percent of the 88 responding to this question support a MOA between the agencies.** This comment captures the sentiment that many expressed: “While a MOA may not be legally binding, it does infer direction, and therefore provides guidance for such ventures. Improved, positive, critical communication is always beneficial.” Another wrote: “Memorializing a communication is just ‘good business.’”

“[Regarding the question of whether another’s liability release has affected you] we have experienced a different problem. Local governments with whom we have worked have been unwilling to recognize our non-liability and work towards establishing their own, instead insisting on indemnities and guarantees of no liability from this organization which substantially undermines the value of having a PPA or qualifying for BFPP in the first place. Extremely frustrated in this area on redevelopment projects. [Consumes] unbelievable resources to work through the issues to the local government’s satisfaction.”

“I think it's just important for DEQ site managers to stay up on current solutions (both pros and cons). I totally get why they cannot recommend a particular company or product, but having a variety of contractors, technologies, etc. they can pull from would be useful for sites where they similar problems; I wish there was more communication about what's worked and what doesn't work for cleanup sites; no one wants to talk about failures or ‘less than success’ stories but I do think that that's where the biggest learning comes from – pitfalls to watch out for, potential obstacles, poor results, etc.”

“A fast-track process for limited contamination, sole contaminants, etc. for the review and approval of reports under VCP would be helpful.”

“This survey is much appreciated!”

Appendix B–Pennsylvania-EPA MOA

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.

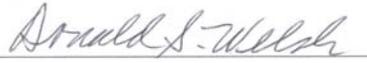
For Commonwealth of Pennsylvania Department of Environmental Protection



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

A handwritten signature in cursive script, reading "Donald S. Welsh", written in black ink on a white background.

Originally signed by: Donald S. Welsh, Regional Administrator, EPA, Region 3
Date: 4/21/2004

Appendix C–Wisconsin-EPA MOA



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGIONS 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

NOV 21 2006

R-19J

Scott Hasset, Secretary
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

RECEIVED

NOV 24 2006
OFFICE OF THE
SECRETARY

Dear Mr. Hasset:

It is with great pleasure that I forward to you the enclosed "*One Cleanup Program Memorandum of Agreement Between the United States Environmental Protection Agency Region 5 and the Wisconsin Department of Natural Resources.*" This document recognizes WDNR's consolidated approach to the cleanup of a wide range of sites through its NR700 rules. U.S. EPA shares your Agency's belief that this agreement will help to guide property owners, developers, consultants, and others to understand the applicability and utilization of Wisconsin's consolidated cleanup approach.

I am excited about the opportunities this concept presents for the implementation of the Agency's One Cleanup Program Initiative and the enhanced potential for redevelopment and revitalization in Wisconsin. Your Agency has shown a history of cooperation and coordination with Region 5 and has been consistently successful in achieving environmental results. I want to personally thank you and your staff for the amount of effort and perseverance exhibited in bringing this to a successful conclusion.

Please sign and date both copies of the enclosed document and return one original to Region 5. We look forward to working with you on this endeavor.

Sincerely,

Mary A. Gade
Regional Administrator

Attachment

**One Cleanup Program
Memorandum of Agreement
Between the
United States Environmental Protection Agency Region 5 and the
Wisconsin Department of Natural Resources**

This Memorandum of Agreement (MOA) is entered into between the Regional Administrator, United States Environmental Protection Agency (U.S. EPA), Region 5, and the Secretary, Wisconsin Department of Natural Resources (WDNR), in order to implement the U.S. EPA's One Cleanup Program (OCP) initiative and to provide a roadmap of cleanup approaches. Wisconsin provides a single, consolidated approach to the cleanup of a wide range of types of sites through its NR700 rules, rather than utilizing a range of separate programs with conflicting approaches and cleanup standards. This agreement will help to guide property owners, developers, consultants, and others to understand the applicability and utilization of Wisconsin's consolidated NR700 approach.

