



**MEMORANDUM OF AGREEMENT  
BETWEEN  
THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY  
AND  
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
CONCERNING  
THE CLEAN UTAH! PROGRAM  
AND  
EPA'S NATIONAL ENVIRONMENTAL PERFORMANCE TRACK**

This Memorandum of Agreement (MOA) is entered into between the United States Environmental Protection Agency (EPA) and the Utah Department of Environmental Quality (Utah DEQ) to guide their partnership in ensuring the success of the Clean Utah! Program and the National Environmental Performance Track (NEPT). While separate, the programs have common objectives and shared environmental and human health goals.

-The National Environmental Performance Track (NEPT) recognizes and encourages top environmental performance among private and public facilities in the United States. It is a voluntary program designed to recognize facilities that consistently meet, and often go beyond, their environmental legal requirements and have implemented high-quality environmental management systems. Performance Track encourages facilities to continuously improve their environmental performance and to work closely with their community and employees.

-Clean Utah! is a voluntary program designed by the Utah DEQ, in consultation with EPA, to recognize and reward facilities or entities that have implemented environmental management systems and are willing to take steps, beyond those required by rule or statute, to prevent or reduce pollution.

***OVERALL AGENCY COORDINATION***

Each agency will identify a contact to coordinate related issues with the other Agency. The contact is responsible, within the respective Agency, for ensuring prompt and effective involvement by relevant offices or divisions, and for working toward a resolution of issues.

Contacts will work together to:

-Provide a forum for interagency communication concerning applications, membership criteria, selection processes, participant status, compliance and enforcement activities, and incentive development related to the Clean Utah! and/or NEPT programs.

-Address and seek a common understanding of programmatic issues for each proposed incentive such as regulatory flexibility mechanisms (including related state authorization issues), enforcement, compliance, and public involvement.

***Agency Coordination on Individual Clean Utah! and National Environmental Performance Track Participants***

For purposes of this MOA, the process of approving applications and granting regulatory flexibility or incentives to individual Clean Utah! and/or NEPT participants is divided into four phases: (1) review and approval or denial of facility application; (2) negotiation of the key elements of the incentive(s), including, if applicable, the legal mechanism for regulatory flexibility and negotiating the individual Incentive Agreement; (3) program implementation; and (4) evaluation.

Phase 1: Application Review Process

The Agencies agree to the need for clear and early communication about the merits and potential issues of each individual Clean Utah! and/or NEPT application.

*Processing of New Applications*

When Utah DEQ receives an application for Clean Utah! it will forward a copy to the EPA designated contact for compliance screening. EPA will communicate any initial reactions within three weeks. Utah DEQ, in consultation with the appropriate local health department, will evaluate an individual Clean Utah! Program application and conduct a compliance review to identify any recent or pending actions regarding the facility. The results will be shared with EPA. The decision to accept or reject a Clean Utah! application will be made within 45 days and that decision will be communicated to the applicant, EPA, and the local health department by Utah DEQ.

When EPA receives an application for NEPT, it will forward a copy to the Utah DEQ designated contact for compliance screening. Utah DEQ will communicate any initial reactions within three weeks. EPA will evaluate NEPT applications and conduct a compliance screen in accordance with NEPT compliance screening criteria. The results will be shared with Utah DEQ. The decision to accept or reject an NEPT application will be made within 90 days and that decision will be communicated to Utah DEQ by EPA.

### *Negotiating Facility Flexibility*

As part of the Clean Utah! application, Utah DEQ will ask the facility to submit a list of incentives sought. Utah DEQ will share the list with the designated EPA contact and will request, in writing<sup>1</sup>, EPA involvement for flexibility incentives that potentially require federal action to implement. EPA will promptly review the requested flexibility incentives, identify the regulatory actions that will likely need federal action, and will decide whether to further proceed. The EPA contact will communicate this information in writing to the Utah DEQ contact.

For any NEPT participants requesting regulatory flexibility incentives that potentially require state action to implement, EPA will provide Utah DEQ with a list of the desired flexibility. The EPA contact will provide a written assessment of the need for state involvement to the Utah DEQ designated representative. Utah DEQ will promptly review the requested flexibility, identify the regulatory actions that will likely need state action, and will decide whether to further proceed. The Utah DEQ contact will communicate this information in writing to the EPA contact.

