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City of Wilmington's Comments on:
Proposed Consent Decree for Response Costs and Natural Resource Damages at Fox Point Park between the State of Delaware and New Castle County

The comments herein are respectfully submitted by the City of Wilmington to the Delaware Department of Natural Resources and Environmental Control ("DNREC") on the Proposed Consent Decree for Fox Point Park ("Proposed Consent Decree" or "PCD") with New Castle County, which proposes to resolve the County's liability under HSCA relative to Fox Point Park (the "Site"). DNREC identified the City as a potentially responsible party ("PRP"), pursuant to the Hazardous Substance Cleanup Act, 7 Del. C. Chapter 91, ("HSCA"), for Fox Point Park in 1994 along with New Castle County ("County"), the State of Delaware, and American Premier Underwriters ("APU"). The Proposed Consent Decree states that sewage sludge from the City's waste water treatment facility was applied at the Site, and identifies the sludge as a "release of hazardous substances".

As a PRP, the City maintains that neither the County nor the City has any liability at the Site for sludge related activities because such activities were undertaken in accordance with a state permit and any sludge activity relating to these permits is excluded from the definition of a "release" under HSCA. This issue has not been resolved by the parties, is not the subject of any final determination by DNREC, and has not been adjudicated. However, the Proposed Consent Decree directly and adversely affects the City's rights since it purports to extinguish the City's potential future right of contribution against the County pursuant to 7 Del. C. §9105(d). As discussed below, the Proposed Consent Decree is inappropriate, inadequate and not in the best interests of the State of Delaware. Significantly, should DNREC maintain that sewage sludge as applied at the Site is a "release" pursuant to HSCA, the allocation of liability to the County in the Proposed Consent Decree is incomplete and inadequate and does not include the County's liability as an operator, arranger or generator. As a result, the City objects to the Proposed Consent Decree.

I. The Proposed Consent Decree Fails to Account for the County's Total Liability at Fox Point Park

HSCA has several categories of liability, the first category is "owner", but other categories include "operator", "generator" and "arranger". The Proposed Consent Decree indicates that the County's liability for the Site is based upon its past ownership of the Site (Para. 13, PCD). Based upon DNREC's characterization of the sewage sludge, however, the County also has operator, generator and arranger liability at Fox Point based upon its activities and relationship with the City's waste water treatment plant. The Proposed Consent Decree does not

take these factors into account when allocating liability and determining an appropriate cost contribution amount.

As stated in the DNREC 1996 Consent Order with the County, City and APU for performance of a Remedial Investigation and Feasibility Study for Phase I of Fox Point: "Respondent County owned the site from 1975 to 1990, and was permitted for and oversaw and approved the sludge spreading operation carried out by the City during that period." Therefore, in addition to owner liability, the County has "operator" liability for overseeing and being permitted for the sludge placement operation which benefited the County by improving the soil and elevating the Site. The County had specific responsibility for the placement of sludge at the Site, and the arrangements for the beneficial reuse that gives rise to the need for remediation. Furthermore, the County has "generator" liability for the sludge since historically 50-87% of the flow in the waste water treatment plant came from the County and therefore, 50-87% of the sludge was generated by the County. In addition, the County's sludge contains a higher percentage of contaminants since historically the County has had significantly more industrial dischargers than the City.

Accordingly, DNREC has not considered or addressed all of the bases for the County's HSCA liability in the Proposed Consent Decree since it only considers "owner liability" but determines that the value of the County's in-kind contributions are "sufficient to resolve Respondent's liability for the costs of the investigation and any remediation of any hazardous substances at the Site, . . . ". (Para. 9, PCD). This is directly adverse to the City since DNREC incorrectly assigned much of the County's liability as operator, arranger and generator to the City as further discussed below.

II. The Proposed Consent Decree is Based Upon an Incorrect and Unsupported Calculation of Liability Allocation

In approximately October 2004 DNREC presented to the PRPs two versions of a Non-Binding Allocation of Responsibility ("NBAR") calculation that stated that the City was responsible for 42-43% of the remediation costs at the Site and the County was responsible for 18-19% of such costs. Since Exhibit B of the Proposed Consent Decree uses a 20% allocation for the County it appears that DNREC is still relying on the 2004 NBAR. The NBAR is incorrect and unsupported however, because the NBAR did not take into account the County's operator, arranger and generator liability at the Site. Furthermore the NBAR incorrectly assigned all of this liability to the City.

The three non-state PRPs, City, County, and APU, worked together cooperatively for nearly ten years, from 1995 to approximately 2005, to monitor DNREC's investigation and remediation of Fox Point Park. During this time, the City made the County aware of the flaws in the NBAR as the PRPs worked cooperatively to respond to DNREC demands. After approximately four years of not hearing from the County or DNREC on this matter, the City was surprised to learn that DNREC was settling with the County. Neither the County nor DNREC shared a copy of the Proposed Consent Decree with the City until a few days before it was to be presented to a County Council Committee in March 2009. This lack of notice failed to give the City time to communicate with DNREC or the County administration concerning the flaws in the NBAR calculation. The City can only surmise that the County did not share with DNREC the

defects in the NBAR calculations and that these calculations remain incorrect and unsupported. The lack of notice to the City was prejudicial.

III. The Proposed Consent Decree Fails to Take into Account the U.S. Supreme Court's Burlington Northern Decision Regarding Apportioning the Cost of Remedies

Recently, the United States Supreme Court decided in Burlington Northern & Santa Fe Railway Co. v. United States that a party found liable under the Comprehensive Environmental Response Compensation and Liability Act, the federal statute that HSCA is modeled after, may avoid joint and several liability by establishing a reasonable basis for apportioning the cost of the remedy. Accordingly, there is a strong argument that DNREC will not be able to establish joint and several liability for its unreimbursed costs for Fox Point Park to the non-settling PRPs that are properly allocable to the County. DNREC should adequately take into consideration the Burlington Northern decision and its effect on the recovery of response costs at the Site by DNREC before entering the Proposed Consent Decree.

Significantly, should DNREC seek response costs from the City in the future, the City will maintain that it has no liability for the sludge because it was placed according to a state permit and is excluded from the HSCA definition of "release". HSCA liability is predicated on the existence of a release: "The following persons are liable with respect to a facility from which there is or has been a release or imminent threat of release, . . . " (7 Del. C. 9105(a)). HSCA's definition of "release" excludes: "Any discharges in compliance with state permits issued in conformance with this title and federally permitted releases under CERCLA." (7 Del. C. §9103(21)(d)). Since the sludge was placed pursuant to a DNREC permit with the County and later a permit with the City it does not qualify as a "release" and therefore does not trigger HSCA liability. According to historical accounts, this beneficial reuse of the sludge as fill and growing media was not only permitted by DNREC, but also promoted by DNREC. DNREC actively encouraged, if not directed, the City to divert air-dried sludge which would otherwise have been land-filled in Cherry Island Landfill, to Fox Point Park as a means of promoting vegetative growth for a future park. For the City to be named as a PRP twenty years later for a DNREC permitted action is perplexing and unproductive, to say the least.

The City respectfully submits these comments on the Proposed Consent Decree in order to protect its legal rights and objects to the Proposed Consent Decree between the County and DNREC since it directly, adversely affects the City. The City requests that it be provided notice of any actions taken with respect to the Proposed Consent Decree, including any response made to these or other comments, any decisions made by the Secretary or other DNREC personnel on this matter, and any further proceedings with respect to the Proposed Consent Decree or the Site.

These comments are respectfully submitted on behalf of the City of Wilmington by:

9/16/2009

Kara S. Coats — Date
Senior Assistant City Solicitor