Purpose and Scope

A. General

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

- 1) facilitate timely implementation of the Resource Conservation and Recovery Act (RCRA) related to hazardous waste remediation at facilities subject to RCRA Subtitle C Cleanup Requirements and environmental cleanup requirements pertaining to RCRA Subtitle I Leaking Underground Storage Tank (LUST) Corrective Action, Toxic Substance Control Act (TSCA) 15 U.S.C. § 2605(e) (hereafter referred to as TSCA Section 6(e)), and Comprehensive Environmental Response, Compensation, Liability Act (CERCLA, known also as Superfund);
- 2) meet the federal Government Performance Results Act (GPRA) implementation schedule;
- 3) facilitate the productive cleanup and redevelopment of brownfields and other contaminated properties in Wisconsin by adopting the efficiencies and innovations resulting from U.S. EPA's OCP initiative;
- 4) meet each agency's mandate to protect human health and the environment, and
- 5) recognize the WDNR's Remediation and Redevelopment (RR) program for grant funding eligibility purposes under § 128(a) of CERCLA as amended by the Small Business Liability Relief and Brownfields Revitalization Act.

B. Applicability

- 1) The following types of sites, if cleaned up under WDNR's oversight, are covered by Section IV.B.1 of this MOA:
 - a) sites subject to RCRA Subtitle I LUST corrective action, as defined in s. 101.144(1)(aq), Wis. Stats.;

- b) sites with PCB contamination subject to TSCA Section 6(e) as explained in Attachment 1 of this MOA;
 - c) “eligible response sites,” as defined in CERCLA § 101(41); and
 - d) other sites or facilities subject to RCRA Subtitle C cleanup requirements, except as listed below.
- 2) The following types of sites are covered by Section IV.B.2 of this MOA and may be addressed by WDNR utilizing NR700 procedures as described in this MOA, **consistent with the requirements of Wisconsin’s authorized program**, however the controlling documents will be the applicable orders or licenses (i.e. the state equivalent of a RCRA permit) which remain in effect.
- a) facilities where WDNR has issued a hazardous waste license to a RCRA treatment, storage or disposal facility, provided the facility complies with the corrective action conditions of their plan approval, and
 - b) facilities where WDNR has issued a corrective action order pursuant to s. 291.37(2) Wis. Stats., provided the facility complies with the conditions of the order.
- 3) The following sites shall not be subject to this MOA:
- a) permitted hazardous waste treatment, storage, and disposal facilities which are subject to cleanup requirements under a U.S. EPA-issued RCRA operating permit;
 - b) sites that are proposed or listed on U.S. EPA’s National Priorities List (NPL)
 - c) any site where WDNR and U.S. EPA Region 5 agree that a hazard ranking system (HRS) scoring package will be submitted to U.S. EPA Headquarters for inclusion on the National Priorities List;
 - d) federal-lead PCB contamination sites as defined in Attachment 1 of this MOA; and
 - e) any site or facility which is under the authority of an existing federal (administrative or judicial) order for cleanup

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:

the RCRA Subtitle C cleanup requirements, 42 U.S.C. § 6901 et seq.;

CERCLA , commonly known as Superfund, 42 U.S.C. § 9601 et seq.;
the TSCA, 15 U.S.C. § 2601 et seq., as it relates to PCB contamination under
Section 6 (e); and
the RCRA Subtitle I Underground Storage Tank requirements, Subchapter IX,
42 U.S.C. § 6991 et seq., pertaining to LUSTs.

B. Wisconsin Department of Natural Resources

The WDNR enters into this MOA in furtherance of its statutory and regulatory responsibilities pursuant to:

- Wisconsin Spill Law, s. 292.11, Wis. Stats.;
- Wisconsin Environmental Repair Law, s. 292.31, Wis. Stats.;
- Wisconsin Groundwater law, Ch. 160, Wis. Stats.;
- Hazardous Waste Law, s. 291.37, Wis. Stats.; and
- The respective administrative codes, including ch. NR 140, Wis. Adm. Code, and the NR 700 rule series, Wis. Adm. Code.

III. Background

Mandate and Authorization

The State of Wisconsin and U.S. EPA Region 5 are mandated to protect human health and the environment. U.S. EPA Region 5 and the WDNR have a history of working cooperatively to clean up contaminated properties and environmental media. U.S. EPA has authorized Wisconsin for the base RCRA program and for the Corrective Action program. In 1995, U.S. EPA Region 5 and the WDNR entered into a Superfund Voluntary Cleanup Program Memorandum of Agreement, to clarify the intentions and expectations of U.S. EPA Region 5 and WDNR at sites subject to CERCLA and addressed by WDNR. This MOA replaces and supersedes the 1995 Superfund Voluntary Cleanup Program Memorandum of Agreement. Since the TSCA PCB program cannot be delegated to states, U.S. EPA Region 5 and WDNR agree to make maximum use of the PCB Coordinated Approval provision in the Federal PCB regulations (40 CFR 761.77). U.S. EPA Region 5 and the WDNR acknowledge the potential benefits that can be achieved by clarifying the intentions and expectations of U.S. EPA Region 5 and WDNR regarding the cleanup and reuse of contaminated properties that are addressed by the WDNR under Wisconsin law

