



PERICONI, LLC
708 THIRD AVENUE
NEW YORK, NEW YORK 10017

TEL 212•213•5500
FAX 212•213•5030
jpericoni@periconi.com
www.periconi.com

September 30, 2009

VIA E-MAIL AND FIRST-CLASS MAIL

Mr. Robert Haynes, Hearing Officer
Dept. of Natural Resources and Environmental Control
Site Investigation and Restoration Branch
391 Lukens Drive, New Castle, DE 19720

Re: Comments by American Premier Underwriters, Inc. on proposed Consent Decree between DRNEC and New Castle County

Dear Hearing Officer Haynes:

Please accept these as the comments of American Premier Underwriters, Inc. (“APU”), one of the allegedly responsible parties at the Fox Point Park site, on the proposed consent decree between the Delaware Department of Natural Resources and Environmental Control (“DNREC”) and New Castle County (the “County”) for Fox Point Park (“Proposed Consent Decree”).

APU respectfully submits these comments in order to protect its legal rights, insofar as APU believes that the Proposed Consent Decree directly, adversely affects APU. We note that on September 16, 2009, the City of Wilmington (the “City”) filed comments.

Summary of APU’s objections to Proposed Consent Decree:

1. It fails to account for the County’s role as operator, generator and arranger, as well as owner, as the City notes;
2. It unfairly and illegally gives the County a complete “pass” on Phase I and Phase II park remediation costs;
3. It grossly understates the level of natural resources damages attributable to the County;



4. In giving contribution protection to the County, it almost insures that the City and APU will pay more than their fair share of costs for remediation of the park;
5. It lacks procedural and substantive fairness as courts have reviewed proposed CERCLA consent decrees;
6. It fails to pass the “reasonableness” standard applicable by courts in evaluating proposed CERCLA settlements, a standard that should be applicable to this HSCA settlement in the absence of case law under HSCA evaluating this issue;
7. A hasty, closed-door settlement with the County, outside of the City’s or APU’s purview, did not even serve the purpose of a prompt and effective response to hazardous waste disposal, much less holding proportionately responsible those whose activities drove the need for remediation.

Argument:

First, APU incorporates by reference one of the City’s arguments, namely, that the Proposed Consent Decree indicates that the County’s liability for the Site is based upon its past ownership of the Site (¶ 13), while Delaware’s Hazardous Substance Cleanup Act, 7 Del. C. Chapter 91 (“HSCA”), assigns liability, as well, to “operator”, “generator” and “arranger.” Given DNREC’s appropriate (in APU’s view) characterization of the sewage sludge as the driver of the remediation, the County also has operator, generator and arranger liability at Fox Point based upon its activities and relationship with the City’s waste water treatment plant. Yet the Proposed Consent Decree did not take these factors into account when allocating liability and determining an appropriate cost contribution amount.¹

Second, the Proposed Consent Decree does something DNREC had never previously been willing to give to the County in the past, despite the County’s protests itself for years of “unfairness”: *it gives the County a complete “pass” on Phase I and Phase II park investigation and remediation costs* on the theory, long raised by the County but rejected and, indeed, discredited by the State for years, that it should be “discharged by the credit granted by DNREC for the conveyance of the Site to the State in the amount of One Dollar,” in 1990. Proposed CD, at ¶ 9. The County has been unable to provide an executed instrument reflecting that the State gave a complete release to the County at the time of the sale of the property.

Third, the calculation of Natural Resources Damages for the County is grossly understated, which is particularly unfair to the City and to APU, given that such liability should not be a viable claim at all. Unlike CERCLA, where Congress recognized the particular unfairness of making natural resources damages retroactively applicable in the manner assigned here, HSCA has no such limitation. CERCLA §§ 107(f)(1), 113(g)(1); *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643 (3d Cir. (Del.) 1988)(court acknowledges in dicta that Congress barred retroactive recovery for damages to natural resources). Instead of

¹ APU does not adopt the City’s other arguments.



paying anything toward investigation and remediation costs, DNREC concludes that the County's "total liability . . . under HSCA is confined to NRD [Natural Resources Damages] in the amount of \$496,752." Proposed CD, at ¶ 20.

However, that 20% figure arises from incorrectly assigning only 20% of NRD to the County, when in fact, the County should have been liable for a significantly higher percentage of NRD than its 20% owner remediation costs share. *That is both because the County has operator as well as owner liability, and even more so because most of the actual ecological damage was caused by the sludge that the County deposited, not the steel slag attributable to fill material brought to the Site by APU's predecessor.* As a practical matter, whatever DNREC might say to the contrary, the State will be likely to seek more money from the remaining PRPs, namely, the City and APU, to make up for the shortfall that will result from undercharging the County.

