



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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NOTICE OF SECRETARY'S ORDER

Order No. 2015-WHS-0002

Site No. DE-0294

Pursuant to 7 *Del. C.* § 9109

Issued To:

**Via Certified Mail
Return Receipt Requested**

Ms. Helen M. Hart, General Solicitor
Norfolk Southern Railway Co.
110 Franklin Road SE
Roanoke, VA 24042-0028

To the Respondent:

The Secretary of the Department of Natural Resources and Environmental Control ("Department") has found Norfolk Southern Railway Co., a/k/a Norfolk Southern Corporation ("Respondent" or "NSC") to be in violation of Delaware's Hazardous Substance Cleanup Act, 7 *Del. C.* Chapter 91 ("HSCA"), and of 7 DE Admin. Code 1375, Delaware's *Regulations Governing Hazardous Substance Cleanup ("Regulations")*. Accordingly, the Department is issuing this Notice of the Secretary's Order pursuant to 7 *Del. C.* § 9109(a)(3).

BACKGROUND

The property that is the subject of this Secretary's Order is an area of contamination ("AOC") associated with the 12th Street Drum Site (DE-0294) that is owned by Pennsylvania Lines, LLC, c/o NSC. The AOC is located at 1280 Railcar Avenue, Wilmington, DE 19802 and is identified by New Castle County as tax parcel number 26-037.00-005 as shown on Exhibit A to this Order. The AOC encompasses approximately 1.1 acres of the western portion of the 75.88 acre parcel and is bordered to the west by the Howard R. Young Correctional Institution to the north, northeast, and east by Amtrak and to the south by 12th Street. The AOC boundaries may change based upon the results of the investigation.

The AOC was discovered by the United States Environmental Protection Agency (US EPA) during the removal action undertaken by the US EPA at the 12th Street Drum Site (DE-0294). As the owner of the AOC, Respondent is a potentially responsible party (PRP) as defined in § 9103(23) of HSCA.

The 12th Street Drum Site was subject to an Emergency Removal Action by the EPA in 2000. As part of this Removal Action, abandoned drums and other wastes were removed from the surface of the Site and disposed. In addition to the surface waste removal, soil and sediment containing high levels of lead were excavated and disposed while other areas containing elevated levels of contaminants were covered with a soil cap. During the Removal Action, EPA identified an area of contamination (AOC) that was associated with the 12th Street Drum Site along the southeastern boundary of the Howard R. Young Correctional Institution and along the southwestern edge of the Respondent's property at 1280 Railcar Avenue in Wilmington, DE.

The US EPA has documented the ongoing release or threatened release of hazardous substances, pollutants, or contaminants at the above-referenced AOC. DNREC believes that further action is required under HSCA. The basis of the Department's position includes, but is not limited to, the presence of hazardous substances, including arsenic, chromium and lead, polyaromatic hydrocarbons (PAHs), volatile organic compounds, and pesticides at the AOC.

In 2013, DNREC's consultant, BrightFields, performed a Remedial Investigation of the 12th Street Drum Site proper as well as the portion of the AOC located on the premises of the Howard R. Young Correctional Institution. The purpose of the remedial investigation was to determine if the full extent of all contamination has been defined, and if the interim actions performed by EPA are sufficient to protect human health and the environment.

There is a record of EPA only performing surface soil sampling at the portion of the AOC on the Norfolk Southern property and not performing any interim remedial action at the AOC. DNREC proposed to have BrightFields sample the AOC on Norfolk Southern's property. However, the sampling was not performed due to Norfolk Southern's refusal to grant access to its property in a timely manner. Therefore, DNREC is requiring that Norfolk Southern sample the AOC.

On March 4, 2014 and April 30, 2014, DNREC issued a notice of liability to Respondent with an invitation to join the Voluntary Cleanup Program. The purpose of that letter was to notify Pennsylvania Lines, LLC, c/o NSC of its liability pursuant to 7 Del. C. §9105 of with respect to the AOC.