General One Cleanup Program Goals

Both the WDNR and U.S. EPA Region 5 acknowledge their mutual respect, positive working relationship, and commitment to the successful implementation of this MOA. In particular, the WDNR and U.S. EPA Region 5 seek to clarify the roles and responsibilities of U.S. EPA Region 5 and the WDNR at contaminated properties, so as to increase the numbers and timeliness of cleanups that will result in the protection of human health and the environment by:

- 1) Supporting the use of the WDNR's RR program's NR 700 series 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 the environment, and promotes revitalization of contaminated property for appropriate use;
- 4) Facilitating the effective use of all available authorities and resources and select 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.

C. Specific Program Goals

The WDNR and U.S. EPA Region 5 intend to ensure that program-specific goals are met, including:

- 1) For sites and facilities subject to RCRA Corrective Action, WNDR will ensure that the following corrective action objectives are met:
 - a) require the owner or operator to conduct facility-wide assessments to determine the full nature and extent of releases;
 - 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 subject to TSCA Section 6(e) requiring the cleanup of PCB contamination, ensure the cleanup under this MOA follows applicable federal and state-laws;
- 3) For sites subject to RCRA Subtitle I LUST Corrective Action, WNDR will ensure that the following corrective action objectives are met:
 - a) require the owner or operator to conduct facility-wide investigations, and
 - b) ensure that all releases of petroleum products or hazardous substances into the environment from underground storage tanks are addressed (on and off-site).
- 4) For sites that may be subject to CERCLA, WDNR will 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 the WDNR has successfully implemented cleanups at sites subject to federal environmental cleanup authorities.
- b) In particular, the WDNR's RR program is responsible for implementing the state's portion of the federal CERCLA program, RCRA Subtitle C Corrective Action program, brownfields, state response initiatives, RCRA Subtitle I LUST Corrective Action sites, and working with the U.S. EPA Region 5 TSCA PCB program on relevant PCB remediation issues. The WDNR's various programs, laws, and regulations work together to achieve appropriate environmental remediation objectives and requirements as mentioned in section III of this MOA.
- c) The WDNR intends to use, as appropriate, the ch. NR 700 series, Wis. Adm. Code process for implementation of requirements at sites that may also be subject to RCRA Subtitle C Corrective Action program, CERCLA, RCRA Subtitle I LUST Corrective Action, and TSCA Section 6(e).

2) Evaluation of WDNR RR under CERCLA Section 128(a)

- a) U.S. EPA Region 5 has evaluated the RR program for purposes of grant eligibility under CERCLA § 128(a) and determined that the RR program includes each of the four elements of a state response program as described in CERCLA § 128(a)(2). WDNR agrees to maintain all of these elements for the RR program as follows:
 - i) Timely survey and inventory of Brownfields sites in Wisconsin. The WDNR has initiated efforts to evaluate historic lists of sites to determine the priority of those sites for follow up. In addition, the WDNR is undertaking an initiative to locate historic brownfields properties not previously identified.
 - ii) Adequate oversight and enforcement authorities and resources. Cleanups under the RR program 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. The WDNR has adequate enforcement resources and authority to ensure completion of response actions, including operation and maintenance or long-term monitoring if the responsible party fails or refuses to complete the required actions.
 - iii) Mechanisms and resources to provide meaningful opportunities for public participation. WDNR's ch. NR 714, Wis. Adm. Code, sets forth a process for public participation on cleanup decisions, and the public has access to site-specific documents.
 - iv) Mechanisms for approval of cleanup plans and verification of completed response actions. U.S. EPA Region 5 has determined that the cleanup

program under the RR program reviews all requests for case closure or a Certificate of Completion, and renders a written decision approving the investigation and cleanup activities.

- b) U.S. EPA Region 5 has reviewed and evaluated the RR program and determined that it provides adequate access to information and meets the public record requirement described in CERCLA Section 128(b)(1)(C). Through Wisconsin's Open Records Law and the WDNR's web-based Bureau for Remediation and Redevelopment Tracking System, which contains data on over 19,000 sites, WDNR will maintain and continue to make this record available to the public.

