



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE: (302) 739-9000
FAX: (302) 739-6242

Secretary's Order No. 2011-WH-0036

**Re: APPROVAL OF PROPOSED CONSENT DECREE TO ASSESS LIABILITY
TO NEW CASTLE COUNTY FOR RESPONSE COSTS AND NATURAL
RESOURCE DAMAGES ASSOCIATED WITH THE ENVIRONMENTAL
REMEDICATION OF PORTIONS OF FOX POINT STATE PARK, NEW
CASTLE COUNTY**

Date of Issuance: September 16, 2011

Effective Date: September 16, 2011

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control (Department), the following findings, reasons and conclusions are entered as an Order of the Secretary on the Department's proposed Consent Decree negotiated with New Castle County (NCC) pursuant to the *Hazardous Substance Cleanup Act, 7 Del. C. Chapter 91* (HSCA).

Background

The Consent Decree would resolve by compromise NCC's response cost and natural resource damage liability based upon NCC's prior ownership of a 60 acre property (Site) along the Delaware River north of the City of Wilmington. The Department now owns and operates the Site as the Fox Point State Park (Park).

The Consent Decree assessed NCC \$496,752 for its share of natural resource damage liability, and to not charge NCC for any response costs. The Consent Decree does not charge for response costs based upon the Site's value when NCC sold the Site to the Department for one dollar in 1990. NCC can satisfy the payment by selecting one

Delaware's Good Nature depends on you!

the payment by selecting one of following three methods: 1) cash payments paid over five years; 2) NCC providing in kind service through by building and operating a yard waste collection facility for a duration calculated to equal the monetary payment; or 3) an agreement on a combination of the cash and in kind yard waste methods.

The Department held a public hearing on the Consent Decree and the Department's presiding hearing officer prepared a Report, dated July 27, 2011 (Report), a copy of which is attached hereto. The Report recommends approval of the Consent Decree upon the condition that NCC select the monetary payment option. The Report also recommends that Department could exercise its discretion to determine that the money received from NCC would benefit the Park's environment, and recommends that such discretion be exercised.

Findings and Reasons

I find that the Consent Decree represents a reasonable and well-supported resolution of the Department's claims against NCC under HSCA, which are claims that NCC could continue to contest in prolonged litigation. I also agree with the Report and its recommendation to approve the Consent Decree as a reasonable compromise to settle the issues of NCC's liability for response costs and natural resource damages attributable to NCC's prior ownership of the Site.

In the Consent Decree, Department has agreed to forego response cost recovery from NCC and NCC has agreed to accept the Department's full calculated dollar valuation of the natural resource damage claim liability. The nature of the compromise has each party giving up its position that it may otherwise have taken if the matter would have been fully litigated. I find the parties' resolution of their competing positions in the

Consent Decree is reasonable as a whole and consistent with HSCA. The public and the environment will be served by approval of the Consent Decree and moving forward without further delay on improving the Site with funds from NCC. This Consent Decree may also lead to agreements with other potentially responsible parties and a complete resolution of the issues that remain over the assignment of liability for the cost of the Site's environmental remediation.

The Report recommends that any approval be conditioned upon NCC's selection of the monetary payment option. This recommendation removes the uncertainty in the Consent Decree on which option NCC may select to fulfill its payment obligation. I agree that the Consent Decree's approval should be based upon knowing exactly what will be selected. The approval avoids any possibility, no matter how remote, that NCC will select the yard waste option. I agree that approval should be conditioned upon NCC selecting the monetary payment option, which would not require any modification to the Consent Decree. The record also supports this action because the public comments did not want NCC to build and operate a yard waste facility, but instead wanted the money spent on improving the Park or water quality improvements. Moreover, the record also indicates that NCC did not want to construct and maintain a yard waste collection facility, but agreed to this option at the Department's request. Thus, the conditional approval should be acceptable to NCC.

The Report discusses that nothing in the Consent Order directs where any money received would be spent, but notes that the Department has certain discretion on how and where to spend any money received. The Report further indicates that the record supports the exercise of the discretion in an Order approving the Consent Decree. The

Report indicates that the record supports providing guidance that the money will be spent on the Park upon gathering more information, including from the public, on specific projects.

I support in concept spending the money received from the Consent Decree's payments on enhancing the Park. The specific determination on any spending, however, should properly be made once the Department has more information available on specific projects and public input. Consequently, the exercise of any spending commitment now is premature based upon the record, but the intent of this Secretary is to spend the money in a manner that will enhance the Park.

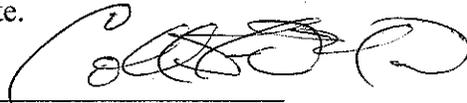
Conclusions

In sum, as more fully described in the Report, I adopt and direct the following as a final Order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the Consent Decree and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and its regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department shall approve the Consent Order subject to the condition that within 30 days of the final Order's notice of publication that NCC selects the monetary payment option in the Consent Order;

6. Upon the receipt of more information on specific projects, including from the public, the Department shall consider spending the money received from NCC's payments pursuant to the Consent Decree in a manner that will enhance the Park's environment; and

7. The Department shall publish notice of this Order, including placing it on its web page, and shall otherwise provide such notice in a manner consistent with its regulations and the Department determines appropriate.


Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: PROPOSED CONSENT DECREE TO ASSESS LIABILITY TO NEW CASTLE COUNTY FOR RESPONSE COSTS AND NATURAL RESOURCE DAMAGES ASSOCIATED WITH THE ENVIRONMENTAL REMEDIATION OF PORTIONS OF FOX POINT STATE PARK, NEW CASTLE COUNTY

DATE: July 27, 2011

I. PROCEDURAL HISTORY

This Report makes recommendations to the Secretary of the Department of Natural Resources and Environmental Control (Department) on the proposed Consent Decree (Consent Decree) negotiated between the Department and New Castle County (NCC) pursuant to the Hazardous Substances Cleanup Act, 7 Del. C. §9100 *et seq.* (HSCA).

The Consent Decree assigns to NCC liability for the Department's response costs and natural resource damage claim associated with NCC's prior ownership of a 60 acre property (Site) located north of the DuPont Edgemoor plant, east of the railroad tracks and along the western bank of the Delaware River. The Site is now part of the Department's Fox Point State Park (Park).

The Department provided the public with the opportunity to comment on the Consent Decree pursuant to HSCA Section 9104, and the Department received a request for a public hearing. The Department held a public hearing on September 16, 2009 in the Department's Bellevue State Park. The public comment period was extended until October 20, 2009 to allow written public comments, which were received from NCC, the Department's counsel and American Premier Underwriters, Inc. (APU), the successor in interest to Penn Central Railroad, a prior owner of the Site.

II. BACKGROUND

The Site was owned by the Pennsylvania Railroad, and portions were created by placing on subaqueous lands along the Delaware River sewage sludge from the City of Wilmington nearby wastewater treatment plant. In 1975, NCC acquired the Site from the Penn Central Railroad, which was the successor to the Pennsylvania Railroad. In 1990, NCC sold the Site to the Department for one dollar, but there is a dispute about the full terms of this transfer with NCC contending that it was to not share in any future environmental responsibility.

In 1992, the Department's Site Investigative and Restoration Branch's (SIRB) consultants, Camp, Dresser & McKee, Inc., issued a Remedial Investigation/Feasibility Study (RI/FS) of portions of the Site (Parcels A and B) and found that the Site contained the following six contaminants of concern: PCB (Aroclor 1260), antimony, arsenic, lead, benoapryrene, and dieldren. The RI/FS recommended placement of a plastic liner over the surface, which would be covered with clean fill. In 1992, the Department approved a final plan for remedial action for the Site's Phase 1 (DNREC Project No. DE1001). In 1993, the Department began negotiations towards settling the environmental liability with the identified potentially responsible parties, which included the City of Wilmington, NCC, and APU. In an April 7, 1994 letter, the Department notified NCC of its potential liability for environmental cleanup and natural resource damages pursuant to HSCA Section 9107(a). On December 23, 2005, the Department approved a final plan of remedial action for the Site's Phase II (Project No. DE-1011). In an October 30, 1996 Consent Decree, the Department, the City of Wilmington, NCC, and APU agreed to shared liability for the Department's \$11,124.97 response costs through 1995, and the Department's approximate \$300,000 cost for the Phase II RI/FS.

The current Consent Decree was the result of further extensive negotiation efforts that began in 2008. SIRB applied its Procedures for Non-Binding Allocation of Responsibility (NBAR Guidance) and negotiated an agreement based upon assigning NCC 20% of the total liability and requiring a natural resource damage payment of \$496,752, which NCC can pay in three methods, namely, 1) paying over five years with annual payments no more than \$100,000; 2) providing in kind service by NCC constructing and operating a yard waste collection facility for a duration of time calculated to be equal to the monetary payment; or 3) selecting some to be agreed to combination of yard waste facility operation and cash payments. The Consent Decree provided NCC with a \$1.1 credit towards any Department response costs. The Department sought the yard waste facility in kind service payment option in response to the Department's decision to close the Cherry Island Landfill to additional yard waste effective January 2008, which created the then need for additional yard waste facilities in New Castle County.

II. SUMMARY OF THE RECOMMENDED RECORD

I recommend that the record contain the 45 page verbatim transcript of the September 16, 2009 public hearing and the documents at the public hearing and during the extended post-hearing.

The Department developed the hearing record with the following relevant documents from its files: the executed Consent Decree dated 2009 (DNREC Ex A); Stephan Tindall's May 15, 2009 letter requesting a public hearing (DNREC Ex. B); the Department's June 23, 2009 letter responding to United States Department of Commerce's National Oceanic and Atmospheric Administration's comments (DNREC Ex. C); the public notice of the Consent Decree (DNREC Ex. D); the Department's final plan of remedial action for the Fox Point Park (Phase II) Site dated December 2005 (DNREC Ex. F); a map of the Fox Point Park site (DNREC Ex. G); a September 16, 2009 letter from James Periconi, Esquire as counsel to APU requesting

a 10 day extension to the public comment period (DNREC Ex.H); a September 16, 2009 letter from the City of Wilmington (DNREC Ex. I); the Department's presentation for the public hearing (DNREC Ex. J); and the notice of the hearing on the Delaware calendar (DNREC Ex. K).

