

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

\_\_\_\_\_  
DAVID S. SMALL, ACTING SECRETARY OF )  
THE DEPARTMENT OF NATURAL )  
RESOURCES & ENVIRONMENTAL CONTROL,) )  
an administrative Agency of the State of Delaware, )

Plaintiff, )

v. )

INVISTA S.à.r.l. )

Defendant. )  
\_\_\_\_\_)

Civil Action No. \_\_\_\_\_

Judge \_\_\_\_\_

**DELAWARE’S COMPLAINT**

NOW COMES, Plaintiff David S. Small, Acting Secretary of the Department of Natural Resources & Environmental Control of the State of Delaware (“Plaintiff Delaware”) by authority of 29 Del. C. Chapter 80 and 7 Del. C. Chapters 60, by and through his attorney Valerie M. Satterfield, Deputy Attorney General, alleging the following:

**NATURE OF ACTION**

1. This is a civil action for civil penalties and injunctive relief brought against Invista S.à.r.l. (“INVISTA”) for alleged violations of the following environmental statutes and their implementing regulations at its integrated fibers and polymers facility located in Seaford in the State of Delaware (“Seaford Facility”). Plaintiff Delaware hereby alleges claims against INVISTA, as the owner and operator of the Seaford Facility in the state. INVISTA has been and is in violation of certain federal environmental statutes, the Delaware Environmental Control Act, 7 Del. C. Chapter 60, environmental regulations promulgated pursuant to Delaware’s authority, and valid conditions of permits issued by Plaintiff and the requirements adopted as

part of the applicable State Implementation Plans (“SIPs”). The Complaint states a claim upon which relief may be granted for injunctive relief and civil penalties against INVISTA.

### **JURISDICTION AND VENUE**

2. Plaintiff Delaware invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction) and 42 U.S.C § 7604 (Clean Air Act Citizen Suit).

3. This Court has jurisdiction over the concurrently filed action brought by the United States for the reasons alleged in the Complaint of the United States, to which reference is here made. The claims of Plaintiff Delaware are so related to the claims of the United States that they form a part of the same case or controversy within the meaning of 28 U.S.C. § 1367. Therefore, the Court has supplemental jurisdiction over the claims of Plaintiff Delaware, and there are no compelling reasons for declining jurisdiction.

4. The original action is brought by the United States on behalf of the Administrator of EPA. Plaintiff Delaware is a citizen within the meaning of 42 U.S.C. § 7604 and has an interest in the subject matter of the civil action filed by the United States.

3. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)-(c) and 1395(a); CAA § 113(b), 42 U.S.C. § 7413(b); CWA §§ 309, 311(b)(7)(E), 33 U.S.C. §§ 1319, 1321(b)(7)(E); EPCRA § 325(c), 42 U.S.C. § 11045(c); and RCRA §§ 3008(a), 9006, 42 U.S.C. §§ 6928(a), 6991(e) because INVISTA is located and doing business in this district.

4. Pursuant to Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1), notice of the violations of the Delaware, South Carolina, Tennessee and Texas SIPs that are alleged in this complaint have been given by the United States of America to the States of Delaware, South Carolina, Tennessee and Texas and INVISTA at least 30 days prior to the filing of this complaint.

## **DEFENDANT**

5. INVISTA is a privately-owned integrated fibers and polymers company registered as a foreign limited liability company in the State of Delaware and headquartered in Wichita, Kansas. INVISTA is a person within the meaning of 7 Del. C. § 6002(17) and as defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e), Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and Section 1004(15) of RCRA, 42 U.S.C. § 6903(15),. INVISTA is an “owner or operator” of its Seaford Delaware Facility within the meaning of Section 304(a) and (b) of EPCRA, 42 U.S.C. § 11004(a), (b), or Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

6. INVISTA is the current owner and operator of a facility located at 25876 DuPont Road, Seaford, in Sussex County, Delaware, where it carries out its integrated fibers and polymers operation (“Seaford Facility”).

## **STATUTORY AND REGULATORY BACKGROUND**

### **CLEAN AIR ACT**

7. The Clean Air Act established a regulatory scheme designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1).

8. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards (“NAAQS” or “ambient air quality standards”) for certain criteria air pollutants. The primary NAAQS are to be adequate to protect the public health, and the secondary NAAQS are to be adequate to protect the public welfare, from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

9. Section 110 of the CAA, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA for approval a SIP that provides for the attainment and maintenance of the NAAQS. The Secretary has adopted and submitted an approved SIP for the attainment and maintenance of the NAAQS in the State of Delaware.

10. Under Section 107(d) of the CAA, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. These designations have been approved by EPA and are located at 40 C.F.R. Part 81. An area that meets the NAAQS for a particular pollutant is classified as an “attainment” area; one that does not is classified as a “non-attainment” area.

11. At the times relevant to this Complaint, the Seaford Facility located in Seaford, in Sussex County, Delaware, has been classified as either an attainment area or unclassifiable for SO<sub>2</sub>, NO<sub>x</sub> and particular matter (PM-10). The Seaford Facility is located in a nonattainment area for ground level ozone.

