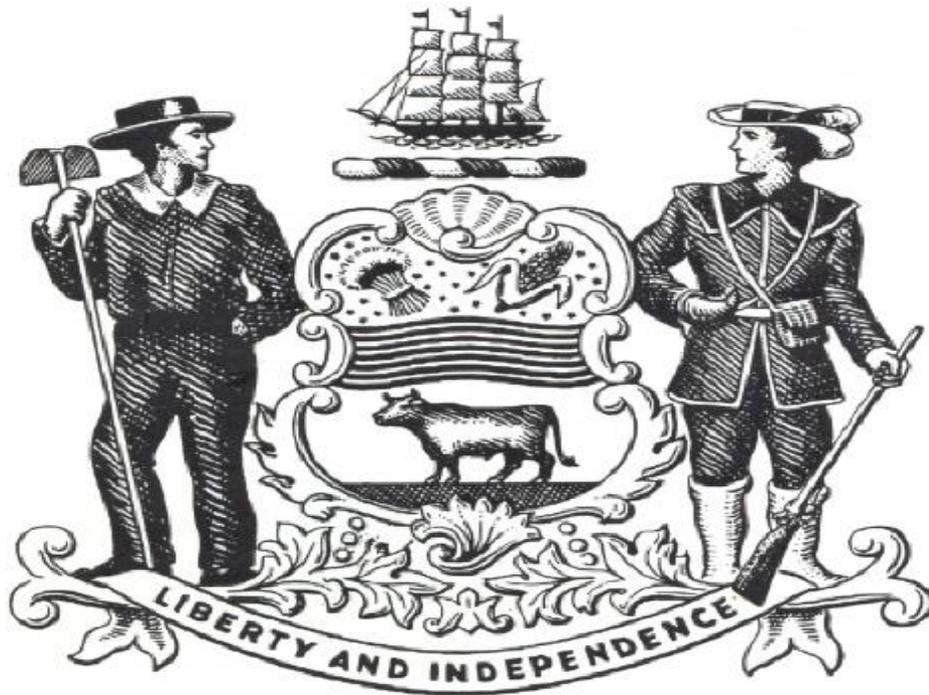

Joint Legislative Oversight and Sunset Committee



**Division of Waste and Hazardous Substances
Hazardous Substance Cleanup Act Fund**

2018 Draft Report

February 2018

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A NOTE ABOUT THIS DRAFT REPORT

The information provided in this report is taken from the Joint Legislative Oversight and Sunset Committee (“Committee”) Performance Review Questionnaire, as it was completed by the agency under review. When appropriate, the Analyst who prepared this report made minor changes to grammar and the organization of information provided in the questionnaire, but no changes were made to the substance of what the agency reported. Any points of consideration which arose in analyzing the questionnaire and compiling this report are addressed in the section titled Additional Comment from the Committee Analyst. It is the intent of the Analyst to make any substantive changes which may be required, as the result of findings made through the review processes, in the final version of this report.

The statutes governing and applying to the agency under review are included as Appendices to this Draft Report. They are included only as a reference for Joint Legislative Oversight and Sunset Committee members, and may not be included in the Final Report.

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AGENCY HISTORY

The Delaware Hazardous Substance Cleanup Act (“HSCA”), 7 *Del.C.* Chapter 91 was passed by the Delaware General Assembly in July 1990.¹ Amendments have been added over the years to support the addition of the Voluntary Cleanup and Brownfields Development Programs.

The HSCA statute gives the Department of Natural Resources and Environmental Control (“DNREC”) the ability to ensure cleanup of facilities with a release, or imminent threat of release, of hazardous substances. The main objective of HSCA is to enable DNREC to address those sites not remediated under the federal Superfund program. Since 1991, DNREC has identified over 1,997 sites in Delaware as potential hazardous substances release sites, between Tank Management Systems (“TMS”), Emergency Prevention and Response Section (“EPRS”), and Site Investigation and Restoration Section (“SIRS”).²

JUSTIFICATION AND NEED FOR EXISTENCE

Before the creation of the HSCA fund, there were many vacant, abandoned, or under-utilized sites that lay contaminated and posed a risk to human health or the environment. Some conditions were naturally occurring and others were caused by historic industrial and commercial activities within the State. The EPA investigated and remediated the worst of the hazardous substances sites under the Federal Superfund Program before the creation of the HSCA Program. Prior to the creation of HSCA, there was no framework for the proper management of containment or disposal of hazardous substances to prevent contamination. Contaminated sites include dry cleaning facilities, salvage yards, closed gas stations, historically filled lands, and debris pits. Contamination from these sites entering groundwater, streams, and soils, poses a risk to public health and safety.

Under the Federal Superfund Program, the State is required to provide a cost share for federally funded remedial actions, such as the Standard Chlorine Metachem facility in Delaware City. At the Standard Chlorine facility, HSCA will start funding the groundwater pump and treat system for \$500,000 each year into perpetuity. Prior to HSCA, there was no state financial mechanism to provide this cost share.

The program is funded by levying a 0.9% tax on all taxable gross receipts from the sale of petroleum or petroleum products, with the exception of crude oil. The State HSCA Program, except for the Brownfield Development Program, requires potentially responsible parties to pay for the costs associated with investigating, and if necessary, cleaning up a site. If a potentially responsible party cannot be identified or is unable to pay for the cleanup, monies from the HSCA Fund (“the Fund”) are utilized to perform the cleanup at the site.

HSCA applies to all of the programs that are managed through DNREC’s SIRS, including the Brownfields Development Program, Voluntary Cleanup Program (“VCP”), state-led projects, and enforcement matters. The Brownfields Program follows the HSCA statute and regulations; the

¹ See Appendix A for 7 *Del.C.*, Chapter 91

² See Appendix B for Organizational Chart.

Brownfields grants are financed by the Fund for approved sites. The VCP follows the HSCA statute and regulations; however, the responsible party pays for the cleanup as well as oversight costs. State led projects follow the HSCA statute and regulations; the cleanup is financed by the Fund until the responsible party can be identified. Enforcement occurs when the responsible party fails to comply with the HSCA statute and regulations and either DNREC Secretary's or judicial order is obtained to enforce compliance.

To date, the Division has remediated and is overseeing long-term monitoring on over 1,450 sites. Many of these sites have been brought back into productive use to the State, creating economic growth and a safer environment for our citizens. There have also been large groundwater contamination issues affecting thousands of people on public or private well water systems who have benefited from the use of the Fund to clean up the contamination. This has been particularly true in rural and suburban areas that have been contaminated by dry cleaning, salvage yard, or mining operations.

The State has also become the lead on sites where the responsible party either went bankrupt or does not have the financial means to fund the remedial action, such as the Wilmington Riverfront development, the NVF site in Yorklyn, the Georgetown Cleaners site in Georgetown, the Seaboard Lumber site in Bridgeville, and North Street Plume site in Dover. For the Wilmington Riverfront, HSCA has funded in the sum of \$15,890,872.41 to address the environmental conditions along the Christiana River putting the once industrial contaminated lands back into productive residential/commercial uses. At the Seaboard Lumber facility, HSCA has expended \$1,681,540.25 in funds to address contamination left behind from a former creosote operation. At NVF Yorklyn, the State is still responsible for operating the zinc removal system and undertaking other cleanup activities at the bankrupt site. The Division has spent \$5,615,774.34 from HSCA to date. Large HSCA cleanup operations, which account for millions of dollars in investigation and remediation activities, have put a financial strain on the Division. Due to financial constraints on the Division, it was necessary to take out a \$3 million dollar loan from the Delaware Clean Water and Drinking Water State Revolving Loan Fund in 2016 in order to continue funding the remediation at NVF Yorklyn.

In addition to the Division utilizing HSCA to take the financial and technical lead on facilities, it has also been instrumental in supporting private entities putting contaminated properties back into a productive use by means of the Brownfield Development Program ("BDP"). Three reports completed by the University of Delaware illustrate the economic and social benefits of the BDP.³ To date, 269 sites have been certified as Brownfields. Sites like the Cutis Paper Mill where HSCA provided the City of Newark with \$946,423.62 for the investigation and cleanup, which transformed this old industrial Site into a City park; to the Former Kirkwood Highway Gulf station where HSCA provided \$132,605.77 to a private developer to transform a closed gas station into a bank; or the Former Bancroft Mills in Wilmington where HSCA funded \$225,000.00 to evaluate the environmental condition of the historical property. Without the support of the Fund, these properties would most likely not have been redeveloped.

³ Analyst note: Reports available upon request.

JOINT LEGISLATIVE OVERSIGHT AND SUNSET COMMITTEE REVIEW HISTORY

The Joint Legislative Oversight and Sunset Committee (“JLOSC”) has never reviewed the Division of Waste and Hazardous Substances oversight of the HSCA fund.

MISSION, GOALS, OBJECTIVES, & AUTHORITY

Mission Statement of the Division of Waste and Hazardous Substances

The mission of the Division of Waste and Hazardous Substances (“Division”) is to protect the environment and the health and safety of the people in Delaware. We do this by ensuring compliance with and enforcing, Delaware’s waste and hazardous substances management laws, promoting waste reduction and recycling, remediating contaminated sites, and by conducting emergency planning, prevention, and response.

Vision Statement of the Division of Waste and Hazardous Substances

The Department envisions a Delaware that offers a healthy environment where people embrace a commitment to the protection, enhancement, and enjoyment of the environment in their daily lives; where Delawareans’ stewardship of natural resources ensures the sustainability of these resources for the appreciation and enjoyment of future generations; and where people recognize that a healthy environment and a strong economy support one another.

The HSCA legislation was enacted to require prompt containment and removal of hazardous substances, to eliminate or minimize the risk to public health or welfare or the environment, and to provide a fund for the cleanup of the facilities affected by the release of hazardous substances. Therefore, HSCA accurately reflects the mission of the Division.

The following represents the program-related goals and objectives for FY2018:

- Support the Delaware Downtown Development District Program.
- Finalize sections of the HSCA Guidance document.
- Continue to work on the National Priorities List Sites with the federal government and toward a record of decision.
- Continue to improve the Site Status Database for SIRS.
- Continue improvements in Brownfield/Voluntary Cleanup Program (“VCP”).
- Provide technical assistance and coordination to address contamination issues associated with other programs.
- Promote innovative technologies in Site investigation and remediation.
- Conduct background and bioavailability studies supporting cleanup standards.
- Conduct baseline assessments and other activities to support a Natural Resource Damage Assessment (“NRDA”) Program.
- Implement Groundwater NRDA Program.
- Conduct assessments and other activities to support the Watershed Assessment Program.
- Initiate basin-wide implementation of sediment remedy through Watershed Approach to Toxics Assessment and Restoration (“WATAR”).
- Work with Division of Small Business, Development and Tourism, formerly known as the Delaware Economic Development Office (“DEDO”), to fully utilize the Brownfield Program in promoting the reuse of properties throughout the State.
- Continue to address the 447+ backlogged HSCA sites to determine what further actions are necessary.

- Fully utilize EQUIS for storing all environmental data within SIRS and assist in Department-wide implementation.
- Continue working with the consulting firm Brightfields, Inc. to complete a study on dry cleaners.
- Address regulatory authority over releases from golf courses and orchards. Working with the University of Delaware on a study of the issue.
- Publish the HSCA Expenditure Plan for FY2019.

The main objective of HSCA is to enable DNREC to address those sites not remediated under the Federal Superfund Program. DNREC also administers several programs under the TMS relating to preventing and cleaning up releases of hazardous substances from underground and aboveground storage tank systems. These include using HSCA funds for state-led projects where a responsible party cannot be found, or when the responsible party is not following regulatory requirements or does not have the ability to pay. HSCA funds have also been used to support financial assistance programs that have reimbursed tank owners for costs associated with removing underground storage tanks and cleaning up releases that have occurred. HSCA funds continue to support the closure of underground storage tanks containing heating fuel that have exceeded their expected service lives. HSCA funds also support the DNREC's Emergency Response Program which mitigates and stabilizes hundreds of releases of hazardous substances that are reported each year through DNREC's spill response hot-line.

In addition, DNREC funds some of the Emergency Prevention and Response Section's ("EPRS") Environmental Response Program activities with monies from HSCA.

COMPOSITION & STAFFING OF THE ADVISORY COMMITTEE

Composition:

There are currently about 25 active participants that attend the quarterly meetings.⁴ This includes 10 to 11 Division staff and the Deputy Attorney General. The additional members are made up of the public, environmental consultants, and attorneys. The HSCA Advisory Committee ("HAC") was established by the Division to be advisory to the Division on matters relating to HSCA. As such, the HAC is not in the Delaware Code or governed by any statute or regulation. All meetings are publicly noticed and anyone who attends is considered a member for purposes of the meeting. The Division seeks the HAC's advice on potential changes to the HSCA statute and regulations, as well as any Division policies or standards.⁵

Compensation:

The members are not compensated for related expenses or the services they provide to the HAC.

Member Trainings:

The HAC members are not provided training opportunities.

Staffing:

The Division has a current authorized staff of 85 merit FTEs; there are no appointed employees. However, only the following sections within the Division work on HSCA Programs: SIRS, TMS, and the EPRS.

There are currently 30 authorized merit positions in SIRS. Of these, 4 are vacant, 11 are funded by EPA grants, and the remaining 15 are funded through the Hazardous Substance Cleanup Act Fund and

⁴ See Appendix C for a list of current HAC participants.

⁵ See Appendix D for the HAC Purpose and Rules.

reimbursements by responsible parties for oversight of cleanup of their sites. There are 2.76 positions within the TMS funded by the HSCA Fund to clean up leaking underground storage tank sites. Also, 1.5 positions within the ERPS are paid by the Fund. All of these positions are merit. Additionally, the Fund pays for the services of 2 Deputy Attorney General positions in the State of Delaware Department of Justice.

DNREC does not utilize contractual workers for the HSCA Fund. However, conservation district employees assist DNREC with conservation-related activities and are shown in the table below.

Year	SIRS Employees utilized	TMS Employees utilized
2016	4	1
2017	3	2
2018	3	2

The Division has been able to adjust workloads to make resources available, while still ensuring the protection of public health. With the recent reduction in HSCA revenue and Federal grants, the Division reduced staff through attrition and reset its priorities to focus on sites that are impacting drinking water, have a potential to impact drinking water, have vapor intrusion into buildings, or have contaminated residential soils, and emergency response to releases of hazardous substances. Consequently, the Division has put remediation of several sites on hold and has reduced the funding for Brownfields and the Underground Storage Tank Home Heating Oil Assistance Program.

Staff is hired in accordance with all state merit employee regulations as administered by the Office of Management and Budget and the Department of Human Resources. Staff is hired through the State of Delaware Employment Website. In-house announcements are made when a position is posted to the website, which gives current staff the opportunity to apply for positions within the Department.