The Department representatives from SIRB were Kathy Stiller, Branch Manager, Tim Ratsep, Program Manager, John Cargill, Hydrologist, and Deputy Attorney General Robert Kuehl.

The public hearing was attended by approximately twenty persons. Mr. Cargill made a presentation on behalf of SIRB in which he reviewed the terms of the Consent Decree. He indicated that NCC was assigned liability because NCC owned the Site when sewage sludge was applied in the 1970's. He noted that the sludge contained PCBs, which contaminated the Site. He noted that NCC donated the Site to the Department in 1990. He indicated that the Department determined the Site's value was \$1.1 million. Consequently, he explained how SIRB determined that the excess land value over what the Department paid for the land was sufficient to offset NCC's share of the Department's response costs. He further described how SIRB assigned NCC a 20% share of the natural resource damages, which was determined by a calculation of the harm from PCBs to the fish. He explained how the Department's experts calculated the cost of 6.9 acres of marsh fish habitat, which was based upon replacing the fish harmed from the Site's PCB contamination as determined by experts in the Department's Division of Fish and Wildlife. NCC's 20% share of the habitat, which would reduce NCC's share to 3.38 acres. The calculation further used a cost of \$146,968 per acre to acquire the habitat needed to restore the loss of fish harmed by PCBs, which resulted in NCC's \$496,752 allocation of the Site's total natural resource damages. Finally, Mr. Cargill explained that the

Consent Decree allowed NCC to operate a yard waste facility as an option to the payment of \$496,752.

Mr. Tindall spoke on the origins of the Park beginning in the 19th century and indicated his belief that most of the land was created by the deposit of fill by the Pennsylvania Railroad Company. He also indicated the City of Wilmington's ownership and the PCB contamination. Mr. Tindall did not dispute the calculated \$500,000 value for the Park's damage, although he indicated it could be on the low side. Mr. Tindall's comments supported a modification to the Consent Decree that would have the money received from NCC be spent on the Park, as opposed spent by NCC on a yard waste facility. He indicated that the yard waste site was part of a deal for the Cherry Island yard waste ban, and that because the ban was in place NCC should no longer operate a yard waste site. He commented on the change at the Site from a very flat marshy area with wildlife that was filled in with a huge pile of contaminated waste. He commented that the recent expansion is beautiful and a nice place to visit, but that the Site is 16-20 feet above the river and fenced off from the Delaware River. He would like to see the Site have access to the River's aquatic environment and support crabs and fishing. He would like to see something to stop the leeching of PCB contaminated material along the 16 foot high wall running along the Delaware River.

Simeon Hahn spoke and indicated his concern with the Delaware River's pollution and wanted the money to be spent on improving the water quality.

Pat Todd spoke on behalf of the New Castle League of Women Voters and also wanted the money dedicated to the Site.

John Cartier spoke in his capacity as New County Council member on how NCC did not really want to get into operating a yard waste site, but wanted to help the environment at the Site.

Jackson Walker also spoke in favor of returning the money to the Site.

State Representative Tom Kovach spoke and inquired about the damage payment and whether it was a penalty. DAG Kuehl indicated that the payment was not to be restricted to any location and that it was not a penalty payment assessed under Chapter 60.

Mr. Tindell added a final comment that the purpose of the public hearing was to provide comments to modify the Consent Decree so that the money from NCC would go to the Site.

The post hearing comments submitted reviewed the Site's history, the settlement negotiations, and provided legal analysis of the respective liability issues raised by the comments.

III. DISCUSSION OF RECOMMENDED FINDINGS AND REASONS

The Consent Decree is subject to review under the HSCA, which provides for public participation by requiring the public notice and opportunity for comments on a "proposed consent decree." The Department's HSCA Regulations, *7 DE Admin. Code 1375*, further set forth HSCA's procedures for a public comments. I find that the Department properly followed HSCA's public participation procedures, which should address the comments submitted by the City and APU that opposed any settlement only with NCC and claim problems with the settlement process. While I agree that a global settlement with all potentially responsible parties may be ideal, I find nothing in HSCA that precludes the Department from approving the Consent Decree.

The comments rely on federal case law and the federal procedures under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S. §§9601 et seq. (CERCLA). I agree with NCC's counsel's argument that CERCLA and its case law does not apply. HSCA also provides a public participation process that allows all potentially responsible parties the opportunity to comment on the proposed Consent Decree. Indeed, the comments by the City and APU indicate that these potentially responsible parties exercised their

right to comment of the Consent Decree. I find that the public participation provision address the comments concerns that the settlement was made without including other potentially responsible parties. I reject the argument that potentially responsible parties were excluded from participation because HSCA explicitly provides for such participation in its public notice provision and the opportunity to comment. No provision in HSCA precludes the Department from executing a consent decree with one of many potentially responsible parties. In sum, the absence of a settlement with other potentially responsible parties does not provide any reason to reject the Consent Decree.

The public participation also included comments by nearby residents and other interested person who sought to change the Consent Decree because it did not specify that the Department would spend the money received, if any, from NCC on the Park. I find that nothing in the Consent Agreement directs where the payment, if any, received from NCC will be spent. I also agree with the comments submitted by the Department's counsel that the Department has certain discretion on where and how to spend any money it may receive under the Consent Decree. The Consent Decree, however, may result in the Department not receiving any money if NCC selects the yard waste in kind service option. I agree with the public comments that seek to use any payment received from NCC be used to enhance the environment at or near the Park and recommend that the Secretary consider such exercise of discretion in approving the Consent Decree.