***New Source Review and Prevention of Significant Deterioration Requirements***

12. Part C of Title I of the CAA, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration (“PSD”) of air quality in those areas designated as attaining the NAAQS standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public

participation in the decision-making process. These provisions are referred to herein as the “PSD program.”

13. Section 165(a) of the CAA, 42 U.S.C. § 7475(a), prohibits the construction and subsequent operation of a major emitting facility in an area designated as attainment unless a PSD permit has been issued. Section 169(1) of the CAA, 42 U.S.C. § 7479(1), defines “major emitting facility” as a source with the potential to emit 250 tons per year (“tpy”) or more of any air pollutant.

14. As set forth at 40 C.F.R. § 52.21(k), the PSD program generally requires a person who wishes to construct or modify a major emitting facility in an attainment area to demonstrate, before construction commences, that construction of the facility will not cause or contribute to air pollution in violation of any ambient air quality standard or any specified incremental amount.

15. As set forth at 40 C.F.R. § 52.21(i), any major emitting source in an attainment area that intends to construct a major modification must first obtain a PSD permit. “Major modification” is defined at 40 C.F.R. § 52.21(b)(2)(i) as meaning any physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase of any criteria pollutant subject to regulation under the CAA.

“Significant” is defined at 40 C.F.R. § 52.21(b)(23)(i) in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, at a rate of emissions that would equal or exceed any of the following: for particulate matter (“PM<sub>10</sub>”), 25 tpy; for nitrogen oxides (“NO<sub>x</sub>”), 40 tpy; for sulfur dioxide (“SO<sub>2</sub>”), 40 tpy.

16. As set forth at 40 C.F.R. § 52.21(j), a new major stationary source or a major modification in an attainment area shall install and operate best available control technology (“BACT”) for each pollutant subject to regulation under the CAA that it would have the potential to emit in significant quantities.

17. Section 161 of the CAA, 42 U.S.C. § 7471, requires SIPs to contain emission limitations and such other measures as may be necessary, as determined under the regulations promulgated pursuant to these provisions, to prevent significant deterioration of air quality in attainment areas.

18. A state may comply with Section 161 of the CAA either by being delegated by EPA the authority to enforce the federal PSD regulations set forth at 40 C.F.R. § 52.21, or by having its own PSD regulations approved as part of its SIP by EPA, which must be at least as stringent as those set forth at 40 C.F.R. § 51.166. Plaintiff Delaware has complied with Section 161 of the CAA by being delegated by EPA the authority to enforce its own PSD regulations, which have been approved as part of Delaware’s SIP.

19. Pursuant to federal and Delaware PSD regulations, any owner or operator who commences construction or modification of a major source without applying for and receiving approval for such construction or modification is subject to an enforcement action. 40 C.F.R. §§ 52.21, 51.166 and Delaware Regulation No. 1125.

#### ***Nonattainment New Source Review***

20. Part D of Title I of the CAA, 42 U.S.C. §§ 7501-7515, sets forth provisions for New Source Review (“NSR”) requirements for areas designated as being in nonattainment with the NAAQS standards. These provisions are referred to herein as the “Nonattainment NSR”

program. The Nonattainment NSR program is intended to reduce emissions of air pollutants in areas that have not attained NAAQS so that the areas make progress towards meeting the NAAQS. Prior to the effective date of the 1990 Clean Air Act Amendments, P. Law 101-549, effective November 15, 1990, the Nonattainment NSR provisions were set forth at 42 U.S.C. §§ 7501-7508.

21. Under Section 172(c)(5) of the Nonattainment NSR provisions of the CAA, 42 U.S.C. § 7502(c)(5), each state is required to adopt Nonattainment NSR SIP rules that include provisions to require permits that conform to the requirements of Section 173 of the CAA, 42 U.S.C. § 7503, for the construction and operation of modified major stationary sources within nonattainment areas. Section 173 of the CAA, in turn, sets forth a series of minimum requirements for the issuance of permits for major modifications to major stationary sources within nonattainment areas. 42 U.S.C. § 7503. Plaintiff Delaware has adopted Nonattainment NSR SIP rules that set forth minimum requirements for the issuance of permits for major modifications to major stationary sources within nonattainment areas.

22. Section 173(a) of the CAA, 42 U.S.C. § 7503(a) and Delaware Regulation 1125 both provide that construction and operating permits may be issued if, inter alia: (a) sufficient offsetting emission reductions have been obtained to reduce existing emissions to the point where reasonable further progress towards meeting the national ambient air quality standards is maintained; and (b) the pollution controls to be employed will reduce emissions to the “lowest achievable emission rate.”

23. Section 182(f) of the CAA, 42 U.S.C. 7511a(f), enacted as part of the Clean Air Amendments of 1990, set forth additional requirements to take effect no later than November 15,

1992, regarding the construction and operation of new or modified major stationary sources of NO<sub>x</sub> located within nonattainment areas for ozone. Section 182(f) defines NO<sub>x</sub> as a pollutant that must be treated as a contributor to the criteria pollutant ozone in an ozone nonattainment area. 42 U.S.C. § 7511a(f). For the purposes of Section 182, a “major stationary source” of NO<sub>x</sub> is one that emits or has the potential to emit 100 tons per year or more of a regulated pollutant. 40 C.F.R. § 52.21(b)(1)(i) and Delaware Regulation 1125. A “significant” net emissions increase of NO<sub>x</sub> is one that would result in increased emissions of 40 tons per year or more. 42 U.S.C. 7511a. 40 C.F.R. § 52.24(b)(23)(I) and Delaware Regulation 1125.

