



**State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES**

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March 3, 2008

Mr. Douglas H. Green  
Venable LLP  
575 7<sup>th</sup> Street, NW  
Washington, DC 20004-1601

Subject: One Clean Up Program MOA Between  
EPA Region 5 and Wisconsin Department of Natural Resources

Dear Mr. Green:

Thank you for your letter of December 31, 2007 concerning the One Cleanup Program (OCP) memorandum of agreement (MOA) between the United States Environmental Protection Agency – Region 5 and the Wisconsin Department of Natural Resources. I appreciate your understanding of the important policy objectives of this MOA. In drafting the MOA, DNR attempted to ensure that remediation projects under DNR oversight are conducted consistently with DNR promulgated rules and guidance. DNR believes the NR 700 rule series provides clear and consistent direction to responsible parties and the consultants and attorneys they hire, regardless of the regulatory source of the cleanup responsibility or the contaminants being remediated.

Of the three items mentioned in your letter, the first two issues are of a federal nature, and the Utility Solid Waste Activities Group (USWAG) should work with EPA to resolve them. It is our understanding that EPA Region 5 will be responding to those issues in a separate letter. If EPA determines that changes should be made to the OCP MOA regarding those two issues, then Wisconsin will work with EPA to do so.

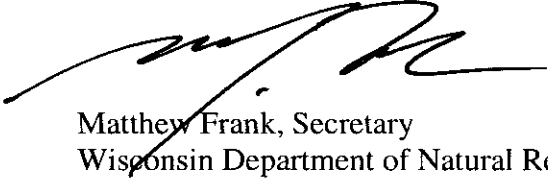
Concerning item number three, we respectfully disagree with the conclusion that the DNR does not have authority to require the remediation of sites contaminated with polychlorinated biphenyls (PCBs) with concentrations of less than 50 ppm. The Wisconsin hazardous substance spill law, S. 292.11, Wis. Stats., is quite clear regarding a person's responsibility under Wisconsin law for discharges of hazardous substances to the environment. It requires a person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance to the environment to take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

PCBs that have been discharged to the environment would meet the definition of a hazardous substance discharge. This also applies to historical discharges to the environment when they are discovered (See *State v. Mauthe* (1985) and *State v. Chrysler Outboard Corporation* (1998)). As a point of clarification, DNR typically requires the management of waste material or media contaminated with PCB concentrations of less than 50 ppm as solid waste. DNR does not impose any special waste handling

requirements on such waste or media, but allows it to be managed similarly to other non-hazardous solid waste disposed of in Wisconsin.

Again thank you for your letter. If you would like, we are willing to meet with you to further discuss your concerns. If you have questions or would like to discuss this letter or the contents of the MOA concerning PCBs, please contact Ed Lynch at 608/266-3084 or you may reach him by email at [edward.lynch@wisconsin.gov](mailto:edward.lynch@wisconsin.gov).

Sincerely;



Matthew Frank, Secretary  
Wisconsin Department of Natural Resources

cc: Mary Gade – EPA Region 5  
Al Shea – AD/5  
Mark Giesfeldt – RR/WW  
Sue Bangert – WMM/WW  
Ed Lynch – RR/WW  
Deb Johnson – LS/5  
Margaret Guerriero – EPA Region 5 / L-8J  
Tony Martig – EPA Region 5 / LC-8J



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

FEB 6 2008

REPLY TO THE ATTENTION OF:

Mr. Douglas H. Green  
Venable LLP  
575 7<sup>th</sup> Street, NW  
Washington, D.C. 20004-1601

Re: One Cleanup Program MOA Between EPA Region 5 and Wisconsin Department of Natural Resources

Dear Mr. Green:

Thank you for your letter of December 31, 2007, on behalf of the Utility Solid Waste Activities Group (USWAG) to Mary Gade regarding the One Cleanup Program Memorandum of Agreement (MOA) between the United States Environmental Protection Agency – Region 5 (EPA) and the Wisconsin Department of Natural Resources (WDNR). First, I appreciate your recognition that MOA's, such as the one between EPA Region 5 and Wisconsin, have a valuable policy goal. As your letter acknowledges, the MOA is designed to clarify the roles and responsibilities of EPA and the WDNR at contaminated properties in Wisconsin, so as to increase the numbers and timeliness of cleanups that will result in the protection of human health and the environment. Your letter raises three concerns with the MOA in regards to the federal PCB program described in Attachment 1 to the MOA.