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Staff Member Name & Title	Responsibilities	Percentage of Time Devoted to Responsibility
Employees under the Site Investigation and Restoration Section		
Robert Asreen	Project Manager (Hydrologist IV)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Gertrude Barone	Administrative Specialist I	100% Scans and files all documents
Patrick Boettcher	Project Manager (Hydrologist)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Keith Brady	Deputy Attorney General	100% legal services for Brownfield Program
Eileen Capitoli	Project Manager (Environmental Scientist I)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
John Cargill	Project Manager	10% Manages sites under HSCA
Meghan Crystall	Project Manager (Environmental Scientist II)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc. Also completes O&M Inspections
Kate Durant	Project Manager (Environmental Scientist II)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Rick Galloway	Project Manager (Hydrologist IV)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Stephanie Gordon	Project Manager (Environmental Scientist II)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Lindsay Hall	Project Manager (Engineer III)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Vanessa Hamm	Management Analyst I	100% manages Equis database
Karissa Hendershot	Project Manager (Environmental Scientist III)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc. Enters all GIS information
Todd Keyser	Project Manager (Hydrologist II)	10% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Sandy Kimbel	Management Analyst I	50% manages Federal Grants and 50% works on financial transactions under HSCA & VCP program.
Liz Lasorte	Paralegal	100% supports the Departments Deputy Attorney Generals

Melissa Leckie	Management Analyst II	95% work on Brownfield program managing grants and loans 5% working on HSCA program loans and budget.
Pam Livingston	Administrative Specialist I	95% manages the front desk and 5% completes travel request for Department
Wendy March	Project Manager (Environmental Scientist IV)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc. Also completes O&M Inspections
Morgan McGee-Solomon	Project Manager (Environmental Scientist II)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Bob Phillips	Deputy Attorney General	100% legal services for HSCA and VCP Program
Jim Poling	Planner IV	100% works on Certifying Brownfield Sites and legislative bills for the Brownfield Program.
Morgan Price	Project Manager (Environmental Scientist IV)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc. Manages all environmental Contracts
Timothy Ratsep	Program Administrator	100% Oversees all programs under SIRS
Qazi Salahuddin	Program Manager II	100% Oversees 9 employees that work under SIRS
Bob Schulte	Analytical Chemist III	95% manager Department Laboratory and oversees 3 employees. 5% manages sites under Brownfield Program and HSCA
Krystal Stanley	Project Manager (Environmental Scientist II)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Kristen Thornton	Project Manager (Environmental Scientist III)	100% Manages sites under the different programs HSCA, VCP, Brownfields, etc.
Christina Wirtz	Ombudsman	50% Acts as Division Ombudsman and 50% project management of HSCA & VCP sites.
Paul Will	Program Manager II	100% Oversees 8 employees that work under SIRS
Randal Wolfe	Analytical Chemist III	100% works in the SIRS Lab
Employees under the Tank Management Section		
Barbara Fawcett	Program Manager II	76% to HSCA Admin as Leaking Underground Storage Tanks (“LUST”) Prevention Match

Jill Hall	Planner IV	100% to HSCA Admin
David Lerner	Hydrologist III	100% LUST Cleanup Grant Match project management
Employees of the Emergency Response and Prevention Section		
Matthew Higgins	Environmental Scientist IV	100% Emergency Response Incidents
Eric Schuller	Environmental Scientist III	50% Emergency Response Incidents

Keith Brady is the Deputy Attorney General assigned to the Division.

ENACTED LEGISLATION IMPACTING THE COMMISSION

State Legislation

Public Notice of Contaminated Sites

HB 200 with HS-140th General Assembly (“GA”), enacted on 6/20/2000.

Updated the DE Code regarding notices of contaminated sites, by deleting the requirement that the notice of a contaminated site be posted in at least four public places in the community in which the hazardous substance is found and replaced it with notice to elected state officials, local governments, and civic associations.

Reauthorization

SB 356-140th GA, enacted on 7/6/2001.

This Act reauthorized the Hazardous Substance Cleanup Act through December 31, 2011.

Notification of Environmental Releases

SB 33 with SS 1-141st GA, enacted on 07/06/2001.

This Act amended the notification of environmental releases and facility performance, established the Community Involvement Advisory Council, and made technical corrections.

Brownfield

SB 183-141st GA, enacted on 7/13/2001.

This Act amended Chapter 91 of Title 7 of the Delaware Code to define “Brownfield,” and to authorize the Delaware Economic Development Office (DEDO) to make grants from the Delaware Strategic Fund to defray a part of the costs for the environmental assessment and remediation of Brownfields.

Strengthened Environmental Enforcement

SB 60-142nd GA, enacted on 7/16/2003.

This Act amended the Delaware Code to further deter individuals from engaging in activity that will pollute Delaware’s environment.

Created Independent Brownfields Program

SB 328-142nd GA, enacted on 8/3/2004.

This Act created the Brownfields Development Program to encourage the redevelopment of Brownfields. This Act also changed DEDO’s matching grant program to assist in the cost of environmental assessment and remediation of certified Brownfields that is part of the Delaware Strategic Fund program.

Update Above Ground Storage Tank Signage Requirement

SB 344 with SS 1-142nd GA, enacted 7/22/2004.

This Act removed the signage requirement for all aboveground storage tanks exempted from registration and regulation requirements. Exempted tanks include heating fuel, diesel, and kerosene tanks less than 20,000 gallons, and hazardous substance tanks less than 250 gallons.

Environmental Covenants

SB 112-143rd GA, enacted on 7/21/2005.

This Act streamlined the process of developing Brownfield sites by establishing a state statutory basis for environmental covenants that is consistent with the Uniform Environmental Covenant Act. This legislation provided authority for establishing durable and enforceable environmental covenants. It also established a process to amend or eliminate the environmental covenant if the conditions that gave rise to the need for the covenants no longer exist (e.g., residual buried hazardous waste contamination).

Expense Recovery

SB 89-143rd GA, enacted on 7/6/2006.

This Act assisted and allowed DNREC to recover expenses incurred including: investigations, legal fees, materials, equipment, human resources, contractual assistance, appropriate salary, and overtime associated with abating a pollution violation. The process is broadened, allowing civil action in any court within the State of Delaware, rather than Superior Court only.

Strengthened Penalty Section

SB90-143rd GA, enacted on 6/7/2006.

This Act strengthened the penalty section for violations of Chapter 60 of Title 7 of the Delaware Code.

HSCA Fund Tax

HB 234-144th GA, enacted on 7/21/2007.

This Act ensured that the tax surcharge imposed for the Fund is paid only once, regardless of how many times petroleum products are resold.

Transfer of an Establishment

SB168 with SS 1-144th GA, enacted on 5/15/2008.

This Act clarified the legal definition of the transfer of an establishment, and brings consistency to other exemptions in change of ownership.

Crude Oil Lightering Business License

HB 287-145th GA, enacted on 7/01/2009.

This Act established the annual business license fee for crude oil lightering operations. It exempted crude oil lightering operations from the gross receipts tax and revised out-of-date references. It also directed that all license fees generated are deposited into the Hazardous Substance Cleanup Fund.

Increase of Gross Receipts Tax Rates

HB 289-145th GA, enacted on 7/01/2009.

This Act increased certain General Fund business and occupational gross receipts tax rates. Sections 21 and 22 of this Act directed that the first \$1 million collected each year under the gross receipts tax surcharge on petroleum be deposited in the General Fund.

DNREC Division Reorganization

HB 480-145th GA, enacted on 7/23/2010.

This Act separated the Division of Air and Waste Management into the Division of Waste Management and Division of Air Quality and authorized the DNREC Secretary to create an Office of Environmental Protection to include the Divisions of Waste Management, Air Quality, and Water.

Gross Receipts Tax Exemption

HB 10-146th GA, enacted on 1/28/2011.

Exempted from the Wholesale Merchants' Gross Receipts Tax the gross receipts from

- (i) sales of crude oil by a crude oil wholesaler to a petroleum product refiner,
- (ii) sales of intermediate petroleum products that have been partially refined by a petroleum product refiner to an intermediate petroleum products wholesaler and from an intermediate petroleum products wholesaler back to a petroleum product refiner,
- (iii) sales of finished petroleum products by a petroleum product refiner to a finished petroleum products wholesaler, and
- (iv) sales of finished petroleum products by a finished petroleum products wholesaler to a wholesaler, if the finished petroleum products wholesaler and the wholesaler stand in a control relationship, i.e., one owns, directly or indirectly, 100% of the other or a third party owns, directly or indirectly, 100% of both the finished petroleum products wholesaler and the wholesaler.

Proceeds from sales of a petroleum product refiner to an intermediate petroleum products wholesaler are similarly exempted from the Manufacturers' Gross Receipts Tax. These changes did not cause a decrease in the Wholesale Merchants' Gross Receipts Tax or the Manufacturers' Gross Receipts Tax.

Revisions to DNREC's Chronic Violator Program

SB 92-146th GA, enacted on 8/16/2011.

This Act revised DNREC's chronic violator program, made consistent several definitions, clarified and expanded the standard and criteria for chronic violator status, added categories of factors and types of violations, updated DNREC's authority to promulgate regulations and enhanced administrative penalties.

DNREC Division Changes

SB 102-146th GA, enacted on 7/13/2011.

This Act changed the name of DNREC's Division of Waste Management to Division of Waste and Hazardous Substances ("the Division"), and enumerates the programs organized under the newly-named division. The Act re-designated the Division of Boiler Safety as a program within the newly-named Division of Waste and Hazardous Substances, eliminated the position of Director of Boiler Safety, and moved the Boiler Safety enabling legislation from Chapter 80 of Title 29 to a new Chapter 74B of Title 7. It also authorized fees from DNREC's Aboveground Storage Tank Program to partially fund administration costs of DNREC's Underground Storage Tank Program and the Boiler Safety Program.

HSCA Funding

HB 127-146th GA, enacted on 7/01/2011.

Restored full funding for the Hazardous Substance Clean-up program in FY 2012 instead of FY 2014.

HSCA Sunset Provisions

HB 163-146th GA, enacted on 7/7/2011.

This Act eliminated the sunset provisions of the Delaware Hazardous Substance Cleanup Act. The Hazardous Substance Cleanup Act was enacted by the General Assembly in 1990 and re-authorized in 2000. The ten-year sunset provisions for the financing of the Hazardous Substance Cleanup Fund were retained with a new sunset date in 2022. In addition, the exemption for transactions among petroleum wholesalers enacted in 2007, which was scheduled to expire on January 1, 2015, was extended indefinitely.

Eliminated Crude Oil Lightering Business License Fee

HB 251-146th GA, enacted on 3/29/2012.

This Act eliminated the \$100,000 business license fee for firms engaged in crude oil lightering. It consequently eliminated the designation of proceeds from the lightering license fee to the Hazardous Substance Cleanup Fund.

HSCA Fiscal and Due Process Updates

SB 198-147th GA, enacted on 10/16/2014.

This Act updated lender liability under HSCA, by amending and adding definitions and detailing the responsibilities of lenders. It also permitted reimbursements and direct payments to any person who enters into a settlement agreement with DNREC. Finally, the legislation aligned due process provisions of HSCA with other state environmental statutes by allowing orders to be issued by the DNREC Secretary without a prior public hearing but allowing an appeal to the Environmental Appeals Board.

Definition Update and Inspection Mandate

SB 199-147th GA, enacted on 9/11/2014.

This Act amended the definition of “extremely hazardous substance” in 7 Del. C., Chapter 77, the Extremely Hazardous Substances Risk Management Act, to be consistent with the wording in the Federal Clean Air Act Amendments and the federal Risk Management Program. This Act also replaced the 3 year inspection mandate for the DNREC to inspect facilities regulated by Chapter 77 with an inspection program based on risk and compliance and established requirements for inspection notice and inspector identification.

DNREC Violation Fines

SB 258-147th GA, enacted on 9/2/2014.

This Act declassified a number of minor violations associated with wildlife, hunting, fishing, and boating by changing them from environmental misdemeanors to environmental violations. The legislation modernized penalties. Finally, the jurisdiction for a number of violations was changed from Superior Court to Magistrate Court.

Modifications to Storage Tank Program

HB 367-147th GA, enacted on 10/06/14.

This Act made a number of revisions, additions, and technical clarification to Chapter 91 of Title 7 relating to Delaware’s petroleum and hazardous substances underground storage tank program in order to ensure the protection of public health and the environment, including drinking water.

Redirection of HSCA Funds

HB 425-147th GA, enacted on 7/01/2014.

This Act was the Bond and Capital Improvement Act of the State for the Fiscal Year ending June 30, 2015. Section 6, Line 25 directed the State Treasurer to reauthorize \$3,000,000.35 from the HSCA fund to various other purposes.

Declassification of Minor Violations

SB 114-148th GA, enacted on 8/14/2015.

This Act declassified a number of minor violations associated with state parks by changing some violations from an unclassified misdemeanor to class D environmental violations. As a result, the first offense of a class D environmental violation will not be reported on criminal history records provided by the State Bureau of Identification for employment purposes under § 8513(c) of Title 11. However, subsequent offenses will be reported for employment purposes.

Violation Corrections

SB 115-148th GA, enacted on 4/20/2016.

This Act made housekeeping amendments to § 1304(i) of Title 7 to clarify the process by which a first offense class C or D environmental violation in Chapter 13, Title 7, relating to fish and game violations, will not be reported on criminal history records provided by the State Bureau of Identification for employment purposes. This Act also clarified that subsequent convictions will be reported for employment purposes.

Clarifies Storage Tank Definitions and HSCA Responsibility

SB 233-148th GA, enacted on 07/13/16.

This Act clarified the definitions pertinent to the Hazardous Substance Cleanup Act, authorized the Department to intervene when the owner or operator has failed to address situations, and clarified the authority for the Department to recover costs associated with these activities. Lastly, the Act authorized the use of HSCA Funds to prevent releases of petroleum and other hazardous substances from aboveground storage tanks, and to investigate and clean up such releases when they occur.

Brownfield Definition and Loan Issuance

SB 236-148th GA, enacted on 8/03/2016.

The Act amended the definition of “Brownfield” so that the designation of the property as a Brownfield is focused on the remediation of environmental contamination and not the status of the property’s use.

Federal Legislation

The Hazardous Substance Cleanup Act, when drafted was intended to mirror the Federal Comprehensive Environmental Response Compensation & Liability Act (“CERCLA”). HSCA funds are used to perform cleanup actions under the underground storage program when responsible parties liable for cleanup activities are recalcitrant and not performing required cleanup actions, do not exist, or do not have the ability to pay for the required work.

PENDING LEGISLATION

At this time, there is no pending legislation that would affect the HSCA fund or HAC.

ADMINISTRATIVE PROCEDURES ACT COMPLIANCE

The Regulations Governing Hazardous Substance Cleanup are promulgated in accordance with 7 *Del.C.* Ch. 91, Delaware Hazardous Substance Cleanup Act, 7 *Del.C.* Ch. 60, Environmental Control, and 7 *Del.C.* Ch. 63, Hazardous Waste Management. The goal of these regulations is to implement the purposes declared in 7 *Del.C.* §9102. The regulations were adopted initially in September of 1996. They were amended in February 2002, August 2012, and July 2015.

Below is a list of the rules and regulations under HSCA.

Section 1.0: General Provisions

Subsection 1.1: Statement of Authority and Purpose

Subsection 1.2: Applicability

Subsection 1.3: Applicability of Other Laws and Regulations; Variances

Subsection 1.4: Severability

Subsection 1.5: Oversight

Section 2.0: Definitions and Usage

Subsection 2.1: Definitions

Subsection 2.2: Usage

Section 3.0: Facility Identification & Prioritization

Subsection 3.1: Notification Requirements

Subsection 3.2: Inventory of Hazardous Substance Release Facilities

Subsection 3.3: Priority List

Subsection 3.4: Brownfields Certification and Funding

Subsection 3.5: Facility Tracking

Subsection 3.6: Record Keeping

Section 4.0: Potentially Responsible Parties

Subsection 4.1: Identification

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Subsection 4.3: Notice of Potential Liability

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Subsection 5.1: Required Information for Settlement Agreements

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Subsection 6.2: Non-Technical Activities and Certified Consultants

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Subsection 6.4: Name or Address Changes

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Subsection 6.7: Requirements for First Time Applicant
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Subsection 6.10: Denial of Certification
Subsection 6.11: Suspension or Revocation of Certification or Denial of Recertification
Subsection 6.12: Public Hearings

Section 7.0: Analytical Procedures
Subsection 7.1: SOPCAP
Subsection 7.2: Analytical Methods

Section 8.0: Public Notification & Participation Related To HSCA Remedies
Subsection 8.1: Public Notice – Land Records
Subsection 8.2: Public Notice –Newspapers

Section 9.0: Investigation
Subsection 9.1: Initial Investigation
Subsection 9.2: Facility Evaluation
Subsection 9.3: Initial Screening
Subsection 9.4: Remedial Investigation
Subsection 9.5: Brownfield Investigation
Subsection 9.6: Sampling and Analysis Plan

Section 10.0: Risk Assessment
Subsection 10.1: Methods Apply to Results of Remedial Investigation
Subsection 10.2: Purpose
Subsection 10.3: Methods Conform to Guidance
Subsection 10.4: Conservative Exposure Assessment
Subsection 10.5: Toxicological Data

Section 11.0: Remedial Action Objectives and Cleanup Levels
Subsection 11.1: Remedial Action Objectives
Subsection 11.2: Cleanup Level

Section 12.0: Remedial Actions
Subsection 12.1: Purpose
Subsection 12.2: Department Oversight of Remedial Actions
Subsection 12.3: Interim Actions
Subsection 12.4: Remedial Alternative Selection
Subsection 12.5: Proposed Plan of Remedial Action
Subsection 12.6: Final Plan of Remedial Action
Subsection 12.7: Remedial Action
Subsection 12.8: Interference with Remedy

Section 13.0: Remedy Completion and Site Closure

Subsection 13.1: Remedy Completion

Subsection 13.2: Facility Closure 36

Subsection 13.3: Archiving Sites

Section 14.0: Natural Resource Damage Assessment and Restoration

Subsection 14.1: Purpose and Applicability

Subsection 14.2: Restoration, Replacement, and Compensation

Subsection 14.3: Agreements with Other Persons

Subsection 14.4: Pre-Assessment Phase

Subsection 14.5: Assessment Phase

Subsection 14.6: Post-Assessment Phase

FREEDOM OF INFORMATION ACT (“FOIA”) COMPLIANCE

To date, there have been no FOIA requests to the HSCA Advisory Committee.

