UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al., Plaintiffs, v. E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants.	Civil Action Nos. 2:19-cv-14758, 1:19-cv-14765, 1:19-cv-14766, 3:19-cv-14767. Hon. John Michael Vazquez, U.S.D.J. Motion Date: February 21, 2022 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S AND ITS COMMISSIONER'S MOTION FOR A PRELIMINARY INJUNCTION REQUIRING E.I. DU PONT DE NEMOURS AND COMPANY AND THE CHEMOURS COMPANY FC, LLC TO ESTABLISH A REMEDIATION FUNDING SOURCE FOR THE CHAMBERS WORKS SITE

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Plaintiffs New Jersey Department of Environmental Protection ("NJDEP") and the Commissioner of the NJDEP (the "Commissioner") (collectively, the "Plaintiffs") submit this memorandum of law in support of their motion for a preliminary injunction requiring Defendants E.I du Pont de Nemours and Company ("Old DuPont") and the Chemours Company FC LLC ("Chemours FC") (collectively, the "RFS Defendants") to establish a $943,360,026 Remediation Funding Source ("RFS") for the Chambers Works site pursuant to (i) the New Jersey Industrial Site Recovery Act, N.J.S.A. 13:1K-6 *et seq*. ("ISRA"); (ii) the New Jersey Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 *et seq.* (the "Brownfield Act"); and (iii) Fed. R. Civ. P 65(a).

PRELIMINARY STATEMENT

Both ISRA and the Brownfield Act require that an RFS be established to ensure there are sufficient funds to cover future costs to remediate the massive contamination that the RFS Defendants caused at the Chambers Works property and manufacturing facility (the "Facility") in Salem County, New Jersey and off-site impacted areas (collectively, the "Site"). An RFS is a financial assurance tool, which can take multiple forms, including a trust fund or letter of credit, to cover the estimated costs to perform future remediation at a site. An RFS is used only for a particular site and is adjusted annually as the remediation costs are further delineated or expended. Thus, the value of the RFS may go up or down over time. When the

remediation is complete, the RFS is terminated and any actual funds that were posted but not used are returned to the responsible party.

For over seven years, the RFS Defendants have failed to comply with their statutory obligations to post a sufficient RFS. In fact, Old DuPont has sought to limit its liabilities through a series of restructurings that even Chemours FC's parent company, The Chemours Company, has attacked as unlawful. Accordingly, the Court should issue an order requiring the RFS Defendants to post an RFS of $943,360,026. NJDEP has determined this sum is required to ensure there are sufficient funds to conduct decades of necessary future remediation at the Site and ensure that the State of New Jersey and its taxpayers are not left with the bill.

NJDEP is the state agency charged with managing New Jersey's natural resources and addressing issues related to pollution, including implementation of ISRA and the Brownfield Act. NJDEP first directed and then negotiated and mediated with the RFS Defendants for years in an attempt to have them post a sufficient RFS. Those efforts have been unavailing. It is now clear that the only way to enforce the statutes that require the RFS Defendants to post an RFS is to seek the Court's intervention, as NJDEP and its Commissioner are statutorily empowered to do; ISRA and the Brownfield Act expressly provide authority to seek injunctive relief.

For approximately 125 years, Old DuPont caused enormous quantities of hazardous substances to be discharged from the Facility, resulting in widespread contamination. For the past 60 years, per- and polyfluoroalkyl substances ("PFAS"), such as perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"), have been among the contaminants discharged from the Facility.

PFAS are toxic at very low levels and never degrade in the environment, earning them the name "forever chemicals." PFAS, which have been detected in practically every part of the environment at the Site, including groundwater and private drinking water wells miles from Chambers Works, present an extraordinary risk to human health. Because the RFS Defendants have failed to complete a full delineation of the contamination (including PFAS) at the Site, NJDEP does not yet know the full extent of the contamination (including in the neighboring communities). The decades-long remediation that is necessary to protect human health and the environment, however, is likely to cost more than the $943,360,026 NJDEP currently seeks as an RFS.

Old DuPont sought to wash its hands of its remediation obligations at Chambers Works when it transferred the Facility to Chemours FC in 2015. This transfer was part of a much larger scheme by Old DuPont to avoid potentially crippling liabilities that it faced (and continues to face) as a result of its use and discharge of PFAS and other hazardous substances at this and numerous other

facilities throughout the country.

To effectuate this scheme, Old DuPont formed two subsidiaries: (i) The Chemours Company; and (ii) Chemours FC (collectively, "Chemours"). In January 2015, Old DuPont transferred the Chambers Works real estate to Chemours FC. Over the next six months, Old DuPont transferred 34 other facilities, and all of Old DuPont's business operations that involved the use or discharge of PFAS, to Chemours. Then, in July 2015, Old DuPont spun off Chemours, and Chemours became a separate, independent, public company. In doing so, Old DuPont saddled Chemours with billions of dollars in PFAS liabilities, and left Chemours so grossly undercapitalized that it could not possibly satisfy them all.

ISRA was enacted to address exactly this situation. ISRA mandates that when a company like Old DuPont transfers "ownership or operations" of a contaminated "industrial establishment," it must establish an RFS, *at the time of the transfer*, to ensure that "contaminated property is not abandoned to the State for cleanup." N.J.S.A. 13:1K-7 & -9. ISRA's requirements are triggered when (i) a company engages in "the sale or transfer of the business of an industrial establishment or any of its real property"; or (ii) "the sale or transfer of stock ... result[s] in a change in the person holding the controlling interest in ... an industrial establishment." N.J.S.A. 13:1K-8 ("Change of ownership"). Once triggered, ISRA requires that the transferring company (i) develop a cost estimate for the full remediation of the site,

which NJDEP can approve as reasonable, and (ii) thereafter establish and maintain an RFS in the approved amount. N.J.S.A. 13:1K-9 & -11.5; N.J.S.A. 58:10B-3.

Old DuPont triggered ISRA at least twice: first, when it transferred the Chambers Works real estate to Chemours FC in January 2015; and again when Old DuPont spun off Chemours six months later.[1]

ISRA's plain language provides that real estate transfers, such as Old DuPont's January 2015 deed transfer to Chemours FC, trigger ISRA. In fact, with respect to the January 2015 real estate transfer, the New Jersey Superior Court, relying on ISRA's plain statutory language, in *Carneys Point Township v. E.I. DuPont de Nemours and Company et al.*, No. SLM-L-251-16 (N.J. Super. Ct. Law Div. filed Dec. 12, 2016), granted summary judgment in Carneys Point's favor because Old DuPont's transfer of the Chambers Works real property to Chemours FC "triggered the requirement for [Old] DuPont to comply with [ISRA] at Chambers Works and surrounding impacted areas." (Ex. A,[2] at 2 (Order Granting Summary Judgment); *see also* Ex. B (Transcript of Telephonic Decision).)[3]

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[1] Plaintiffs' Second Amended Complaint alleges that Old DuPont triggered ISRA on four separate occasions, but this motion focuses on two such triggers. The two other triggers are the subject of a pending motion to dismiss. D.E. 174 & 200.

