



**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL
DIVISION OF WASTE AND HAZARDOUS SUBSTANCES
SITE INVESTIGATION & RESTORATION SECTION**

Subject: Policy Concerning Ability to Pay Determination

Issued: November 6, 2013

This Policy addresses how the Site Investigation and Restoration Section (SIRS) will administer the Ability to Pay Determination. The Ability to Pay Analysis determines if a Potentially Responsible Party (PRP) can fully fund their required remedial costs under the Hazardous Substance Cleanup Act (HSCA). The specific elements of the Ability to Pay Analysis will be covered under a separate SIRS policy. It is at the full unreviewable discretion of the SIRS when to use the Ability to Pay Determination for a PRP and what that determination will be for any PRP. If SIRS determines that an inability to pay determination may be afforded to a PRP, the SIRS will request specific terms in a Settlement Agreement between the Department. The Settlement Agreement shall state:

1. The amount the PRP will be responsible to pay for the remedy; and,
 - a. If the amount is less than the total amount of the remedy, then the SIRS will review all the financial data every five years. The five-year review will evaluate the PRP's financial records to see if the PRP's financial situation has changed, therefore changing the amount the PRP is required to pay.
 - i. If the terms of the repayment changes at the conclusion of the five-year review process, a amended settlement agreement between the PRP and the SIRS will be required.
2. The terms of repayment.
 - a. The SIRS will allow a repayment schedule on a monthly basis up to 10 years with an interest rate as low as 0%.
 - i. If a payment is received by the Department 30 or more days past due, a late fee up to 3% may be assessed.
 - b. Payment may be in the form of a lien placed upon the property indicating the the proceeds of a sale will satisfy the financial responsibility of the PRP for remedy.

The SIRS can determine, at any time during settlement negotiations with the PRP to implement the Ability to Pay Determination, that satisfactory progress has not been achieved. When settlement negotiations cease, at the request of either the SIRS or the PRP, the SIRS will follow the provisions outlined in 7 Del C. Ch. 91 to seek full payment of the remedial costs.

At any time, either prior to, during, or after the Ability to Pay Determination, SIRS may withdraw the PRP from consideration of the Ability to Pay Determination if:

1. The PRP fails to follow the provisions outlined 7 Del C. Chapter 91 or the regulations promulgated pursuant to it;
2. The PRP is non-cooperative with, or fails to provide access to, the Department regarding performance of the completion of a remedy;
3. The PRP violates other environmental requirements made by the Department;

4. The PRP fails to exercise due care regarding hazardous substances or releases or treat of releases;
5. The PRP submits any false or fraudulent information to the Department;
6. The PRP's culpability for causing or contributing to any releases;
7. The PRP takes actions which SIRS determines are inconsistent with the purposes of HSCA; or,
8. Granting an Inability to Pay Determination to the PRP would be fundamentally unfair to the Department, other RP's, or any other person.

Once SIRS withdraws the Ability to Pay Determination, the PRP must follow the provisions of 7 **Del C.** Chapter 9109 to satisfy their liability under HSCA. In addition, regardless of the Ability to Pay Determination the SIRS can use the full amount of the PRP's liability to the State pursuant to 7 **Del C.** Ch. 91 to offset any claims made by the PRP against the State related to the performance or requirement of the remedy.

Approved:


Timothy Ratsep
Program Administrator

Date:

11/06/2013

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