And even as to those costs, the County may either pay DNREC that amount of money **or** "provide compensation for NRD by the performance of in-kind services in the form of operating a yard waste drop off site, for such period of time as necessary to offset Respondent's Total Liability." Proposed CD, at ¶¶ 23(A)-(B) and 24. Part of that "credit" is for capital costs (\$135,000) for the construction of the yard waste recycling facility, and annual operating expenses credit of \$93,220, presumably until this amount is "worked off."

The prior DNREC cost allocations by PRPs (which the City correctly noted in its comments was part of HSCA's NonBinding Allocation of Responsibility) and by task has never included figures for NRD.. Thus, the total allocable share for NRD for the County, as explained in the proposed CD, is the \$496,752 attributable to the previously unknown amount of NRD. But if that 20% share were properly increased to the higher figure that the State concludes would be fair, it would surely reduce APU's (and the City's) shares significantly. Given that neither the City nor APU has ever had the forum in which to raise arguments relating to NRD (which were never the topic of prior negotiations), the unilateral allocation of such damages here by DNREC is particular inaccurate and unfair.

Fourth, in giving contribution protection to the County, DNREC almost insures that the City and APU will pay more than their fair share of costs for remediation of the park. In addition to DNREC's release, "with regard to claims for contribution against [the County], the parties . . . agree that [the County] is entitled to protection from contribution actions or claims as provided by HSCA for matters addressed in this Consent Decree." Such matters include "response costs incurred *or to be incurred* by DNREC or any other person as to the Site." Proposed Consent Decree at ¶ 34 (emphasis added).

Such contribution protection means that neither APU nor the City could, if sued or threatened with suit by DNREC, seek contribution from the County to make up its fair share. And such contribution protection includes an open-ended amount of costs "to be incurred" in the future.



To the extent that over \$1,000,000 in investigation and remediation costs previously attributable to the County will be, in effect, waived, the City and APU will have to pick up that “orphan share.” This is unfair to the City and to APU.

Fifth, to the extent HSCA was modeled on the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended, 42 U.S.C. §9601 et seq. (“CERCLA”), the Consent Decree fails to meet judicial tests of procedural or substantive fairness. We have reviewed under what circumstances under CERCLA, non-settling PRPs may object to a proposed settlement on these grounds.

Procedural fairness refers to the negotiating process, and is generally satisfied “if the proposed settlement is reached through arms-length negotiations in which all parties, including non-parties, are afforded an opportunity to participate.” *United States v. Davis*, 11 F.Supp.2d 183, 189 (D.R.I. 1998)(where the court found that all parties were given a chance to participate in settlement negotiations and did participate in informal discussions in a global settlement conference even though the consent decree does not settle claims against roughly 90 third and fourth party defendants). Here, there was little “procedural fairness,” in that “all parties” – particularly APU and the City of Wilmington, the other PRPs – did not have “an opportunity to participate” in the negotiations between DNREC and one PRP, the County.

Substantive fairness refers to the terms of the consent decree. Most courts agree that consent decrees “must be based upon, and roughly correlate with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational estimates of how much harm each PRP has done.” *Davis*, 11 F.Supp.2d, at 189-90 (quoting *U.S. v. Cannons Eng’g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990)). Accountability is important because, if a settling PRP pays less than its fair share, a non-settling PRP may be saddled with liability for more than its fair share and unable to sue the settling PRP for contribution (because of CERCLA’s contribution protection for settling parties²). *Davis*, 11 F.Supp.2d, at 190.

In assessing relative liability, EPA must take into account the strength of the evidence against each PRP, the risks of litigating against that PRP and the interest of having remediation begin immediately rather than after prolonged litigation. *Cannons Eng’g*, 899 F.2d, at 88; *Davis*, 11 F.Supp.2d, at 190. Therefore, low settlements are justifiable by the value of early settlements. *Cannons Eng’g*, 899 F.2d, at 88; *United States v. Fort James Operating Co.*, 313 F.Supp.2d 902, 908 (E.D. Wisc. 2004) (where a settling defendant, who was found to be 15-20% liable for the contamination based on amounts discharged, paid only 3.3-6.2% of the estimated natural resources damages under the consent decree). But that value is lacking here because the settlement with the County is in no sense an “early” settlement in relation to the cleanup.

According to one commentary, courts have held that the effect of settlement on nonsettlers should be considered in evaluating fairness. *See* Broun & O’Reilly, *RCRA and Superfund: A Practice Guide*, Vol. 2, § 13:39 (West, 3d. Ed. 2008) (citing *U.S. v. Kramer* 19

² HSCA, like CERCLA, provides contribution protection for settling PRPs. *See* HSCA § 9107(c). Therefore, this rationale applies to consent decrees under HSCA as well.