[2] The facts are set forth in the accompanying Declaration of Helen Dudar, dated January 27, 2022 ("Dudar Decl."), the Declaration of Steven Humphreys, dated January 28, 2022 ("Humphreys Decl."), and any exhibits thereto. Unless otherwise specified, references to "Ex. []" refer to the exhibits attached to the Humphreys Decl.

[3] The Order provided that "motions for reconsideration may be filed." (Ex. A, at 3.) Old DuPont's motion for reconsideration has been stayed pending mediation.

Likewise, Old DuPont's spinoff of Chemours triggered ISRA because it transferred the ownership and operations of an industrial establishment. As discussed below, none of ISRA's statutory exceptions apply here.

The RFS Defendants are also separately obligated to post an RFS pursuant to the Brownfield Act. The Brownfield Act requires a "discharger of hazardous substances" or a party who is otherwise "in any way responsible" for hazardous substances to establish an RFS after being served with a Directive pursuant to the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11 *et seq*. NJDEP served such a Directive on the RFS Defendants on August 30, 2017. The Directive required them to submit an estimate for the full cost of remediation at the Chambers Works Site and to establish an RFS. Although Chemours FC has submitted cost estimates for the RFS Defendants, the estimates are woefully inadequate; they are a small fraction of the $943,360,026 that NJDEP has determined is needed for the RFS.

ISRA and the Brownfield Act specifically authorize preliminary injunctive relief to require that the RFS be posted now. Plaintiffs seek such relief because it has become apparent after years of negotiation and mediation that the RFS Defendants have no intent on funding anything close to a proper RFS amount. Accordingly, this Court should grant a preliminary injunction requiring the RFS

Defendants to establish an RFS in the amount that NJDEP has determined is currently needed: $943,360,026.

BACKGROUND

I. OLD DUPONT DISCHARGED HAZARDOUS SUBSTANCES AT THE CHAMBERS WORKS SITE, MAKING IT AN UNPRECEDENTED TOXIC DISASTER

Chambers Works spans 1,455 acres along the eastern shore of the Delaware River in Salem County, New Jersey. The Facility is surrounded by residential neighborhoods to the north and the east. (Dudar Decl. ¶ 4.)

Old DuPont owned and operated Chambers Works for approximately 125 years, manufacturing roughly 1,200 chemical products there. (Ex. C, at 5.) As a result, Chambers Works and the surrounding areas are heavily contaminated with hazardous substances, including various semi-volatile organic compounds ("SVOCs"), volatile organic compounds ("VOCs"), polychlorinated biphenyls ("PCBs"), metals, pesticides, and PFAS—all discharged by Old DuPont. (Dudar Decl. ¶¶ 5-17.)

PFAS (including PFOA) are highly toxic contaminants that pose great risks to human health and the environment.[4] Because of these risks, NJDEP has

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[4] *See, e.g.*, Leticia M. Diaz and Margaret R. Stewart, "Forever Chemicals": Forever Altering the Legal Landscape (2020). Belmont Law Review, Vol. 7, Issue 2, pp. 308-342; Belmont University College of Law Research Paper No. 2020-24. Available at SSRN: https://ssrn.com/abstract=3616361.

established a drinking water limit of 14 parts per trillion ("ppt") for PFOA.[5]

Old DuPont discharged PFOA at Chambers Works through its manufacturing processes and from its wastewater treatment plant. (Ex. D, at 7-12.) Despite its clear knowledge of the dangers of PFOA, Old DuPont concealed PFOA's true nature from NJDEP, brought PFOA-waste to Chambers Works from its other sites around the world, and discharged and disposed of PFOA and other PFAS at and from Chambers Works for decades. (*See, e.g.*, *id.* at 9.) In fact, Chambers Works remains a continuing source of significant PFAS contamination, contaminating water supplies and the environment miles away from the Facility. (*Id.* at 16, 23-25, 30; Dudar Decl. ¶¶ 16-17; *see generally* Ex. E.) The contamination will continue indefinitely (unless cleaned up) because PFAS do not break down in the environment, and are persistent, soluble, and mobile in water. *See, e.g.*, 51 N.J.R. 437(a).

PFOA contamination in drinking water poses a serious threat to the health of New Jersey's residents. PFOA accumulates in the human body and continued exposure to even very low concentrations in drinking water substantially increases

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[5] On June 1, 2020, NJDEP published regulations establishing a 14 ppt maximum contaminant level ("MCL") (i.e., drinking water standard) and specific ground water quality standard for PFOA, and also listing it as a "hazardous substance" under the Spill Act. 52 N.J.R. 1165(b).

concentrations in human blood serum over time.[6] According to the U.S. Environmental Protection Agency ("EPA"), "negative health effects may occur at much lower levels of exposure to PFOA … than previously understood and … PFOA is a likely carcinogen," associated with testicular and kidney cancer, as well as increased cholesterol, increased liver enzymes (an indication of liver damage), decreased vaccine response, and decreased birth weight in humans.[7] The PFAS contamination at the Site (including areas miles from the Facility) is, therefore, of the utmost concern to the NJDEP, as its function is to protect human health and the environment.

II. OLD DUPONT TRANSFERRED CHAMBERS WORKS AND THE REST OF ITS PERFORMANCE CHEMICALS BUSINESS TO CHEMOURS, TRIGGERING OLD DUPONT'S ISRA OBLIGATIONS

Old DuPont has long known of its enormous financial exposure due to the PFAS contamination that it caused not only at the Site, but also at numerous other manufacturing facilities across the country. By 2000, Old DuPont's in-house

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[6] Post et al., *Key scientific issues in developing drinking water guidelines for perfluoroalkyl acids: Contaminants of emerging concern*, PLoS Biol 15(12) e2002855, (2017) https://doi.org/10.1371/journal.pbio.2002855(last visited Jan. 28, 2022); *see generally* Interstate Technology & Regulatory Council, *PFAS Technical and Regulatory Guidance Document and Fact Sheets PFAS-1*, https://pfas-1.itrcweb.org/ (last visited Jan. 28, 2022).

[7] EPA, *EPA Advances Science to Protect the Public from PFOA and PFOS in Drinking Water* (Nov. 16, 2021), https://www.epa.gov/newsreleases/epa-advances-science-protect-public-pfoa-and-pfos-drinking-water (last visited Jan 28, 2022); *see generally* Meeting Material, Science Advisory Board, *SAB PFAS Review Panel Meeting* (aggregating materials), https://sab.epa.gov/ords/sab/f?p=100:19:11957753573732:::RP,19:P19_ID:963#materials (last visited Jan. 28, 2022).

counsel was particularly concerned about the threat of punitive damages resulting from Old DuPont's releases of PFOA at its Washington Works facility in West Virginia. (Ex. F.) In 2005, Old DuPont paid the "largest civil administrative penalty EPA ever obtained under any federal environmental statute" because Old DuPont failed to disclose toxicity and exposure information for PFOA in violation of federal law. (Ex. G.) That same year, Old DuPont settled a class action filed on behalf of certain Ohio and West Virginia residents whose water was contaminated with DuPont's PFAS; the settlement was valued in excess of $300 million. (Ex. H, at F-30; Ex. I.) On February 13, 2017, Old DuPont and Chemours settled additional residents' personal injury claims for $671 million. (Ex. J ¶ 4; Ex. K.) Several dozen additional class members settled claims for $83 million in 2021. (Ex. L.)