24. Upon EPA approval, state SIP requirements are federally enforceable under Section 113 of the CAA, 42 U.S.C. §§ 7413(a), (b); 40 C.F.R. § 52.23.

25. Delaware PSD/NNSR Requirements - At all times relevant to this Complaint, the State of Delaware SIP has included PSD and NNSR provisions approved by EPA, as set forth in Title 7 “Conservation” of the Delaware Code, Chapter 60. The Delaware PSD and NNSR regulations are federally enforceable.

26. Pursuant to Section 113(b)(1) of the CAA, 42 U.S.C. § 7413(b)(1), the violation of any requirement or provision of an applicable implementation plan is a violation of the CAA.

27. Whenever any person has violated, or is in violation of, any requirement or prohibition of any SIP, Section 113(b) of the CAA, 42 U.S.C. § 7413(b), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day for each violation occurring before January 31, 1997; up to \$27,500 per day for each such violation occurring on or after January 31, 1997 and before March 15, 2004; and up to \$32,500 for each such violation occurring after

March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended.

***New Source Performance Standards***

28. Section 111(b)(1)(A) of the CAA, 42 U.S.C. § 7411(b)(1)(A), requires the Administrator of EPA to publish a list of categories of stationary sources that emit or may emit any air pollutant. The list must include any categories of sources which are determined to cause or significantly contribute to air pollution which may endanger public health or welfare.

29. Section 111(b)(1)(B) of the CAA, 42 U.S.C. § 7411(b)(1)(A), requires the Administrator of the EPA to promulgate regulations establishing federal standards of performance for new source of air pollutants within each of these categories. “New Sources” are defined as stationary sources, the construction or modification of which is commenced after the publication of the regulations or proposed regulations prescribing a standard of performance applicable to such source. 42 U.S.C. § 7411(a)(2). These standards are known as New Source Performance Standards (“NSPS”)

30. Section 111(e) of the CAA, 42 U.S.C. § 7411(e), prohibits an owner or operator of a new source from operating that source in violation of a NSPS after the effective date of the applicable NSPS to such source.

31. The provisions of 40 C.F.R. Part 60 Subpart J apply to specified “affected facilities,” including, *inter alia*, fuel gas combustion devices that commenced construction or modification after June 11, 1973. 40 C.F.R. § 60.100(a),(b).

32. Pursuant to Section 111(b) of the CAA, 42 U.S.C. § 7411(b), EPA has promulgated general NSPS provisions, codified at 40 C.F.R. Part 60, Subpart A, §§ 60.1-60.19,

that apply to owners or operators of any stationary source that contains an “affected facility” subject to regulation under 40 C.F.R. Part 60.

33. Section 111(e) of the CAA, 42 U.S.C. § 7411(e), prohibits the operation of any new source in violation of an NSPS applicable to such source. Thus, a violation of an NSPS is a violation of Section 111(e) of the CAA.

34. Whenever any person has violated, or is in violation of, any requirement or prohibition of any applicable New Source Performance Standard, Section 113(b) of the CAA, 42 U.S.C. § 7413(b), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day for each violation occurring before January 31, 1997; up to \$27,500 per day for each such violation occurring on or after January 31, 1997 and before March 15, 2004; and up to \$32,500 for each such violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended.

#### ***Other Clean Air Act Requirements***

35. Section 110 of the CAA, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA for approval a SIP that provides for the maintenance, implementation and enforcement of NAAQS. Under Section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), each SIP must include a permit program to regulate the modification and construction of any stationary source of air pollution, including stationary sources in attainment and nonattainment areas of the state, as necessary to assure that NAAQS are achieved.

36. EPA subsequently approved and made federally enforceable the SIP for the State of Delaware. See 40 CFR Part 52, Subpart I.

37. A violation of a federally enforceable SIP requirement is a violation of Section 110 of the Clean Air Act, 42 U.S.C. § 7410.

38. Title V of the CAA, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including “major sources.” The purpose of Title V is to ensure that all “applicable requirements” for compliance with the CAA, including PSD, NSR and NSPS requirements, are collected in one place.

39. Delaware Title V - The State of Delaware’s Title V program was granted full approval in 2001. Delaware’s Title V program is implemented pursuant to the general environmental conservation authority established in 7 Del. C. Chapter 60 and its implementing regulations as codified in Delaware Administrative Regulations Section 1100 and the Delaware Regulations Governing the Control of Air Pollution Regulation 30.

40. Section 502(a) of the CAA, 42 U.S.C. § 7661a(a), and the Title V operating permit programs identified in Paragraphs 52-56 above have at all relevant times made it unlawful to violate any requirement of a permit issued under Title V or to operate a major source except in compliance with a permit issued by a permitting authority under Title V.