F.Supp.2d 273, 280 (D.N.J. 1998) (the effect on nonsettlers should be considered); *In re Acushnet River & New Bedford Harbor Proceedings*, 712 F.Supp. 1019, 1029 (D.Mass. 1989) (however, the effect on nonsettlers is not determinative in the court's evaluation); *U.S. v. Rohm & Haas Co.*, 721 F.Supp. 666, 687 (D.N.J. 1989) (any unfairness to nonsettlers is a by-product of the Congressional scheme)).

Procedural fairness is important, but was lacking here, in that APU (and the City) were not given the opportunity to participate in the settlement negotiations process between DNREC and the County. As to substantive fairness, courts will determine that a proposed CD is substantively fair if it roughly correlates with some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational estimates of how much harm each PRP has done. In this regard, although the settling agency's apportionment is given much deference, its apportionment and the amount that the settling PRP will be liable for must be weighed against the risk of litigating against that PRP.

Therefore, if the agency's settlement with a PRP is disproportionately low, as here, that settlement will be justified only if there was a high risk that the settling PRP will not be found liable after litigating the issues, which is not the case here; or because of the benefits of early settlement where time is of the essence (where, for example, money is needed to start or to complete a remediation). But these factors showing justification are not present here, as it is clear that the County's sludge waste was a primary cause of the remediation at the Fox Point Site, and the remediation was completed without any benefit from a "rough justice" early settlement with the County. In short, this proposed CD lacks substantive as well as procedural fairness and thus can be attacked on both grounds.

Sixth, the Proposed Consent Decree fails to pass the "reasonableness" standard applicable by courts in evaluating proposed CERCLA settlements. Reasonableness is based on "the consent decree's likely efficaciousness as a vehicle for cleansing the environment." *Cannons Eng'g*, 899 F.2d, at 89. This facet of "reasonableness" does not apply when a consent decree settles liability for cleanup costs already spent.

However, two other aspects of the "reasonableness" test apply to all CERCLA consent decrees: (1) whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures; and (2) the relative strength of the parties' litigating positions. See *Cannons Eng'g*, 899 F.2d, at 90; *55 Motor Ave. Co. v. Liberty Industrial Finishing*, 332 F.Supp.2d 525, 531-532 (E.D.N.Y. 2004).

As for the first of these two factors, whether the settlement compensates the public for actual and anticipated cleanup costs is an important consideration. *Fort James Operating Co.*, 313 F.Supp.2d at 910 (even though "the consent decree does not mandate that [the settling PRP] pay its full equitable share of natural resource damages, when viewed in light of the benefits of early settlement and CERCLA's joint and several liability scheme, it appears to satisfactorily compensate the public for [the settling PRP's] share of the estimated natural resource damages."). The First Circuit has held that, although compensation to the public is an important consideration, "to the extent that time is of the essence or that transaction costs loom large, a



settlement which nets less than full recovery of cleanup costs is nonetheless reasonable.” *Cannons Eng’g*, 899 F.2d, at 90; see also *Davis*, 11 F.Supp.2d at 192-193. Here, there are no “benefits of early settlement,” as the remediation has already been completed.

Seventh, the Proposed Consent Decree lacks consistency with HSCA’s, as with CERCLA’s, purpose. The two primary goals of CERCLA are:

1. prompt and effective response to hazardous waste disposal; and
2. holding those responsible for problems caused by the disposal of hazardous waste to bear cost and responsibility of clean-up.

Cannons Eng’g, 899 F.2d, at 90-91.

If the proposed consent decree meets these two primary goals, it will be in accord with the purposes of CERCLA. *55 Motor Ave.*, 332 F.Supp.2d, at 533 (citing *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992)). Of course, this Proposed Consent Decree in no sense provides a “prompt and effective response” to disposal that took place decades ago, nor does it appropriately hold the County responsible for problems caused by the County’s past acts that make up its various forms of liability.

Conclusion:

For all these reasons, the Proposed Consent Decree should be rejected, and DNREC staff be directed to reassess the proposed settlement with the County consistent with procedural and substantive fairness and reasonableness, in light of the factors enumerated hereinabove.

Respectfully submitted,

Periconi, LLC, on behalf of
American Premier Underwriters, Inc.

To:

Robert Kuehl, Deputy Attorney General (via e-mail only)
Delaware Department of Natural Resources and Environmental Control

New Castle County Attorney (via e-mail only)

Kara Coats, Esq. (via e-mail only)
Senior Assistant City Solicitor