The Consent Decree's yard waste facility option could preclude the Department from receiving any money from NCC. I consider it unlikely that NCC will select this option, but it nevertheless is a possibility. The Department in an Order on a proposed Consent Decree has the authority to either approve or reject the proposed Consent Decree based upon information in the record. The Department's approval authority also includes the imposing conditions to any

approval based upon the record, and I recommend approval be condition upon NCC selecting the monetary payment option to avoid any possibility that the yard waste option would be selected. The authority to impose conditions on any approval is often exercised when the Department issues permits, and the Consent Decree could be approved upon the conditions imposed in an Order that leave the Consent Decree entail if NCC selects the monetary payment option. This would remove effective remove the yard waste option without modifying the Consent Decree. Thus, I recommend no change to the Consent Decree, but I recommend to the Secretary's the option of a condition to any approval that requires NCC to select the monetary payment option.

I recommend approval of the Consent Decree based upon its reasonable settlement of the liability in a manner supported by expert calculations that provide a reasoned basis. SIRB followed guidance documents and relied upon Fish and Wildlife experts, who used accepted calculations on fish loss and habitat needed to offset the loss. I find the calculated values reasonable even if they may be subject to challenge if the matter was fully litigated. The nature of a settlement does not require that the determination of the settled values to subject to the same level of scrutiny as if the matter was litigated, but only that the values in the Consent Decree are reasonable and adequately supported in the record. I find that the calculations in the Consent Decree are reasonable and adequately supported in the record.

I find the settlement as a whole to be reasonable and recommend its approval subject to the condition that NCC select the monetary payment option. The Consent Decree is a compromise and should not be rejected or modified because one or more items may be challenged. As a settlement, it may be possible that either side could obtain better results if fully litigated, but then the settlement eliminates the cost of litigation and the uncertainty of the result from such litigation. The payment of the money can be directed by the Secretary in any Order

approving the Consent Order and there is sufficient record support to direct the payment to be applied to benefit the Park or its nearby area.

V. CONCLUSIONS

Based on the record developed, I recommend that the Department approve the following conclusions:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the Consent Decree and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and its regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department shall approve the Consent Order subject to the condition that within 30 days of the final Order's notice of publication that NCC selects the monetary payment option in the Consent Order; and
6. The Department shall publish legal notice of this Order and place this Order on its web page and shall provide such notice in a manner consistent with its regulations and the Department otherwise determines appropriate.



Robert P. Haynes, Esquire
Senior Hearing Officer

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

IN THE MATTER OF:)	
)	
Fox Point Park Site)	CIVIL ACTION NO.
Wilmington, Delaware)	
)	Proceeding Under Sections
)	9105, 9107, and 9112 of the
)	Delaware Hazardous Substance
David S. Small, Acting Secretary,)	Cleanup 7 <u>Del. C.</u> Chapter 91.
Department of Natural Resources and)	
and Environmental Control of the State)	
of Delaware,)	
)	
Petitioner,)	
)	
v.)	
)	
New Castle County,)	
)	
Respondent.)	

CONSENT DECREE

I. INTRODUCTION

1. This Consent Decree ("Consent Decree" or "Decree") is entered into voluntarily by the Delaware Department of Natural Resources and Environmental Control ("DNREC" or "Department") on behalf of the State of Delaware ("State") and New Castle County, a political subdivision of the State of Delaware ("Respondent" or "County"). The Consent Decree concerns the resolution of Respondent's liability for any and all response costs ("Response Costs," hereinafter defined) and natural resource damages ("NRD") under the Delaware Hazardous Substance Cleanup Act, 7 Del. C. Chapter 91 ("HSCA") for the Fox Point Park Site located in Wilmington, Delaware ("facility" or "Site").

II. JURISDICTION

2. This Consent Decree is entered into pursuant to the authority vested in the Secretary of the Department by HCSA and the Delaware Regulations Governing Hazardous Substance Cleanup ("Regulations").

3. The Respondent agrees to undertake all actions required by the terms and conditions of this Consent Decree. In any action by the Department to enforce the terms of this Consent Decree, Respondent consents to and agrees not to contest the authority or jurisdiction of the Secretary to enter into or enforce this Decree, and agrees not to contest the validity of this Decree or its terms.

III. PARTIES BOUND

4. This Consent Decree shall apply to and be binding upon DNREC and shall be binding upon the Respondent, its agents, successors, assigns, officers, directors and principals. Respondent is responsible for carrying out all actions required of it by this Consent Decree. The signatories to this Consent Decree certify that they are authorized to execute and legally bind the parties they represent to this Decree.

IV. STATEMENT OF PURPOSE

5. In entering into this Consent Decree, the objectives of DNREC and the Respondent are to set forth and resolve Respondent's liability for Response Costs and NRD for the Site under HSCA by Respondent's payment of an amount set forth in this Consent Decree and/or performance of in-kind services as described below.