3) Recognition of WDNR standard-setting processes and standards

- a) U.S. EPA Region 5 has reviewed and evaluated Wisconsin's cleanup standard-setting processes, including its risk-based process and standards in chs. NR 720 and 140, Wis. Adm. Code, and has determined that the WDNR's procedures and standards will result in cleanups that meet the objectives of the RCRA Subtitle C Corrective Action program, CERCLA, RCRA Subtitle I LUST Corrective Action, and TSCA Section 6(e) for sites subject to this MOA
- b) Based on the assessment of WDNR's capabilities and authorities as listed above, U.S. EPA Region 5 has determined that the standards and processes in ch. NR 140, Wis. Adm. Code, for groundwater, and ch. NR 720, Wis. Adm. Code, to establish residual soil contaminant levels or performance standards for each exposure and migration pathway of concern will result in cleanups that meet the objectives of the RCRA Subtitle C Corrective Action program, CERCLA, RCRA Subtitle I LUST Corrective Action, and TSCA Section 6(e) for sites subject to this MOA.

4) Recognition of WDNR RR program processes

- a) The cleanup criteria specified in the ch. NR 700, Wis. Adm. Code rule series provide for land use-based cleanups which may entail deed restrictions, placement on WDNR's GIS (Geographical Informational Systems) Registry of Closed Remediation sites, a combination of those institutional controls, or other restrictions in order to meet the criteria specified for each land use category.
- b) The WDNR will utilize criteria specified in the ch. NR 700 Wis. Adm. Code rule series when reviewing and approving institutional controls.
- c) The WDNR acknowledges its responsibility with respect to RCRA Corrective Action, CERCLA, and RCRA Subtitle I LUST Corrective Action 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) The WDNR acknowledges it will issue a state approval to remediate PCB contamination under this MOA, including Attachment 1, which is consistent with TSCA Section 6(e).
- e) Based on the assessment of the WDNR's capabilities and authorities, U.S. EPA Region 5 had determined that the processes in ch. NR 726, Wis. Adm. Code, for

determining when no further cleanup action (i.e., closure) is necessary, will result in cleanups that meet the objectives of RCRA Subtitle C Corrective Action program, CERCLA, RCRA Subtitle I LUST Corrective Action, and TSCA Section 6(e) sites subject to this MOA.

- f) U.S. EPA Region 5 has reviewed and evaluated the WDNR's RR program, rules, public record and participation requirements and guidances, and has determined that this comprehensive state cleanup 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 paragraph II.A at a site or facility described in Section I.B.1 of this MOA and being addressed or overseen by the WDNR while that site or facility remains in compliance with the RR program and the authorities listed in paragraph II.B, except where one or more of the following circumstances apply:
 - a) The WDNR requests that U.S. EPA Region 5 provide assistance in the performance of a response action;
 - 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, U.S. EPA Region 5 determines under the authorities listed in paragraph II.A that the site or facility may present an imminent and substantial endangerment to public health or welfare or the environment;
 - d) After considering the response activities already taken, U.S. EPA Region 5 determines that the PCB contamination subject to TSCA Section 6(e) poses an unreasonable risk of injury to health or the environment; or
 - e) WDNR 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 by the WDNR are no longer protective of public health or the environment, given the current conditions at the property, except where inconsistent with CERCLA § 128.
- 2. (a) U.S. EPA does not generally anticipate taking action under RCRA Subtitle C for corrective action non-compliance at a facility described in Section 1.B.2(a) of this MOA, as long as that facility is in compliance with the corrective action portion of the state license (i.e. the state equivalent of a RCRA permit) unless one or more of the conditions specified in NR 680.40 (the state analog to 40 C.F.R. Section 270.4(a)) exists.
 - (b) U.S. EPA does not generally anticipate taking action under RCRA Subtitle C for

corrective action non-compliance at a facility described in Section I.B.2(b) of this MOA, as long as that facility is in compliance with the state corrective action order.

- 3) 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 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 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 RR program.

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 of WDNR or U.S. EPA Region 5 under state or federal law. This MOA does not replace or amend the Resource Conservation and Recovery Act (“RCRA”) MOA for Wisconsin’s authorized RCRA program. This MOA is intended to implement the efficiencies and innovations contained in U.S. EPA’s OCP initiative and the WDNR’s comprehensive cleanup rules and to achieve cleanups that comply with federal and state cleanup requirements. U.S. EPA Region 5 continues to have its authority to bring enforcement action under federal law.