With respect to the first two issues you raised, I recognize that these are related to issues you have raised with EPA Headquarters. I note that the statements contained in the MOA closely follow or quote the current regulations and guidance, and EPA Region 5 does not intend to modify the MOA. However, there may be potential areas for clarification and guidance that the Office of Solid Waste and Emergency Response (OSWER) may consider, and Region 5 would evaluate its activities, including the MOA, in light of any such clarification or guidance.

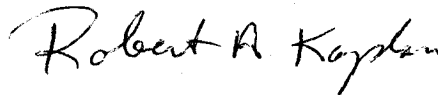
With regard to issue number three, you assert that Wisconsin does not have the authority to regulate spills of PCBs at less than 50 ppm and that it is an "error" for the MOA to suggest otherwise. EPA has consistently taken the position TSCA Section 18(a)(2)(B) allows States to enact their own PCB disposal regulations. EPA's statement and restatement of this position can be found at 59 FR 62788, 62832 (December 6, 1994) and 63 FR 35384, 35386 (June 29, 1998). *See also* 40 CFR § 761.50(a)(6) (providing that any person storing or disposing of PCBs under EPA regulations is also responsible for determining and complying with all other applicable Federal, State, and local laws and

regulations). Accordingly, EPA Region 5 does not believe that any amendment to the MOA is warranted regarding this issue.

As discussed above, each of the provisions you cite in your letter are restatements of previously articulated EPA regulations and interpretation. However, please note that Section IV.C of the MOA (page 8) expressly provides that “[t]his 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.” Of course, if any enforcement action were ever brought against USWAG or any of its members, those parties would be free to raise whatever defenses they believed appropriate.

Again, thank you for your letter. If you have further questions, please contact Karen L. Peaceman at (312) 353-5751. For issues number one and two, please contact Bob Hall, Director of the Permits and State Programs Division in OSWER, at (703) 308-8432.

Sincerely,

A handwritten signature in cursive script that reads "Robert A. Kaplan".

Robert A. Kaplan  
Regional Counsel

December 31, 2007

**VIA ELECTRONIC MAIL AND  
OVERNIGHT COURIER**

Mr. Matthew J. Frank, Secretary  
Wisconsin Department of Natural Resources  
P.O. Box 7921  
Madison, WI 53707-7921

Ms. Mary A. Gade  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

RE: Corrections to the One Cleanup Program MOA Between  
EPA Region 5 and the Wisconsin Department of Natural Resources

Dear Mr. Frank and Ms. Gade:

I write on behalf of the Utility Solid Waste Activities Group<sup>1</sup> ("USWAG") to identify certain mistaken legal positions set forth in the "One Cleanup Program Memorandum of Agreement" ("MOA") Between the United States Environmental Protection Agency Region 5 ("EPA Region 5") and the Wisconsin Department of Natural Resources ("WDNR"). USWAG appreciates the MOA's important policy objective to "clarify the roles and responsibilities of U.S. EPA Region 5 and the WDNR at contaminated properties so as to increase the number and timeliness of cleanups that will result in the protection of human health and the environment." MOA at 3. At the same time, because the MOA may serve as the model for the development of

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<sup>1</sup> USWAG was formed in 1978 and is an association of approximately 80 energy industry operating companies and associations, including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA") and the American Gas Association ("AGA"). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly-owned electric utilities. AGA represents 200 local energy utility companies that deliver natural gas to 64 million homes, businesses and industries throughout the United States. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., service more than 95% of the nation's consumers of electricity, and deliver 92% of all natural gas provided by the nation's natural gas utilities.

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similar agreements between the EPA Regions and various other states, it is important to identify and correct erroneous legal positions in the MOA to ensure that these errors are not perpetuated.

We discuss below three fundamental legal errors regarding the federal PCB regulatory program contained in Attachment 1 to the MOA. Attachment 1 discusses the WDNR and EPA oversight responsibilities for the cleanup of PCB-contaminated sites and sets forth the criteria under which PCB-contaminated sites being addressed by the WDNR can qualify for EPA's coordinated approval process under 40 C.F.R. § 761.77. USWAG does not take issue with the coordinated approval process. Indeed, that process is intended to streamline the approval and oversight process between EPA and the states for addressing PCB-contaminated sites. Nonetheless, there are several erroneous statements in Attachment 1 that should be corrected regarding (1) the regulatory status of PCB-contaminated properties, (2) the legal presumptions with respect to EPA's enforcement authority that attach to these properties, and (3) the extent to which the WDNR – and states generally – can establish cleanup requirements for PCB-contaminated sites beyond those already established by EPA under the federal PCB program. We respectfully request that the MOA be corrected to eliminate these errors so that the appropriate PCB requirements are complied with by EPA 5 and WDNR and to help ensure that these errors are not repeated in future MOAs between EPA Regions and other states.