41. Section 504(a) of the CAA, 42 U.S.C. § 7661c(a), implementing regulations of the CAA, 40 C.F.R. § 70.2, and the Title V operating permit program regulations identified in Paragraphs 52-56 above have at all relevant times required that each Title V permit include, among other things, enforceable emission limitations and standards as are necessary to assure compliance with applicable requirements of the CAA and the requirements of the applicable SIP, including any PSD requirement to comply with an emission rate that meets BACT and any NSR

requirement to comply with an emission rate that meets LAER, and any applicable NSPS requirement.

42. Section 112 of the CAA, 42 U.S.C. § 7412, and the regulations at 40 C.F.R. Parts 61 and 63 provide emissions requirements for owners and operators of major stationary sources that emit hazardous air pollutants.

43. Section 114 of the CAA, 42 U.S.C. § 7414, and the implementing regulations thereto, establishes the authority of the Administrator or an authorized representative to require any person who may have information necessary for the purposes of CAA Section 114 or who is subject to a requirement of the CAA, except for certain specified provisions, to require production of records, an inspection, monitoring and/or entry.

44. Subchapter VI of the CAA, 42 U.S.C. §§ 7671-7671q (“Stratospheric Ozone Protection”) implements the Montreal Protocol on Substances that deplete the Ozone Layer, and mandates, the elimination or control of emissions of substances which are known or suspected to cause or significantly contribute to harmful effects on the stratospheric ozone layer, referred to as Class I and Class II substances.

45. Section 603 of the CAA, 42 U.S.C. § 7671b, and the implementing regulations, establishes reporting and monitoring requirements for each person who produces, imports or exports Class I and Class II substances which are identified in Section 602 of the CAA, 42 U.S.C. § 7671a.

46. Section 608 of Subchapter VI, 42 U.S.C. § 7671g (“National Recycling and Emission Reduction Program”) requires that the EPA promulgate regulations establishing standards and requirements regarding the use and disposal of Class I and Class II ozone-

depleting substances during the service, repair, or disposal of appliances and industrial process refrigeration.

47. EPA promulgated the regulations required by Section 608, codified at 40 C.F.R. Part 82, Subpart F, §§ 82.150- 82.166 (“Recycling and Emissions Reduction”) (hereinafter “Subpart F Regulations”) on May 14, 1993. 58 Fed. Reg. 28712.

48. Section 608 of the CAA states: “[i]t shall be unlawful for any person, in the course of maintaining, servicing, repairing, or disposing of an appliance of industrial process refrigeration, to knowingly vent or otherwise release or dispose of any such Class I or Class II substances used as a refrigerant in such appliance (or industrial process refrigeration) in a manner which permits such substance to enter the environment.” 42 U.S.C. § 7671g(c)(1). The Subpart F Regulations reiterate this prohibition, effective June 14, 1993. 40 C.F.R. § 82.154(a).

49. The Subpart F Regulations contain leak repair requirements for industrial process equipment containing more than 50 pounds of refrigerant. These regulations are aimed at reducing emissions of Class I and Class II ozone-depleting substances in the atmosphere.

50. Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1), provides that:

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which the notice of violation is issued, the Administrator may . . . bring a civil action in accordance with subsection (b) of this section.

51. Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), provides that:

“Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other

requirement or prohibition of this subchapter . . . including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued or approved under those provisions or titles . . .the Administrator may . . . bring a civil action in accordance with subsection (b) of this section . . . .”

52. Section 113(b)(1) of the CAA, 42 U.S.C. § 7413(b)(1), and 40 C.F.R. § 52.23 authorize the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day of violation for violations occurring before January 30, 1997; up to \$27,500 per day for each such violation occurring between January 30, 1997 and March 15, 2004; and up to \$32,500 for each such violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan.

53. Section 113(b)(2) of the CAA, 42 U.S.C. § 7413(b)(2), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day of violation for violations occurring before January 30, 1997, up to \$27,500 per day for each such violation occurring between January 30, 1997 and March 15, 2004, and up to \$32,500 for each such violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, requirements of the Act other than those specified in Section 113(b)(1), 42 U.S.C. § 7413(b)(1), including violations of Section 165(a), 42 U.S.C. § 7475(a) and Section 111, 42 U.S.C. § 7411. Seven Del. C. § 6005(b) authorizes Plaintiff Delaware to initiate a

judicial enforcement action for a permanent or preliminary injunction and/or for a civil penalty of up to \$10,000 per day of violation against anyone who violated, or is in violation of 7 Del. C. Chapter 60, any rule or regulation promulgated there under, or any condition of any permit issued pursuant to that authority by the Plaintiff Delaware.

54. Section 167 of the CAA, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief, as necessary, to prevent the construction, modification or operation of a major emitting facility which does not conform to PSD requirements.

### **CLEAN WATER ACT**

55. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. 33 U.S.C. § 1251(a).

56. Section 301(a) of the CWA, 33 U.S.C. § 1251(a), prohibits the discharge of any pollutant into navigable waters of the United States by any person except in compliance with, *inter alia*, a National Pollutant Discharge Elimination (“NPDES”) permit issued by U.S. EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

57. U.S. EPA or an authorized state, in issuing NPDES permits, shall prescribe conditions for such permits as the permitting authority determines are necessary to carry out the provisions of the CWA. Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

58. Each NPDES permit includes effluent limitations which are applicable to outfalls which discharge pollutants from a permitted facility. Failure to comply with the effluent limits and other requirements of an NPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

59. “Effluent limitation” means any restriction imposed by the permitting authority on quantities, discharge rates, and concentrations of “pollutants” which are “discharged” from “point sources” into “waters of the United States. . .” 40 C.F.R. § 122.2.