6. The in-kind services conducted under this Consent Decree are subject to approval by DNREC and shall provide for the operation of a yard waste drop off site in accordance with (1) the Community Yard Waste Drop Off Site Performance Standards (the "Performance Standards"), a copy of which is attached hereto as Exhibit A, and made an integral and enforceable part of this Consent Decree, and (2) a Site Plan to be prepared by Respondent and submitted to DNREC for its review and approval; once approved by DNREC, the Site Plan shall also become an integral and enforceable part of this Consent Decree. The activities conducted under this Consent Decree shall be conducted in compliance with all applicable federal, state, and local laws.

V. FINDINGS OF FACT

7. The Fox Point Park Site consists of approximately 60 acres of land and lies between Interstate 495 and the Delaware River in Wilmington, Delaware.

8. The Site was created by the filling of subaqueous lands of the Delaware River with industrial waste material, and the application of sewage sludge from the City of Wilmington's wastewater treatment facility on said filled lands.

9. DNREC has determined that the value of the Site when donated to the State in 1990 was greatly in excess of one dollar (\$1.00) and that Respondent should be given a credit for the value of the donated property to be used to offset a portion of Respondent's liability for the Site under HSCA. DNREC has determined that the value of the credit Respondent shall receive for the value of the donated property is sufficient to resolve Respondent's liability for the costs of the investigation and any

remediation of any hazardous substances at the Site, estimated by DNREC to be approximately \$1.1 million dollars ("Response Costs"), but not for NRD. Respondents liability for NRD shall be resolved in accordance with this Consent Decree.

10. DNREC has investigated the release of hazardous substances, and has implemented Final Plans of Remedial Action, for Phases I and II on the Site pursuant to HSCA.

11. The decision by the Department on the remedial action for Phase I of the Site is embodied in the Final Plan of Remedial Action dated December 18, 1992. The decision by the Department on the remedial action for Phase II was executed on December 23, 2005.

12. Respondent, New Castle County, is a political subdivision of the State of Delaware.

13. Respondent was a past owner of the Site.

14. Respondent was notified of its potential liability pursuant to 7 Del. C. § 9107(a) in a letter dated April 7, 1994.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

15. The Site is a "facility" as defined in 7 Del. C. Section 9103(10) and is comprised of both Fox Point Park Phase I (DNREC Project Number DE-1001) and Fox Point Park Phase II (DNREC Project Number DE-1011).

16. Wastes and materials disposed of at the Site identified in Paragraph 8 are "hazardous substances" as defined in 7 Del. C. Section 9103(12).

17. The presence of hazardous substances at the Site, or the past, present or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and/or threatened "releases" as defined in 7 Del. C. Section 9103(21).

18. Respondent is a "person" as defined in 7 Del. C. Section 9103(17).

19. Respondent is a "potentially responsible party" as defined in 7 Del. C. Section 9103(19).

20. Because Respondent's liability for Response Costs is being discharged by the credit granted by DNREC for the conveyance of the Site to the State in the amount of One Dollar, Respondent's total liability at the Site under HSCA is confined to NRD in the amount of \$496,752.00 as set forth in Exhibit B of this Consent Decree (Respondent's "Total Liability").

21. The actions taken by DNREC to investigate and remediate the Site, as stated in this Consent Decree, were necessary to protect the public health or welfare or the environment, and are consistent with 7 Del. C. Chapter 91, and the Regulations.

VII. DEFINITIONS

22. Unless otherwise expressly stated, the definitions provided in 7 Del. C. Chapter 91, and the Regulations shall control the meaning of terms used in this Consent Decree.

VIII. SCOPE OF CONSENT DECREE

23. The parties agree that within five (5) years of the effective date of this Consent Decree, Respondent shall perform the following actions pursuant to this Consent Decree:

- A) Pay to DNREC a total of Four Hundred Ninety Six Thousand Seven Hundred Fifty Two Dollars (\$496,752.00); or
- B) Provide compensation for NRD by the performance of in-kind services in the form of operating a yard waste drop off site, for such period of time as necessary to offset Respondent's Total Liability; or
- C) A combination of direct payment to DNREC and in-kind services as set forth below in Article IX or as otherwise agreed upon.

IX. SERVICES TO BE PERFORMED

24. Should Respondent decide not to provide direct payment to DNREC in the amount of \$496,752.00, Respondent shall provide in-kind services consisting of the operation of a community yard waste drop-off site in accordance with the Performance Standards (the "Services"). The Services shall be performed by Respondent for a period of years sufficient to off-set Respondent's Total Liability. The Services shall be performed at a site chosen by the County and approved in writing by DNREC. The yard waste drop-off site shall include improvements and general site design as shown on a Site Plan to be developed by Respondent and submitted to DNREC for its review and approval.

25. Upon DNREC's receipt of written notice that Respondent completed construction, Respondent shall receive a credit of \$135,000.00 against its Total Liability for the costs of the capital improvements necessary to construct the yard waste recycling facility; for every year that Respondent performs the Services, it shall receive a credit of \$93,220.00, as shown on Exhibit C. If Respondent performs the Services for less than a year in any calendar year, the credit will be pro rated based on the number of days the Services are performed in that calendar year.