Nothing in this MOA modifies federal or state statutory requirements (or regulations promulgated there under) or WDNR’s responsibility to fully implement Wisconsin’s authorized hazardous waste program under RCRA

D. Coordination Between the WDNR and U.S. EPA Region 5

- 1) U.S. EPA Region 5 and the WDNR 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 5 and the WDNR regarding RCRA Subtitle C Corrective Action facilities, CERCLA sites, high-priority state-lead LUST sites under the jurisdiction of the WDNR, TSCA Section 6(e) sites subject to this MOA, and overall program implementation. As part of this process, the WDNR may request, and U.S. EPA Region 5 may transfer to the WDNR, primary responsibility for overseeing activities at a federal-lead facility within the legal parameters of that program. For TSCA Section 6(e) sites, U.S. EPA Region 5 may acknowledge the sufficiency of proposed cleanups under a PCB Coordinated Approval. U.S. EPA Region 5 and the WDNR hereby commit to continuing implementation and improvement of this process.
- 2) Frequent communication between U.S. EPA Region 5 and the WDNR is critical to the success of this MOA. U.S. EPA Region 5 and the WDNR commit to continuing 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, the WDNR and U.S. EPA Region 5 will conduct semi-annual meetings or conference calls to discuss progress in implementing this MOA, the WDNR's overall cleanup program, achieving state and federal commitments, funding opportunities and facility- or property-specific concerns.
- 4) This OCP MOA clarifies U.S. EPA Region 5's intentions regarding those closed sites or facilities addressed under Wisconsin's NR 700 rule series, Wis. Adm. Code, as set forth in section IV.B of this MOA, subject to the limitations set forth herein or as may be required by law.
- 5) The cleanup criteria in the NR 700 rule series, Wis. Adm. Code, provide for land use-based cleanups, which may entail restrictive covenants, or other restrictions in order to meet the criteria specified for each land use category. The WDNR will utilize these criteria when reviewing and approving institutional controls used in lieu of restrictive covenants.
- 6) For sites or facilities with PCB contamination, the parties agree to implement the review process in Attachment 1. Attachment 1 explains the WDNR-U.S. EPA coordinated review and approval process and clarifies the roles of each Agency. This MOA does not supersede or eliminate the PCB remediation and disposal options available to facilities under 40 CFR Section 761.61.

V. Entry and Modification

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

U.S. EPA Region 5 enters into this MOA based upon review of WDNR's cleanup criteria and processes. The WDNR agrees to provide U.S. EPA Region 5 with prompt notice of significant changes to the laws, regulations, and guidance and practices addressed through this MOA. The WDNR 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 only be modified by the mutual written agreement of both parties, or it may be terminated by one Party after a 45-day notice to the other Party.

For the Wisconsin Department of Natural Resources



11/27/06
Date

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



11/21/06
Date

Attachment 1
TSCA Section 6(e) Applicability Screening Analysis and
Expedited Coordinated Review and Approval Process

Intent of MOA. The intent of the OCP MOA is to describe the process under which WDNR and U.S. EPA Region 5 will recognize WDNR's leadership role for the remediation of certain sites with PCB contamination under the multiple cleanup programs in Wisconsin. In section IV.D.6 of the OCP MOA, U.S. EPA Region 5 and the WDNR have agreed to implement the review process in this attachment, which clarifies the roles and responsibilities of each Agency at certain sites involving PCB contamination. This MOA is not a delegation of U.S. EPA's authority under TSCA Section 6(e). However, U.S. EPA regulations at 40 CFR 761.77 provide for federal TSCA Section 6(e) coordinated approvals based on state permits or enforcement and decision documents. This attachment establishes a specific process under which the WDNR and U.S. EPA Region 5 will provide expedited coordinated approval for any person seeking to remediate PCB contamination at certain sites as described below.

Although the federal PCB regulations at 40 CFR 761.77 do not restrict the types of sites that are subject to coordinated approval, U.S. EPA Region 5 has determined that the expedited review and approval process established in this MOA would not be appropriate for certain environmentally diverse sites, or for those involving multiple complex issues. Such sites, which are referred to as Type A sites below, typically require more time to evaluate and consider than is provided for in the expedited coordinated review process. Any person seeking to remediate such sites may still apply to U.S. EPA Region 5 for a coordinated approval under 40 CFR 761.77, but the application will not be subject to the expedited review process established in this MOA.

