MEMORANDUM OF AGREEMENT
BETWEEN THE
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION VIII

I. Purpose

The purpose of this Memorandum of Agreement (MOA) is to define the roles and responsibilities of the Colorado Department of Public Health and Environment (CDPHE) and the United States Environmental Protection Agency Region VIII (EPA) (collectively, the Parties) with respect to activities conducted under the authority of the Voluntary Cleanup and Redevelopment Act.

II. Background

EPA and CDPHE believe that the proper reutilization of contaminated or potentially contaminated industrial and commercial properties (often referred to as "Brownfields") will provide a significant benefit to both the environment and the economy of the local communities. Proper reutilization of "brownfields" is also a key element of Colorado's "Smart Growth" concept. To the extent possible, EPA and CDPHE seek to facilitate the productive re-use of these properties by working with the private sector to eliminate impediments to financing, transfer, and redevelopment. Due to limited resources, the need to prioritize sites, and the need to expedite cleanup action, EPA and CDPHE seek to encourage participation in the Voluntary Cleanup and Redevelopment Program to protect human health and the environment while fostering the transfer, redevelopment, and reuse of facilities that have been previously contaminated with hazardous substances or petroleum products.

III. Responsibilities

1. CDPHE will implement Title 25-16-301, *et seq.* (known as the Voluntary Cleanup and Redevelopment Act and referred to herein as "the Act") to allow owners of contaminated properties to voluntarily propose cleanup actions or petition for no further action determinations for eligible sites. CDPHE and EPA agree that this Voluntary Cleanup Program (VCUP) will include the specific elements as described in Attachment A.

2. Once an application to clean up a site in accordance with the VCUP has been submitted to CDPHE, EPA will not plan and does not anticipate undertaking any federal action under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* (CERCLA or Superfund), at such a site, unless: (1) the site is an "NPL Caliber" site or the site poses an imminent and substantial endangerment to public health, welfare or the environment and exceptional circumstances warrant EPA action; (2) CDPHE's approval of the cleanup plan becomes void; or (3) the applicant fails to complete or materially comply with the cleanup plan as approved by CDPHE.

3. In accordance with the VCUP Description contained in Attachment A, if requested by the applicant, CDPHE may provide written notice to the applicant of its determination that performance of the cleanup is complete and in compliance with the cleanup plan as approved or modified. Written notification of CDPHE's certification of completion shall also be forwarded to EPA. EPA will then remove the site from its CERCLIS database if the site was previously identified in the CERCLIS database.

4. Failure to complete or materially comply with the cleanup plan, submission of materially misleading information, or the discovery of significant new information different than that submitted to CDPHE with the VCUP application, renders CDPHE's approval of the cleanup plan and EPA's assurances void. Further, EPA reserves the right to take all appropriate response and enforcement actions under Superfund in the event a cleanup plan or no action determination is deemed "approved" as a result of a failure of CDPHE to review and approve or deny an application prior to the expiration of the 45 day time limit, as provided in Sections 25-16-306(1)(a) and 25-16-307(1) of the Act.

5. Nothing in this MOA shall be construed to abrogate EPA's responsibility under Section 105(d) of CERCLA, 42 U.S.C. § 9605(d), to perform a preliminary assessment when requested by a citizen petition.

6. EPA will assist and may provide technical support to CDPHE in further developing and expanding the use of VCUP. Similarly, CDPHE will assist and support efforts to promote and implement EPA's Economic Redevelopment initiatives.

This MOA has been developed by mutual cooperation and consent of the Parties, and becomes effective upon execution of the signatures below. EPA and CDPHE will conduct an annual review of the VCUP and the terms of this MOA and determine if this MOA should remain in effect as is, be amended or be terminated. This MOA may be terminated unilaterally by either party with 30 days notice. Any amendment to this MOA must be made in writing and by mutual consent of the parties.

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ATTACHMENT A

VOLUNTARY CLEANUP AND REDEVELOPMENT PROGRAM DESCRIPTION

Purpose

The State of Colorado's authority for the Voluntary Cleanup Program (VCUP) is derived from the Voluntary Cleanup and Redevelopment Act (C.R.S. 25-16-301, *et seq.*) passed in 1994. The purpose of the Act is to "[p]rovide for the protection of human health and the environment and to foster the transfer, redevelopment, and reuse of facilities that have been previously contaminated with hazardous substances or petroleum products." The Act is intended to permit and encourage voluntary cleanups by providing a method to determine cleanup responsibilities in planning reuse of a property. The VCUP is tasked to operate quickly and with a minimum of administrative processes and costs. Accordingly, no regulations have been promulgated to implement this Act.