26. If Respondent fails, refuses or is unable to continue to perform the Services before it has received sufficient credit to off-set Respondent's Total Liability, it shall not be released from liability for

the amount of Respondent's Total Liability for which it did not receive a credit. Respondent shall begin making payment in accordance with a payment plan to be agreed upon by DNREC and Respondent of this difference as an amount due to DNREC under this Consent Decree (the "Amount Due") within sixty (60) days of a written notice from Respondent that it shall not perform the Services. The payment plan to be agreed upon by Respondent and DNREC shall not require that the payment of the full Amount Due must occur prior to five (5) years from the effective date of this Consent Decree and shall not require more than \$100,000.00 per year in payment unless Respondent agrees otherwise.

X. DISPUTE RESOLUTION

27. If a dispute arises as to any part of the Consent Decree, the procedures of this Section shall apply.

A) Respondent shall, within twenty-one (21) days of the date a dispute arises, provide the DNREC Project Officer with a written statement setting forth the dispute and the information Respondents are relying upon to support their position, and stating whether Respondents will suspend any work required under this Consent Decree.

B) If the dispute cannot be settled through negotiations with the DNREC Project Officer within (10) ten days, Respondent may submit the written statement under Section 27(A) to the Director of Air and Waste Management ("Director").

C) Following receipt of Respondent's statement under Section 27(A), the Director shall issue an order with respect to the issue(s) in dispute.

D) If the Respondent is not satisfied with the decision of the Director, as to any dispute arising under this Consent Decree, then Respondent may hire, at its own expense, an independent consultant, approved by DNREC, to review all relevant information regarding the dispute, and to make a written recommendation to the Secretary of DNREC reflecting an objective position regarding the issue in dispute. The Secretary may also review any other relevant information or confer with any DNREC staff or other experts before making a decision. The decision of the Secretary shall be considered final unless appealed by the Respondent under 7 Del. C. Chapter 60 or any other appeal right that Respondent may be entitled to under 7 Del. C. Chapter 91.

XI. RESERVATIONS OF RIGHTS AND COVENANT NOT TO SUE

28. DNREC reserves the right to bring an action against the Respondent under 7 Del. C. Section 9109 for recovery of the Amount Due as defined above.

29. Except as expressly provided in this Consent Decree, each party reserves all rights and defenses it may have. Nothing in this Consent Decree shall affect DNREC's removal authority or DNREC's response or enforcement authorities at the Site.

30. Except as specifically provided in this Section and upon the performance of the Services by the Respondent and/or payment of Respondent's Total Liability or any Amount Due, DNREC covenants not to sue or take administrative action against Respondent pursuant to HSCA for Response Costs or for NRD related to the Site; provided, however, that this covenant not to sue is conditioned upon the satisfactory performance by Respondent of its obligations under this Consent Decree.

31. By entering into this Consent Decree, or by taking any action in accordance with it, Respondent does not admit any of the findings of fact, conclusions of law, determinations or any allegations contained in the Consent Decree, nor does Respondent admit liability for any purpose or admit any issues of law or fact or any responsibility for the alleged release or threat of release of any hazardous substances into the environment. The participation of Respondent in this Consent Decree shall not be admissible against Respondent in any judicial or administrative proceeding, except in an action by DNREC seeking to enforce the terms of this Consent Decree or recover costs incurred by DNREC with respect to this Consent Decree, or actions to which the State of Delaware or DNREC is a party and in which the State or DNREC asserts a claim, defense or argument based upon the terms of this Consent Decree.

XII. OTHER CLAIMS

32. Nothing herein is intended to bar or release any claims, causes of action, or demands in law or equity by or against any person, firm, partnership, or corporation not a signatory to this Consent Decree for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, disposal or release of any hazardous substances at, to, or from the Site.

33. DNREC shall not be held as a party to any contract entered into by Respondent to implement the requirements of this Consent Decree.

XIII. CONTRIBUTION PROTECTION

34. With regard to claims for contribution against Respondent, the parties hereto agree that Respondent is entitled to protection from contribution actions or claims as provided by HSCA for matters addressed in this Consent Decree. The matters addressed in this Consent Decree include, without limitations, any remedy taken and response costs incurred or to be incurred by DNREC or any other person as to the Site.

XIV. OTHER APPLICABLE LAWS

35. All actions required to be taken pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. If there is a conflict in the application of federal, state or local laws or regulations, the most stringent of the conflicting provisions shall apply.

XV. ENFORCEABILITY

36. The terms of this Consent Decree shall be legally enforceable by any party to this Consent Decree in a court of appropriate jurisdiction.

XVI. AMENDMENT OF CONSENT DECREE

37. This Consent Decree may be amended by mutual agreement of DNREC and Respondent. Amendments shall be in writing and shall be effective when signed by DNREC. DNREC Project Managers do not have the authority to sign amendments to the Consent Decree.

38. No informal advice, guidance, suggestions, or comments by DNREC regarding reports, plans, specifications, schedules, and any other writing submitted by the Respondent will be construed as relieving the Respondent of its obligation to obtain such formal approval as may be required by this Consent Decree. Any deliverables, plans, technical memoranda, reports (other than progress reports), specifications, schedules and attachments required by this Consent Decree are, upon approval by DNREC, incorporated into this Decree.

XVII. SUCCESSORS

39. This Consent Decree shall be binding upon Respondent, its successors and assigns, and upon DNREC, its successors and assigns.