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FISCAL INFORMATION

Actual Revenue:

Fiscal Year	Source(s)of Funds	Amount \$
FY18 (budgeted)*	Tax Assessments	\$7,000,000.00
	Cost Recovery	\$200,000.00
	Interest	\$160,000.00
	Other HSCA Loan Interest	\$700.00
	Other HSCA Loan Principle	\$79,800.00
FY17 (actual)	Tax Assessments	\$7,904,736.29
	Cost Recovery	\$150,000.00
	Interest	\$202,995.71
	Other HSCA Loan Interest	\$1,080.00
	Other HSCA Loan Principle	\$63,900.00
FY16 (actual)	Tax Assessments	\$7,345,782.00
	Cost Recovery	\$197,345.99
	Interest	\$167,070.00
	Other HSCA Loan Interest	\$450.00
	Other HSCA Loan Principle	\$169,377.00

The Fund does not receive federal grants. However, DNREC receives grants (see table below) through the U.S. Environmental Protection Agency that are used toward the same projects as the Fund.⁶

	10/01/15-09/30/16	10/01/16-9/30/17	10/01/17-09/30/18	Match
Grant	FY15	FY16	FY17*	
Army Creek OU2	\$ -	\$ -	\$ -	
Brownfield Subtitle C	\$ 431,675.00	\$ 465,504.00	\$ 458,673.00	
ChemSolv	\$ -	\$ -	\$ -	
Core	\$ 460,000.00	\$ 91,806.00	\$ 262,625.00	16.79%
Core Match	\$ 92,818.00	\$ 58,880.00	\$ 52,922.00	
DE City PVC OU2		\$		

⁶ Analyst’s Note: Federal Funds are used for HSCA projects, however, those funds are not deposited into HSCA. The EPA funds are in separate accounts that are disbursed through DNREC.

RIFS		10,000.00		
DE City PVC OU2 LTRA		\$ 5,000.00		
DE Sand & Gravel	\$ -	\$ -	\$ -	
DSMOA	\$ 23,550.00	\$ 23,550.00		
DSMOA			\$ 22,500.00	
Dupont Newport	\$ 2,000.00	\$ -	\$ -	
Halby RA OU2			\$ 4,000.00	
Koppers RD		\$ 7,000.00		
Millsboro AOC#1	\$ 7,200.00	\$ -	\$ -	
Millsboro AOC#2	\$ 3,000.00			
Millsboro AOC#3			\$ 22,000.00	
NCR Millsboro	\$ -	\$ -	\$ -	
Pre-Remedial	\$ 382,500.00	\$ 258,236.00	No Data to date.	
Standard Chlorine OU1 RA	\$ -	\$ 1,000.00	\$ -	
Standard Chlorine OU2 RD	\$ 6,000.00			
Standard Chlorine OU4 RIFS	\$ -	\$ -	\$ -	
Standard Chlorine OU3 RA	\$ 5,000.00	\$ 7,000.00		
LUST Prevention	\$ 370,154.00	\$ 378,557.00	\$ 366,067.00	25%
LUST Cleanup	\$ 707,778.00	\$ 707,555.00	\$ 707,555.00	10%

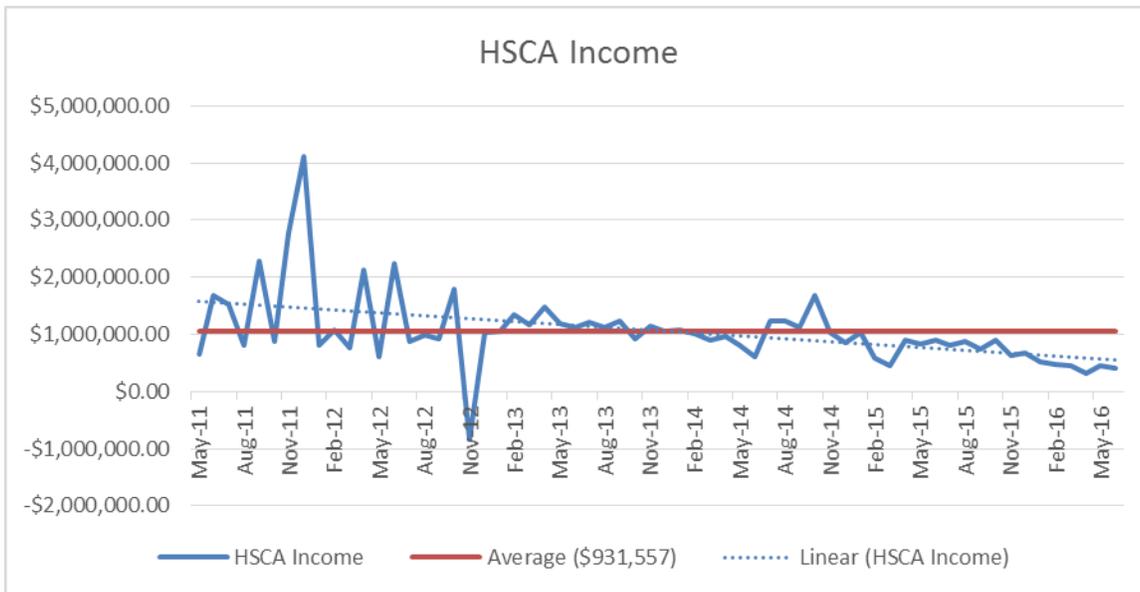
* Please note that funding for FY17 Subtitle C grant was submitted in the amount of \$458,673. Of that amount, \$277,033 has been awarded. The remainder will be awarded in increments as funding becomes available.

* Please note that funding for FY17 Core grant application was submitted for \$262,625, EPA has no time frame for award.

The Division requires responsible parties to pay for cleanups. Below is what was collected through cost recovery efforts within the Division.

Description of Fine or Fee	Current Fine or Fee \$\$	Number of Persons or Entities Paying Fine or Fee	Fine or Fee Revenue \$\$	Where is the Fine or Fee Revenue Deposited (i.e., general fund, special fund)
HSCA Tax	0.9% tax on wholesale petroleum	(450-500) entities	\$7,904,736.29	HSCA Fund
Cost Recovery Fee	Recovery of funds varies	33 entities	\$132,775.78	HSCA Fund
HSCA Consultant Certification Fee	\$500	8 entities	\$4,000.00	HSCA Fund
HSCA Loan	Varies	3 entities	\$66,219.93	HSCA Fund

The Fund is in need of revenue increases to accomplish the HSCA program objectives. HSCA is funded by a .09% tax on the wholesale of petroleum products in the State. Due to the decrease in the price of oil, the Fund has seen a reduction in revenues since 2015. Any changes in fees would be proposed by the Governor’s office for legislative approval. The table below further demonstrates the decrease in monthly HSCA revenues from May 2011 through May 2016.⁷

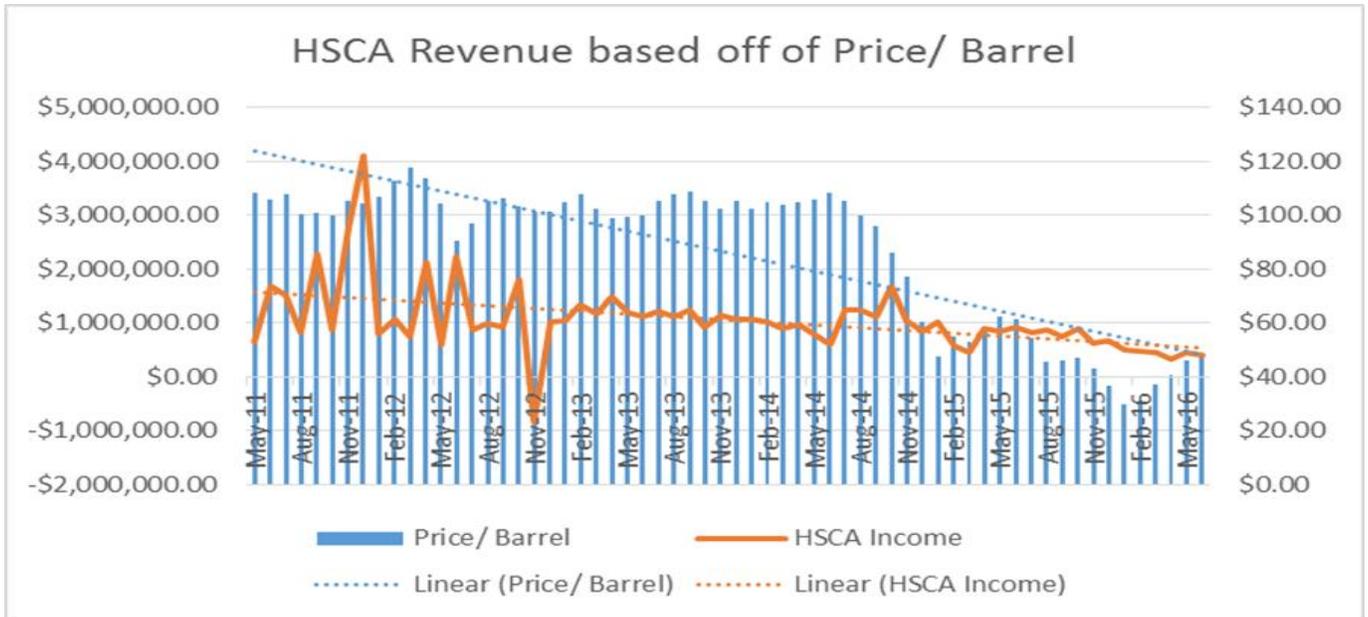


⁷ The dip in HSCA income in November 2012 is due to a return of funds to the oil refinery for overpayment.

Actual Expenditures:⁸

Fiscal Year	Source(s)	Amount \$\$
FY18 (budgeted)*		
		TOTAL \$13,996,300.00
FY17 (actual)**	Special Fund	
		TOTAL \$12,795,014.20
FY16 (actual)	Special Fund	
		TOTAL \$17,261,607.00

The price per barrel of oil has dropped significantly over the past 2 years. Due to the price drop, the Division has seen an almost 50% decrease in revenue. The Division has taken drastic measures to cover basic operating costs, including the delay of clean-up projects until future years when funding becomes available.



⁸ Detailed expenditure plans and annual reports are available upon request for FY18, FY17, and FY16.

ACCOMPLISHMENTS

Some of the most significant accomplishments of the Fund involve the remediation and redevelopment of Brownfield sites. The redevelopment of these contaminated sites have made and will continue to make economic and social gains throughout the State and our local communities. Below is a table that illustrates how many sites have completed the remedial process. These sites no longer pose a risk to human health, or the environment, and are back in productive use.

Type	Active	Certification of Completion of Remedy (“COCR”) or No Further Action (“NFA”)	Long-Term Stewardship	Total
Brownfield Development Program Sites	109	49	111	269
State lead HSCA Sites	268	167	46	481
VCP Sites	64	67	76	207
TMS Sites	58	151	N/A	209
Tank management Section Home Heating Oil Program	48	558	N/A	606
Emergency Response Cleanups	0	225	N/A	225
Total	547	1217	233	1,997

To date, HSCA has provided \$200,907,751.62 in funding for investigations and remedial actions. Without the Fund, sites throughout the State, along with the potential for additional releases of hazardous substances, could pose a direct health risk to citizens of the State.

Without the Fund, contaminated sites that are vacant, with no known responsible party or that have responsible parties that are not financially solvent, pose a threat to human health and the environment. Securing funding for the cleanup of these sites would be virtually impossible.

CHALLENGES

1) Decrease in revenue of the Fund. Due to the price of taxable petroleum products and new exceptions to taxable petroleum products, the revenues in FY16 and FY17 were approximately 40% below revenues collected in previous years.⁹ Revenue decreases cause programs funded by HSCA, such as the successful State Brownfield Program, to become limited and therefore not able to meet their mission of putting blighted properties back into productive use.

2) Uncertainty in the amount of revenue deposited into the Fund. Del C. §9104 (c) states that the Secretary must submit a budget to the Governor and the General Assembly providing a 5-year projection of costs and revenue associated with the Fund. The Division utilizes the revenue for future years based

⁹ HB 10, 146th General Assembly

on the previous year's income to allocate financial resources needed for remedial Sites. Based on the revenue, it is difficult to properly budget the amount of funds to be expended each year, including the 15% administrative costs, due to the fluctuation of the Fund's revenue.

3) Future Liability of the State past the expiration of the Fund. 7 Del C. § 9113 (c) gives a thorough description of what activities the money in the fund can support. One specific item is the State's cost share required under CERCLA. In FY18, the Division estimates that amount will be \$2.59 million, up from \$452 thousand in FY12. As identified Superfund Sites move through completion, these funds will continue to increase and last into perpetuity while the Fund expires December 31, 2021.

4) Additional financial burdens placed on the Fund. Over the last few years, the State's General Fund has seen substantial financial constraints. Therefore, personnel and other operating costs once supported by general funds have been placed onto HSCA. At this time SIRS, which primarily supports HSCA, does not receive any general funds. SIRS does receive an annual Federal Cooperative Agreement (Core Grant) to help defray some of the Sections administrative expenses. The EPA Core Grant does require a match of 16.79%, which is supported by HSCA. Unfortunately, due to reductions in the Federal Budget, the Core Grant has decreased dramatically over the last five years. Since FY12, the Core Grant allocations have decreased by 23.84%. This reduction in federal funds and lack of state General Fund support requires SIRS to place more of a reliance on HSCA to fund administrative costs.

OPPORTUNITIES FOR IMPROVEMENT

Opportunities for improved operational efficiency include:

Use of EQUIS data system within the LUST Program would allow for the consistent application of cleanup approaches and cleanup levels for petroleum compounds for projects being addressed by the SIRS, TMS, and SHWMS cleanup programs.

Closer coordination between EPRS and TMS regarding conducting interim responses and limited hydrology investigations to quickly assess contamination and close out sites.

Development of a policy, such as adopting a first screening, to evaluate a party's inability to pay remedial costs based on the party's income when compared to the federally-defined poverty levels.

Improvement of cost recovery efforts when a responsible party can be found. Such improvements could include increased use of liens placed against properties, coordination with the Division of Revenue in collecting any outstanding recoverable costs, and the additional use of low-interest loans rather than grants from the Fund.

On-going efforts for improvements already underway include:

Continual sharing and reallocation of staff resources between SIRS, the LUST Program and the Corrective Action Program. Each program acts under separate state and/or federal codes and separate remedial standards; however, the groups follow similar processes in remediating releases into the environment. Allowing the trained remedial staff to collaborate across programs ensures the best use of time and faster program responses.

Various LEAN management and process improvement practices began in 2006 and have been sustained in the following areas:

SIRS/Brownfield Program continues to use visual performance tracking at Lukens to ensure that the program continue to meet these targets. In addition, SIRS, in collaboration with the Department of Information and Technology (DTI) is about to roll out a new database (Site Specific Database [SSD]) that will have a dashboard for each project leader. This dashboard will have built-in time frames, specifically relating to those identified in the Value Stream mapping process, to ensure that both staff and management meet or beat those deadlines or communicate why they were not able to be achieved. SIRS has made this technology investment and believes that it will take the already successful Value Stream mapping to the next level.