60. “Discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source.” Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

61. “Pollutant” is defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.” Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

62. “Navigable water” is defined as the “waters of the United States,” and includes lakes, rivers, and streams. Section 502(7) of the CWA, 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.

63. “Point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . conduit, . . . [or] container . . . , from which pollutants are or may be discharged.” Section 502(14) of the CWA, 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

64. “Person” is defined as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

65. Pursuant to CWA § 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C), EPA promulgated Spill Prevention Control and Countermeasure Plan (“SPCC Plan”) regulations, codified at 40 C.F.R. Part 112, which establish requirements for procedures, methods and equipment to

prevent discharges of oil from onshore facilities into or upon the navigable waters of the United States or adjoining shorelines.

66. The SPCC Plan regulations in 40 C.F.R. Part 112 are applicable to owners or operators of non-transportation related onshore facilities engaged in storing or consuming oil when the facility has an above-ground storage capacity of no less than 1,320 gallons of oil or in a single container of more than 660 gallons of oil, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities as defined in 40 C.F.R. Part 110.

67. Under the SPCC Plan regulations, 40 C.F.R. § 112.3, the owner or operator of an onshore facility that has discharged or, due to its location, could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, must prepare a SPCC plan in writing within six months after the date that such facility begins operations. The Plan must be in accordance with the requirements and guidelines set forth in the SPCC Plan regulations, 40 C.F.R. § 112.7.

68. Section 311(b)(7)(C) of the CWA, 33 U.S.C. § 1321(b)(7)(C), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. §§ 19.2 and 19.4 (Table), provides that any person who fails or refuses to comply with any regulation issued pursuant to CWA § 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C), shall be subject to a civil penalty in an amount up to \$25,000 per day of violation occurring on or before January 30, 1997, and up to \$27,500 per day of violation for each such violation occurring after January 30, 1997, and up to \$32,500 for each such violation occurring after March 15, 2004. Seven Del. C. § 6005(b) authorizes Plaintiff Delaware to initiate a judicial enforcement action for a permanent or preliminary

injunction and/or for a civil penalty of up to \$10,000 per day of violation against anyone who violated, or is in violation of 7 Del. C. Chapter 60, any rule or regulation promulgated there under, or any condition of any permit issued pursuant to that authority by the Plaintiff Delaware.

### **EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT**

69. Section 302(c) of EPCRA, 42 U.S.C. § 11002(c), and its implementing regulations found at 40 C.F.R. Part 370, requires each facility subject to the EPCRA Section 302 requirements to notify the State Emergency Response Commission (“SERC”) for the State where the facility is located that the facility is subject to EPCRA Section 302 requirements if a substance exceeds the threshold planning quantity, or if there is a revision to such a list within 60 days after either such substance is acquired at the facility or when the list is revised.

70. Section 304 of EPCRA, 42 U.S.C. § 11004, and its implementing regulations found at 40 C.F.R. Part 370, requires the owner or operator of a facility at which an extremely hazardous substance is released to immediately provide notice to any Local Emergency Planning Committee (“LEPC”) and the SERC in the area likely to be affected by the release. With respect to transportation, the owner or operator shall call 911, or the operator in the absence of 911, upon the release of an extremely hazardous substance. The notice must meet the requirements must include the information specified in Section 304(b)(2) of EPCRA, 42 U.S.C. § 11004(b)(2).

71. Section 311 of EPCRA, 42 U.S.C. § 11021, and its implementing regulations found at 40 C.F.R. Part 370, requires the owner or operator of any facility which is required to prepare or have available a material safety data sheet (“MSDS”) for each hazardous chemical listed under the Occupational Safety and Health Act (“OSH Act”) of 1970, 29 U.S.C. § 651 *et seq.*, and regulations promulgated under that Act, to submit the MSDS (or in the alternative a list

of chemicals) to the LEPC, the SERC, and also the fire department with jurisdiction over the facility, by October 17, 1987, or within three months of first becoming subject to the requirements of EPCRA § 311, 42 U.S.C. § 11021.

72. Section 312 of EPCRA, 42 U.S.C. § 11022, and the regulations found at 40 C.F.R. Part 370, require the owner or operator of a facility which is required to have a MSDS for a hazardous chemical under the OSH Act of 1970, 29 U.S.C. § 651 *et. seq.*, and regulations promulgated under that Act, to prepare and submit an emergency and hazardous chemical inventory form (Tier I or Tier II, as described in 40 C.F.R. Part 370) containing the information required by those sections to the LEPC, SERC, and also the fire department with jurisdiction over the facility, by March 1, 1988 or March 1 of the first year after the facility first becomes subject to the requirements of EPCRA § 312, 42 U.S.C. § 11022, and annually thereafter.