Facing massive liabilities from PFAS and environmental contamination, Old DuPont embarked on a restructuring effort to shield its assets from creditors, including the State. Old DuPont began this effort by creating two wholly-owned subsidiaries, The Chemours Company and Chemours FC, in 2014. (Ex. M, at 19; Ex. N, at Ex. 21.1.) Old DuPont then completed a significant internal reorganization and transferred to Chemours all the Old DuPont assets and businesses that had developed, used, and discharged PFAS. (Ex. O, at 24; Ex. J ¶¶ 15-16; Ex. P § 2.2(b).) In total, Old DuPont transferred to Chemours or its subsidiaries at least 35 active chemical plants associated with the Performance Chemicals business. (Ex. Q, at 3.)

On January 23, 2015, Old DuPont transferred the Chambers Works real estate to Chemours FC. (Ex. R.) The deed transfer triggered Old DuPont's obligations under ISRA because it was a "transfer[ ] [of] ownership or operations" of the Chambers Works Facility. N.J.S.A. 13:1K-8; (*see also* Exs. A & B).

On July 1, 2015, Old DuPont spun off The Chemours Company by transferring 100% of its common stock from Old DuPont to Old DuPont's shareholders (the "Spinoff"). (Ex. Q, at 3.) As a result, Chemours became a separate, publicly traded company. (*Id.*) The Chemours Spinoff, therefore, triggered Old DuPont's ISRA obligations at Chambers Works for a second time because the Spinoff transferred the "ownership or operations" of the Chambers Works industrial establishment. N.J.S.A. 13:1K-8.

Prior to the Spinoff, Old DuPont had a net worth of $13.38 billion; after the Spinoff, Chemours, the new company, had a net worth of only $130 million. (Ex. M, at F-6; Ex. Q, at F-5.) Prior to the Spinoff, Old DuPont had $49.88 billion in total assets, which were available for remediation; after the Spinoff, Chemours had only about $6.3 billion. (Ex. M, at F-6; Ex. Q, at F-5.) Thus, Old DuPont transferred Chambers Works to an entity with a net worth of less than 1% of Old DuPont's and over $43 billion ***less*** in assets available for remediation.

Not only that, but Old DuPont required Chemours to assume most of Old DuPont's environmental liabilities, including Old DuPont's massive PFAS

liabilities. (Ex. J ¶¶ 8, 37-40; Ex. P §§ 2.2(c), 1.1(34)(ix) & 1.1(21).) In fact, according to Chemours, it "received only 19% of DuPont's business lines, but was saddled with approximately two-thirds of [Old] DuPont's environmental liabilities and 90% of [Old] DuPont's pending litigation by volume of cases." (Ex. J ¶ 38.) Old DuPont also required Chemours to incur almost $4 billion in debt to fund a $3.9 billion dividend payment to Old DuPont. (*Id.* ¶ 35.) The transaction left Chemours grossly undercapitalized and unable to satisfy its environmental liabilities. (*Id.* ¶¶ 2-10 & 119.)

In fact, following the Spinoff, Chemours sued Old DuPont in Delaware state court, alleging that Old DuPont "systematically" and "spectacularly" understated the enormous environmental liabilities that Old DuPont purported to transfer to Chemours. (*Id.* ¶ 2.) Chemours alleged, *inter alia*, that if the Court did not cap the liabilities that Old DuPont purported to transfer, "Chemours was insolvent at the time of the Spinoff." (*Id.* ¶ 119.) Indeed, shortly after the Spinoff, market analysts described Chemours as "a bankruptcy waiting to happen" and a company "purposely designed for bankruptcy." (Ex. S.)

Although Chemours has since settled its lawsuit against Old DuPont under an agreement that requires Old DuPont's new parent company, Corteva, Inc., and former parent company, DuPont de Nemours, Inc., to contribute a limited amount of funds over the next 20 years to resolve certain PFAS claims, that agreement does not

materially reduce the substantial risk that Old DuPont and Chemours FC will have insufficient assets to fund the remediation required at Chambers Works. In fact, the settlement expressly *excludes* the ISRA liabilities at issue here. (Ex. T, at A-11.)

III. THE OBLIGATION TO ESTABLISH AN RFS ARISES BY STATUTE AT THE TIME OF A TRANSFER

The obligation to establish an RFS arises at the time of an ISRA-applicable transfer. Specifically, ISRA provides that "the owner or operator of an industrial establishment shall not transfer ownership or operations until … a remediation funding source, as required pursuant to [Section 10B-3 of the Brownfield Act], has been established." N.J.S.A. 13:1K-9(c). The Brownfield Act also authorizes NJDEP to require responsible parties to establish an RFS. The Act imposes obligations to establish an RFS on any party responsible under ISRA or "a discharger, a person in any way responsible for a hazardous substance, or a person otherwise liable for cleanup and removal costs pursuant to [the Spill Act] … who has been issued a directive or order by a State agency." N.J.S.A. 58:10B-3(a).

Once the obligation to establish an RFS has been triggered, the responsible party is required to "establish and maintain [an RFS] in the amount necessary to pay the estimated cost of the required remediation." N.J.S.A. 58:10B-3(a). "The remediation funding source shall be established in an amount equal to or greater than the cost estimate of the implementation of the remediation" "as approved by the [NJDEP] …," "as stated in a [NJDEP] order or directive," or "as agreed to by a

court ….” *Id.* “A person required to establish a remediation funding source pursuant to this section shall provide to the department satisfactory documentation that the requirement has been met.” *Id.*

After NJDEP has approved, ordered, or directed, or a court has approved the RFS cost estimate, the responsible party must establish an RFS through one of the authorized forms of financial security instruments. N.J.S.A. 58:10B-3; N.J.A.C. 7:26 C-5.2(h). The regulatory methods of posting an RFS are designed to ensure that the funds for the remediation will be readily available when needed to pay for the remediation, and that the RFS will be used exclusively for the remediation of the particular site and for no other purpose. Although years have passed since the RFS Defendants’ RFS obligations arose in 2015, they have neither properly documented their cost estimates nor established an RFS in a proper amount.

IV. NJDEP ISSUED A DIRECTIVE REQUIRING THE RFS DEFENDANTS TO ESTABLISH AN APPROPRIATE RFS FOR CHAMBERS WORKS

On August 30, 2017, pursuant to the Spill Act, NJDEP issued a Directive and Notice to Insurers (the “Directive”), finding that the RFS Defendants are responsible for the remediation of hazardous substances discharged at the Chambers Works Site. (Ex. U ¶¶ 4-8, 11-16.) Under the Brownfield Act, a “discharger” or “a person in any way responsible for a hazardous substance” who has received a Directive must post

an RFS in an amount approved or directed by the NJDEP or ordered by a court. N.J.A.C. 7:26C-5.2(2)(i); N.J.S.A. 58:10B-3(a) & 3(b).

The Directive ordered the RFS Defendants to (i) prepare and submit for NJDEP's approval within 30 days a cost estimate for remediating the Site; and (ii) within 60 days of NJDEP's approval of the cost estimate, establish an RFS in the amount of the approved estimate. (Ex. U ¶¶ 18-19.) The RFS Defendants failed to submit an approvable RFS cost estimate, establish an RFS, or otherwise comply with the Directive, ISRA or the Brownfield Act.