Improvements in LUST corrective actions continue to improve. Program staff continue to maintain the 2005 value stream mapping improvements. In 2005, DNREC had 100 LUST sites that were open for more than 10 years. Today, there are 57. In addition, in 2015, DNREC developed and implemented a project tracking system that identifies where every project is within the regulatory timeframe and a daily report on deliverables due from both our staff and the regulated entity. The technology enhancement uses a dashboard and visual reminders as set by targeted timeframes.

ADDITIONAL COMMENT FROM THE COMMITTEE ANALYST

The Committee is concerned with a finding in the independent review of Zelenkofske Alexrod, LLC.¹⁰ A finding in the review showed that the HSCA fund exceeded the 15% administrative cap, without required Joint Finance Committee approval. The Legislative Attorney for the Committee has reviewed the auditor's report as well as the response to the report by DNREC's Deputy Attorney General.¹¹ The Legislative Attorney is in agreement with the Deputy Attorney General's Memorandum dated September 10, 2017.

According to the Division's website,

The Department of Natural Resources and Environmental Control formed the Brownfields Advisory Committee ("BAC") in 2005 to provide advice to the Division of Waste and Hazardous Substances on [Brownfields](#) rules, policies, and procedures. In March 2013, the BAC decided to change the name of the committee to the HSCA Advisory Committee ("HAC") to better reflect the broader scope of the advisory committee.

With the assistance of the HAC, the Division's objective is to promote the cleanup and development of Brownfield sites in the state by ensuring timely and effective cleanups with protective, equitable and sustainable remedies. In addition, the HAC will address long-term stewardship for properties that have a remedy in place, as well as other HSCA issues. The HAC will also help integrate DNREC's objectives with other state and local goals for conservation and economic development. The Division will rely on the HAC to represent broad public interest and community perspectives for [Delaware's Brownfields Development Program](#).

¹⁰ See Appendix E for Zelenkofske Alexrod, LLC. Independent Auditors' Report finding 2016-001.

¹¹ See Appendix F for DNREC's Deputy Attorney General Memorandum, dated 9/15/17.

Although responsibilities vary, New Jersey, California, Washington, and Pennsylvania all have varying forms of HSCA Advisory Committees mandated in Code.¹² The Committee may wish to discuss the possibility of adding the HAC in Delaware Code to better define the HAC's functions.

The Committee may wish to address ways to protect the HSCA fund from continued fiscal demands. The HSCA fund is primarily funded by a .9% tax on all taxable gross receipts from the sale of petroleum or petroleum products, with the exception of crude oil. There has only been one increase since the original 1991 rate of .6%. Since the increase to .9% in July 1993, there have been legislative demands, such as HB 10 in 2011 and HB 251 in 2012, that have in fact decreased the .9%. HB 425 which was enacted in July 2014 directed the State Treasurer to reauthorize \$3,000,000.35 from the HSCA Fund to various other purposes. In the FY18 Budget Bill, \$125,000.00 from HSCA was directed to be used to support operational costs for the for the Polly Drummond Hill Yard Waste Demonstration site.

¹² For examples of State Advisory Committees found in code, see the following:

New Jersey: <https://law.justia.com/codes/new-jersey/2013/title-58/section-58-10b-23/>

California: <http://codes.findlaw.com/ca/health-and-safety-code/hsc-sect-25135-1.html>

Washington: Under their Model Toxics Control Act-Cleanup: <http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-610>

Pennsylvania: <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1988/0/0108..HTM>

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APPENDIX A

TITLE 7

Conservation

Hazardous Substance Cleanups

CHAPTER 91. DELAWARE HAZARDOUS SUBSTANCE CLEANUP ACT

Subchapter I. General Provisions and Enforcement

§ 9101 Short title.

This chapter shall be known and may be cited as the "Delaware Hazardous Substance Cleanup Act."

[67 Del. Laws, c. 326, § 1.](#);

§ 9102 Declaration of purpose; applicability.

(a) The General Assembly recognizes that large quantities of hazardous substances are and have been generated, transported, treated, and stored within the State. The General Assembly also recognizes that some hazardous substances have been stored or disposed of at facilities in the State in a manner insufficient to protect public health or welfare or the environment. The General Assembly finds that the release of a hazardous substance constitutes an imminent threat to public health or welfare or the environment of the State. The General Assembly intends by the passage of this chapter to exercise the powers of the State to require prompt containment and removal of such hazardous substances, to eliminate or minimize the risk to public health or welfare or the environment, and to provide a fund for the cleanup of the facilities affected by the release of hazardous substances.

(b) The General Assembly finds that private parties should be provided with encouragement to exercise their responsibility to clean up the facilities for which they are responsible, but that if they refuse to do so, then the State should conduct the cleanup and recover the costs thereof from the private parties.

(c) The General Assembly recognizes the need to remedy contaminated facilities and to promote opportunities and provide incentives to encourage the remedy of such facilities to yield economic revitalization and redevelopment within the State.

(d) The General Assembly finds that in order to effectuate the purposes of this chapter to remedy contamination resulting from past acts and to address more equitably the issue of who should bear the costs of remediation, § 9105 of this title shall apply to all responsible parties without regard to the date of enactment of this chapter or any amendments thereto.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 1](#);

§ 9103 Definitions.

As used in this chapter:

(1) "Act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) "Allowable interest rate" means a rate of interest 5% over the federal reserve discount rate.

(3) "Brownfield" means real property, the expansion, redevelopment, or reuse of which may be hindered by the reasonably held belief that the real property may be environmentally contaminated.

(4) "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended.

(5) "Contractor" means any corporation, company, association, firm, partnership, society, joint-stock company, sole proprietorship or individual that contracts to perform any remedial action under the remedial standards established in this chapter.

(6) "Contractual relationship" means, but is not limited to, land contracts, deeds, easements, leases or other instruments transferring title or possession. A "contractual relationship" does not exist if the real property on which the facility concerned is located was acquired by the person after the disposal or placement of the hazardous substance on, in, or at the facility, and 1 or more of the circumstances described in paragraph (6)a., b., or c. of this section is also established by the person by a preponderance of the evidence:

- a. At the time the person acquired the facility the person did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility.
- b. The person is a government entity which acquired the facility by escheat or through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.
- c. The person acquired the facility by inheritance or bequest.

(7) "Department" means the Department of Natural Resources and Environmental Control.

(8) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous substance into or on any land, water or into the air so that such hazardous substance or any constituent thereof may enter the environment.

(9) "Environment" means the navigable waters, the waters of the contiguous zone, ocean waters, and any other surface water, groundwater, drinking water supply, land surface or subsurface strata or ambient air within the State.

(10) "Facility" means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, aircraft, or any site or area where a hazardous substance has been generated, manufactured, refined, transported, stored, treated, handled, recycled, released, disposed of, placed or otherwise come to be located.

(11) "Fiduciary" means:

- a. A person acting for the benefit of another party as a bona fide:
 - 1. Trustee;
 - 2. Executor;
 - 3. Administrator;
 - 4. Custodian;
 - 5. Guardian of estates or guardian ad litem;

6. Receiver;
7. Conservator;
8. Committee of estates of incapacitated persons;
9. Personal representative;
10. Trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or
11. Representative in any other capacity that the Secretary, after providing public notice, determines to be similar to the capacities described in paragraphs (11)a.1.-10. of this section above; and

b. "Fiduciary" does not mean:

1. A person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or
2. A person that acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or of any other person.

(12) "Fiduciary capacity" means the capacity of a person in holding title to a facility, or otherwise having control of or an interest in the facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(13) "Foreclosure"; "foreclose" mean, respectively:

a. Acquiring, and to acquire, a facility through:

1. Purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;
2. A deed in lieu of foreclosure, or similar conveyance from a trustee; or

3. Repossession,

b. If the facility was security for an extension of credit previously contracted;

1. Conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

2. Any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a facility in order to protect the security interest of the person.

(14) "Fund" means the Hazardous Substance Cleanup Fund created pursuant to § 9113 of this title.

(15) "Hazardous substance" means:

a. Any hazardous waste as defined in Chapter 63 of this title or any hazardous waste designated by regulation promulgated pursuant to Chapter 63 of this title;

b. Any hazardous substance as defined in CERCLA; or

c. Any substance determined by the Secretary through regulation to present a risk to public health or welfare or the environment if released into the environment.

(16) "Imminent threat of release" means potential for a release which requires action to prevent or mitigate damage to the environment or endangerment to public health or welfare which may result from such a release.

(17) "Lender" means:

a. An insured depository institution (as defined in the Federal Deposit Insurance Act at 12 U.S.C. § 1813(c)(2)) or an insured credit union (as defined in the Federal Credit Union Act at 12 U.S.C. § 1752(7)) authorized by law to do business in this State;

b. A bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. § 2001 et seq., as amended) authorized by law to do business in this State;

c. A leasing or trust company that is an affiliate of an insured depository institution authorized to do business in this State;

- d. Any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;
- e. Any legally recognized person authorized, to buy or sell loans or interests in loans in a bona fide manner in this State;
- f. A person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and
- g. A person that provides title insurance and that acquires a facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(18) "Natural resources" means land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by Delaware, the United States, any foreign government, any local government, or any Indian tribe.

(19) "Operable unit" means any subdivision of a facility in terms of area or environmental media or any other manner approved by the Secretary.

(20) "Owner or operator" means:

- a. Any person owning or operating a facility.
- b. Any person who owned, operated, or otherwise controlled activities at a facility.
- c. The term "owner or operator" does not include an agency of the State or unit of local government that acquired title or control involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances.
- d. The term "control" does not include regulation of the activity by a federal, state or local government agency.
- e. The term "owner or operator" does not include a person, who, without participating in the management of a facility, holds indicia of ownership primarily to protect that person's security interest in the facility.
- f. The term "owner or operator" does not include a person who, without acquiring legal title, conducts or directs activities in connection with the actual or potential acquisition or evaluation

of a facility, including due diligence, site inspections, site assessments, or other pre-closing activities in connection with the acquisition of a facility.

(21) "Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, school district, conservation district, federal government agency, Indian tribe or interstate body.

(22) "Plan of remedial action" means a detailed plan describing cleanup actions and related information for the containment or permanent removal and disposal of hazardous substances from a facility.

(23) "Potentially responsible party" means any person identified pursuant to § 9105(a)(1) through (6) of this title as a person liable with respect to a facility.

(24) "Prospective purchaser" means a person (or a tenant of a person) that acquires or intends to acquire ownership of a facility after the date of the enactment of this subdivision and that establishes each of the following:

a. All disposal of hazardous substances at the facility occurred before the person acquired the facility.

b. Inquiries.

1. The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with standards and practices in accordance with paragraphs (24)b.2. and 3. of this section.

2. The standards and practices referred to in § 9105(c)(2)b.1. and 2. of this title, shall be considered to satisfy the requirements of this subsection.

3. In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subsection.

c. Notices. The person provides all legally required notices with respect to the discovery or release of any hazardous substance or substances at the facility.

(25) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes:

- a. Any release which results in exposure to a person solely within the workplace, with respect to a claim which such person may assert against an employer provided, however, that this exclusion does not apply to any such release which also results in exposure to the environment;
- b. Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel or pipeline pumping station engine;
- c. The appropriate application of fertilizer and pesticide;
- d. Any discharges in compliance with state permits issued in conformance with this title and federally permitted releases under CERCLA.

(26) "Remedial action" means the containment, contaminant mass or toxicity reduction, isolation, treatment, removal, cleanup or monitoring of hazardous substances released into the environment, or the taking of such other actions as may be necessary to prevent, minimize or mitigate harm or risk of harm to the public health or welfare or the environment which may result from a release or an imminent threat of a release of hazardous substances.

(27) "Remedy" means any action, response or expenditure consistent with the purposes of this chapter to identify, minimize or eliminate any imminent threat posed by any hazardous substances to public health or welfare or the environment including preparation of any plans, conducting of any studies and any investigative, oversight of remedy or monitoring activities with respect to any release or imminent threat of release of a hazardous substance and any health assessments, risk assessments or health effect studies or natural resource damage assessments conducted in order to determine the risk or potential risk to public health or welfare or the environment.

(28) "Secretary" means Secretary of the Department or the Secretary's designee.

(29) "Security interest" includes a right under a mortgage, deed of trust, assignment, judgment, lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a

person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(30) "Site assessment" means the assessment of a facility and/or property to determine whether hazardous substances have entered the environment.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 186, § 1](#); [70 Del. Laws, c. 218, §§ 2-10](#); [73 Del. Laws, c. 183, § 2](#); [74 Del. Laws, c. 185, §§ 2, 3](#); [74 Del. Laws, c. 409, §§ 6, 7](#); [76 Del. Laws, c. 220, § 3](#); [79 Del. Laws, c. 441, § 1](#); [80 Del. Laws, c. 359, § 1](#);

§ 9104 Secretary's powers and duties.

(a) The Secretary may exercise the following powers in addition to any other powers granted by law:

(1) The Secretary shall take any actions necessary to carry out the provisions of this chapter, including but not limited to adoption of emergency or interim regulations, when immediate promulgation of regulations is necessary to implement this chapter prior to the adoption of final regulations.

(2) The Secretary shall, after notice and public hearing, promulgate and revise such regulations as deemed necessary for the implementation, administration and enforcement of this chapter. Such regulations may include provisions waiving or limiting the applicability of this chapter which the Secretary determines to be adequately regulated by state or federal statute or regulation.

(3) The Secretary may, after notice and public hearing, exempt certain facilities or properties or classes of facilities or properties from the provisions of this chapter upon finding that these facilities or properties do not pose an imminent threat to public health or welfare or the environment.

(4) The Secretary shall plan, study or conduct, or order a potentially responsible party to plan, study or conduct, appropriate actions to remedy a release or imminent threat of release.

(b) The Secretary shall implement all provisions of this chapter to the maximum extent practicable, including conducting investigations and remedies when appropriate. The Secretary shall, after notice and public hearing, promulgate and revise as appropriate, regulations to:

(1) Establish criteria for determining a priority list among facilities. These criteria shall assure that facilities are ranked by a system that objectively assesses the relative degree of risk to public health or welfare or the environment caused by releases from such facilities.

(2) Establish procedures:

- a. For identifying facilities with a release or imminent threat of release;
- b. For conducting site assessments, preliminary site evaluations and comprehensive site investigations;
- c. For identifying potentially responsible parties;
- d. For notifying a person of liability as a potentially responsible party;
- e. For determining the appropriate type of settlement agreement that may be entered into by potentially responsible parties or any person who agrees to perform a remedy;
- f. For providing potentially responsible parties or any other person with a reasonable opportunity to enter into a settlement agreement for a remedy by which potentially responsible parties or any other person may propose 1 or more remedial alternatives;
- g. For identifying cleanup levels based on site-specific risks;
- h. For public notice and an opportunity for public comment on the proposed plan of remedial action and proposed consent decrees;
- i. For conducting a remedy;
- j. For public participation in the decision for a remedy at a facility;
- k. For granting or denying a certificate of completion of remedy;
- l. For placing a notice in the records of the real property pursuant to § 9115 of this title;
- m. For managing the Fund established pursuant to § 9113 of this title;
- n. For assessing natural resource damages;

- o. For providing criteria governing public funding of remedial costs when the Secretary enters into a settlement agreement that requires the Secretary to provide a specified amount of money from the Fund;
- p. For certifying part or all of a parcel of real property as a brownfield;
- q. For listing of Brownfield, or potential Brownfield, sites on a Brownfield redevelopment database;
- r. To certify and decertify contractors to conduct remedial action. As a prerequisite for certification, the Department shall conduct written examinations, or other qualification criteria as deemed appropriate by the Department, within the State for the purpose of determining ability to conduct a remedial action. The Department may waive the examination for persons who possess a valid certificate from another state, provided such certification is for similar work to be performed in Delaware. A remedial action shall be conducted under the direction and supervision of an individual possessing a valid certificate issued by the Department. Certification requirements for contractors shall commence 6 months after adoption of regulations. Certification shall be valid for 2 years. The fees for certification required pursuant to this chapter shall be established by the Department in its rules and regulations. The fees may be adjusted periodically but shall approximate and reasonably reflect all costs necessary to defray the expenses incurred by the Department in operating the certification program.