73. Section 313 of EPCRA, 42 U.S.C. § 11023, and the regulations found at 40 C.F.R. Part 370, require the owner or operator of a facility to complete a toxic chemical release form for each toxic chemical listed in Section 313(c) of EPCRA, 42 U.S.C. § 11023(c), that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by Section 313(f) of EPCRA, 42 U.S.C. § 11023(f) during the preceding calendar year at the facility.

74. Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. §§ 19.2 and 19.4 (Table), provides that any person who violates any requirement of EPCRA § 312, 42 U.S.C. § 11022, shall be liable to the United States for a civil penalty in an amount up to \$25,000 per day of violation

occurring on or before January 30, 1997, and up to \$27,500 per day of violation for each such violation occurring after January 30, 1997 and up to \$32,500 for each such violation occurring after March 15, 2004.

### **RESOURCE CONSERVATION AND RECOVERY ACT**

75. RCRA and its amendments establish a comprehensive regulatory program for generators of hazardous waste and for the management of facilities that treat, store, or dispose of hazardous waste. Pursuant to the authority granted by RCRA, U.S. EPA has promulgated regulations applicable to such generators and hazardous waste management facilities, codified at 40 C.F.R. Parts 260-271. Plaintiff Delaware has authority to regulate the generation, storage, transportation, treatment and disposal of hazardous waste within the State of Delaware pursuant to 7 Del. C. § 6304.

76. RCRA's Subchapter III (RCRA §§ 3001 - 3023, 42 U.S.C. §§ 6921 - 6940) (also known as "Subtitle C") required EPA to promulgate regulations establishing performance standards applicable to facilities that generate, transport, treat, store and dispose of hazardous wastes.

77. Section 3002 of RCRA, 42 U.S.C. § 6922, directs the Administrator to promulgate regulations establishing standards applicable to generators of hazardous waste. These regulations are codified at 40 C.F.R. Part 262.

78. Section 3004 of RCRA, 42 U.S.C. § 6924, directs the Administrator to promulgate regulations establishing standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities. These regulations are codified at 40 C.F.R. Part 265.

79. RCRA and its implementing regulations provide for government regulation of hazardous waste management facilities primarily through a permitting process. Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), requires each person owning or operating a hazardous waste treatment, storage or disposal facility to have a permit and prohibits the treatment, storage or disposal of hazardous waste except in accordance with a permit.

80. Section 3005(e)(1) of RCRA, 42 U.S.C. § 6925(e)(1), provides that a hazardous waste facility that was in existence on November 19, 1980, may obtain “interim status,” and treatment, storage, or disposal of hazardous waste at the facility may continue until EPA takes final action with respect to the facility’s permit application, as long as the facility satisfies specified conditions. These conditions include filing a timely notice under Section 3010 of RCRA, 42 U.S.C. § 6930, and filing an application for a hazardous waste permit.

81. Section 3006(g) of RCRA, 42 U.S.C. § 6926(g), provides that EPA must carry out new requirements promulgated pursuant to the HSWA until such time as the State is authorized to carry out such program. The requirements established by the HSWA are effective in all states regardless of their authorization status and are implemented by EPA until a State is granted final authorization with respect to these requirements.

82. Under Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), and 40 C.F.R. Part 271, any State may apply for and receive authorization to enforce its own hazardous waste management program in lieu of the federal hazardous waste management program, provided the state requirements are consistent with and equivalent to the federal requirements. To the extent that the State hazardous waste program is authorized by U.S. EPA pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the requirements of the State program are effective in lieu of the

federal hazardous waste management program set forth in 40 C.F.R. Part 260. EPA retains independent authority to enforce requirements established pursuant to HWSA regardless of whether a state has been authorized to carry out such program.

83. Under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), the United States retains jurisdiction and authority to initiate an independent enforcement action to address any violations of the requirements of an authorized State program.

84. Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), provides that when any person has violated or is in violation of any requirement of RCRA, including provisions of a federally-approved state hazardous waste management program, the Administrator of EPA may commence a civil action in U.S. District Court for appropriate relief, including a temporary or permanent injunction.

85. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), as amended by the Federal Civil Penalties Adjustment Act of 1990, 104 Stat. 890 (codified as amended at 28 U.S.C. § 2461), provides that any person who violates a requirement of RCRA shall be liable for a civil penalty of up to \$27,500 per day for each violation that occurred after January 30, 1997 through March 15, 2004, and authorizes the assessment of civil penalties not to exceed \$32,500 per day for each such violation that occurred on or after March 15, 2004. Seven Del. C. § 6309(b), (c) authorizes Plaintiff Delaware to initiate a judicial enforcement action for a permanent or preliminary injunction and/or for a civil penalty of up to \$25,000 per day of violation against anyone who violated, or is in violation of 7 Del. C. Chapter 60, any rule or regulation promulgated there under, or any condition of any permit issued pursuant to that authority by the Plaintiff Delaware.

86. Pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), whenever the Administrator determines that there has been a release of hazardous waste into the environment from a facility that has interim status, that once had interim status, or that should have had interim status, the Administrator may commence a civil action for appropriate relief, including an injunction requiring the defendant to take corrective action necessary to protect human health and the environment.