FINDINGS OF FACT AND VIOLATION

1) Norfolk Southern Railway Co., as owner and/operator of the AOC, is a potentially responsible party, as defined in Sections 9103(23) and 9105.

2) DNREC notified Norfolk Southern Railway Co. of its liability on March 4, 2014 and April 30, 2014 with the invitation to join the Voluntary Cleanup Program.

3) On April 4, 2014, Helen Hart, Solicitor for NSC, sent Robert Asreen, DNREC, an informal email response that NSC is not liable due to the "fresh start" policy instituted by Congress when it created Conrail, the successor company of Norfolk Southern Railway Co.

4) Norfolk Southern Railway Co. has not responded further and has refused to cooperate

with DNREC. As a PRP, Respondent is in violation of HSCA and the Regulations and, therefore, is liable under HSCA and the Regulations to conduct a remedial investigation and/or remedial action of the AOC.

5) Norfolk Southern Railway Co.'s statement that the "fresh start" program cancels any liability pursuant to HSCA is not relevant and does not apply to its liability pursuant to HSCA.

6) Pursuant to Section 9109(a)(3) of HSCA, the Secretary has the authority to issue an Order to a potentially responsible party to implement a remedy at the AOC.

CONCLUSIONS

Based on the foregoing, the Department has concluded that Norfolk Southern Railway Co. has violated HSCA and *the Regulations* and is hereby ordered to:

- 1) Hire a HSCA-qualified consultant to be approved by SIRS, consistent with the relevant provisions of HSCA, in order to prepare Remedial Investigation and Feasibility Study ("RFS") of the Site subject to SIRS' review and approval;
- 2) Within 90 days of receipt of this Order by Respondent, submit a work plan to SIRS for SIRS' review and approval based upon a projected submission of a complete RF/FS within one year from this Order;
- 3) Pay SIRS the response costs billed through this Secretary's Order and agree to pay any reasonably incurred response costs in the future; and
- 4) Implement the approved Final Plan of Remedial Action upon issuance.

PUBLIC HEARING

This Order shall become effective and final 30 days from the receipt of this Order unless the Department receives from Respondent within 30 days of receipt of this Order a written request for a public hearing on these matters as provided in 7 *Del. C.* § 9109(a)(3)(c). In the event Respondent requests a hearing, the Department reserves the right to withdraw this Order and take additional enforcement actions regarding these and other violations at Respondent's facility, including but not limited to, the imposition of civil penalties and recovery of the Department's costs and attorney's fees. The Department does not otherwise intend to convene a public hearing on these matters, but reserves the right to do so at its discretion.

If you have any questions, please contact Timothy Ratsep at (302) 395-2600.

6-15-15
Date


David S. Small, Secretary

cc: Robert F. Phillips, Deputy Attorney General
Marjorie A. Crofts, WHS Director
Timothy Ratsep, SIRS Program Administrator
Robert Asreen, Project Officer, SIRS
Jenny Bothell, Enforcement Coordinator
Elizabeth LaSorte, Paralegal
SIRS File-DE 0274) H3

WAIVER OF STATUTORY RIGHT TO A HEARING

Norfolk Southern Railway Co. hereby waives its right to a hearing and its opportunity to appeal or contest this Assessment and Order and agrees to the following:

- 1). Hire a qualified consultant to be approved by SIRS in order to prepare Remedial Investigation and Feasibility Study ("RFS") of the Site subject to SIRS' review and approval;
- 2). Within 90 days of receipt of this Order by Respondent, submit a work plan to SIRS for SIRS' review and approval based upon a projected submission of a complete RF/FS within one year from this Order;
- 3) Pay SIRS the outstanding response cost billed through this Secretary's Order and agree to pay any reasonably incurred response cost incurred; and
- 4) Implement the approved Final Plan of Remedial Action upon issuance.

Date: _____

By: _____

Title: _____

EXHIBIT
Order No. A-2015-WHS-0002
 Tables