(3) Establish deadlines for negotiation processes with potentially responsible parties for an agreement providing for a voluntary remedy pursuant to § 9107 of this title, and for initiating an investigation and remedying releases at or from a facility by potentially responsible parties.

(c)(1) The Secretary shall, as part of the budget submittal, submit an annual report to the Governor and the General Assembly of the State, setting forth in detail progress on remedies and may submit such additional reports from time to time to the Governor and General Assembly as deemed desirable by the Secretary.

(2) The Secretary shall prepare an annual budget for the proposed use of the Fund and cause an audit of the fiscal affairs to be made annually and shall, as part of the budget submittal, furnish a copy of such audit report together with such additional information or data with respect to the affairs as he or she may deem desirable to the Governor and General Assembly of the State.

(3) The Secretary shall, as part of the budget submittal, provide 5-year projections of costs and revenues associated with the Fund, and the amount of the obligated and unobligated balance in the Fund.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 186, § 1](#); [70 Del. Laws, c. 218, §§ 11-13](#); [73 Del. Laws, c. 183, § 3](#); [74 Del. Laws, c. 185, § 7](#); [76 Del. Laws, c. 220, § 2](#);

§ 9105 Standard of liability.

(a) The following persons are liable with respect to a facility from which there is or has been a release or imminent threat of release, except as provided in subsection (c) of this section:

(1) Any person who owned or operated the facility at any time.

(2) Any person who owned or possessed a hazardous substance and who by contract, agreement or otherwise arranged for disposal or treatment of a hazardous substance at the facility.

(3) Any person who arranged with a transporter for transport, disposal or treatment of a hazardous substance to the facility.

(4) Any person who generated, disposed of or treated a hazardous substance at the facility.

(5) Any person who accepted any hazardous substance for transport to the facility, when the facility was selected by the transporter.

(6) Any person who is responsible in any other manner for a release or imminent threat of release.

(b) Each person who is liable under this section is strictly liable, jointly and severally, for all costs associated with a release from a facility and for all natural resource damages resulting from the release. The Secretary may recover all costs and damages from all responsible parties. The amounts recoverable in an action under this chapter shall include interest on the amounts recoverable through regulations developed pursuant to §§ 9104 and 9109 of this title. Such interest shall accrue from the date the expenditure was incurred. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be at the established allowable interest rate.

(c) The following persons are not liable under this section:

(1) Any person who can establish that the release or imminent threat of release for which the person would be otherwise liable was caused solely by:

- a. An act of God;
- b. An act of war; or
- c. An act or omission of a third party other than:
 1. An employee or agent of the person asserting the defense; or
 2. Any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly with the person asserting this defense to liability. This defense applies only when the person asserting the defense has exercised due care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions.

(2) Any person who is an operator, past operator, owner, or past owner of a facility and who can establish that at the time the facility was acquired or operated by the person, the person had no knowledge or reason to know of any release or imminent threat of release. This paragraph (c)(2) is limited as follows:

a. *Reason to know.* —

To establish that the person had no reason to know of the matter described in § 9103(6)a. of this title the person must demonstrate that on or before the date on which the person acquired the facility, the person carried out all appropriate inquiries, as provided in paragraph (c)(2)b. of this section below, into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.

b. All appropriate inquiry.

1. With respect to property purchased on or after May 31, 1997, the procedures of the American Society for Testing and Materials ("ASTM"), including the documents known as "Standard E1527-97" and "Standards E1527-00," entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process," or any

other procedure the Secretary may adopt by regulation, shall satisfy the requirements in paragraph (c)(2)a. of this section.

2. With respect to property purchased before May 31, 1997, in making a determination with respect to a person described in paragraph (c)(2)a. of this section, the following factors shall be taken into account:

- A. Any specialized knowledge or experience on the part of the person;
- B. The relationship of the purchase price to the value of the property, if the property was not contaminated;
- C. Commonly known or reasonably ascertainable information about the property;
- D. The obviousness of the presence or likely presence of contamination at the property;
and
- E. The ability of the person to detect the contamination by appropriate inspection.

3. In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of paragraph (c)(2)a. of this section.

c. Nothing in this subsection shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter.

d. Notwithstanding this subsection, if the person obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the person owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such person shall be treated as liable under subsection (a) of this section and no defense under this subsection shall be available to such person.

e. Nothing in this subsection shall affect the liability under this chapter of a person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(3) A person who acquires, for subsequent disposition, title to, or possession of, a property to protect a security interest held by the person and does not participate in management of the property; or a fiduciary which has a legal title to or manages any property for purposes of administering an estate or trust of which such property is part; provided, however, that this exemption shall not relieve a person from liability under this section where such liability is based on conduct entirely independent from that covered by this exemption. This paragraph (c)(3) is further limited as follows:

a. The term "participate in management" as used in this section:

1. Means actually participating in the management or operational affairs of a facility and does not include merely having the capacity to influence, or the unexercised right to control, facility operations.

2. A person that is a lender or fiduciary that holds indicia of ownership primarily to protect a security interest in a property shall be considered to participate in management only if, while the borrower is still in possession of the property encumbered by the security interest, the person:

A. Exercises decision-making control over the environmental compliance related to the facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the facility; or

B. Exercises control at a level comparable to that of a manager of the facility, such that the person has assumed or manifested responsibility: I. For the overall management of the facility encompassing day-to-day decision-making with respect to environmental compliance; or II. Over all or substantially all of the operational functions, as distinguished from financial or administrative functions, of the facility other than the function of environmental compliance.

3. The term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a property; and, provided the actions do not rise to the level of participating in management (within the meaning of paragraphs (c)(3)a.1. and 2. of this section above), does not include:

A. Holding a security interest or abandoning or releasing a security interest;

- B. Including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;
 - C. Monitoring or enforcing the terms and conditions of the extension of credit or security interest;
 - D. Monitoring or undertaking 1 or more inspections of the facility;
 - E. Requiring a remedy or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the facility prior to, during, or on the expiration of the term of the extension of credit;
 - F. Providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the facility;
 - G. Restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;
 - H. Exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or
 - I. Conducting a remedy under this chapter or otherwise under the direction of the Department.
4. A person who is a lender that did not otherwise participate in the management of a facility as provided in paragraph (c)(3)a.2. of this section shall not be considered to have participated in management, notwithstanding that the person forecloses on the property and, after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the property, maintains business activities, winds up operations, or undertakes a remedy under § 9107 of this title with respect to the facility, or takes any other measure to preserve, protect, or prepare the facility prior to sale or disposition, if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

b. A fiduciary as described in this paragraph (c)(3) shall not be liable in its personal capacity under this chapter for:

1. Undertaking or directing another person to undertake a remedy or any other lawful means of addressing a hazardous substance in connection with the facility;
2. Terminating the fiduciary relationship;
3. Including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;
4. Monitoring or undertaking 1 or more inspections of the facility;
5. Providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;
6. Restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;
7. Administering, as a fiduciary, a facility that was contaminated before the fiduciary relationship began; or
8. Declining to take any of the actions described in paragraphs (c)(3)b.2.-7. of this section.

c. The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity; provided, however, that this limitation shall not apply to the extent that a person is liable under this chapter independently of the person's ownership of a facility as a fiduciary or actions taken in a fiduciary capacity.

d. The exclusion from liability contained in this paragraph (c)(3) does not limit liability pertaining to the release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

e. Nothing contained in this paragraph (c)(3):

1. Affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this paragraph; or

2. Creates any liability for a person or a private right of action against a fiduciary or any other person.

f. Nothing in this paragraph (c)(3) applies to a person if the person:

1. Acts in a capacity other than that of a fiduciary or in a beneficiary capacity, and in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

2. Is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

g. This paragraph (c)(3) does not preclude a claim under this chapter against:

1. The assets of the estate or trust administered by the fiduciary; or

2. Nonemployee agent or independent contractor retained by a fiduciary.

(4) Prospective purchaser agreements.

a. Notwithstanding paragraph (c)(5) of this section, a prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the prospective purchaser, with or without the participation of the seller of the property, enters into a prospective purchaser agreement in which the parties responsible for completing a site investigation and any subsequent remediation are identified and paragraph (c)(4)b. of this section is met. Such prospective purchaser agreements shall:

1. Define the scope of and financial responsibility for the environmental work to be performed pursuant to the agreement;

2. Define the amount, if any, of assistance to be provided by the Department; and

3. Define the scope of any lien to be secured.

b. Requirements for operation under a prospective purchaser agreement.

1. The person shall exercise appropriate care with respect to hazardous substance or substances found at the facility by:

- A. As a prospective purchaser (i.e. prior to acquisition of the property):
 - I. Not causing a new release of hazardous substances; and
 - II. Not taking any action to exacerbate or contribute to an existing release.
 - B. As owner after acquisition of the property, unless specifically addressed in a prospective purchaser agreement with the Department, by:
 - I. Stopping or mitigating any on-going release; II. Preventing any threatened future release; and
 - III. Preventing or limiting exposure (human, environmental, or natural resource) to any previously released hazardous substance or substances.
2. The person shall provide cooperation, assistance, and access to persons that are authorized to oversee remedies or natural resource restoration at a facility (including the cooperation and access necessary for the installation, integrity, operation and maintenance of any complete or partial remedies or natural resource restoration at the facility).
 3. The person shall:
 - A. Be in compliance with any land use restrictions established or relied on in connection with the remedy at a facility; and
 - B. Not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a remedy.
 4. The person shall comply with any request for information or administrative subpoena issued by the Secretary under this chapter.
 5. The person shall not be affiliated with any other person that is potentially liable pursuant to § 9105(a) of this title, for response costs at a facility through:
 - A. Any direct or indirect familial relationship, to include spouse, domestic partner, parent, grandparent, brother, sister, son, son-in-law, daughter, daughter-in-law, grandson, granddaughter, step-parent, the parent, son or daughter of a son or daughter of the person's spouse or domestic partner, nephew, niece, aunt, uncle, brother-in-law, sister-in-law, grandparent-in-law or any relative or friend living in the person's household; or

B. Any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

C. The result of a reorganization of a business entity that was potentially liable.

c. Lien.

1. If there are unrecovered remedial costs incurred by the State at a facility for which an owner of the facility is not liable by reason of paragraph (c)(4)a. of this section, the State may by agreement with the owner, obtain from the owner a lien on this or on any other property or other assurance of payment satisfactory to the Secretary, for all or any portion of the unrecovered remedial costs.

2. A lien under this subsection:

A. Shall be in an amount not to exceed the unrecovered remedial costs incurred by the State;

B. Shall be subject to the requirements of paragraph (c)(4)a. of this section; and

C. Shall not exceed the value added to the worth of the property by the remedial action.

(5) Contiguous properties.

a. Not considered to be an owner or operator.

1. A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a facility under this paragraph (c)(5)a.1. or paragraph (c)(5)a.2. of this section solely by reason of said release if:

A. The person did not cause, contribute or consent to the release or threatened release;

B. The person is not: I. Potentially liable, or affiliated with any other person that is potentially liable, for costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual,

corporate, or financial relationship that is created by a contract for the sale of goods or services); or II. The result of a reorganization of a business entity that was potentially liable;

C. The person takes reasonable steps to: I. Not cause a release of hazardous substances on their property; and II. Not take any action to exacerbate or contribute to contamination migrating onto their property.

D. The person provides reasonable cooperation, assistance and access to persons that are authorized to conduct a remedy or natural resource restoration at the facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation and maintenance of any complete or partial remedy or natural resource restoration at the facility);

E. The person: I. Is in compliance with any land use restrictions established or relied on in connection with the remedy at the facility; and II. Does not impede the effectiveness or integrity of any institutional control employed in connection with a remedy;

F. The person is in compliance with any written request for information related to the property or contamination or administrative subpoena issued by the Secretary or a court pursuant to this chapter;

G. The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

H. At the time at which the person acquired the property, the person conducted all appropriate inquiry within the meaning of paragraph (c)(2)b. of this section with respect to the property.

2. To qualify as a person described in paragraph (c)(5)a.1. of this section, a person must establish by a preponderance of the evidence that the conditions in paragraph (c)(5)a.1.A. through H. of this section have been met.

3. Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in paragraph (c)(5)a.1.H. of this

section at the time of acquisition of the real property may qualify as a prospective purchaser under § 9103 of this title if the person is otherwise described in that section.

b. With respect to a person described in this paragraph, nothing in this subsection:

1. Limits any defense to liability that may be available to the person under any other provision of law; or
2. Imposes liability on the person that is not otherwise imposed by paragraph (c)(5)a. of this section.

c. The Secretary shall, upon written request:

1. Issue an assurance in writing that no enforcement action under this chapter will be initiated against a person described in paragraph (c)(5)a. of this section; and
2. Grant a person described in paragraph (c)(5)a. of this section protection against a cost recovery or contribution action under § 9107(c) of this title.

(d) A person who expends moneys performing a remedy or any remedial action under this chapter or reimbursing the State for any remedial action may bring an action against any responsible party as defined in subsection (a) of this section who has not entered into a settlement agreement with the Secretary. In an action authorized by this section, the person bringing the action shall be entitled to reimbursement for the costs incurred which are consistent with this chapter and contribution for moneys expended to reimburse the State for its expenses.

(e) Where the Secretary has issued a certification of completion of remedy pursuant to § 9108 of this title with respect to a remedy performed at a facility, any person who owns, operates or otherwise controls activities at the facility after the date of issuance of the certification shall not, by virtue of that later ownership, operation or control, be liable for the release or imminent threat of release addressed in the certification, or for any future release or imminent threat of release attributable to conditions existing prior to the issuance of the certification, provided such person does not interfere or permit any interference with any aspect of the remedy addressed by the certification of completion of remedy.

(f) The exemption contained in subsection (e) of this section shall also apply to any person who, in connection with the sale, lease, acquisition or transfer of a facility, enters into a settlement agreement with the Secretary for a remedy at the facility; provided, that the remedy is satisfactorily

conducted and the Department issues a certification of completion of remedy. The Secretary, in the settlement agreement, may place conditions or limitations on the scope of the exemption granted under this subsection.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, §§ 14, 15](#); [74 Del. Laws, c. 185, §§ 4-6](#); [79 Del. Laws, c. 441, § 1](#);

§ 9106 Investigation and access.

(a)(1) If there is a reasonable basis to believe there was a release or is an imminent threat of release, the Secretary may require information or documents relevant to the release or imminent threat of release from any person who may have information pertinent to:

- a. The identification, nature and volume of materials generated, treated, stored, transported to or disposed of at a facility, and the dates thereof;
- b. The extent of a release or imminent threat of release from a facility;
- c. The identity of potentially responsible parties;
- d. The financial ability of a potentially responsible party to perform a remedy.

(2) The Secretary or his or her authorized employees or agents may enter, at reasonable times, upon any real property, public or private, to conduct sampling, inspection, examination, and investigation evaluating the release or imminent threat of release to determine the need for a remedy or to execute the remedy upon given verbal notice, and after presenting official identification to the owner or operator. The Secretary or other authorized person gaining access under this section, if requested in advance, shall split a sample with the operator, or person in charge of the facility. If any analysis is made of the samples, a copy of the results of the analysis may be furnished to the owner, operator, or person in charge.

(b) If the Secretary determines that:

- (1) An emergency exists that requires immediate action to protect public health or welfare or the environment; and
- (2) The operator is unwilling or unable to take such immediate action, the Secretary, or his or her authorized employees or agents, without court order, may enter upon a facility and take any

immediate action necessary to abate the emergency notwithstanding the provisions of § 9107(e) of this title.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 16](#);

§ 9107 Remedies.