87. The State of Delaware has a corrective action program.

***Relevant State RCRA Program***

88. Delaware - On June 8, 1984, EPA authorized the State of Delaware to administer and enforce a hazardous waste program in lieu of the federal hazardous waste management program established under Subchapter III of RCRA, 42 U.S.C. §§ 6921-6935, 40 C.F.R. § 272.401. Subsequent program revisions were approved on August 8, 1996, August 18, 1998, July 12, 2000, and August 8, 2002. 67 Fed. Reg. 51478 (Aug. 8, 2002). The authorized Delaware hazardous waste regulations were incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. § 6921, *et. seq.* 40 C.F.R. § 272.401. The State of Delaware's hazardous waste law is found in 7 *Delaware Code* Chapter 63 (§§ 6301 – 6317) pursuant to which Delaware has established regulations designated at the *State of Delaware Regulations Governing Hazardous Waste*.

89. At all times relevant to the violations alleged in this Complaint, the State of Delaware has been authorized to issue permits and to administer their own hazardous waste programs.

**FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT (“FIFRA”)**

90. FIFRA establishes a comprehensive scheme for regulating the distribution, use and sale of pesticides.

91. Section 12(A)(2)(g) of FIFRA, 7 U.S.C. § 136j, makes it unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

### **FIRST CLAIM FOR RELIEF**

#### **(CAA PSD/NNSR Violations at Covered Facilities)**

92. Paragraphs 1 through 91 are re-alleged and incorporated by reference as is fully set forth herein.

93. INVISTA owns and operates its facility at Seaford, Delaware.

94. At all times pertinent to this civil action, the Seaford Facility was a “major stationary source,” within the meaning of the Act for SO<sub>2</sub>, NO<sub>x</sub> and PM<sub>10</sub> for purposes of PSD and NNSR.

95. Upon information and belief, INVISTA has modified emissions units at its facilities at Seaford, Delaware as set forth in Appendix B to the United State’s Complaint.

96. Upon information and belief, each modification specified in Appendix B at the Seaford Facility was a “major modification” within the meaning of 40 C.F.R. § 52.21(b)(2), for PSD violations, and of 40 C.F.R. § 52.24(b)(2), for NNSR violations, to existing major stationary sources that resulted in a significant net emissions increase of: NO<sub>x</sub>, SO<sub>2</sub>, and/or PM from the Facility.

97. Since the major modifications of the Facilities, as identified in Appendix B, the Seaford Facility has been in violation of 7 Del. C. Chapter 60, Section 165(a) of the CAA, 42 U.S.C. § 7475(a), 40 C.F.R. §§ 52.21, 52.24, and the Delaware, SIP, by (1) failing to undergo

PSD or NNSR review, (2) failing to obtain permits, and (3) failing to install the best available control technology or lowest achievable emissions rate for the control of those pollutants for which a significant net emissions increase occurred.

98. Unless restrained by an Order of the Court, these violations of the Clean Air Act and the implementing regulations will continue.

99. The violations set forth above subject the defendants to injunctive relief and civil penalties of up to: (1) \$10,000 per day for each violation pursuant to 7 Del. C. § 6005.

### **SECOND CLAIM FOR RELIEF**

#### **(Other Violations of Clean Air Act)**

100. The allegations of paragraphs 1 through 99 above are realleged and fully incorporated herein by reference.

101. Based on information and belief, INVISTA violated and continues to violate 7 Del. C. Chapter 60, the applicable SIP provisions for the Seaford Facility as identified in Appendices A and B to the United States' Complaint.

102. Based on information and belief, INVISTA violated 7 Del. C. Chapter 60 and its applicable Title V requirements, its Title V permit and/or the requirements of CAA § 502 at the Seaford Facility as identified in Appendix A.

103. Based on information and belief, INVISTA violated 7 Del. C. Chapter 60 and Section 112 of the Clean Air Act by failing to meet the regulatory requirements for emissions of hazardous air pollutants at the Seaford Facility as identified in Appendix A.

104. Based on information and belief, INVISTA violated 7 Del. C. Chapter 60 and Section 603 of the Clean Air Act by failing to monitor and/or report Class I or Class II

substances in accordance with the requirements of Section 603 and the implementing regulations at the Seaford Facility as identified in Appendix A.

105. The violations set forth above subject the defendants to injunctive relief and civil penalties of up to: (1) \$10,000 per day for each violation pursuant to 7 Del. C. § 6005.

### **THIRD CLAIM FOR RELIEF**

#### **(Violation of the Clean Water Act)**

106. The allegations of paragraphs 1 through 105 above are realleged and fully incorporated herein by reference.

107. INVISTA is engaged in storing or consuming oil or oil products for backup generators located at its Seaford Facility in “harmful quantities,” as defined by 40 C.F.R. §110.3.

108. INVISTA’s Seaford Facility is an onshore facility within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. §1321(a)(10), and 40 C.F.R. Part 112, which, due to their location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by Section 502(7) of the Act, 33 U.S.C. §1362(7), and 40 C.F.R. §110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

109. Based on the above, and pursuant to Section 311(j)(1)(C) of the CWA and its implementing regulations, INVISTA is subject to the Oil Pollution Prevention requirements of 40 C.F.R. Part 112.