**1. The Presence of PCB Contamination on Real Property Does Not Constitute the “Unauthorized Use” of PCBs.**

The first error requiring correction is the assertion that persons who acquire PCB-contaminated properties (*e.g.*, for redevelopment) and who have no responsibility for the PCB spill that originally contaminated the property, nonetheless have a *legal* duty under the federal PCB rules to cleanup the PCBs. This position is predicated on the theory that the mere presence of this contamination constitutes the “unauthorized use” of PCBs by the property owner. The specific MOA language provides as follows:

[t]he 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 applicable use authorizations. In general, this means the owner must first clean up the property or decontaminate it before it can be used (see 40 C.F.R. § 761.30(u)).

MOA, Attachment 1 at 1.

This erroneous position was, to our knowledge, first articulated by EPA Headquarters in the Agency's “PCB Site Revitalization Guidance under TSCA” (“Revitalization Guidance”). Unfortunately, EPA Region 5 appears to have simply reiterated this position in the MOA.

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USWAG and other interested stakeholders informed EPA Headquarters when it issued the Revitalization Guidance that this position was incorrect.<sup>2</sup> The fact that it has reappeared in the MOA is unfortunate and reinforces the need for EPA to correct this position immediately so that it does not appear in future EPA documents and frustrate PCB cleanup and redevelopment efforts.

The Agency has not pointed to any regulatory or legislative support for the position that purchasers of PCB-contaminated property – including entities that were *not* responsible for the contamination – are obligated by law to clean up that property because their mere ownership of the property constitutes the “unauthorized use” of PCBs. Nor has EPA provided any legal support for the proposition that TSCA’s prohibition on “using” PCBs somehow encompasses using PCB-contaminated property, or that the prohibition on unauthorized use provides EPA the authority to order PCB cleanups. EPA’s interpretation also defies common sense: the PCBs in the property are not being “used” within the plain meaning of the word. This interpretation is at odds with the manner in which the concept of “use” has historically been applied under the PCB regulations – namely, connoting some functional purpose of the PCBs in the item or material involved. Plainly, the presence of PCBs in contaminated property serves no functional purpose.

Second, the position that property contaminated by PCBs constitutes the “unauthorized use” of PCBs is inconsistent with EPA’s position elsewhere in the Revitalization Guidance that responsibility for PCB contamination “resides with the person(s) who caused the contamination or who owned or operated the PCBs or PCB-containing equipment at the time of the contamination.” Applicable case law confirms this point by making clear that only parties who engage in a regulated activity are liable for PCB compliance for that activity. Entities “are only liable for storage violations if they stored PCBs and they are only liable for disposal violations if they disposed of PCBs.” *In the Matter of Jay’s Auto Sales & Paul Taylor*, 1996 EPA ALJ Lexis 33, 29 of 40 (June 5, 1996). On the other hand, entities that merely own real property upon which PCBs have been disposed of are not liable if they themselves “did not cause the uncontrolled discharge and did not own or control the PCB sources on the property” because “disposal requirements do not impose responsibility on a person who merely acquired the property after the PCBs had been discharged.” *See In re City of Detroit*, TSCA Appeal No. 89-5, 3 E.A.D. 514, 526 (Feb. 6, 1991); *see also In the Matter of Jay’s Auto Sales & Paul Taylor* at 29-30 of 40.

In the Revitalization Guidance, and now in the MOA, EPA is trying to have it both ways – claiming that a spill of PCBs onto the ground constitutes improper disposal and imposing cleanup responsibility on the party who caused the contamination (in this case, the prior owner of

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<sup>2</sup> See letter dated June 12, 2006 to Ms. Susan Hazen, EPA, from the PCB Panel of the American Chemistry Council, USWAG, and the Arizona Association of Industries.

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the property) while at the same time arguing that owning the property on which the spill occurred also constitutes the “use” of PCBs and trying to impose additional cleanup responsibility on the innocent new owner. However, as the Agency has stated in other guidance, the regulatory status of PCBs at any particular time can only fall into *one* of certain enumerated categories: *i.e.*, “use,” “storage for reuse,” “storage for disposal,” or “disposal.” *See e.g.*, EPA’s 2001 PCB Question and Answer Document at 32 (equipment is either in storage for reuse or storage for disposal, but not both). Put simply, PCBs that are classified as being disposed of cannot at the same time be considered in “use.”