(a)(1) When the Secretary or his or her designee has determined that a release or imminent threat of a release of a hazardous substance as defined herein will require a remedy, the Secretary shall, within 20 days of such determination, provide public notice of that fact. The Secretary shall likewise provide public notice within 20 days after entering into negotiations for a voluntary cleanup settlement agreement with any person that agrees to perform a remedy. Such public notice shall be published in a newspaper of general circulation in the county in which the facility is located. Such notice shall also be provided to:

- a. All elected members of the General Assembly in whose district such facility or any part thereof lies;
- b. If the facility or any part thereof is located within the boundaries of any municipality, then such notice shall also be given to the governing body of all municipalities in which the facility or any part thereof lies;
- c. In the event the facility or any part thereof is not located within the boundaries of a municipality, then such notice shall also be given to the governing body of the county in which the facility or any part thereof lies; and
- d. The governing body of any civic, neighborhood or similar association in which the facility or any part thereof lies, provided that such association makes itself known to the Department and provides a legal mailing address.

(2) When the Secretary has reason to believe that a release or imminent threat of release will require a remedy, the Secretary shall notify the potentially responsible party with respect to the release or imminent threat of release, and provide the person with an opportunity to enter into a settlement agreement providing for a remedy consistent with regulations developed pursuant to § 9104 of this title. The Secretary may provide any person who has knowledge of a release of a hazardous substance at a facility and agrees to perform a remedy with an opportunity to enter

into a settlement agreement providing for a remedy consistent with regulations developed pursuant to § 9104 of this title.

(b) The settlement agreement providing for a remedy may be in the form of a consent decree, administrative order of consent, memorandum of agreement or any other form of agreement consistent with regulations developed pursuant to § 9104 of this title. When a settlement agreement is entered into in the form of a consent decree pursuant to this chapter, it shall be filed with the Superior Court. The Secretary shall allow at least 20 days for public comment before the proposed consent decree is entered. If the Secretary deems it appropriate to effectuate the purposes of this chapter, the Secretary may choose to resolve a person's liability with the State under this section through use of settlement agreements entered into pursuant to CERCLA.

(c) A person who has resolved his or her liability to the State under this section is not liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other potentially responsible parties, but it reduces the total potential liability of others to the State by the amount of the settlement exclusive of § 9109 of this title.

(d) The Secretary may enter into a settlement agreement that requires the Secretary to provide a specified amount of money from the Fund to help defray the costs of implementing the remedy. These funds may be provided only in circumstances where the Secretary finds it would expedite or enhance remediation or achieve equity with respect to the payment of remedial costs. The Secretary may recover the amount of public funding provided under this section from a potentially responsible party who has not entered into a settlement agreement under this section or fulfilled all obligations under the agreement. For purposes of such a cost recovery, the public funding shall be considered as remedial costs paid by the Secretary.

(e) Before conducting a remedial action, the Secretary shall:

(1) Propose a plan of remedial action based on any investigation or study conducted by or for the Secretary, the potentially responsible party, or others;

(2) Provide public notice of the proposed plan of remedial action and an opportunity to comment on the plan as well as the investigation upon which the plan of remedial action is based;

(3) Prepare a final plan of remedial action with due consideration of the comments received and any other study or investigation conducted by or for the Secretary.

(f) The proposed and final plan of remedial action and the basis for it, as well as all comments received by the Secretary, constitute the remedial decision record of the Secretary. The Secretary shall maintain a remedial decision record for a period that the Secretary deems appropriate based upon the remedy being implemented and the future use of the facility.

(g) Where the Secretary has developed a remedial decision record for a remedy and the Secretary has conducted the remedy in accordance with the record, in any action brought to recover costs, the plan of remedial action shall be presumed reasonable and necessary unless demonstrated to be arbitrary and capricious by clear and convincing evidence.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 186, § 1](#); [70 Del. Laws, c. 218, §§ 17-23](#); [72 Del. Laws, c. 322, §§ 1, 2](#);

§ 9108 Certification of completion of remedy.

(a) Upon completion of a remedy at a facility, or an operable unit thereof, the Department may issue, or the owners, parties to the settlement agreement or parties responding to an order, may apply for a certification of completion of remedy from the Secretary pursuant to regulations promulgated under § 9104 of this title. For the purposes of this section, the Secretary may consider a remedy complete when the remedial action is operational and functional; provided, however, that the Secretary may place conditions or limitations in the certification of completion of remedy which identify those portions of the final plan of remedial action, including but not limited to operation and maintenance, and compliance monitoring, which must continue to be performed, and which provide for the performance of additional remedies in the event that the remedial goals contained in the final plan of remedial action are not achieved as required by the plan and the regulations promulgated under § 9104 of this title.

(b) The Secretary shall grant or deny an application for a certification of completion of remedy within 180 days of the application with stated reasons.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 24](#); [74 Del. Laws, c. 409, § 5](#); [80 Del. Laws, c. 359, § 2](#);

§ 9109 Enforcement.

(a) Whenever, in the opinion of the Secretary, a person:

(1) Is a potentially responsible party; and

(2) Has been notified of such person's potential liability pursuant to §§ 9104 and 9105 of this title; and

(3) Has not submitted a proposed settlement or has submitted a proposed settlement and the Secretary has rejected the proposal, the Secretary may seek to have the potentially responsible party perform a remedy at a facility by giving written notice to the person;

- a. Specifying the basis of the person's liability under this chapter for a remedy at the facility;
- b. Identifying the remedy to be performed by the person at the facility, and the timeframe for its completion;
- c. Advising that a public hearing, conducted pursuant to §§ 6004 and 6006 of this title, on the person's alleged liability, and the remedy to be performed and the timeframe for its completion, under this chapter may be had if requested within 30 days of the notice; and
- d. Notifying that the proposed remedy, and the timeframe for its completion, will be ordered unless a public hearing is requested.

(b) Whenever the Secretary determines that there exists an imminent danger that requires immediate remedy to protect public health or welfare or the environment, the Secretary may seek such injunctive relief or issue an order without prior notice or opportunity to submit a proposed settlement agreement.

(c) To enforce the order, the Secretary may bring an action in the Court of Chancery against any potentially responsible party who without sufficient cause, fails to comply with an order issued under subsection (a) or (b) of this section.

(d) The Secretary may bring an action in the Superior Court to recover from any potentially responsible party all natural resource damages resulting from a release.

(e) The Secretary may bring an action in the Superior Court against any potentially responsible party to collect remedial costs incurred by the Secretary, or for a party's refusal to comply, without sufficient cause, with an order issued under subsection (a) or (b) of this section.

(f) The Secretary may issue an order as the Secretary deems appropriate to any person who fails to provide the required information or documents under § 9106(a)(1) of this title, who fails to provide

access under § 9106(a)(2) of this title, or who fails to report a release as required by the regulations promulgated pursuant to this chapter.

(g) The Secretary may bring an action in Superior Court to enforce any order issued by the Secretary under subsection (f) of this section. Any person refusing to comply, without sufficient cause, with such an order shall be liable pursuant to paragraph (h)(2) of this section.

(h) In any action brought under subsection (e) of this section for a refusal to comply with an order, the person found responsible shall be liable for payment of:

(1) An amount at least equal to, but not greater than 3 times the amount of, any remedial costs incurred by the State as a result of the person's refusal to comply; and

(2) A civil penalty of up to \$10,000 per day for each day the person refuses to comply. For purposes of determining a civil penalty, the period of noncompliance shall be deemed to commence on the day of the Secretary's decision and continue until full compliance with the terms of the order is achieved.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 186, § 1](#); [70 Del. Laws, c. 218, §§ 25, 26](#); [79 Del. Laws, c. 441, § 1](#);

§ 9110 Public hearings — Violations.

(a) Any hearing involving allegations of violations of this chapter held by the Secretary shall be conducted as follows:

(1) For any hearing on an alleged violation, notification shall be served upon the alleged violator as summonses are served or by registered or certified mail not less than 20 days before the time of said hearing. Not less than 20 days notice of the hearing shall also be published in a newspaper of general circulation in the county in which the activity is proposed or the alleged violation has occurred and in a daily newspaper of general circulation throughout the State.

(2) The alleged violator may appear personally or by counsel at the hearing and produce any competent evidence in his or her behalf. The Secretary or the Environmental Appeals Board or its duly authorized designee may administer oaths, examine witnesses and issue, in the name of the Department or the Environmental Appeals Board, notices of hearings or subpoenae requiring the testimony of witnesses and production of books, records or other documents relevant to any matter involved in such hearing; and subpoenae shall also be issued at the request of the alleged

violator. In case of contumacy or refusal to obey a notice of hearing or subpoena under this section, the Superior Court in the county in which the hearing is held shall have jurisdiction upon application of the Secretary or the Chairperson of the Environmental Appeals Board to issue an order requiring such person to appear and testify or produce evidence as the case may require.

(3) A record from which a verbatim transcript can be prepared shall be made of all hearings and shall, along with the exhibits and other documents introduced by the Secretary or other party, constitute the record. The expense of preparing any transcript shall be borne by the person requesting it. The Secretary or the Environmental Appeals Board or its duly authorized designee shall make findings of fact based on the record. The Secretary or the Environmental Appeals Board shall then enter an order that will best further the purpose of this chapter, and the order shall include reasons. The Secretary shall promptly give written notice to the persons affected by such order.

(4) The Secretary may collect, from a violator finally adjudged liable, the necessary expenses of the Department for conducting the hearing. Any moneys collected under this section shall be deposited in the Fund pursuant to § 9113 of this title.

(b)(1) Any person or persons, aggrieved by any decision of the Secretary rendered pursuant to this chapter, may appeal the decision to the Environmental Appeals Board in accordance with § 6008 of this title.

(2) Any person who is substantially affected by a decision of the Environmental Appeals Board may appeal to the Superior Court in accordance with § 6009 of this title.

(3) No appeal shall operate to stay automatically any action of the Secretary, but upon application, and for good cause, the Secretary or the Superior Court may stay the action pending disposition of the appeal.

(c) The decisions of the Secretary issued pursuant to the provisions of this section are reviewable only as provided in subsection (b) of this section.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 186, § 1](#); [70 Del. Laws, c. 218, § 27](#);

§ 9111 Fraud.

(a) If a potentially responsible party commits fraud on the Secretary or another potentially responsible party in a proposed settlement agreement or in an application for a certification of

completion of remedy, then any limitation on liability otherwise provided herein shall be void, and any injured person, including the Secretary, may recover actual damages sustained as well as a civil penalty of up to \$10,000 for each fraudulent act.

(b) The Secretary may bring an action in the Superior Court to establish and collect a civil penalty for which a person is liable for fraud under this chapter.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 28](#);

§ 9112 Public hearings — Rule making, settlement agreements and remedial actions.

Public hearings shall be held on regulations developed pursuant to this chapter, and, if the Secretary receives a meritorious request for a public hearing from any person on the proposed consent decree and the proposed plan of remedial action in accordance with §§ 6004 and 6006 of this title, as well as any additional notice and hearing requirements the Secretary has adopted by regulation.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 29](#);

§ 9113 Hazardous Substance Cleanup Fund.

(a) There shall be established in the State Treasury and in the accounting system of the State a special fund to be known as the Hazardous Substance Cleanup Fund ("The Fund").

(b) The following moneys shall be deposited into the Fund:

- (1) All the taxes assessed pursuant to § 9114 of this title;
- (2) All remedial costs recovered pursuant to this chapter;
- (3) Penalties collected or recovered pursuant to this chapter;
- (4) Penalties collected or recovered pursuant to this chapter, not to include penalties assessed on any gross receipts tax surcharge provided by this chapter;
- (5) The State Treasurer shall credit to the Hazardous Substance Cleanup Fund such amount of interest as determined by this paragraph upon such Fund. On or before the last day of each month, the State Treasurer shall credit the Fund with interest on the average balance in the Fund for the preceding month. The interest to be paid to the Fund shall be that proportionate share, during such preceding month, of interest to the State as the Fund's and the State's average

balance is to the total State's average balance. The Fund's average balance shall be determined by averaging, in each instance, the balances at the beginning of each month and the balances at the end of that month; and

(6) Any other money appropriated or transferred to the account by the General Assembly.

(c) Money in the Fund may be used by the Secretary only to carry out the purposes of this chapter, including, but not limited to, the following activities:

(1) Implementing the hazardous substance cleanup program required under this chapter.

(2) Providing a remedy with respect to releases or imminent threats of release of a hazardous substance at or from facilities.

(3) Providing for state matching funds required under the CERCLA, as well as future operations and maintenance costs for facilities at which a state match is required.

(4) Reimbursing, or directly paying, any person for reasonable remedial costs incurred with the prior authorization of the Secretary in responding to a hazardous substance remedy, including remedies of releases from underground storage tanks, pursuant to authorization of the Secretary. Direct payments may be made to the certified environmental consultant who performed the remedial work provided that the brownfield developer acknowledge and sign the remedial work invoice.

(5) Conducting emergency response actions pursuant to §§ 9106, 6308 and 7406 of this title.

(6) Providing low-interest loans to parties with an executed settlement agreement with the Department.

(7) Payment to the Division of Revenue for the costs of administering § 9114 of this title.

(8) Provide for a remedy, or for reimbursement of allowable costs, for certified brownfields.

(d) No greater than 15 percent of the moneys deposited into the Fund shall be used for administering this chapter without approval of the Joint Finance Committee.

(e) Any expenditures of moneys from the Fund on sites not budgeted for under § 9104(c)(2) of this title must be approved by the Speaker of the House and the President Pro Tempore of the Senate.

[67 Del. Laws, c. 326, § 1](#); [69 Del. Laws, c. 458, § 1](#); [70 Del. Laws, c. 218, § 30](#); [74 Del. Laws, c. 409, § 8](#); [77 Del. Laws, c. 81, § 3](#); [77 Del. Laws, c. 83, §§ 21, 25](#); [78 Del. Laws, c. 73, § 2](#); [78 Del. Laws, c. 218, § 3](#); [79 Del. Laws, c. 441, § 1](#); [80 Del. Laws, c. 359, § 3](#);

§ 9114 Tax assessment.

(a) With regard to gross receipts received after December 31, 1990, and before July 1, 1993, there shall be added to the tax provided in §§ 2902(c)(3) and 2905(b)(1) of Title 30 an additional tax of .6% on all taxable gross receipts determined under §§ 2902 and 2905 of Title 30 derived from the sale of petroleum or petroleum products. With regard to gross receipts received after June 30, 1993, and before January 1, 2022, the rate of additional tax under this subsection shall be increased to 0.9%. For purposes of the additional tax imposed by this section, gross receipts, as defined in Chapter 29 of Title 30, that are received after June 30, 2007, shall not include gross receipts from a sale of petroleum or petroleum products by a wholesaler, as defined in Chapter 29 of Title 30, if:

(1) The petroleum or petroleum products were sold to the wholesaler by a person who is licensed under Chapter 29 of Title 30; and

(2) The gross receipts from the sale described in paragraph (a)(1) of this section were gross receipts defined in Chapter 29 of Title 30 with respect to the seller.

For purposes of this section and Chapter 29 of Title 30, exclusions from the gross receipts tax shall first be computed by including in said exclusions, to the extent possible, receipts deriving from sales not subject to the tax provided in this section.

(b) The surcharge provided by this section shall be remitted to the Division of Revenue on forms issued by the Director of Revenue and subject to such regulations and requirements as shall be prescribed by the Director of Revenue. The Director of Revenue shall deposit the additional tax provided in this section to the credit of the special fund described in § 9113 of this title.

(c) Each wholesaler or importer may list, as a separate line item on an invoice, the amount of the fees due under this section.

(d) Notwithstanding the provisions of subsection (a) of this section, with regard to gross receipts received after June 30, 1991, for purposes only of this section but not for other taxes applied against gross receipts on petroleum products in Chapter 29 of Title 30, the term "petroleum or petroleum products" shall not include crude oil.

[67 Del. Laws, c. 326, § 1](#); [68 Del. Laws, c. 183, § 1](#); [68 Del. Laws, c. 393, § 1](#); [69 Del. Laws, c. 135, §§ 1, 2](#); [69 Del. Laws, c. 289, § 15](#); [72 Del. Laws, c. 353, § 1](#); [76 Del. Laws, c. 135, § 1](#); [77 Del. Laws, c. 83, §§ 22, 25](#); [78 Del. Laws, c. 73, § 3](#); [78 Del. Laws, c. 94, §§ 3, 4](#);

§ 9115 Notice in property records.