XVIII. TERMINATION

40. The provisions of this Consent Decree shall be deemed satisfied and terminated upon receipt by Respondent of written notice from the DNREC Secretary that Respondent has demonstrated, to the satisfaction of DNREC, that all the terms of this Consent Decree have been completed. Upon satisfactory completion of the terms of this Consent Decree, DNREC shall file with the Superior Court a Stipulation of Dismissal of this Decree incorporating any Certificate of Completion issued by DNREC.

XIX. COUNTERPARTS

41. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument.

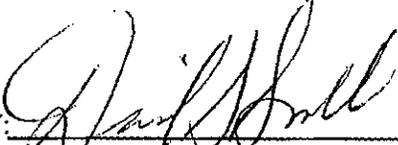
XX. EFFECTIVE DATE

42. This Consent Decree is effective on the date that it is entered by the Superior Court.

****Signature Page Follows****

RSK09005

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

BY: 
David S. Small, Acting Secretary

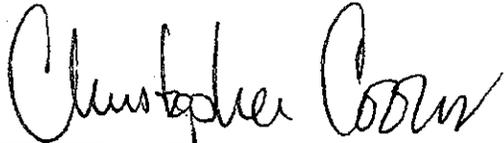
DATE: 2/25/09

AS TO FORM:

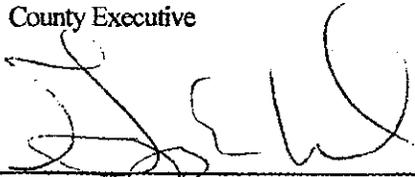
BY: _____
Robert S. Kuehl, Deputy Attorney General
Delaware Department of Justice

DATE: _____

NEW CASTLE COUNTY

BY: 
Christopher A. Coons
County Executive

DATE: 4/8/09

BY: 
Gregg E. Wilson
County Attorney

DATE: 4/13/09

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

BY: _____
David S. Small, Acting Secretary

DATE: _____

AS TO FORM:

BY: Robert S. Kuehl
Robert S. Kuehl, Deputy Attorney General
Delaware Department of Justice

DATE: 2/13/09

NEW CASTLE COUNTY

BY: Christopher Coons
Christopher A. Coons
County Executive

DATE: 4/8/09

BY: Gregg E. Wilson
Gregg E. Wilson
County Attorney

DATE: 4/13/09

EXHIBIT A

Community Yard Waste Drop Off Site Performance Standards

In order to satisfy the requirements of the Consent Decree entered into between Delaware Department of Natural Resources and Environmental Control ("DNREC") and New Castle County ("County"), Civil Action No. _____ (the "Consent Decree"), the County agrees comply with the following general performance standards for the operation of a community yard waste drop off site ("Drop Off Site").

- The Drop Off Site shall be operated so as to allow the general public access and use a minimum of thirty hours a week, barring exigent circumstances.
- The Drop Off Site site shall generally be kept free of extraneous debris (other than yard waste debris) and managed such that unacceptable materials are largely precluded from entering the Drop Off Site to the extent possible and any unacceptable materials that do enter the Drop Off Site are removed and properly disposed of or recycled, as the County deems appropriate. Prior to the commencement of operations at the Drop Off Site, the County will develop a list of materials it deems unacceptable and such list will be subject to review and approval by DNREC.
- Delivery and storage of yard waste at the Drop Off Site and the subsequent accumulation of mulch from the grinding of the yard waste shall be conducted such that large piles of un-ground yard waste and/or accumulated mulch are avoided. "Large piles" shall be defined as piles generally no higher or wider than the standards for piles set by DNREC and maintained in other DNREC community yard waste sites.
- The site shall be fenced and/or buffered from surrounding residential properties, as shown in the attached drawing.
- Generated yard waste and mulch piles shall be inspected at least once a day on a day that the site is open to the public and the piles shall be maintained in such a manner that spontaneously generated fires are avoided to the extent possible.
- The mulch produced from the yard waste may be used by the County for its own use or by the general public, as the County deems appropriate. The mulch shall be of a quality that is functional for the general public or the County.
- The site shall be designed to accommodate the type and volume of traffic and the necessary maintenance equipment that can reasonably be expected to use

the site during peak periods of yard waste activity such that a smooth flow of traffic in and out of the site is generally permitted. County shall apply for and receive DelDOT approval for any entrance permit or traffic flow pattern, if applicable. The Site Plan attached hereto has been approved by DNREC. The County shall receive written approval from DNREC for any substantial changes to the site design.

- DNREC recognizes that yard waste is a compostable material and can be managed to produce quality compost. In the event that the County desires to produce compost from the yard waste, it will be necessary for the County to obtain the required permits and approvals from state and local government, including DNREC, to conduct composting of the yard waste.
- In order to educate the public about the use and availability of the Drop Off Site, it is necessary to maintain a yard waste website and respond to public inquiries via telephone. The County must maintain a website similar to the one DNREC has prepared regarding the Drop Off Site and respond to telephone inquiries from the general public about Drop Off Site usage, location availability of mulch, hours of operation, etc. The County shall submit a plan for its website to DNREC within thirty (30) days of the effective date of the Consent Decree. DNREC shall provide comments or approval no later than sixty (60) days after the receipt of such website plan.

Your Search...

