MEMORANDUM

TO: Senator S. Elizabeth Lockman, Chair
Representative David Bentz, Vice Chair
Members of the Joint Legislative Oversight and Sunset Committee

FROM: Mark Brainard Jr., JLOSC Analyst

SUBJECT: HSCA Holdover Status Update

DATE: March 25, 2019

Background

Delaware's Hazardous Substance Cleanup Act ("HSCA") was enacted 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."[1] The statute established the HSCA Fund to carry out the purposes of the act.[2] HSCA is under the purview of the Department of Natural Resources and Environmental Control ("DNREC"), the Division of Waste & Hazardous Substances ("DWHS").

JLOSC decided to review the HSCA fund in 2018 because an independent audit "as of and for the year ended June 30, 2016" found that the HSCA Fund had exceeded its statutory 15% administrative cap, without required Joint Finance Committee approval. A Deputy Attorney General ("DAG") for DNREC issued a memorandum in September 2017 arguing that the auditor misinterpreted a HSCA provision and that the Fund had not exceeded its cap.

The statutory provision at issue was § 9113(d), which states:

> 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.

The question presented was whether the statute intends to apply the 15% cap to the cumulative amount deposited into the Fund since its creation, or the amount deposited each fiscal year. DNREC argued that the cap applies to the cumulative amount, while the auditor believed the cap applies to the amount deposited each fiscal year.[3]

During its review, the Committee of 100 brought to the Committee draft legislation to amend HSCA by creating a new adjustable tax rate, which should stabilize revenues for the HSCA Fund and Brownfield Program and, in the process, resolve the 15% cap issue by smoothing over the amount that goes to administrative costs.

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[1] See 7 *Del. C.* § 9102.
[2] See *id.* at § 9113.
[3] For a more detailed discussion of the statutory interpretation issue, see the DAG's memorandum (Appendix C of the HSCA JLOSC 2018 Final Report) on page 7.

Reason for the Hold Over

HSCA was held over to hear from DNREC whether the changes made in last year's HB 451 have had the anticipated effect of smoothing the amount of funds going to administrative costs, or if additional legislation to clarify § 9113(d) is needed. Introducing legislation to clarify the cap provision was recommended in 2018, but tabled:

Recommendation: The two options for this recommendation are outlined in the final 2018 report:

Option 1: JLOSC will sponsor a bill drafted by JLOSC's Legislative Attorney to amend 7 Del. C. § 9113(d) to clarify that the HSCA Fund's 15% cap on administrative costs expenditures is based on the amount deposited into the Fund on a cumulative basis, as follows (including 2 changes to conform existing law with the standards of the Delaware Legislative Drafting Manual):

> (d) No greater than 15 percent <u>%</u> of the moneys deposited into the Fund <u>on a cumulative basis over the life of the Fund</u> shall <u>may</u> be used for administering this chapter without approval of the Joint Finance Committee.

Option 2: JLOSC will sponsor a bill drafted by JLOSC's Legislative Attorney to amend 7 Del. C. § 9113(d) to clarify that the HSCA Fund's 15% cap on administrative costs expenditures is based on the amount deposited into the Fund in the current fiscal year, as follows:

> (d) No greater than 15 percent <u>%</u> of the moneys deposited into the Fund <u>in the current fiscal year</u> shall <u>may</u> be used for administering this chapter without approval of the Joint Finance Committee.

Update: This recommendation was tabled at the June 5, 2018 meeting. The Committee will revisit this recommendation in January 2019.

Completed Recommendations

By way of further background information, JLOSC approved the following 2 recommendations in 2018:

Recommendation: JLOSC will sponsor a bill drafted by the Committee of 100 to amend 7 *Del. C.* §§ 9113-9114 to stabilize revenues for the HSCA Fund and Brownfield Program.[4] This recommendation passed on April 17, 2018.

Update: HB 451 was enacted on September 13, 2018. The legislation addressed the fluctuating annual revenue of the HSCA Fund by creating a new adjustable tax rate. With this new tax rate in place, DNREC officials expect a more predictable and steady revenue stream.

[4] See HB 451 on page 5.

Recommendation: In order to demonstrate the achievements of the Division of Waste and Hazardous Substances, and the success of the Brownfields Development Program, update the Delaware Brownfields Marketplace website with a complete list of market-ready brownfield sites for redevelopment. This recommendation passed on April 17, 2018.

Update: DNREC says officials have been working diligently with private property owners to list their properties on the Brownfields Marketplace. Since last year, DNREC has worked to reevaluate sites and plans to contact property owners to educate them on the Brownfield Development Program while offering to place their properties in the Brownfield Marketplace. Additionally, DNREC is working with its IT Department to make changes to the website to allow additional sites to be added. With the upgrades, the Department will be able to add additional sites. Through these efforts over the last 9 months, DNREC has added 3 sites to the Brownfields Marketplace with plans to add additional sites once upgrades are complete. Listing a property on the Marketplace is voluntary, and DNREC will continue to respect the rights of private property owners not to list their properties. Outreach efforts by DNREC officials to communicate the beneficial nature of the Brownfield Development Program to the community will continue.

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SPONSOR: Rep. Bolden & Sen. Walsh
Reps. Bennett, Brady, Dukes, Spiegelman; Sens. Delcollo, Pettyjohn, Sokola

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE BILL NO. 451
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 7 RELATING TO THE HAZARDOUS SUBSTANCE CLEANUP ACT.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend § 9113, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 9113. Hazardous Substance Cleanup Fund.

(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:

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

(9) Provide annually to the Brownfields Grant Program an amount equal to 1/3 of the amount deposited in that year into the Hazardous Substance Cleanup Fund under § 9113 of this title.

Section 2. Amend § 9114, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 9114. Tax assessment.

(a) (1) 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.

(2) With regard to gross receipts received after June 30, 1993, and before January 1, ~~2022~~ 2019 , the rate of additional tax under this subsection shall be increased to 0.9%.

(3) With regard to gross receipts received after December 31, 2018, and before January 1, 2022, the rate of additional tax under this subsection is subject to annual adjustment based upon the total of moneys deposited into the Fund during the

lookback period, as that term is defined in § 2122 of Title 30. The Division of Finance shall calculate the annual adjustment under this paragraph (a)(3) of this section in conjunction with the determination of gross receipts tax filing frequencies.

(4) For taxable periods beginning after December 31, 2018, the rate of tax imposed under this section is determined by multiplying .9% by a fraction, the numerator of which is $15,000,000 and the denominator of which is the total of moneys deposited into the Fund during the lookback period, as that term is defined in § 2122 of Title 30, but the tax rate calculated under this section may not be less than .0675% or greater than 1.675%.

(5) The Department of Finance shall publish the annual adjustments made under this section and engage in public outreach to notify businesses, employers, payroll processors, tax professionals, and the general public of the adjustments, subject to the deadline provide under § 515(d) of Title 30.

(6) 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 all of the following apply :

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

~~(2)~~ b. The gross receipts from the sale described in paragraph ~~(a)(1)~~ (a)(6)a. of this section were gross receipts defined in Chapter 29 of Title 30 with respect to the seller.

(7) 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.

APPENDIX C

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.

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