Site Screening and Communication

After receiving an application under the VCUP, the State will conduct a site screening. Site screening in the VCUP is two-fold. First, sites are screened for eligibility. Section 25-16-303(3)(b) excludes: (I) sites listed or proposed for listing on the NPL; (II) sites under a RCRA corrective action order; (III) sites subject to an order or agreement issued by the Water Quality Control Division; (IV) sites that have or should have a RCRA permit or interim status for treatment, storage, or disposal of hazardous waste; and (V) sites regulated by the UST program. After an initial review of the site history, the lead reviewer discusses the site with each of the above State programs to determine whether the site is excluded under one of the listed criteria.

If the site qualifies for the VCUP, a second screening occurs to determine existing actions proposed by EPA and EPA's level of potential interest in the site. The purpose of this communication is to avoid duplication of effort between the two agencies. First, the State reviewer will determine whether the site is listed on CERCLIS. If the site is listed in EPA's CERCLIS database, the State reviewer will contact appropriate EPA staff to discuss the site status and proposed EPA actions. Second, the State reviewer will determine whether the site is subject to an EPA CERCLA Administrative Order. If the site is subject to an EPA CERCLA Administrative Order, the State reviewer will review the application as required by C.R.S. 25-16-306, but EPA's agreement to forbear from planning or undertaking any action under CERCLA as contained Section III, Paragraph 2 of the MOA is void.

1. **CERCLIS Sites**

If all or a portion of the site is on CERCLIS, the State will comply with the requirements of C.R.S. 25-16-309(2) and request that EPA suspend activities to allow the cleanup to proceed under the VCUP. Should EPA decide to proceed with its planned actions, the State may choose to deny the application, or may process the application and coordinate approval of the application with EPA.

For a CERCLIS site for which EPA has planned but will agree to suspend investigatory or response action activities in lieu of the owner's compliance with the Act and VCUP, CDPHE will keep EPA informed of the owner's progress toward completion of the remedial action. CDPHE will also notify EPA of the owner's completion or failure to complete the remedial action. In the event the owner implements the cleanup plan completely and to the satisfaction of CDPHE, EPA shall remove the site from its CERCLIS database.

2. **Non-CERCLIS Sites**

If the site is not on CERCLIS, the State will evaluate the information submitted by the applicant to determine whether the site might be considered "NPL Caliber."

EPA has generally defined "NPL Caliber" to mean sites where significant human exposure to hazardous substances has been documented or where sensitive environments have become contaminated. Examples of what EPA considers "NPL Caliber" site characteristics are sources of contamination that may have contributed to the following:

- Public drinking water supplies or private wells are contaminated with a hazardous substance above the concentration listed in the Risk-Based Concentration Table for tap water, January, 1995†;
- Soils on school, day care center, or residential properties are contaminated by a hazardous substance significantly above background levels and are above concentrations for soil ingestion (residential) listed in the Risk-Based Concentration Table, January, 1995†;
- Soils on school, day care center, or residential properties are contaminated by lead concentrations significantly above background levels and the lead soil concentration is above 400ppm;
- A hazardous substance is detected in an off-site air release in a populated area and the release is above the concentration listed in the Risk-Based Concentration Table for ambient air†;

- A highly toxic hazardous substance known to persist and bioaccumulate in the environment (e.g., PCBs, mercury, dioxin, PAHs), is discharged into surface waters;

- A highly toxic hazardous substance known to be mobile in the subsurface (e.g., vinyl chloride, trichloroethylene, acetone, phenol, cadmium, mercury), is discharged to significant useable aquifers.

- Sensitive environments are contaminated with a hazardous substance significantly above background levels and water quality standards where appropriate and;

† If this document is modified, use the most recent version.

Even though the application for VCUP may not address off-site problems, if releases from the applicant's property has contributed to off-site exposure to hazardous substances, EPA considers the sources of hazardous substance contamination as well as the areas where contamination has migrated to be an "NPL Caliber" site.

If CDPHE determines a site to be of "NPL Caliber," CDPHE will notify the applicant of its determination as early in the 45-day review period as possible. CDPHE and the applicant will then jointly decide whether to inform EPA of CDPHE's determination and to request EPA's review of and concurrence on the cleanup plan and application. If CDPHE and the applicant jointly decide to seek EPA's review and approval, EPA will provide its comments on the application as quickly as possible. If CDPHE and the applicant jointly decide not to solicit EPA's review and approval of the application, CDPHE may either approve or deny the application. In the event CDPHE approves the application for the "NPL Caliber" site without EPA's review and concurrence, the applicant may still implement the cleanup plan, but EPA's forbearance not to plan or undertake any action under CERCLA as contained Section III, Paragraph 2 of the MOA is void.