(a) Pursuant to § 9104(b)(2) of this title, when a release of a hazardous substance that has been determined by the Secretary to be a threat to public health or the environment has occurred at a facility or property on which the facility is located, the owner of the property shall place a notice in the records of real property kept by the Recorder of Deeds of the county in which the property is located. The notice shall:

- (1) Identify the facility;
- (2) Identify the owner of the facility and the person causing the notice to appear;
- (3) State that a release occurred at or from the facility;
- (4) State the date the release occurred; and
- (5) Direct further inquiries to the Secretary.

(b) Any certification of completion of remedy issued in accordance with § 9108 of this title shall be promptly filed by the owner with the records of real property kept by the recorder of deeds of the county in which the facility is located and shall identify the facility, the owner of the facility, and the date of issuance of the certification of completion.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 31](#);

§ 9116 Confidentiality of proprietary information.

Information obtained by the Secretary under this chapter shall be available to the public as provided in Chapter 100 of Title 29, unless the Secretary certifies such information to be proprietary. The Secretary may make such certification where any person shows to the satisfaction of the Secretary that the information, or parts thereof, if made public, would divulge methods, processes or activities entitled to protection as trade secrets or as confidential financial or commercial information. Nothing in this section shall be construed as limiting the disclosure of information by the Secretary to any officer, employee or authorized representative of the state or federal government to effectuate the

purposes of this chapter. Furthermore, nothing in this section shall prevent the Secretary from including in the remedial decision record information concerning the cost of the remedy or the manner in which it is performed. Prior to disclosure of information certified by the Secretary to be proprietary to an authorized representative who is not an officer or employee of the state or federal government, the person providing the proprietary information may require the representative to sign an agreement prohibiting disclosure of such information to anyone not authorized by this chapter or the terms of the agreement. Such agreement shall not preclude disclosure by the representative to any state or federal government officer or employee concerned with effecting this chapter.

[67 Del. Laws, c. 326, § 1](#); [70 Del. Laws, c. 218, § 32](#);

§ 9117 Environmental liens [For application of this section, see 79 Del. Laws, c. 69, § 5]

(a) Pursuant to the provisions of this section, all reasonable costs related to any remedy undertaken by the State for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such remedy takes place and which belongs to such liable person.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property upon which a remedy has been undertaken by the State and which is owned by a person liable under this chapter when:

(1) No less than 30 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all record owners of the property and to all persons holding liens or security interests of record. The notice of lien shall state the amount of and basis for the lien;

(2) No less than 30 days prior to the effective date of the lien, a notice of lien is filed by the Secretary with the office of the recorder of deeds in the county in which the property is located; and

(3) Costs associated with any remedy at the property are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this title. This section shall not preclude any equitable claims by an aggrieved person in the Court of Chancery to contest the imposition of a lien, including actions to

quiet title. In any action seeking to contest or enforce a lien, the burden of establishing entitlement to such lien shall be consistent with the burden of proof applicable in an action brought by the Secretary pursuant to this chapter.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected, except for liens and encumbrances which relate back to before the perfection of the lien recorded pursuant to this section.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law. The Secretary shall, on written request, make available the documentation upon which such lien is based within 10 days of such request.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the office of recorder of deeds in the county in which the real property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same liable person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the requested lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the record owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

(i) A person whose interest is substantially affected by any action of the Secretary taken pursuant to this section, while contesting the imposition of such environmental lien in accordance with the

procedures set forth herein, shall have the right to discharge said lien upon payment into the Court of Chancery or entry of security as follows:

(1) *Cash deposit.* — Any environmental lien filed hereunder shall, upon petition of the owner or any party in interest, be discharged as a lien against the property whenever a sum equal to the amount of the claim shall have been deposited with the Court in said proceedings for application to the payment of the amount finally determined to be due. Said petition shall include an affidavit by the owner or party in interest setting forth which parts of the claim filed hereunder are disputed and which parts are not disputed. The nondisputed part of the claim shall be paid to the Secretary before the lien against the property is discharged. If it is finally determined by the Court that the disputed portion of the claim has been grossly overstated by the affiant, the Court may, in its discretion, award damages to the Secretary against the affiant in an amount up to twice the figure stated by the affiant to be disputed.

(2) *Refund of excess.* — Any excess of funds paid into Court as aforesaid, over the amount of the claim or claims determined and paid therefrom, shall be refunded to the owner or party depositing same upon application.

(3) *Security in lieu of cash.* — In lieu of the deposit of any such sum or sums in cash, approved security may be entered in such proceedings in an amount which the Court shall approve, which, however, shall in no event be less than the full amount of such required deposit; and the entry of such security shall entitle the owner to have such liens discharged to the same effect as though the required sums have been deposited in Court as aforesaid.

(4) *Authority of Court.* — The Court, upon petition filed by any party, and after notice and hearing, may upon cause shown:

- a. Require the increase or decrease of any deposit or security;
- b. Strike off security improperly filed;
- c. Permit the substitution of security and enter an exoneration of security already given.

[67 Del. Laws, c. 326, § 1;](#) [79 Del. Laws, c. 69, § 1.](#);

§ 9118 Cease and desist orders.

The Secretary shall have the power to issue a cease and desist order to any person violating any provision of this chapter ordering such person to cease and desist from such violation, provided that any cease and desist order issued pursuant to this section shall expire:

- (1) After 30 days of its issuance; or
- (2) Upon withdrawal of said order by the Secretary; or
- (3) When the order is superseded by an injunction.

[67 Del. Laws, c. 326, § 1.;](#)

§ 9119 Injunctions.

The Court of Chancery shall have jurisdiction to enjoin violations of this chapter.

[67 Del. Laws, c. 326, § 1.;](#)

§ 9120 Inconsistent laws or ordinances superseded.

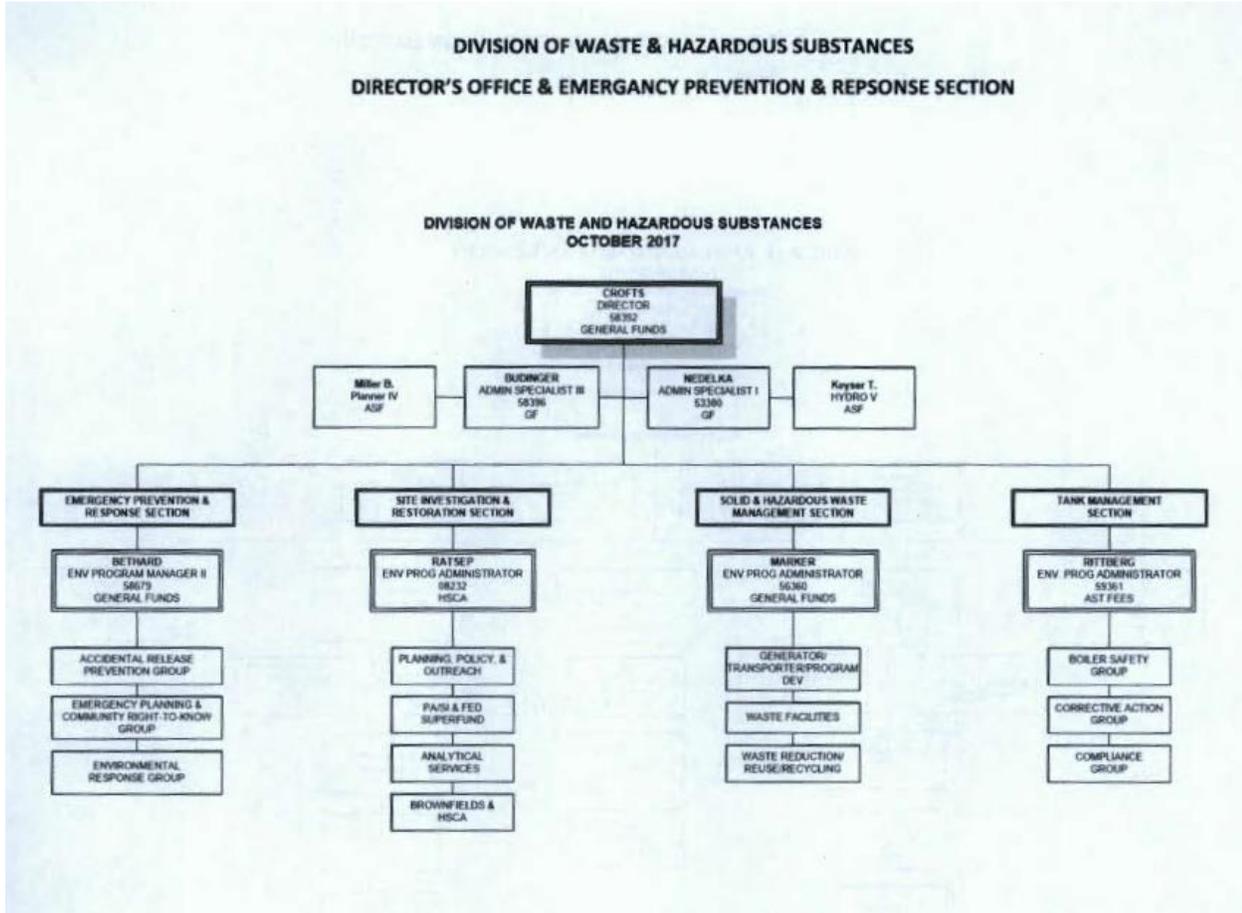
All laws or ordinances inconsistent with any provisions of this chapter are hereby superseded to the extent of the inconsistency.

[67 Del. Laws, c. 326, § 1.;](#)

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APPENDIX B



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APPENDIX C

Name	Professional Or Public Member	Position Held	Profession or Occupaion
Marjorie Crofts	Professional	Director of Waste and Hazardous Substance Division	Government
Timothy Ratsep	Professional	Administrator of Site Investigation and Restoration Section	Government
Alex Rittberg	Professional	Administrator of Tank Management Section	Government
Qazi Salahuddin	Professional	Program Manager II Site Investigation Restoration Section	Government
Paul Will	Professional	Program Manager II Site Investigation Restoration Section	Government
Jim Poling	Professional	Planner IV Site Investigation and Restoration Section	Government
Lori Spagnolo	Professional	Program Manager II Tank Management Section	Government
Christina Wirtz	Professional	Ombudsman & Project Manager Site Investigation Restoration Section	Government
Kate Durant	Professional	Project Manager Site Investigation Restoration Section	Government
Melissa Leckie	Professional	Management Analyst II Site Investigation and Restoration Section	Government
Keith Brady	Professional	Deputy Attorney General	Government
Walt Bryan	Professional	Del Mar Consulting Services LLC-President	Commercial Land Agent
Patricia Cannon	Professional	DEDO	Government

Marianne Cinaglia	Public	CCOBH Representative	Citizen
Kathy Fox	Professional	Project Manager	Environmental Consultant EA Engineering
Jeff Gernand	Professional	Project Manager	Environmental Consultant KCI
Ken/Joanne Haynes	Public	Citizen	Citizen
Robert Hillard	Professional	Project Manager	Environmental Consultant Lewis Environmental
Clay Greer	Professional	Senior Engineer	Environmental Consultant Ten Bears Environmental
Cheryl Mathes	Public	Citizen	Citizen
George Mathes	Public	Citizen	Citizen
Doug Seavey	Professional	Environmental Engineer	Environmental Consultant Landmark Science Engineering
Bill Smith	Professional	President	Environmental Consultant Environmental Alliance
Mike Vanderslice	Professional	Vice President Sales and Marketing	Environmental Consultant Environmental Alliance
Bill Stephens	Professional	President	Environmental Consultant Stephens Environmental Consulting Inc.
Kathy Stiller	Professional	Senior Program Manager	Environmental Consultant Brightfields
Mark Lannon	Professional	Professional Geologist/Principle	Environmental Consultant Brightfields
Marian Young	Professional	President	Environmental Consultant Brightfields
Chris Whallon	Professional	Professional Geologist/Senior Program Manager	Environmental Consultant Duffield Associates
Todd Coomes	Professional	Lawyer	Richards Layton Finger

Neeraj Batta	Professional	Professional Engineer/Vice President	Environmental Consultant Batta Environmental
Jess Anderson	Professional	Project Manager	Environmental Consultant Michael Baker International
Angelo Fatiga	Professional	Senior Engineer	Environmental Consultant Pennoni Associates
Bill Baldwin	Professional	President	Environmental Consultant Action Env. Services
Nora Lober	Professional	Project Manager	Environmental Consultant Pennoni Associates
David Kane	Professional	Hydrogeologist/Project Manager	Environmental Consultant TetraTech NUS
Debra Heffernan	Professional	Representative	State Representative
Pat Todd	Professional	Activist	League of Women Voters
Derek Thomlinson	Professional	Senior Engineer and Hydrogeologist	Environmental Consultant Geosyntec
Lorraine Sheldon	Professional	Realtor	NAI Emory Hill Real Estate

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APPENDIX D

HSCA Advisory Committee (HAC) Purpose and Rules

The purpose of the HAC is to provide recommendations, upon request, to the Department of Natural Resources and Environmental Control (DNREC), Division of Waste and Hazardous Substances (the Division or DWHS) related to the Hazardous Substance Cleanup Act (HSCA) rules, guidelines, policies, and procedures that may impact both public and private HSCA stakeholders throughout the State of Delaware. HSCA provides funding to the Site Investigation and Restoration (SIRS) and Tank Management Sections (TMS) with the primary objectives of protecting human health, welfare and the environment for the assessment, cleanup and long-term stewardship of contaminated soil, sediment, groundwater and aquatic resources in the state.

With insight from the members of the HAC, a secondary objective of promoting equitable redevelopment and re-use of formerly impaired properties through the Delaware Brownfields program and restoration of water bodies can also be more effectively achieved. Upon request, the HAC will provide advice on integrating and promoting DNREC's objectives with other state and local goals of conservation and economic development, without compromising applicable Delaware statutes (including Chapters 74, 74A and 91, collectively called "HSCA and TMS programs") and associated regulations. The Division will rely on the HAC to represent broad public interest and community perspectives for Delaware's HSCA and TMS programs, as appropriate.

The HAC Chair and/or Co-Chair (as identified below) may establish subcommittees to provide detailed input on DNREC proposed changes to HSCA and TMS program statutes, regulations and guidance documents; funding options for cleanup and development of properties; technical, financial, and community outreach activities related to HSCA- funded programs; and, on improving public participation and community involvement in SIRS and TMS programs.

For the purpose of streamlining public notice processes, the HAC may be engaged to review and comment on proposed new or revised regulations prior to statutorily required public comment. In addition, the Division may request that the HAC provides input on other HSCA and TMS program initiatives that may not require public notice or public comment e.g., guidance or policy.

HAC Roles and Responsibilities

HAC Chair and Co-Chair - The HAC Chair and Co-Chair shall be DNREC employees appointed by the Director of DWHS, and are responsible for facilitating HAC meetings. They will ensure that agendas are prepared and followed, and they will preserve the integrity and professionalism of the committee meetings.

HAC Committee Members – HAC Committee membership is open to any interested party and anyone attending HAC meetings can be considered a member. The HAC Committee members share the responsibility for successful quarterly meetings by agreeing to follow the HAC Meeting Ground Rules and the HAC Meeting Participation Rules.

Recording Secretary – The Recording Secretary shall be a DNREC representative who is responsible for taking detailed meeting minutes for subsequent distribution to the HAC Committee Members.

Subcommittee Chair – A Subcommittee Chair shall be a DNREC employee who is responsible for scheduling and facilitating subcommittee meetings. The Subcommittee Chair, or their designee, will also be responsible for presenting subcommittee activities to the HAC Committee Members during HSCA Advisory Committee meetings.

HAC Meeting Ground Rules

1. Start and end on time.
2. No side conversations.
3. Review the agenda in advance of the meeting.
4. Respect the agenda.
5. Respect differences of opinion.
6. No personal attacks.
7. Speak one at a time.
8. Help facilitators and the Recording Secretary to capture ideas accurately.
9. Share responsibility for the Committee's progress and success.
10. No DNREC enforcement matters shall be discussed.
11. Appropriate accommodations shall be made for differently abled members, participants, and attendees, as required by law.