V. THE RFS DEFENDANTS HAVE FAILED TO SUBMIT A COST ESTIMATE FOR ALL THE REQUIRED REMEDIATION

NJDEP has determined that the remediation will cost at least $943,360,026, or nearly 19 times the amount Chemours FC has estimated. (Dudar Decl. ¶ 30.) Although the parties have engaged in years of negotiations and mediation, that process has been fruitless because the RFS Defendants have refused to provide a cost estimate or post an RFS that is anywhere close to what NJDEP has determined is necessary. (*Id.* ¶¶ 19-31.) The parties' dispute largely comes down to the estimated costs associated with seven remediation tasks that NJDEP has determined are necessary, and primarily centers on how to address non-aqueous phase liquid ("NAPL") and PFAS at the Site. (*Id.* ¶¶ 23, 28.) NAPL, commonly referred to as "free product" or "residual product," consists of non-dissolved phase contaminants that impact soil and groundwater. (*Id.* ¶ 5); *see* N.J.A.C. 7:26E-1.8 (defining "free

product" and "residual product.") The Site is permeated with free and residual product that contains an array of hazardous substances, including PFAS and other dangerous compounds. (Dudar Decl. ¶ 5; Ex. C, at 44-87.)

The New Jersey Technical Requirements for Site Remediation require that "the person responsible for conducting the remediation *shall treat or remove* free product and residual product [i.e., NAPL] *to the extent practicable*, or contain free product and residual product when treatment or removal is not practicable." N.J.A.C. 7:26E-5.1(e) (emphasis added). NJDEP has determined that NAPL treatment and removal *is practicable* because treatment and removal are reasonable, cost-effective remedial approaches from an engineering and remediation perspective. (Dudar Decl. ¶ 24; Cohen Decl. ¶ 16; Rafferty Decl. ¶ 15.) Nonetheless, the RFS Defendants have argued that because they believe treatment and removal will be impracticable, they should be allowed to leave the NAPLs at the Facility forever.[8]

Based upon this assertion, the RFS Defendants have refused to develop a legitimate cost estimate that accounts for the enormous amount of NAPL at the Site requiring treatment and removal. They have also refused to provide a reasonable

[8] NJDEP's hydrogeologic and engineering experts have examined the issue of practicability, concluding that removal of the Site's NAPLs is practicable. (Declaration of Harvey A. Cohen, dated January 28, 2022 ("Cohen Decl."), ¶ 19, Ex. A, at 10; Declaration of Michael T. Rafferty, dated January 28, 2022 ("Rafferty Decl."), ¶ 19, Ex. A, at 10).

estimate for other tasks that NJDEP has determined are necessary to remediate PFAS and other contamination at the Site, including: (i) investigating and treating PFAS in the potable wells in the residential areas surrounding the Facility; (ii) investigating and delineating PFAS in the soil and groundwater; and (iii) investigating and conducting remedial action of the ditch system to remove "hot spot/source areas" that exceed EPA and NJDEP screening criteria and applicable standards. (Dudar Decl. ¶ 25.)

VI. NJDEP ENGAGED TECHLAW TO ESTIMATE SITE REMEDIATION COSTS

The current site remediation concerns 21 "Items," numbered 1-15 and 20-25.[9] Based on information supplied by Chemours's licensed site remediation professional, NJDEP estimates the total costs for Items 1-10 and 12-15 to be $48,920,339. (Dudar Decl. ¶ 30.) It is NJDEP's understanding that this estimate is not controversial. Because there has been a significant dispute between NJDEP and the RFS Defendants with respect to the estimated costs to implement Tasks 11 and 20-25, however, the State engaged TechLaw, Inc. ("TechLaw") to assist NJDEP in developing the required cost-estimates for these seven disputed Items. (Dudar Decl. ¶ 27; Dudar Decl., Ex. C, at ES-1; Cohen Decl., Ex. A, at 1; Rafferty Decl., Ex. A,

[9] Items 16, 17, 18, and 19 are not included because they are managed separately under the federal Resource Conservation and Recovery Act's ("RCRA") closure and post-closure requirements for financial assurance, which are not included in an RFS calculation. *See* 42 U.S.C. 6924(u) & (v); 40 C.F.R. 264.101.

at 1.) TechLaw is a highly regarded environmental engineering firm with particular expertise in remediation cost estimation. (Dudar Decl. ¶ 27.) NJDEP tasked TechLaw with analyzing the long-term costs for the seven disputed "Items" that must be addressed as part of the remediation. TechLaw's cost estimate for these seven Items provides, in part, the basis for NJDEP's current remediation cost estimate, which is intended to provide sufficient long-term financial protection to ensure the public will not have to pay for the remediation, which in this case will take decades.

TechLaw estimated that these seven disputed Items will cost at least $894,439,687, which includes: (i) $12,497,846 for Item 11, which involves a dense NAPL recovery system; (ii) $65,927,422 for Item 20 to operate and maintain PFAS treatment systems on, as well as monitor, residential potable wells and to delineate PFAS in off-property groundwater; (iii) $754,590,179 for Item 21, which concerns Site-wide NAPL remediation; (iv) $3,586,239 for Item 22 to better investigate and delineate PFAS in Facility soils; (v) $1,459,851 for Item 23 to investigate and delineate PFAS in soils off the Facility; (vi) $2,030,942 for Item 24 to investigate PFAS in groundwater at the Facility; and (vii) $54,347,208 for Item 25 to investigate and remove "hot spot/source areas" that exceed EPA and NDJEP screening criteria

in the nearly 30 miles of historic ditches on the Facility.[10] (Dudar Decl. ¶ 28; *see generally* Dudar Decl., Ex. C.)

Hydrogeologic and engineering experts were also retained to peer review TechLaw's estimates. These experts have determined that TechLaw's estimates are reasonable, conservative, and cost-effective. (Cohen Decl. ¶ 16, Ex. A, at 7; Rafferty Decl. ¶ 15, Ex. A, at 7.)

Thus, based upon NJDEP's estimate of $48,920,339 for Items 1-10 and 12-15, which should be uncontroversial, and TechLaw's estimate of $894,439,687 for Items 11 and 20-25, the RFS Defendants need to post $943,360,026 to ensure that adequate funds will be available to remediate the Chambers Works Site.[11] (*Id.*) The RFS Defendants, however, have yet to post any RFS funds with NJDEP despite

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[10] TechLaw emphasized in its report that these amounts are conservative and do not account for (i) long-term operation and maintenance of the Site beyond 30 years, although it is highly likely that it will take more than 30 years, or (ii) restoration of the Delaware River or wetlands adjacent to the Site. (Dudar Decl., Ex. C, at ES-1.) The report also excludes the costs of certain categories of remediation that will be required when a proper investigation is complete. The RFS process includes an annual review and adjustments can be expected to be made to the amount of the RFS over time.