Resources and Capabilities

CDPHE utilizes trained environmental professionals to review voluntary cleanup applications. The specialty of these individuals may vary, but includes: geology, hydrology, engineering, risk analysis, and chemistry. These environmental professionals have applied this expertise to UST remediation, RCRA corrective action, solid waste facility permitting, and Superfund remedial action. On an as needed basis, the appropriate expertise can be utilized to assist the State's lead reviewer. The maximum number of applications which can be reviewed per month is set by statute, in order to insure that authorized staff have sufficient time to review applications in sufficient detail.

Standards and Risk Analysis

CDPHE will implement a risk-based cleanup approach based on the proposed land use and will utilize applicable standards and remediation objectives in cleanup decisions. CDPHE will take under consideration site-specific cleanup standards if they are based on risk and utilize appropriate land use assumptions. Although a site-specific risk assessment prepared using EPA's RAGS document can be submitted by the applicant at his/her option, the 45 day time period available for review of an application containing such a risk assessment may be insufficient and need to be extended.

Therefore, CDPHE will use relevant standards derived from applicable statutes, regulations, guidance, and the application of the risk-derived numbers developed by EPA, CDPHE or other governmental entities. In all cases, an analysis of the risk entails an evaluation of targets and receptors and the potential for pathways of exposure to be realized. In all application evaluations, the CDPHE reviewers will examine the proposed cleanup standards, the proposed remedial method and the proposed land use in concert to ensure that protection of health and the environment is achieved by the implementation of the cleanup plan.

Public Participation

The Act has no requirements for public participation or review of applications. However, all files are public documents and available for public review upon request. Also, CDPHE routinely contacts the local health department to see if there is any knowledge of or interest in the site, and will make a copy of the application available for local review if requested. Local governments may have additional public participation requirements related to the redevelopment of property (i.e., zoning hearings) which are applicable to these sites.

Notwithstanding any local government public participation procedures or requirements for redevelopment of these sites, in order to obtain EPA's forbearance not to plan or undertake any action under CERCLA as contained Section III, Paragraph 2 of the MOA, within 30 days of approval of its VCUP application, the applicant will provide adequate public notice of its cleanup plan. "Adequate public notice" will be determined on a site-specific basis and should include publication of the availability of the cleanup plan in a local newspaper or posting of any public notice plan required by building permit or zoning ordinance procedures. For large sites or sites where public interest is likely due to publicity or proximity to Superfund sites, CDPHE may request that the applicant hold a public meeting to explain its cleanup plan.

Verification

In accordance with Section 25-16-306(5), verification of the completion of a cleanup under the VCUP is left to the applicant. Verification that the cleanup has been performed in accordance with the CDPHE-approved cleanup plan is provided by the property owner submitting a certification from a qualified environmental professional that the plan has been fully implemented. Should this certification be falsified, the Act renders CDPHE's approval and EPA's forbearance not to plan or undertake any action under CERCLA as contained Section III, Paragraph 2 of the MOA void.

Since conditions encountered in the field during the implementation may be different than those represented in the approved cleanup plan, the applicant may not be able to certify that it has substantially complied with the cleanup plan as approved by CDPHE. CDPHE is available to discuss changing field conditions and the impact of such changes on the cleanup plan. Thus, CDPHE should be informed of these deviations from the plan as they occur, determine if the plan should be modified and may require the applicant to submit a revised application based on this new information.

In order to obtain EPA's forbearance not to plan or undertake any action under CERCLA as contained Section III, Paragraph 2 of the MOA, the applicant must submit a written petition requesting a "No Further Action" determination on the subject property following completion of the cleanup plan. This petition must include a completion report which describes how the applicant has complied with the initial or modified cleanup plan as approved by CDPHE. CDPHE will review the report to assure compliance with the approved cleanup plan and may conduct an inspection of the subject property to obtain readily available information concerning the property's current condition.

Within 45 days of the submission of this petition, CDPHE will notify EPA and the applicant whether the petition for a "No Further Action" determination has been approved or disapproved. If CDPHE approves the petition for "No Further Action," EPA shall forbear from planning or undertaking any action under CERCLA as contained Section III, Paragraph 2 of the MOA. EPA, however, reserves the right to take all appropriate response and enforcement actions under Superfund in the event a "No Further Action" determination is deemed "approved" as a result of a failure of CDPHE to review and approve or deny an application prior to the expiration of the 45 day time limit as provided in Section 25-16-307(1) of the Act.