This document primarily addresses the cleanup and disposal of PCBs, however, the federal PCB regulations at 40 CFR 761 address use, as well as clean up and disposal, of PCBs. The use of contaminated portions of real property constitutes the use of PCBs on the property, and such use is prohibited under TSCA section 6(e)(2)(A), unless the owner of the property contaminated with PCBs complies with all applicable use authorizations. In general, this means that the owner must first clean up the property or decontaminate it before it can be used (see 40 CFR §761.30(u)).

Program adequacy. Consistent with Section IV of the MOA, the U.S. EPA Region 5 TSCA PCB program has reviewed the Wisconsin State Statutes, administrative rules, and program guidance used by WDNR to implement the State's remediation program. As part of that program, for Type C sites, described below, WDNR agrees to assess the risk posed by PCBs via dermal exposure pathway as well as to assess the risk residual PCBs pose to post remediation construction workers. U.S. EPA Region 5 has determined the State's program should generally result in cleanups that meet the objectives and requirements of TSCA Section 6(e) for sites subject to this MOA.

Notification. WDNR and U.S. EPA Region 5 will provide each other with information on the status of Type A, B, or C sites described below. Notification by WDNR of Type C sites is covered in paragraph ii in the discussion on the expedited coordinated review process at the conclusion of this attachment. In addition to participating in the semi-annual meeting discussed in section IV.D.3, DNR agrees to provide a status report to U.S. EPA Region 5 TSCA program on Type A and B sites by March 31, annually. U.S. EPA Region 5 TSCA Program agrees to provide WDNR with a status report on all PCB

sites in Wisconsin it is managing on an annual basis by the same date. Either agency may request information about individual sites any time during the year.

If PCBs are found on a site, the owner or operator has the burden of proving the date the PCBs were released and the concentration of the original spill (See 40 CFR 761.50(b)(3)(iii)). This information can be used to determine if review and approval of the PCB remediation should proceed under TSCA Section 6(e) authority or if it can proceed under state authority only, as discussed further under Type A, B, or C sites described below.

It is important that the proper TSCA Section 6(e) determination be made as early in the site investigation process as possible to ensure proper implementation of the applicable requirements. This determination will affect whether PCB contaminated media is regulated under TSCA Section 6(e), and will affect the cleanup and disposal options for the contaminated media or materials. Failure to evaluate all available information could result in costly delays of redevelopment projects, put the owner or operator at risk of future liability (future complaints, spill report data or other information), or both.

This TSCA Section 6(e) determination should include a thorough and good faith inquiry into the nature and origin of the contamination. Where a facility owner or operator makes a good-faith effort to determine the date and concentration of the material at the time of the release, but cannot make a definitive determination because documentation regarding the date of the release and source of contamination is unavailable or inconclusive, then U.S. EPA may presume that PCBs are illegally disposed of at a site and require remediation under TSCA (See 59 FR 62788, 62799 (Dec. 6, 1994)).

WDNR and U.S. EPA recommend the owner or operator interview current and former employees and take other reasonable steps, such as using available site and waste specific information such as manifests, vouchers, bills of lading, sales and inventory records, accident reports, site investigation reports, spill reports, inspection logs, enforcement orders, etc., to determine the timing and concentration of the PCB release. In-depth inquiries are in the best interest of the owner or operator (individuals, companies, municipalities, etc.) as it may limit liability and guard against potential enforcement action should information later be discovered as a result of a less than adequate inquiry. WDNR and U.S. EPA recommend working with the WDNR regional project manager in making this determination.

Determining Agency Review and Approval based on TSCA Section 6(e) Determination. For the purpose of this MOA, three "types" of sites will be considered. Specific criteria to determine the "type" of site and agency review for a site are identified below. Once an appropriate determination has been made involving PCBs, the type of WDNR and U.S. EPA regulatory review for the proper investigation, cleanup and disposal of the contamination can be made. The screening criteria below will be used as guidance to determine the appropriate agency and process to follow in order to receive approval for the cleanup actions.

The screening criteria summarize the considerations for determining the applicability of the expedited review and approval. They do not establish any rights, obligations, or limitations beyond those established in the statute or the regulations themselves, and they do not otherwise supersede or substitute for the statute or regulations.