#### Phase 2: Negotiating Key Elements of an Incentive Agreement and Identification of Legal Mechanisms

The Agencies agree that for Clean Utah! and NEPT to succeed, resolution of regulatory issues must proceed expeditiously through the negotiation phase. The objective for this phase is to reach agreement on environmental performance and regulatory flexibility, and identify the legal mechanism for implementing that requested flexibility. The Agencies will follow the process described in this MOA to define any necessary state or federal actions and determine whether or not the State of Utah and/or EPA is prepared to implement these incentives.

#### *Incentive Agreements*

An Incentive Agreement (IA) is a joint statement of the plans, intentions, and commitments of the Agencies and the participant regarding the implementation of any requested regulatory flexibility or other incentives. The IA contains detailed information necessary for the implementation of any regulatory flexibility. It is not a legally binding document or contract, and does not create legal rights or obligations for the signatories. Any IA that outlines regulatory flexibility must also be accompanied by a legally enforceable and binding document.

Utah DEQ will take the lead in specifically defining the purpose and details of any proposed flexibility through a Clean Utah! IA. EPA will take the lead in specifically defining the purpose and details of any proposed flexibility through a NEPT IA. The Agencies will jointly identify the appropriate legal mechanisms that render the regulatory flexibility effective. The designated representatives from Utah DEQ and EPA will meet as necessary to identify the most efficient legal mechanisms consistent with federal and

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<sup>1</sup> For purposes of this MOA, in writing means by letter or e-mail, unless specifically noted otherwise.

state law for implementing the specific flexibility or incentives. The Agency contacts will ensure that the appropriate program offices and staff are involved in a detailed review and negotiation of the IA, and any proposed implementing mechanisms, being considered for a participant.

It should be noted that implementation of any proposed IA is dependent upon available staff and financial resources at the Agencies and the ability of the specific program to grant the incentive.

#### *Incentives Requiring Federal Action*

When proposed regulatory flexibility would have the effect of modifying a federally approved, authorized, or delegated program, the Agencies will consult to assure that the change is made in accordance with all applicable requirements and is fully enforceable. Through this consultation process, the Agencies will ensure that any proposed modifications do not compromise delegation, authorization, or enforcement agreements, and that they are implemented in ways that are consistent with the discretion allowed under federal and Utah statutes.

EPA may determine that certain regulatory flexibility incentives require modification of the approved, authorized, or delegated program. In such cases, federal action may be required to ensure that any regulatory flexibility granted is consistent with the federal program.

Additionally, EPA may have to modify the federal program through a rule change in order to implement the flexibility. EPA will consider such changes on a case-by-case basis and retains final approval authority.

#### *Incentives not Requiring Federal Action*

In general, the required implementation steps will depend on the nature and magnitude of the regulatory flexibility or incentive being considered. Utah DEQ may have the discretion within existing delegation to change implementation of its currently authorized and delegated programs without requiring additional federal action. If the Agencies agree that the requested flexibility involves a Utah DEQ policy, practice, or interpretation falling within this range of discretion, the Agencies agree that no federal action will be necessary. No federal action will be necessary for incentives involving state-only programs that do not affect federally approved, authorized, or delegated programs. However, to ensure a clear understanding among the Agencies, Utah DEQ will inform EPA of all proposed program modifications.

Furthermore, where the proposed regulatory flexibility or incentives affect the regulatory requirements of a federally approved, authorized, or delegated program, the Agencies agree to follow the applicable state and federal procedures for rule or program changes. In this way, the Agencies intend that any such

change to implement regulatory flexibility or other incentives will be consistent with Utah's responsibilities under approved, authorized, or delegated programs and remain federally enforceable.

#### *Legal Mechanisms to Implement an IA*

Once a participant requests regulatory flexibility in the form of an IA, the Agencies will work to identify the appropriate legal mechanism for implementation. Utah DEQ and EPA intend that any regulatory flexibility for a participant will be implemented through legally enforceable means such as site-specific rulemaking, substitute permits, compliance orders, or other legal mechanisms establishing the alternative compliance requirements.

If EPA determines that federal action is necessary before the granting of regulatory flexibility or other incentives, EPA will decide, after consultation with Utah DEQ, if it is prepared to initiate that action and what is required in order to take such action. If Utah DEQ determines that state action is necessary before the granting of regulatory flexibility or other incentives, Utah DEQ will decide, after consultation with EPA, if it is prepared to initiate that action and what is required in order to take such action.