[11] Items 1-15 and 20-25 are subject to concurrent requirements with respect to posting an RFS and financial assurance for areas subject to corrective action pursuant to RCRA. To avoid double posting, NJDEP will allow a $11,616,000 credit for the amount already posted with EPA as RCRA financial assurance for corrective action. (Dudar Decl. ¶ 31.) Nonetheless, Plaintiffs seek an order requiring an RFS in the full amount of $943,360,026 to ensure that the full amount remains posted regardless of whether it is posted as an RFS or as financial assurance with EPA. It is notable that the $11,616,000 that has already been posted makes up less than 1.25% of the total amount of the $943,360,026 that needs to be posted to protect the citizens and environment of New Jersey.

being required to do so for more than seven years. Plaintiffs, therefore, seek an order from the Court. N.J.S.A. 58:10B-3(a) & (b).

ARGUMENT

I. LEGAL STANDARD

Both ISRA and the Brownfield Act authorize NJDEP to seek injunctive relief to enforce the respective acts' requirements.[12] ISRA authorizes the Commissioner to seek injunctive relief to "enforce [ISRA's] provisions" to remedy past violations, and to "prohibit and prevent" future violations. N.J.S.A. 13:1K-13.1(c). ISRA was passed to "protect the public health, safety, and the environment," and to address "discharges of toxic chemicals dating back to early industrialization" that "have left a legacy of contaminated industrial property in [New Jersey]." N.J.S.A. 13:1K-7. ISRA's requirement to establish an RFS is "in the general public interest by … assuring that contaminated property is not abandoned to the State for cleanup." *Id.* An ISRA violation based on a failure to establish an appropriately funded RFS, therefore, constitutes sufficient harm to the public to support injunctive relief.

Likewise, the Brownfield Act provides that any person who fails to comply with the Brownfield Act, including by failing to establish an RFS when required to

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[12] NJDEP is also authorized to seek injunctions through its enabling legislation. *See* N.J.S.A. 13:1D-9(e) (NJDEP has power to "institute legal proceedings for the prevention of pollution of the environment ... and shall have the authority to seek and obtain injunctive relief and the recovery of fines and penalties in a court of competent jurisdiction").

do so, "shall be liable to the enforcement provisions established" pursuant to the Spill Act, N.J.S.A. 58:10-23.11u. The Spill Act, in turn, provides that NJDEP may commence a civil action for "a temporary or permanent injunction." N.J.S.A. 58:10-23.11u(b). The Brownfield Act requires the prompt resolution of statutory violations. In the Brownfield Act's legislative findings the Legislature declared that "the State needs to ensure that the public health and safety and the environment are protected from the risks posed by contaminated sites" and that "regulatory action [be] timely and efficient." N.J.S.A. 58:10B-1.2. The timely enforcement of a responsible party's statutory obligation to establish an appropriate RFS is therefore critical to the achievement of these stated goals.

When a government agency seeks preliminary injunctive relief authorized by statute and the statutory conditions are satisfied, the traditional grounds for an injunction need not be established. For statutory injunctions "the passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained." *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 27-28 (2d Cir. 1972); *see also Matawan Reg'l Teachers Assoc. v. Matawan-Aberdeen Reg'l Bd. of Edu.*, 212 N.J. Super. 328, 335 (Law Div. 1986). New Jersey courts have recognized NJDEP's statutory authority to obtain injunctive relief to *prevent* continuing violations of state environmental laws without showing irreparable harm:

> There is clear statutory authority for the issuance of injunctive relief to prevent violations of [New Jersey's] environmental laws … to protect the public health. Actual harm or direct injury to the public health or environment need not be shown to enjoin a violation of [New Jersey's] environmental laws. Rather, the Legislature has fashioned an injunctive remedy designed to be "preventive" and intended to "restrain acts which tend to produce public injury."

N.J. Dep't of Envtl. Prot. v. Boro Auto Wrecking Co., No. A-4920-04T3, 2006 N.J. Super. Unpub. LEXIS 1960, at *13-14 (App. Div. Oct. 24, 2006) (internal citations omitted). "Governmental plaintiffs," like NJDEP, therefore, are "not bound to conform with the requirements of private litigation when [they] seek[] the aid of the courts to give effect to [] policy ... as manifested in a statute." *Def. Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-338 (4th Cir. 1983) (quoting *Shafer v. United States*, 299 F.2d 124, 128 (4th Cir. 1956)). NJDEP need not demonstrate irreparable harm in the present circumstances. *See also Hoffman v. Garden State Farms, Inc.*, 76 N.J. Super. 189, 201 (Ch. Div. 1962) (granting injunctive relief on basis of statutory violation, without showing of irreparable harm); *N.J. Dep't of Envt'l Prot. v. Interstate Recycling, Inc.*, 267 N.J. Super. 574, 577-78 (App. Div. 1993) (same); *S.E.C. v. Northeastern Fin. Corp.*, 268 F. Supp. 412, 414 (D.N.J. 1967) (same).

Although NJDEP and the Commissioner are not required to satisfy the traditional test for a preliminary injunction, they easily meet that test as well. The traditional test requires that a plaintiff show (i) "a reasonable probability of eventual success in the litigation," (ii) "that it will be irreparably injured … if relief is not

granted," and (iii) the "court … should take into account," when they are relevant, (a) the possibility of harm to other interested persons from the grant or denial of the injunction; and (b) the public interest. *Reilly v. City of Harrisburg*, 858 F.3d. 173, 176 (3d Cir. 2017); *see also Crowe v. DeGioia*, 90 N.J. 126, 132-34 (1982).

As demonstrated below, there can be no question that Plaintiffs have a likelihood of success on their ISRA and Brownfield Act claims. The RFS Defendants' failure to establish a cost estimate that NJDEP can approve and to post an RFS plainly violates both ISRA and the Brownfield Act. Irreparable injury to the State is also clear. "'Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *United States v. Power Eng'g*, 10 F.Supp.2d 1145, 1162 (D. Colo. 1998), *aff'd* 10 F. 3d. 1224 (10th Cir. 1999) (citing *Amoco Production Co. v. Village of Gambell, Arkansas*, 480 U.S. 531, 545 (1987)), *cert. denied*, 529 U.S. 1086. In *Power Engineering*, for example, the court granted a preliminary injunction under the traditional test requiring a responsible party to post a form of financial assurance very similar to an RFS because "[w]ithout financial assurance, remediation of the Facility may never be accomplished or may be accomplished only with public funds." *Id.* at 1163.

Likewise, here, remediation may be delayed substantially because the cost would be left to the State's taxpayers, who would somehow have to come up with hundreds of millions of dollars. Thus, the funding of remediation is not guaranteed if the responsible parties fail to perform or are unable to fund the remediation. Shifting the cost of remediation to the State and the taxpayers, however, is exactly what the RFS requirements of ISRA and the Brownfield Act are designed to prevent. Finally, requiring Old DuPont and Chemours to satisfy their statutory obligations does not place an unreasonable burden on them as they are the very companies that profited from the Site's pollution. Moreover, the lack of an RFS infringes on Plaintiffs' and the State's residents' rights to a clean and safe environment under ISRA and the Brownfield Act, among other state laws. The New Jersey Supreme Court recognized almost forty years ago in *NJDEP v. Ventron Corp.*, 94 N.J. 473, 493 (1983), that the fundamental pillar of environmental protection is "that those who poison the land must pay for its cure."