For the above reasons, the MOA’s assertion that the presence of PCB contamination on real property constitutes the unauthorized “use” of PCBs is incorrect as a matter of law. As a practical matter, this position will unnecessarily impede the willingness of parties to invest the resources to purchase and remediate PCB-contaminated sites if the mere act of purchasing the property immediately thrusts the innocent purchaser into non-compliance with TSCA.

## **2. EPA Has the Initial Burden of Proof Regarding the Improper Disposal of PCBs.**

Another error in the MOA are the statements that the *initial* burden of proof regarding the regulatory status of a PCB spill rests with the owner/operator of the property and that, in the absence of owner/operator knowledge of either the date or the source of the spill, EPA is to *presume* that the “PCBs are illegally disposed of” under TSCA. *See* MOA Attachment at 2. This means that, upon the discovery of PCB-contaminated property, the owner/operator has to prove the negative to avoid being in violation of TSCA – *i.e.*, either that the spill was from a source of < 50 ppm PCBs or that it occurred prior to April 18, 1978 (the effective date of the initial PCB disposal regulations). Absent the owner/operator being able to prove this, the MOA states that EPA is to presume the presence of PCBs in real property (presumably even at levels < 50 ppm) is evidence of an illegal PCB spill.

The above position is wrong as a matter of law. While it is true that 40 C.F.R. § 761.50(b)(3)(iii) imposes the burden on the owner/operator of demonstrating the date the PCBs were released and the concentration of the original spill, this burden arises only *after* EPA has met its burden of demonstrating a *prima facie* case that a regulatory infraction has in fact occurred (*e.g.*, that the source of the spill was  $\geq$  50 ppm *and* that the spill occurred after April 18, 1978).

It is black letter law that EPA bears the ultimate “burden of persuasion” in any enforcement case. *See* 40 C.F.R. § 22.24; *see also In the Matter of Nello Santracroce & Dominic Fanelli D/B/A Gilroy Associates*, 24 Env’tl. L. Rep. 40146 TSCA Appeal No. 92-61, (March 25, 1993). “[T]he party having the burden of persuasion must bear the risk of not having his position sustained if the opposing party’s evidence is as persuasive as his own on any disputed issue of fact.” *Id.* at 40148. In other words, if the evidence is a “draw,” EPA should

lose. To meet its “burden of persuasion,” the Agency must show by “a preponderance of the evidence” that a violation occurred. *Id.* EPA’s evidence must be “the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force.” Black’s Law Dictionary (8th ed., 2004).

In the context of a PCB enforcement case, this means that EPA must first present its *prima facie* case – *i.e.*, demonstrating that the spill came from a source of  $\geq 50$  ppm PCB and that the spill occurred after April 18, 1978. This is determined on a case-by-case basis, but as a general principle it requires EPA to present enough evidence “to infer the fact at issue and rule in the parties’ favor.” Black’s Law Dictionary (8th ed., 2004). Then and only then does the burden shift to the owner/operator of the property to offer rebuttal evidence, including any affirmative defense set forth in 40 C.F.R. § 761.50(b)(3)(iii) (*e.g.*, the spill occurred before February 17, 1978 or the source of the spill was  $< 50$  ppm PCBs). The burden then shifts back to EPA to rebut the evidence with evidence in favor of its own position. In the end, EPA has the ultimate burden of showing, by a preponderance of the evidence, that a violation has occurred. 40 C.F.R. § 22.24. Again, this means that EPA’s evidence must be “evidence that has the most convincing force.”

It is incorrect for the MOA to state that EPA may *presume* that PCBs at a site were illegally disposed of if an owner/operator cannot make a definitive determination regarding the date of the release or the source of contamination. As in any enforcement case, EPA has the initial burden to make out a *prima facie* case that the spill was illegal, at which point the owner/operator is able to present an affirmative defense as contemplated in 40 C.F.R. § 761.50(b)(3)(iii) that the spill was not illegal based on the date of the spill or the concentration of the release.

### **3. Spills of $< 50$ ppm PCBs Cannot Constitute Violations under the WDNR Rules.**

Another error in the MOA requiring correction is the assumption that the WDNR has the authority to regulate spills of PCBs at  $< 50$  ppm. This position is reflected in Attachment 1 where, in identifying the PCB sites generally not subject to TSCA section 6(e) but only *subject to WDNR review and approval*, EPA identifies sites where the spill occurred after July 2, 1979 in concentrations of  $< 50$  ppm PCBs. Attachment 1 at 3. While such releases are “presumed not to present an unreasonable risk of injury to health or the environment” (*id.*) and do not constitute the “disposal” of PCBs under the federal PCB rules (*see* 40 C.F.R. § 761.50(a)(4)), the MOA accepts the notion that these low concentration spills can be more strictly regulated by WDNR as constituting the improper disposal of PCBs. This position ignores the preemption provision in TSCA that prohibits states from regulating chemicals regulated under TSCA – including PCBs – more stringently than EPA.