#### *Agreement to Pursue IA Implementation*

The contacts will inform management in the relevant program offices, the EPA Region VIII Regional Administrator, and the Director of Utah DEQ (or their designees) of the negotiations and request decisions necessary to proceed with the implementation of the incentives. After the specific EPA actions, if any, are identified to implement incentives, the EPA Regional Administrator (or his designee) will convey, in writing to the Utah DEQ, EPA's agreement to pursue the identified implementation steps. After the specific Utah DEQ actions, if any, are identified to implement incentives, the Director of Utah DEQ (or her designee) will convey, in writing to EPA, Utah's agreement to pursue the identified implementation steps.

#### Phase 3: Program Implementation

The Agencies agree to take all reasonable steps, through effective communication and collaboration, to ensure that incentive agreements proceed smoothly through the implementation phase. The required implementing steps will depend on the nature of the flexibility or incentives sought by each Clean Utah! and/or NEPT participant.

#### *Stakeholder Involvement*

The Agencies agree to coordinate and conduct required federal and state public review processes concurrently when possible. Stakeholders must have an opportunity for meaningful involvement in the design and evaluation of IAs. The Agencies agree that each agency will participate, as appropriate, in the stakeholder involvement process for each IA. The Agencies will work to develop a system for identifying Clean Utah! and

NEPT facilities so that all Agency program officials will be aware of a participant's status. The Agencies will work to ensure that each participant's alternative compliance requirements are measurable by means comparable to the current requirements and that relevant participant information is accessible to the public and regulators.

#### *Modifications, Renewals, or Proposed Terminations*

Modifications, renewals, or proposed terminations of an IA will be discussed between the Agencies prior to Utah DEQ or EPA making a final decision on such actions. A termination review will automatically be triggered and participation in Clean Utah! and/or NEPT may be terminated by either of the Agencies under any of, but not limited to, the following circumstances:

##### Termination of an IA

- Enactment or promulgation of any environmental law or regulation after the execution of an IA, that renders the project illegal or legally, technically, or economically impracticable.

##### Conditions for Termination from Clean Utah! and/or NEPT

- Failure by any party to (a) comply with the provisions of the legally implementing mechanisms for the project, or (b) act in accordance with the provisions of an IA.
- Failure of any party to disclose material facts during the development of an IA.
- Falsifying information in the application.
- Falsifying information in the Annual Performance Report.
- Failing to file an Annual Performance Report.
- Misrepresenting environmental performance in advertising or marketing claims.
- Compliance problems that would be seen as inconsistent with Clean Utah! and/or NEPT entry criteria.
- Failure to meet Clean Utah! and/or NEPT criteria, such as maintaining the EMS or conducting appropriate public outreach.
- Failure to certify compliance in the Annual Performance Report.
- Failure to correct violations discovered as a result of an EMS audit or to sufficiently modify the EMS to prevent repeat violations.

If a facility's participation in Clean Utah! and/or NEPT is terminated for any cause or action, regulatory requirements that are in existence at the time of termination will be in effect for that facility upon termination from Clean Utah! and/or NEPT. The IA and/or legal mechanism should provide for a participant's orderly return to compliance with all existing regulatory requirements.

#### Phase 4: Evaluation

The Agencies agree that evaluating the Clean Utah! Program is an integral step in making systemic improvements to environmental regulatory programs. Utah DEQ will take the lead in developing protocols for measuring the success of the Program with EPA and external stakeholders providing input. To this end, the Agencies will collaborate in evaluating the working relationships of the Agencies under this MOA, the overall success of Clean Utah! and NEPT, and the success of individual IAs.

#### ***LOW PRIORITY FOR ROUTINE INSPECTIONS***

EPA policy for NEPT allows participants to receive low priority for routine inspections. These routine inspections comprise the majority of EPA inspections, and generally occur under a scheme in which there is no specific reason to believe that a violation exists at a specific facility. In limited situations, EPA could inspect NEPT facilities if information is obtained that serious problems may exist. Examples of such problems are criminal activity, major compliance problems in a priority area of concern to EPA, or endangerment.

Through this MOA, EPA extends this same low priority for routine federal inspections to participants in Clean Utah!. Utah DEQ has also adopted a low priority for routine inspections for Clean Utah! participants (except in instances of criminal activity, major compliance problems in a priority area of concern to Utah DEQ, endangerment, or where inspections are required by state law.) Utah DEQ extends this same low priority for routine state inspections to participants in NEPT.