HAC Procedural Rules

- HAC meetings will be held on a quarterly basis, in March, June, September, and December of each year. Additional meetings may be scheduled at the discretion of the Chair and/or Co-Chair.
- An agenda will be developed by the Division and sent to committee members via email two weeks prior to the HAC meeting. The agenda will also be posted on the Statewide Calendar at <http://www.delaware.gov/egov/calendar.nsf/FutureMeetings/ByDepartment?openview&Agency=Natural%20Resources%20and%20Environmental%20Control>
- Presentations materials that will be used during a meeting will be attached to the agenda, if available.
- Final meeting minutes from prior HAC meetings will be posted on the Statewide Calendar within 5 days of being finalized and will be distributed to HAC members via email prior to the next quarterly meeting.
- The appropriate Section Manager (SIRS or TMS) and/or Division Director shall make final decisions about applicable HSCA rules, guidelines, policies, and procedures after considering input from both DNREC staff and the HAC.
- All HAC meeting documents will be maintained on DNREC's webpage at <http://www.dnrec.delaware.gov/whs/awm/BAC/Pages/BACMeetings.aspx>

HAC Meeting Participation Rules

- All persons attending a HAC meeting should sign in so there is a record of attendance.
- Before speaking, all meeting attendees are asked to be recognized by the Chair or Co-Chair.
- A timeslot should be added to each agenda for statements not pertaining to an agenda item, i.e., new business.
- The public is encouraged to suggest meeting topics via written communication at least two weeks prior to the scheduled HAC meeting to allow the Chair and Co-Chair sufficient time to review the topic(s) of interest, add the topic to the agenda, and post the agenda on the Statewide Calendar. All communication can be directed to the HAC Recording Secretary at 391 Lukens Drive, New Castle, Delaware 19720.

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APPENDIX E

Zelenkofske Axelrod LLC

INDEPENDENT AUDITORS' REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING AND ON COMPLIANCE AND OTHER MATTERS BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH GOVERNMENT AUDITING STANDARDS

To the Management of the State of Delaware Hazardous Substance Cleanup Fund
Dover, Delaware

We have audited, in accordance with the auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, the modified cash basis financial statements of the Department of Natural Resources and Environmental Control Hazardous Substance Cleanup Fund of the State of Delaware (the "Fund"), as of and for the year ended June 30, 2016, and the related notes to the financial statements, which collectively comprise the Fund's basic financial statements – modified cash basis, and have issued our report thereon dated December 13, 2016.

Internal Control over Financial Reporting

In planning and performing our audit of the financial statements – modified cash basis, we considered the Fund's internal control over financial reporting (internal control) to determine the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinion on the financial statements – modified cash basis, but not for the purpose of expressing an opinion on the effectiveness of the Fund's internal control. Accordingly, we do not express an opinion on the effectiveness of the Fund's internal control.

A *deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. A *material weakness* is a deficiency, or a combination of deficiencies, in internal control such that there is a reasonable possibility that a material misstatement of the Fund's financial statements – modified cash basis will not be prevented, or detected and corrected on a timely basis. A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control that might be material weaknesses or significant deficiencies and therefore, material weaknesses or significant deficiencies may exist that were not identified. We did identify a certain deficiency in internal control, described as finding 2016-001 in the accompanying schedule of findings and responses that we consider to be a material weakness.

Compliance and Other Matters

As part of obtaining reasonable assurance about whether the Fund's financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed an instance of noncompliance or other matters that is required to be reported under *Government Auditing Standards* and which is described as Finding 2016-001 in the accompanying schedule of findings and responses.

Harrisburg	Philadelphia	Pittsburgh	Greensburg
830 St Thomas Court, Suite 100 Harrisburg, PA 17109 717.361.9200 Fax 717.561.9202	2370 York Road, Suite A-5 Jambon, Pa 18929 215.918.2277 Fax 215.918.2302	3800 McKnight E. Drive, Suite 3805 Pittsburgh, PA 15237 412.367.7102 Fax 412.367.7103	210 Tolliver Hill Road Greensburg, PA 15601 724.834.2151 Fax 724.834.5969

Zelenkofske Axelrod LLC

The Fund's Response to Findings

The Fund's response to the finding identified in our audit is described in the accompanying schedule of findings and responses. The Fund's response was not subjected to the auditing procedures applied in the audit of the financial statements and, accordingly, we express no opinion on it.

Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the Fund's internal control or on compliance. This report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the Fund's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

Zelenkofske Axelrod LLC

ZELENKOFKSKE AXELROD LLC

Harrisburg, Pennsylvania
December 13, 2016

State of Delaware
 Department of Natural Resources and Environmental Control
 Hazardous Substance Cleanup Fund
 Schedule of Findings and Responses
 June 30, 2016

- 15 -

<u>Finding 2016-001</u>	<u>15% Administrative Cost Cap</u>
Criteria:	Title 7 Subsection 9113(d) of the State of Delaware code states, “No greater than 15% of the monies deposited into the Fund shall be used for administering this chapter without approval of the Joint Finance Committee”.
Condition:	Costs charged to the Administrative Account for the year under audit amounted to 23% of the monies deposited into the Hazardous Substance Cleanup Fund, which exceeded the 15% cap by \$630,460. No approval was given from the Joint Finance Committee.
Cause:	The Delaware Department of Natural Resources and Environmental Control looks at the monies deposited and administrative costs on a cumulative basis over the life of the fund instead of on an annual basis when considering the 15% cap.
Effect:	Costs charged to the Administrative Account for the year under audit that exceeded the 15% cap by \$630,460 were potentially unallowed costs. The internal controls did not prevent the Fund from exceeding the administrative cap for a fiscal year.
Recommendation:	The Delaware Department of Natural Resources and Environmental Control should review the 15% cap on administrative costs on an annual basis, seeking approval from the Joint Finance Committee for amounts over the 15% cap, or seek revision to current legislation clarifying the 15% cap can be calculated on a cumulative basis over the life of the fund.
Management’s Response:	We have looked at the 15% cap on administrative costs to be cumulative over the life of the fund. Our records show that at the end of June 2016, the cumulative total for the administrative cap on total deposits was \$35,144,674 and the cumulative total spent for administrative costs to date was \$29,314,578. This leaves a total available for administrative costs of \$5,830,096.

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APPENDIX F

MEMORANDUM

To: Timothy T. Ratsep
Program Administrator

From: Keith R. Brady
Deputy Attorney General

Re: 7 *Del. C.* § 9113(d)

Date: September 15, 2017

QUESTION PRESENTED

You have asked whether 7 *Del. C.* § 9113(d), which imposes a 15% limitation (“15% cap”) on administrative costs expenditures from the Hazardous Substance Cleanup Fund (“the Fund”), requires that the 15% cap be determined based upon the cumulative amount deposited into the Fund since its creation, or is to be determined based upon the amount deposited into the Fund each fiscal year.

FACTUAL BACKGROUND

Your inquiry arises from the statutory requirement that the Department of Natural Resources and Environmental Control (“DNREC”) prepare an annual budget for the proposed use of the Fund and have an annual audit of the Fund performed and reported to the Governor and General Assembly as part of DNREC’s budget submittal. 7 *Del. C.* § 9104(c)(2). An Independent Auditor’s Report was issued January 3, 2017. Included in the report was *Finding 2016-001* (“the Finding”) which noted that administrative expenses for Fiscal Year 2016 (“FY 16”) which ended June 30, 2016 exceeded 15% when applied to deposits into the Fund **solely in FY 16**. The Finding noted that DNREC determined the amount of the 15% cap on a cumulative basis over the life of the Fund and that as a result, the costs were well under the 15% cap. The Finding concluded that, under the auditors’ interpretation of the law, expenditures above 15% of the amount deposited into the Fund in FY 16 “were potentially unallowed costs.”

You have also advised that you spoke with the auditor who performed the FY 16 audit and prepared the report. He stated that he did not seek legal advice regarding the meaning of the language contained in 7 *Del. C.* § 9113(d). Rather, he determined the 15% cap on a fiscal year basis because the audit pertained only to FY 16, so he thought it appropriate to apply the cap solely to deposits made into the Fund in FY 16.

LEGAL DISCUSSION

Considering the factual background and applying well established Delaware law as set forth below, the 15% cap should be determined each year based upon the cumulative amount of moneys deposited into the Fund since its inception.

The Delaware Hazardous Substance Cleanup Act (“HSCA”), 7 *Del. C. Ch. 91*, was enacted on July 10, 1990. The reason for the legislation is set forth as follows:

The General Assembly intends by the passage of this Act to exercise the powers of the State to require prompt containment and removal of such hazardous substances, to eliminate or minimize the risk to public health or welfare or the environment, and to provide a fund for the cleanup of the facilities affected by the release of hazardous substances. 7 *Del. C. § 9102(a)*.

The Fund referenced in the above cited subsection, was established in 7 *Del. C. § 9113* of HSCA, the focus of your inquiry. It provides:

(d) No greater than fifteen percent of the moneys deposited into the Fund shall be used for administering this Act without approval of the Joint Finance Committee. 7 *Del. C. § 9113(d)*.

Both the General Assembly and the Delaware courts have provided clear legal principles to assist in determining the meaning of statutory provisions including § 9113(d). Initially, the Delaware Code mandates that:

Words and phrases [used in a statute] shall be read with their context and shall be construed according to the common and approved usage of the English language. See 1 *Del. C. § 303*.

Similarly, in *New Castle County v. Chrysler Corporation*, 681 A.2d 1077, 1081-1082 (Del. Super. 1995), *aff'd* 676 A.2d 905 (Del. 1996), the Court stated:

In construing a statutory or regulatory provision, it is fundamental that the Court ascertain and give effect to the intent of the legislative or administrative body as clearly expressed in the language of the statute or regulation. *In re Adoption of Swanson*, Del.Supr., 623 A.2d 1095, 1096-97 (1993); *Giuricich v. Emtrol Corp.*, Del.Supr., 449 A.2d 232, 238 (1982). In seeking to ascertain this intent, the courts of Delaware employ the plain meaning rule. *Alfieri v. Martelli*, Del.Supr., 647 A.2d 52, 54 (1994). In other words, a court is required to give words of a statute or regulation their ordinary

meaning. *Arbern–Wilmington, Inc. v. Director of Revenue*, Del.Supr., 596 A.2d 1385, 1388 (1991). **In particular, “the courts may not engraft upon a statute ... language which has been clearly excluded therefrom by the Legislature.”** *Alfieri*, 647 A.2d at 54 (quoting *Giuricich*, 449 A.2d at 238). (Emphasis added).

The language of § 9113(d) is clearly expressed. Moreover, it furthers the legislative intent behind the creation of the HSCA Fund, namely to provide funding “to carry out the purposes of [the Act].” 7 *Del. C.* § 9113(c). Thus, applying the “plain meaning rule” as required by the Delaware courts to the statutory language of § 9113(d), the words of the statute must be given their ordinary meaning. See *New Castle County v. Chrysler* at 1082.

Moreover, as further mandated by the Delaware courts, in considering the meaning of a statutory provision one **“may not engraft upon a statute . . . language which has been clearly excluded therefrom by the Legislature.** *Id.*

Therefore, applying the plain meaning rule, it is impermissible to read into the provisions of § 9113(d) a substantive, limiting requirement that the 15% cap be determined based solely upon the moneys deposited into the Fund each fiscal year. Clearly, had the General Assembly intended such a significant limitation to be placed upon the use of the Fund it would have expressly included it in the law. Neither DNREC nor the Delaware courts have the authority to alter the clear language of the provision in question. To do so would effectively usurp the General Assembly’s constitutional authority to enact the laws of Delaware as it sees fit.

There are additional considerations that bolster the conclusion that the General Assembly clearly intended that the 15% cap to be calculated by DNREC based upon the cumulative total of deposits in the Fund from its inception when it prepares its annual budget and has the Fund audited.

First, there is a clear instance within § 9113, the section at issue, wherein the General Assembly placed specific limitations and conditions pertaining to the calculation of interest to be credited to the Fund. Specifically, § 9113(b)(5) provides that the State Treasurer shall credit the Fund with interest on or before the last day of each month based on the average balance in the Fund for the preceding month. Further, the General Assembly directed that:

“[t]he interest to be paid to the Fund shall be that proportionate share, during such preceding month, of interest to the State as the Fund’s and the State’s average balance is to the total State’s average balance. The Fund’s average balance shall be determined by averaging, in each instance, the balances at the beginning of each month and the balances at the end of that month[.]”

Based upon the statutory language, it is clear that the General Assembly carefully considered and provided a detailed means by which interest would be credited to the Fund in the very same

section of the law in which it created the 15% cap. It is highly implausible that the General Assembly would have inadvertently failed to include language that would limit the moneys subject to the cap to those sums deposited each fiscal year while at the same time addressing, in detail, the process by which interest is credited to the Fund. The obvious conclusion is that the General Assembly intended that the amount of the 15% cap on administrative costs is to be determined by the cumulative amount in the Fund since its inception.

Second, as both a legal and practical matter, interpreting § 9113(d) to limit the 15% cap calculation to the amount deposited each fiscal year would lead to an unreasonable result as described below. This further supports the conclusion that such an interpretation was never intended by the General Assembly.

A requirement that DNREC based the determination of the 15% cap on administrative costs on the deposits into the Fund each fiscal year would make preparing the annual budget subject to great uncertainty and even speculation because the amounts of money deposited into the Fund are subject to great fluctuations over which DNREC has no control. The primary revenue source of the Fund is a 0.9% tax on gross receipts from the sale of petroleum and petroleum products excluding crude oil. *See 7 Del. C. § 9114*. As is common throughout the country, the price of oil is subject to great fluctuations due to many varied causes such as embargoes, political strife, natural disasters, and the vagaries of the petroleum market itself.

A real-life example clearly reveals the challenges inherent in trying to calculate the 15% cap on a fixed amount of each fiscal year's deposits into the Fund. In July 2016, deposits into the Fund amounted to \$660,812. In July 2017 however, refinery shut downs in Texas, as a result of Hurricane Harvey, increased the price of petroleum products, resulting in almost \$1 million dollars of deposits into the Fund.

These significant fluctuations are not just the result of major events and often occur monthly without any clear explanation. For example, in January 2017 \$739,465 was deposited into the Fund while in February 2017 only \$473,385 was deposited.

Therefore, if DNREC were statutorily required to calculate the 15% cap based upon the deposits to the Fund each fiscal year, it would subject its budgeting process for such costs to great uncertainty and even speculation. Such an uncertain process would be made even more challenging when considering that DNREC's budget requests have to be formulated just months into the fiscal year. Under such a system, DNREC would be faced with the uncertainty of making requests pertaining to administrative costs with no assurance that sufficient funds necessary to meet those requests would be available at the end of the fiscal year. This could lead to various unfortunate and unproductive situations such as leaving a vacant position unfilled for fear that the money necessary to pay the salary costs associated with that position will not be available at the end of the fiscal year.

To interpret § 9113(d) so as to restrict the application of the 15% cap calculation solely to deposits each fiscal year would not only conflict with the plain language of the statute, it would also result in an unreasonable interpretation lacking any legislative support. As the Delaware Supreme Court has observed:

The golden rule of statutory interpretation to which we refer is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985).

The General Assembly, which enacted HSCA “to eliminate or minimize the risk to public health or welfare or the environment, and to provide a fund for the cleanup of the facilities affected by the release of hazardous substances,” clearly did not intend to subject DNREC to such uncertainty and difficulty in trying to carry out its critical statutory obligations. To read language into 7 *Del. C.* § 9113(d) that the General Assembly did not include would impede the very authority provided to DNREC by the Legislature and would significantly hinder DNREC’s ability to carry out its statutory mission.

CONCLUSION

The plain wording of the statute clearly evidences the intent of the General Assembly that the 15% cap on administrative costs of DNREC is to be calculated based on the cumulative total of the deposits into the Fund since its creation. Conversely, the complete lack of any legal support for the alternative interpretation as well as the practical challenges that such an interpretation would create compel its rejection.