Section 18 of TSCA provides, in pertinent part, that

[e]xcept as provided in subsection (b) of this section . . .  
. . . if the Administrator [i.e., EPA] prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture . . . unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under authority of the Clean Air Act or any Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

TSCA § 18(a)(2)(B), as codified at 15 U.S.C. § 2617(a)(2)(B)(emphasis added).

Thus, once EPA regulates a chemical substance under TSCA Section 6, as EPA has done in the case of PCBs under Section 6(e), it is unlawful for any state or locality to establish or continue in effect any requirement applicable to such chemical. The only exceptions to this explicit preemption provision are (1) if the state requirement fits into one of the three enumerated exceptions *or* (2) as provided for in the parenthetical exception to Section 18, the EPA rule or order “impos[es] a requirement described in subsection (a)(6)” of the statute (*e.g.*, TSCA § 6(a)(6)).<sup>3</sup> *Id.*

The United States Court of Appeals for the Fifth Circuit, the highest federal court to examine TSCA’s preemption provision as applied to PCBs, interpreted the statute as *precluding* states and localities from establishing PCB disposal regulations that are more stringent than the federal PCB program. *Rollins Environmental v. Parish of St. James*, 775 F.2d 627 (5th Cir. 1985) (“*Rollins*”). In *Rollins*, the Court struck down a local ordinance banning the disposal of PCBs because the ordinance, which was more stringent than the federal PCB disposal rules, was expressly preempted under TSCA Section 18. *Id.* at 637. The *Rollins* Court found that a local

<sup>3</sup> In addition, Subsection 18(b) allows states to petition EPA for an exclusion from the statute’s preemption provision on a case-by-case basis. The availability of § 18(b) ensures that TSCA’s broad preemption directive does not unduly impinge upon legitimate state interests in protecting the health and welfare of its citizens in those circumstances that a particular state is able to demonstrate to EPA that it is necessary to regulate PCBs in a manner more stringently than prescribed under the federal PCB program. *See* H.R. Rep. No. 94-1341 at 54 (1976).

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PCB disposal regulation that is more stringent than the federal requirements “has the illegitimate objective of regulating a field preempted by Congress” and “is an impermissible intrusion into territory preempted under [TSCA] . . . “ *Id.* at 637. As the Court admonished, the proper method for a state or locality to “establish or continue in effect” any PCB disposal requirement that is more stringent than those promulgated by EPA under TSCA is through the “orderly procedure by which exemptions from [TSCA’s] preemption provisions can be sought and obtained” under Section 18(b). *Id.* at 637. Relying on both the plain language of Section 18 and its legislative history, the Court explained that “Congress has explicitly mandated that [TSCA], and regulations promulgated under it by the EPA, preempt state and local regulation of PCB disposal.” *Id.* at 634 (emphasis in original).

More recently, the Fifth Circuit issued a decision in *Central and South West Services, Inc. et al v. EPA*, wherein the *Rollins* decision once again was referenced as the “controlling precedent” on the question of TSCA’s preemption provision. 220 F.3d 683 (5th Cir. 2000). While the *Central and South West* Court did not apply the *Rollins* holding because it found the issue presented in that case not ripe for review, it is clear that *Rollins* is still controlling law.

WDNR is precluded under TSCA section 18 from regulating the disposal of PCBs more stringently than EPA unless the State of Wisconsin has properly sought and obtained an exemption for doing so from EPA. To our knowledge, the State has not obtained this approval and therefore WDNR may not regulate spills of < 50 ppm as constituting the improper disposal of PCBs requiring remediation under State law. The MOA should be corrected to eliminate the suggestion that the WDNR has such authority.

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While USWAG appreciates the importance of the MOA to help facilitate the remediation of contaminated sites in Wisconsin, it is important that the above-referenced errors in the MOA regarding the application of the federal PCB rules to contaminated sites in the State be corrected. We would be glad to discuss in more detail the above-referenced issues with EPA or the WDNR.

Very truly yours,



Douglas H. Green  
On behalf of the Utility Solid Waste  
Activities Group

DHG/vbl

cc: Jim Roewer, Executive Director, USWAG  
Mary E. Davis, Chair, USWAG PCB Committee  
Matthew Hale, Director, Office of Solid Waste, USEPA