Type A: PCB Sites not subject to the expedited coordinated review and approval under this MOA and subject to WDNR and U.S EPA Region 5 review and approval outside of this MOA. These sites would typically be complex sites or sites involving environmentally diverse or multiple complex issues such as those described in the first through third bullets, below. In addition, Type A sites would include sites where the owner or operator has not met the WDNR's procedures or standards or fails to submit adequate information to the WDNR and does not receive an approval from the WDNR. Sites which do not receive an approval or a decision and enforcement document from the WDNR could not be approved by U.S. EPA Region 5 under 40 CFR 761.77 because the party must have such a state-issued document for U.S. EPA to issue a coordinated approval (See 40 CFR 761.77(c)). For Type A sites, the owner or operator is subject to WDNR and U.S. EPA Region 5 review and approval, outside of this MOA.

Type A sites include:

- sites where there is widespread sediment contamination beyond that which is merely incidental to soil contamination;
- sewers or sewage treatment systems;
- private or public drinking water sources or distribution systems; or
- sites where the responsible party has not met the WDNR's procedures or standards.

Type B: PCB Sites generally not subject to TSCA Section 6(e) and only subject to WDNR review and approval. These sites are subject to WDNR review and approval and are managed by the WDNR under the NR 700 rule series because they are presumed not to present an unreasonable risk of injury to health or the environment under TSCA Section 6(e) and the federal PCB regulations at 40 CFR 761.50(b)(3)(i)(A).

Type B sites include sites where:

- the PCB remediation waste resulted from spills, or other releases into the environment:
 - prior to April 18, 1978, regardless of the concentration of the spill or release, or
 - on or after April 18, 1978, but prior to July 2, 1979, where the concentration of the spill or release was greater than or equal to 50 ppm but less than 500 ppm;
- the date the PCBs were released was on or after July 2, 1979, and the PCB concentration of the actual material that was released was less than 50 ppm.

However, if a site meets either of the criteria under the first bullet above and U.S. EPA Region 5 and WDNR make a finding that an unreasonable risk of injury to health or the environment exists, U.S. EPA Region 5 and WDNR may direct the owner or operator of the site to remediate the site under TSCA Section 6(e) and the federal PCB regulations at 40 CFR 761.50(b)(3)(i)(A) and the WDNR's NR 700 rule series, Wis. Adm. Code, respectively. In cases where U.S. EPA Region 5 and WDNR direct the owner or operator of the site to remediate the site and the site is also determined by U.S. EPA Region 5 and WDNR to be a Type C site, it may be subject to the expedited coordinated review and approval process (See provisions for Type C sites, below).

If a site meets either of the criteria under the first bullet above and U.S. EPA Region 5 or WDNR makes a unilateral finding that an unreasonable risk of injury to health or the environment exists and U.S. EPA Region 5 or WDNR directs the owner or operator of the site to remediate the site, the sites would not be subject to the expedited coordinated

review and approval under this MOA and instead would be subject to separate U.S. EPA or WDNR review and approval outside of this MOA.

Type C: PCB Sites subject to WDNR review and approval under this MOA, with U.S. EPA TSCA Section 6(e) expedited coordinated review and approval. These are PCB contamination sites that do not fall into either the Type A or Type B site classification. Sites that meet the criteria for a Type C site may utilize the WDNR-U.S. EPA Region 5 expedited coordinated review process, below. Type C sites can include sites where there is sediment contamination as long as that contamination is merely incidental to soil contamination.

Type C sites include sites where:

- the PCB remediation waste is at any concentration and resulted from spills, or other releases into the environment:
 - on or after July 2, 1979, where the concentration of the spill or release was greater than or equal to 50 ppm or
 - on or after April 18, 1978, but prior to July 2, 1979, where the concentration of the spill or release was greater than or equal to 500 ppm; or
- the following provisions are met:
 - the screening criteria under the first bullet for a Type B site, above, are met,
 - the site is determined by WDNR and U.S. EPA not to be a Type A site,
 - the as-found concentration is greater than or equal to 50 ppm,
 - U.S. EPA Region 5 and WDNR make a finding that an unreasonable risk of injury to health or the environment exists in accordance with 40 CFR 761.50(b)(3)(i)(A) and the NR 700 rule series, Wis. Adm. Code, respectively, and
 - U.S. EPA Region 5 and WDNR direct the owner or operator of the site to remediate the site under TSCA Section 6(e) and the federal PCB regulations at 40 CFR 761.50(b)(3)(i)(A) and the NR 700 rule series, Wis. Adm. Code, respectively, based on their findings of unreasonable risk.