Because Plaintiffs can meet both of the preliminary injunctive relief tests set forth above, the Court should issue a preliminary injunction requiring an RFS totaling $943,360,026.

II. OLD DUPONT TRIGGERED ISRA'S OBLIGATION TO POST AN RFS ON AT LEAST TWO SEPARATE OCCASIONS

Old DuPont is required to establish an RFS because, under ISRA's plain language, it triggered ISRA's requirements on at least two separate occasions. "[I]f

[the language of a statute] is plain, the sole function of the courts is to enforce it according to its terms." *Sheeran v. Nationwide Mut. Ins. Co.*, 80 N.J. 548, 556 (1979) (citing *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)).

ISRA provides that:

> the owner or operator of an industrial establishment shall not transfer ownership or operations until ... a remediation funding source, as required pursuant to [the Brownfield Act], has been established.

N.J.S.A. 13:1K-9(c).

ISRA further requires that:

> [t]he owner or operator ... shall provide ... evidence of the establishment of a remediation funding source in an amount of the estimated cost of the remediation and in accordance with the provisions of [Section 58:10B-3 of the Brownfield Act].

N.J.S.A. 13:1K-9(e).

ISRA's obligation to post an RFS is triggered whenever an "owner or operator of an industrial establishment ... *transfer[s] ownership or operations[.]*" N.J.S.A. 13:1K-9(a) (emphasis added). ISRA defines "transferring ownership or operations" to include "any transaction or proceeding through which an industrial establishment undergoes a change in ownership." N.J.S.A. 13:1K-8. A "change in ownership" includes:

- "the sale or transfer of the business of an industrial establishment or any of its real property"; and

- "the sale or transfer of stock in a corporation ... resulting in a change in the person holding the controlling interest in the direct owner or operator or indirect owner of an industrial establishment."

Id.

The reason that ISRA requires the RFS to be established at the time of the transfer is to ensure that the environmental remediation can be conducted in an orderly manner, and to "guarantee implementation of the cleanup plan" as a precondition to the transfer. N.J.S.A. 13:1K-7; Senate Energy & Env't Comm. Statement to Assembly No. 1231, L.1983, c.330.

The Facility is an ISRA "industrial establishment" because it is a "place of business or real property at which such business is conducted" that falls within North American Industrial Classification System Codes 325 and 326, as specified in Appendix C to N.J.A.C. 7:26B, and "involve[d] the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes on-site, above or below ground." N.J.A.C. 7:26B-1.4.

NJDEP shares jurisdiction at the Site with the EPA, which has responsibility for certain requirements arising under the federal RCRA, 42 U.S.C. §§ 6901, et seq. New Jersey's remediation requirements for the contamination at the Site, however, go beyond and are more stringent than EPA's requirements. Thus, NJDEP has the authority to enforce New Jersey's more stringent and extensive statutory and regulatory requirements.

Old DuPont triggered ISRA at least twice: first, when it transferred the Chambers Works real property to Chemours FC in January, 2015 (the "Real Estate Trigger"), and again when Old DuPont spun off Chemours on July 1, 2015 and transferred all of its stock in Chemours to its shareholders (the "Spinoff Trigger").

A. Old DuPont's First ISRA Trigger: Its Transfer of the Chambers Works Real Property to Chemours FC

Old DuPont's January 23, 2015 transfer of the deed for the Chambers Works real property to Chemours FC triggered ISRA because it was a "transfer" of an "industrial establishment['s] … real property." N.J.S.A. 13:1K-8. ISRA is triggered whenever there is a "transfer of the business of an industrial establishment or any of its real property." N.J.S.A. 13:1K-8. In *In re Adoption of N.J.A.C. 7:26B*, 250 N.J. Super. 189, 211 (App. Div. 1991), the court (construing ISRA's forerunner statute, the Environmental Cleanup Responsibility Act) held that the "actual transfer of a physical plant" is a "clear-cut" case of a change in ownership. ISRA has express provisions for real property; a "transfer … [of] any of [an industrial establishment's] real property" is a change of ownership that triggers ISRA. N.J.S.A. 13:1K-8. ISRA also has express exclusions for real property transfers that would not trigger ISRA, such as intra-family transfers, transfers to correct title, and the like. *Id.* None of those real estate exceptions apply here. Thus, ISRA's plain language establishes that the transfer of the Chambers Works real property was a "change in ownership" and therefore triggered ISRA. *Sheeran*, 80 N.J. at 556.

Indeed, the New Jersey Superior Court, relying on ISRA's plain language, reached the same conclusion in *Carneys Point*, *supra*. In *Carneys Point*, Carneys Point Township alleged, among other things, that Old DuPont's transfer of the Chambers Works deed triggered ISRA, and that Old DuPont violated ISRA by failing to establish an RFS.

The Court entered partial summary judgment in Carneys Point's favor on August 8, 2019, because "[a] plain reading of the statute evidences the legislature's intention to make the transfer of real property of an industrial establishment an ISRA triggering event." (Ex. B, at 22:17-20; Ex. A, at 3.) Therefore, "[Old] DuPont's transfer of the Chambers Works Site … to The Chemours Company FC, LLC … by deed dated January 23, 2015 … triggered the requirement for [Old] DuPont to comply with [ISRA] at Chambers Works and surrounding impacted areas." (Ex. A, at 2.) Although Old DuPont has moved for reconsideration of that decision, this Court should conclude that a plain reading of ISRA provides that Old DuPont's transfer of the Chambers Works Facility to Chemours triggered Old DuPont's obligations under ISRA, like the Superior Court did. *See In re Closing Jamesburg High Sch.*, 83 N.J. 540, 548 (1980) ("[The Court's] duty is to construe and apply the statute as enacted.").

B. Old DuPont's Second ISRA Trigger: Its Spinoff of Chemours

Old DuPont's 2015 Spinoff of Chemours is an independent ISRA triggering event because it involved the "transfer of stock in a corporation" that "result[ed] in a change in the person holding the controlling interest in the direct owner or operator or indirect owner of an industrial establishment." N.J.S.A. 13:1K-8.

Prior to 2015, Old DuPont owned and operated the industrial establishment at Chambers Works for well over a century. (Ex. C, at 5.) As described above, in light of the massive liabilities and costs it faced for its environmental liabilities at the Site and for PFAS throughout the world, Old DuPont decided to (1) consolidate its PFAS business in a wholly-owned subsidiary, Chemours, and to (2) spin-off those operations, making some $40 billion in Old DuPont assets unavailable to remediate the Site. *Supra*, 10-13.

Sometime between the January 23, 2015 real estate transfer and the July 1, 2015 Spinoff, The Chemours Company became the "indirect owner" of Chambers Works because it held (and continues to hold) Chemours FC as its subsidiary. (Ex. N, at Ex. 21.1.) Yet, prior to the Spinoff, Old DuPont held the controlling interest in Chemours, (Ex. M, at 19), and all of Old DuPont's assets were "available for remediation." When Old DuPont spun off Chemours, it transferred one hundred percent of its stock in The Chemours Company to Old DuPont's shareholders, making The Chemours Company a publicly-traded independent entity. (Ex. Q, at

3.) Thus, the Spinoff resulted in precisely the type of change in ownership to which ISRA applies. N.J.S.A 13:1K-8; *Sheeran*, 80 N.J. at 556.

