



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.