Enforcement managers within each Agency are responsible for ensuring that this policy is implemented and appropriately incorporated into internal planning and accountability processes, as well as planning processes with each other (e.g. Performance Partnership Agreements [PPAs] and inspections plans). The Agencies acknowledge that inspection plans may need to be modified as participants in Clean Utah! and/or NEPT become eligible for the low inspections priority incentive.

#### ***ENFORCEMENT AND COMPLIANCE***

The Agencies will notify each other of the results of an inspection or investigation of a Clean Utah! or NEPT facility through the coordination process described in this agreement. When a non-compliance situation is discovered, either through an inspection, investigation or through self-disclosure, notification will be made through the respective agency contact and the lead agency contact will keep the other informed on how the non-compliance issue is being addressed. IAs will be modified to incorporate compliance schedules and any new commitments, as appropriate. Existing Agency agreements regarding coordination and communication on compliance and enforcement matters shall also apply.

The Agencies retain their respective right to bring enforcement actions but will not increase scrutiny of a facility on the sole basis that it is a Clean Utah! and/or NEPT participant.

In cases involving issues where other State, local, or federal agencies may have authorities affected by a Clean Utah! and/or NEPT application or incentive, the Agencies recognize that the programs may be enhanced by the involvement of these agencies and agree to coordinate as necessary. In cases where such involvement is requested, Utah DEQ will serve as the primary contact for state and local agencies. These additional agencies may directly participate in discussions with EPA and Utah DEQ. EPA will serve as the primary contact for other federal agencies.

The Agencies agree to the following enforcement and compliance principles in addressing facilities participating in the Program:

- As defined in Clean Utah! and NEPT program guidance, facilities with strong compliance histories are eligible for Clean Utah! and/or NEPT participation (except under special circumstances). Utah DEQ and EPA will review compliance consistent with the approach outlined in EPA's "Compliance Screening Guide for EPA Partnership Programs," state guidance for the Clean Utah! Program, and EPA guidance for the National Environmental Performance Track;
- When noncompliance by a Clean Utah! or NEPT facility is self-reported and corrected consistent with any applicable federal and/or state laws and policies, Utah DEQ may use its discretion, to the extent consistent with state law, in negotiating gravity-based penalties, provided the participant's EMS is modified to prevent recurrence;
- Except as provided in the legal mechanism implementing specific regulatory flexibility incentives, participants are required to remain in compliance with all other applicable state and federal laws or regulations;
- Utah DEQ and EPA maintain their authority to conduct site visits at Clean Utah! and/or NEPT participant facilities; and,
- Except as expressly provided in the legal mechanism implementing the project-specific regulatory flexibility, nothing in an IA or this MOA affects or limits the legal rights of a participant, EPA, the State or any other signatory. These rights may include legal, equitable, civil, criminal, or administrative claims, or other relief regarding enforcement of present or future applicable federal and state laws, rules, regulations, or permits with respect to the participant.

The Following language is mandatory per EPA Office of General Counsel:

All commitments made in this MOA are subject to the availability of appropriated funds and each agency's budget priorities. Nothing in this MOA, in and of itself, obligates Utah DEQ or EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or other financial obligation.

Neither Utah DEQ nor EPA may endorse the purchase or sale of products or services provided by private organizations that become partners in this effort.

This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity against Utah DEQ or EPA, their officers or employees, or any other person.



**MEMORANDUM OF AGREEMENT  
BETWEEN  
THE CLEAN UTAH! PROGRAM  
AND  
EPA'S NATIONAL ENVIRONMENTAL PERFORMANCE TRACK**

This Agreement is hereby entered into this 7<sup>th</sup> day of September, 2004 and remains in effect unless amended by mutual consent.

A handwritten signature in black ink that reads "Dianne R. Nielson".

Dianne R. Nielson  
Executive Director  
Utah Department of Environmental Quality

A handwritten signature in black ink that reads "Robert E. Roberts (for)".

Robert E. Roberts  
Regional Administrator  
United States Environmental Protection Agency, Region 8

A handwritten signature in black ink that reads "Jessica L. Furey".

Jessica L. Furey  
Associate Administrator  
US EPA Office of Policy,  
Economics and Innovation