Since the Spinoff, Old DuPont has asserted that it is no longer responsible for the Site's remediation costs because it no longer holds a controlling interest in the Facility's indirect or direct owners (the Chemours entities). Old DuPont's position, however, ignores the fact that the transaction triggered ISRA by causing a change in the entity holding a controlling interest in the indirect owner (The Chemours Company).

C. None of the ISRA Statutory Exceptions Apply Here

Although ISRA provides that certain changes in ownership do not trigger ISRA's obligations, none of those exceptions apply here. Old DuPont, however, incorrectly contended in the *Carneys Point* litigation that the following exceptions are relevant here:

- "a corporate reorganization not substantially affecting the ownership of the industrial establishment" ["Corporate Reorganization Exception"];
- "a transaction or series of transactions involving the transfer of stock, assets or both, among corporations under common ownership, if the transaction or transactions will not result in the diminution of the net worth of the corporation that directly owns or operates the industrial establishment by more than 10 percent, or if an equal or greater amount in assets is available for the remediation of the industrial establishment before and after the transaction or transactions" ["Common Owner Exception"]; or
- "a transaction or series of transactions involving the transfer of stock, assets, or both, resulting in the merger or de facto merger or consolidation

> of the indirect owner with another entity, or in a change in the person holding the controlling interest of the indirect owner of an industrial establishment, when the indirect owner's assets would have been unavailable for cleanup if the transaction or transactions had not occurred" ["Indirect Owner Exception"].

N.J.S.A. 13:1K-8; *see also* N.J.A.C. 7:26B-2.1 These exceptions do not apply to either the January 2015 Real Estate Trigger, or the July 2015 Spinoff Trigger.

1. No Exceptions Apply to The January 2015 Real Estate Transfer Trigger

Old DuPont's January 2015 deed transfer to Chemours FC does not fall within any of ISRA's exceptions because the exceptions are applicable only to corporate reorganizations and stock transfers—not the direct transfer of real estate via a deed. *See* N.J.S.A. 13:1K-8; N.J.A.C. 7:26B-2.1. Again, ISRA's plain language regarding real estate transfers controls: "a change in ownership means (1) the sale or transfer of an industrial establishment or *any of its real property*." N.J.S.A. 13:1K-8 (emphasis added). If the Legislature intended for real estate transfers to qualify for the above exceptions, it would have made its intentions explicit, as it did in the case of ISRA's specific real estate transfer exceptions. *See Roe v. Borough of Upper Saddle River*, 336 N.J. Super. 566, 576 (App. Div. 2001) ("Had the Legislature so intended [to create a statutory exception], surely it would have expressly so provided, as it has in other contexts.").

In the *Carneys Point* case, Old DuPont argued that its transfer of the Chambers Works real estate to Chemours FC fell under all three ISRA exceptions—the

Corporate Reorganization Exception, the Common Owner Exception, and the Indirect Owner Exception—because the transfer involved "a transaction or series of transactions" involving "assets" to which the exceptions apply. (Ex. B, at 18:11-22, 23:19-24:13.) Old DuPont urged the court to employ the common dictionary definition of "assets" to find that transfers of real property are transfers of "assets." (*Id.*) But Judge McDonnell rejected Old DuPont's arguments, holding:

> [ISRA] not only includes the sale or transfer of any of an industrial establishment's real property within its definition of change of ownership but it also specifies within its exceptions that real property sold or transferred pursuant to eminent domain proceedings does not constitute a change of ownership that triggers the statute. ***In other words, the legislature went out of its way to specify certain real property transfers that are not subject to ISRA. And those specified transfers are not similar to that which occurred here***.

(*Id.* at 23:1-11 (emphasis added).) Judge McDonnell also held:

> [Old DuPont] focuses on the dictionary definition of the word asset in pointing out that a business['s] assets include its real property. While it's certainly clear that real property is an asset in the general definition, it's also clear that the legislature did not include real property there and it does include it in other places.
>
> Further, ... it would seem that the goals of ISRA would seldom be accomplished if big corporations could have involved complex transactions including real property, and not trigger ISRA. I think the statute makes clear that the transfer of real property does, indeed, trigger ISRA.

(*Id.* at 24:7-20.) Accordingly, Judge McDonnell held:

> [Old DuPont's] real estate transfer [of the Chambers Works real estate to Chemours] on January 23, 2015 was a triggering event for ISRA not excepted from the statute as an indirect owner transaction, corporate reorganization transaction or controlling interest transaction.

(Id. at 23:12-18; Ex. A.) Based on ISRA's plain language, and for all of the same reasons that Judge McDonnell stated, this Court should find that the real estate transfer triggered ISRA. *Sheeran*, 80 N.J. at 556.

2. No Exceptions Apply to the July 1, 2015 Spinoff Trigger

The statutory exceptions also do not apply to Old DuPont's Spinoff of Chemours. *First,* the Corporate Reorganization Exception applies only to transfers that do "not diminish the availability of assets for any remediation, diminish the Department's ability to reach those assets, or otherwise hinder the owner's or operator's ability to remediate the industrial establishment." N.J.A.C. 7:26B-1.4.

There is no question that the Spinoff resulted in a diminution of assets available for remediation. Prior to the Spinoff, Old DuPont had $49.88 billion in total assets available for remediation. (Ex. M, at F-6.) After the Spinoff, Chemours had only $6.3 billion in total assets. (Ex. Q, at F-5.) Because "the transfer resulted in a diminution of value of the direct owner" of the Chambers Works industrial establishment, the Corporate Reorganization Exception does not apply. (Ex. B, at 20:7-11.)

Second, the Common Owner Exception does not apply for the same reason. To satisfy that exception, Old DuPont must show that (1) the transaction or transactions "will not result in the diminution of the net worth of the corporation that directly owns or operates the industrial establishment by more than 10 percent; or

(2) a greater or equal amount in assets are available for the remediation of the industrial establishment before and after the transaction or transactions." Prior to the Spinoff, Old DuPont's net worth was $13.38 billion ($49.88 billion in total assets minus $36.50 billion in total liabilities). (Ex. M, at F-6.) After the Spinoff, Chemours's reported net worth was only approximately $130 million ($6.3 billion in total assets minus $6.17 billion in total liabilities). (Ex. Q, at F-5.) Thus, Old DuPont's Spinoff of Chemours reduced the net worth of the company that directly owns Chambers Works by more than 99%, far more than the exception's 10% limit. N.J.S.A. 13:1K-8; N.J.A.C. 7:26B-2.1. Moreover, Chemours's assets of $6.3 billion are plainly less than Old DuPont's $49.88 billion. *Id.*

Third, the Indirect Ownership Exception does not apply here because it requires the former indirect owner's assets to have been "unavailable for remediation if the transaction ... had not occurred." N.J.S.A. 13:1K-8; N.J.A.C. 7:26B-2.1. As the former owner of Chambers Works, Old DuPont's assets *were available* "for remediation."