WDNR-U.S. EPA Region 5 Expedited Coordinated Review and Approval Process

The WDNR-U.S. EPA Region 5 expedited coordinated review and approval process below is solely for the purpose of evaluating coordinated approval requests under this MOA. Any person seeking any approval of a remedial action should consult the applicable regulations to determine their legal responsibilities. This MOA does not absolve any person from their legal responsibilities or obligations.

Any person seeking approval from the WDNR on response activities to address PCB contamination under a remedial action options report prepared pursuant to ch. NR 722, Wis. Adm. Code, or other appropriate vehicle must also, and will be encouraged by the WDNR to, formally request coordinated approval from U.S. EPA Region 5. The WDNR will, upon request, supply an electronic form to the person to facilitate this step.

- ii If the WDNR determines that the site investigation and remedial action options report or other appropriate vehicle (including revisions required by the WDNR as part of its review) satisfy the WDNR's NR 700 rule series, Wis. Adm. Code, processes and criteria, the WDNR will transmit information relevant to the PCB remediation and approval activities to U.S. EPA Region 5. The WDNR will use an electronic form to verify to U.S. EPA Region 5 that the regulatory package is

complete and identify significant site-specific issues, if any. The form will include a summary description of the site, contamination, remediation targets, proposed cleanup activities, including any disposal activities, public comments, proposed conditions, and a draft approval.

- iii. U.S. EPA Region 5 agrees that within 30 days after receipt of a complete package including WDNR's information in ii, above, and the request for coordinated approval, it will issue a letter to the person seeking the approval and WDNR informing the person seeking the approval and WDNR of its intent to grant or deny a TSCA coordinated approval, requesting further information, or requesting additional time to complete its review. If U.S. EPA Region 5 intends to grant a TSCA coordinated approval, the letters will include any additional conditions it determined are necessary to prevent unreasonable risk of injury to health or the environment.
- iv. U.S. EPA Region 5 also agrees that if it must request additional information or time, it will complete its review as expeditiously as possible.
- v. U.S. EPA Region 5 agrees that when it intends to grant a TSCA coordinated approval, it will work with WDNR to finalize and issue the TSCA coordinated approval to the person seeking the approval immediately after WDNR issues its approval.
- vi. U.S. EPA Region 5 will consult with the WDNR and provide the WDNR, where practicable and appropriate, an opportunity to respond to U.S. EPA's comments in a timely manner, prior to denying or conditioning a request for coordinated approval.
- vii. All requirements, conditions and limitations of the WDNR's approved remedial action options report or other determinations are conditions of the coordinated approval.
- viii. Any person that receives coordinated approval under this MOA must comply with the reporting and record keeping requirements of 40 CFR Part 761, Subparts J and K, as applicable.

The WDNR will monitor the site's compliance with the approved PCB remediation measures and will notify U.S. EPA Region 5 of changes it finds relating to PCB waste requirements and/or changes in facility ownership.

Appendix D – Survey of Other States on Affordable Housing Incentives

In July 2017, DEQ conducted a research to determine what other states have successful brownfield programs. In e-mails to environmental officials in each of these states, DEQ posed the following questions:

1. Does [your state] have any formal programs for coordinating brownfield cleanup with affordable housing development?
2. Does [your state] have any established best practices, incentives, or policies that encourage affordable housing development on brownfield sites? If so, which sectors take advantage of these – public, private, non-profit?
3. Have those incentives been measurably successful? Anything you suggest that would make policy tools more effective?
4. Are these tools/incentives/programs used only in large urban areas, or there are also some examples of small city/rural area success stories?
5. What types of affordable housing comes out of this (relates to owner, single or multifamily construction, low-income people, etc.)?
6. Does [your state] define a term of affordable housing as “housing that the occupant is paying no more than 30 percent of his/her income for gross housing costs?” If no, what other definition does the State use?

Only Pennsylvania and Washington responded, with the main messages being: 1) there are limited state tools in place to directly support affordable housing development on brownfields; and 2) states supports parties efforts to redevelop brownfields to affordable housing, but these states do not initiate or direct proposals for new housing. Pennsylvania stated that it “supported remediators with their Affordable Housing Program Brownfield Certification loan application.”