SEARCH

Phone Numbers

Help

DNREC : Yard Waste

Yard Waste In Delaware

Home

- [About the Agency](#)
- [Contact Information](#)
- [Divisions/Programs](#)
- [Employment](#)
- [Newsroom](#)
- [Office Locations](#)
- [Outdoor Delaware](#)
- [Public Meeting Calendar](#)
- [Public Notices](#)
- [Site Map](#)

Services

- [Business Services](#)
- [Contractor](#)
- [Licenses/Certification](#)
- [Delaware Energy Office](#)
- [Email List Subscription](#)
- [Env Release Notification](#)
- [Environmental Navigator](#)
- [Forms/Applications](#)
- [Licenses](#)
- [Loans/Grants](#)
- [Online Reporting](#)
- [Online Sales](#)
- [Permits and Approvals](#)
- [RSS Feeds](#)

Information

- [Climate Change](#)
- [Coastal Zone Act Program](#)
- [Delaware Energy Plan](#)
- [Delaware Wetlands](#)
- [Educational Resources](#)
- [Enforcement & Compliance Info](#)
- [Environmental Databases](#)
- [Freedom of Info Act Request](#)
- [Open Space/SRAs](#)

What is yard waste?

It's plant material that comes from lawn maintenance and other gardening and landscaping activities. This includes:

- Grass
- Leaves
- Prunings
- Brush and shrubs
- Garden materials
- Christmas trees
- Tree limbs up to 4" in diameter

Quick links

- [The New Castle County Yard Waste ban explained](#)
- [Yard waste collection options](#)
- [Yard waste drop-off options](#)
- [DNREC community yard waste demonstration sites](#)
- [Homeowner yard waste options](#)
- [Composting information](#)
- [Senate Joint Resolution 2/Senate Amendment 1](#)
- [Senate Joint Resolution 2 Final Report](#)
- [Cherry Island Landfill permit condition](#)
- [DNREC yard waste presentation schedule](#)
- [DNREC yard waste presentation \(Power Point\)](#)
- [Yard waste management committee](#)
 - [Yard waste management consensus points](#)
- [Mulching mower information](#)



For more information: contact the Solid & Hazardous Waste Management Branch at (302) 739-9403.

Publications & Reports
Rules, Regulations, Laws
Secretary's Orders
Solid Waste Management
Alternatives for
Delaware
TMDLs
Watershed Teams
Whole Basin
Management
Yard waste

DWSA-related information and programs can be found at <http://www.dswa.com/> or 302-7080.

[site map](#) | [about this site](#) | [contact us](#) | [translate](#) | [delaware.gov](#)

EXHIBIT B

Fox Point NRDA Cash Out Calculation

ASSUMPTIONS

Estimated PCBs to river: **25 lb** (SIRB calculation)

Ratio of PCBs in fish to PCBs discharged to water **0.05% = 0.0005** (per Rick Greene)

Fish advisory criterion (based on human consumption) **24 ppb** in filets, equivalent to **48 ppb** in whole body (Delaware Fish advisory estimated for whole body)

Fish biomass produced per acre of marsh per year: **1,213 lbs of fish produced /acre of restored tidal wetland/year (PSE&G Estuary Enhancement Program)**

Discounted Service Acre Years (DSAY's) for a typical Delaware tidal wetland restoration project with a 50 year lifespan and enhance from 20to 60% of services in first 10 years and reaches 90 % (full potential) by year 20 = **12.7 service acre years (NOAA)**

Cost to restore freshwater tidal marsh in New Castle County: **\$146,968/acre with 25% contingency (Delaware Division of Fish and Wildlife)**

New Castle County's share of PCB related damages = **20% = 0.2 (SIRB)**

Therefore:

Amount of PCBs in fish tissue = $25 \text{ lb} * 0.0005 = 0.0125 \text{ lb}$

Fish biomass contaminated to or above advisory level = $0.0125 \text{ lb} / 0.000000048 = 260,416.67 \text{ lb}$

Acres of tidal marsh required to replace this amount of fish biomass in one year = $260416.67 \text{ lb} / (1213 \text{ lb/acre}) = 214.69 \text{ acres}$

Number of acres wetland need to replace assuming 12.7 DSAY's/ acre of wetland project $214.69 \text{ acres} / 12.7 \text{ DSAY's} = 16.9 \text{ acres}$

New Castle County's share = $16.9 * 20\% = 3.38 \text{ acres}$

Cash cost of restoration = $3.38 \text{ acres} * \$146,968/\text{acre} = \$496,752$

Therefore, we propose to settle this natural resource damage liability for **\$496,752**.

EXHIBIT C

Yard Waste Site Anticipated Annual Operating Costs

Labor

Maintenance crew visiting site once per week for 4 hours Crew consists of: Crew Chief, MEO II, M&C, M&C Tasks are for straightening up the site and trash removal	\$31,200
Loader and operator for 4 hours every other week	\$ 7,020
Rental of tub grinder and crew for ten grindings per year	<u>\$50,000</u>
Sub-Total per year.....	\$88,220

Miscellaneous costs

Illegal dumping removal & disposal	\$ 5,000
Sub-Total per year.....	\$ 5,000
Total.....	\$ 93,220

Site Construction Capital Cost..... \$135,000