110. Based on information and belief, INVISTA has violated 7 Del. C. Chapter 60 and the CWA as specified in Appendix A at its Seaford Facility by failing to prepare and implement

a SPCC Plan, as required by Section 311(j)(1)(C) of the CWA, 33 U.S.C. §1321(j)(1)(C), and the regulations found at 40 C.F.R. §112.3 through §112.7.

111. INVISTA has been granted an NPDES permit by Delaware which allows for the discharge of process and sanitary wastewater in accordance with its terms at its Seaford Facility. The Delaware NPDES permit identifies the outfalls that INVISTA may use for such discharge and the types and amounts of pollutants that may be lawfully discharged.

112. Upon information and belief, INVISTA has violated the requirements of its NPDES permit or the Facilities' NPDES permit and/or stormwater requirements in violation of 7 Del. C. Chapter 60 and Sections 301 and 402 of the CWA at its Seaford Facility as identified in Appendix A to the United States' Complaint.

113. The violations set forth above subject the defendants to injunctive relief and civil penalties of up to: (1) \$10,000 per day for each violation pursuant to 7 Del. C. § 6005.

#### **FOURTH CLAIM FOR RELIEF**

(EPCRA Violations)

114. The allegations of paragraphs 1 through 113 above are realleged and fully incorporated herein by reference.

115. Upon information and belief, INVISTA has violated Section 302(c) of EPCRA, 42 U.S.C. § 11002( c),and the regulations found at 40 C.F.R. Part 370 by failing to provide the notice required under this Section to the State emergency response commission at its Seaford Facility as identified in Appendix A to the United States' Complaint.

116. INVISTA's Seaford Facility is a "facility" at which "hazardous chemicals" are produced, used, or stored, within the meaning of Section 304(a) and (b) of EPCRA, 42 U.S.C. § 11004(a), (b).

117. Upon information and belief, INVISTA has violated Section 312 of EPCRA, 42 U.S.C. § 11022, and the regulations found at 40 C.F.R. Part 370 by failing to prepare and submit an emergency and hazardous chemical inventory form (Tier I or Tier II, as described in 40 C.F.R. Part 370) containing the information required by those sections to the LEPC, SERC, and the fire department with jurisdiction over the facility by March 1, 1988 (or March 1 of the first year after the facility first becomes subject to the requirements of EPCRA Section 312), and annually thereafter at its Seaford Facility as identified in Appendix A.

118. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), as amended by the FCPIAA, 28 U.S.C. §2461 and adjusted by the DCIA, 31 U.S.C. §3701 and 40 C.F.R. Part 19, the violations above subject Defendant to civil penalties of up to \$25,000 per day for violations occurring on or before January 30, 1997, up to \$27,500 per day for violations occurring after January 30, 1997 up to March 15, 2004 and up to \$32,500 for violations occurring after that date.

#### **FIFTH CLAIM FOR RELIEF**

(RCRA Violations)

119. Paragraphs 1 through 118 are re-alleged and incorporated by reference as if fully set forth herein.

120. At all times relevant to the violations alleged in this Complaint, INVISTA is the "owner" and "operator" of the Covered Facilities, within the meaning of 40 C.F.R. § 260.10 and the applicable state laws and regulations.

121. INVISTA is a “generator” of hazardous waste within the meaning of 40 C.F.R. § 260.10 and applicable state laws and regulations at the Covered Facilities.

122. As relative to this Complaint, INVISTA generates RCRA-regulated hazardous wastes at its Covered Facilities.

123. Upon information and belief, INVISTA has violated 7 Del. C. Chapter 63 and Section 3002 of RCRA, 42 U.S.C. § 6922, the applicable regulations at 40 C.F.R. Part 262 and the applicable state regulations establishing standards applicable to generators of hazardous waste at INVISTA’s Seaford Facility as identified in Appendix A to the United States’ Complaint.

124. Upon information and belief, INVISTA has violated 7 Del. C. Chapter 63 and Section 3004 of RCRA, 42 U.S.C. § 6924, the applicable regulations at 40 C.F.R. Part 265 and the applicable state regulations which establish requirements for owners and operators of hazardous waste treatment, storage, and disposal facilities at its Seaford Facility as identified in Appendix A.

124. Pursuant to 7 Del. C. § 6309, INVISTA is subject to injunctive relief and is liable for civil penalties for this claim for relief.

**SIXTH CLAIM FOR RELIEF**

**(FIFRA Violations)**

125. Paragraphs 1 through 124 are re-alleged and incorporated by reference as if fully set forth herein.

126. Upon information and belief, INVISTA has violated Section 12(A)(2)(g) of FIFRA, 7 U.S.C. § 136j by using a registered pesticide in a manner inconsistent with its labeling at its Seaford Facility, as specified in Appendix A to the United States' Complaint.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Delaware, the Acting Secretary of the State of Delaware Department of Natural Resources & Environmental Control, respectfully requests that this Court:

1. Order INVISTA to immediately comply with the statutory and regulatory requirements cited in this Complaint;
2. Order INVISTA to take appropriate measures to mitigate the effects of its violations;
3. Assess civil penalties against INVISTA for up to the maximum amounts provided in the applicable statutes; and
4. Grant the Plaintiff Delaware such other relief as this Court deems just and proper.

Respectfully submitted,

Date: April 13, 2009

*/s/ Valerie M. Satterfield*

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