The Indirect Owner Exception also cannot apply because it focuses on a "change in the person holding the controlling interest of the indirect owner." N.J.S.A. 13:1K-8; N.J.A.C. 7:26B-2.1(a)(4). No individual shareholder of Old DuPont owned a controlling interest in Old DuPont and the assets of Old DuPont's shareholders were never available for remediation. Thus, Old DuPont's

shareholders are irrelevant to the Indirect Owner Exception. *See* N.J.S.A. 13:1K-8 (defining "owner," "indirect owner," and "direct owner or operator").

To show common ownership with shareholders, Old DuPont would have "to determine the aggregate net worth of all the shareholders of [Old DuPont] (potentially thousands or millions of persons), and to have each of those shareholders agree to assume any liability [Old DuPont] may have had for the cleanup of the industrial establishment." 25 N.J.R. 1565 (April 5, 1993), Response to Comment 58. This "would be almost impossible to determine." *Id*.

Old DuPont may also contend that its Spinoff of Chemours did not trigger ISRA because, regardless of the extent of diminution in value of assets available for remediation, enough value was left in Chemours to cover any remediation costs. There is no such exception in ISRA. As the agency charged with the enforcement of ISRA, NJDEP makes independent determinations for each case, which are entitled to deference. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 301-02 (2015). Here, the transactions fall squarely within ISRA.

III. THE BROWNFIELD ACT REQUIRES THE RFS DEFENDANTS TO ESTABLISH AN RFS BECAUSE THEY ARE "RESPONSIBLE PARTIES" AND NJDEP ISSUED A DIRECTIVE REQUIRING THEM TO DO SO

The Brownfield Act gives NJDEP broad authority to require parties responsible for remediating contaminated sites to establish an RFS. The Brownfield Act imposes separate and independent obligations from ISRA to establish an RFS

on "a discharger, a person in any way responsible for a hazardous substance, or a person otherwise liable for cleanup and removal costs pursuant to [the Spill Act] who has been issued a directive or order by a State agency." N.J.S.A. 58:10B-3(a).

Old DuPont is a "responsible party" because it discharged hazardous substances at the Site. Old DuPont publicly admitted in *Carneys Point* that it:

> repeatedly affirmed with [NJDEP] that [Old] DuPont remains jointly and severally liable to [NJDEP] for the remediation of any hazardous substances discharged at Chambers Works during the period of time that [Old] DuPont owned the Site ... [and Old] DuPont is legally obligated to do so under both New Jersey and Federal law.

Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment at 6, *Carneys Point Twp. v. E.I. DuPont de Nemours & Co.*, No. SLM-L-251-16 (N.J. Super. Ct. Law Div. Sept. 4, 2018). (Ex. V.)

Likewise, Chemours FC is "in any way responsible" for hazardous substances at the Site under the Spill Act because it currently owns Chambers Works, and therefore, is jointly and severally liable with Old DuPont for remediating the Site.

Because of the massive contamination at Chambers Works, NJDEP issued a Directive to the RFS Defendants on August 30, 2017, informing them that they are "strictly, jointly and severally liable, without regard to fault, for all cleanup and removal costs" pursuant to the Spill Act and that they must enter into an Administrative Consent Order committing them "to remediate the entire … Site while maintaining an RFS for the full cost of remediation." (Ex. U ¶¶ 15 & 20.) The

Directive also required them to "[p]repare a cost estimate for [NJDEP] approval for the full cost of the remediation, including operations and maintenance, for all contaminants for the entire" Site and to "establish and maintain an RFS pursuant to N.J.A.C. 7:26C-5" "[w]ithin 60 days of [NJDEP's] approval of the RFS cost estimate." (*Id*. ¶¶ 18 & 19.)

"In the case of a remediation performed pursuant to [the Spill Act], the remediation funding source shall be established … *as provided by a court, or as directed or ordered by [NJDEP]*." N.J.S.A. 58:10B-3(b) (emphasis added). The amount shall be "equal to or greater than the cost estimate of the implementation of the remediation … as approved by the [NJDEP]" or "as stated in a [NJDEP] order or directive, or … as agreed to by a court[.]" N.J.S.A. 58:10B-3(a). Because NJDEP is authorized under the Act to approve, direct, or order the amount of the cost estimate, the Act contemplates NJDEP developing a cost estimate. Consequently, the RFS Defendants' obligation under the Brownfield Act to establish an RFS in an amount approved or estimated by the NJDEP, which is entitled to deference by the Court, is indisputable. Here, Plaintiffs ask the Court to agree to an appropriate number as calculated by NJDEP.

IV. THIS COURT SHOULD ORDER THE RFS DEFENDANTS TO ESTABLISH AN RFS IN THE AMOUNT NJDEP HAS DETERMINED IS NECESSARY

When a statute authorizes an agency to act, as ISRA and the Brownfield Act

authorize here, that statute should be liberally construed to allow the agency to achieve its purpose. "The grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals." *Gloucester Cty. Welfare Bd. v. State Civ. Serv. Comm'n*, 93 N.J. 384, 390 (1983); *see also In re Proceedings by the Comm'r of Banking & Ins.,* 98 N.J. Super. 263, 271-72 (App. Div. 1967).

The Legislature expressly delegated authority to NJDEP to approve costs and to set the amount in an order or directive. *See* N.J.S.A. 58:10B-3(a) ("The [RFS] shall be established in an amount equal to or greater than the cost estimate of the remediation … *as approved by [NJDEP]*") (emphasis added); *see also N.J. Dep't of Envt'l Prot. v. Pole Tavern Mobil Site*, No. A-2239-10T2, 2012 N.J. Super. Unpub. LEXIS 2715, at *6 (App. Div. Dec. 12, 2012) (providing NJDEP "due deference" on its determination of an RFS amount and affirming that determination).

When an entity triggers ISRA, as Old DuPont has, or when a Spill Act responsible party has received a Directive, like the RFS Defendants here, and does not submit an approvable cost estimate, NJDEP's role to approve, order, or direct such cost estimates must necessarily include the authority and ability to generate a cost estimate itself using its own resources, as well as the ability to enforce that determination. Companies should not be rewarded for flouting their ISRA and Brownfield Act obligations by withholding an approvable cost estimate, so that they

can delay posting an RFS. When NJDEP must step in to provide an RFS amount, such amount should be entitled to deference.

Indeed, the New Jersey Supreme Court has recognized the "strong presumption of reasonableness" that must be afforded to "an administrative agency's exercise of statutorily delegated responsibility." *City of Newark v. Nat. Res. Council in Dept. of Envt'l Prot.,* 82 N.J. 530, 539 (1980), *cert. denied*, 449 U.S. 983 (1980).

The Court should give "substantial deference" to NJDEP's determination of the RFS amount because it is the state agency charged with enforcing ISRA, the Brownfield Act, other environmental statutes, and the RFS requirements. "Courts generally give substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing." *R & R Marketing, L.L.C. v. Brown-Forman Corp.*, 158 N.J. 170, 179 (1999); *see also Hargrove*, 220 N.J. at 301-02.

The New Jersey Supreme Court has acknowledged that "[t]he cleanup of hazardous wastes is a complex problem, involving the delicate balance of environmental protection with concerns for the State's economy and public health….so complicated a subject calls for the expertise of an administrative agency." *In re N.J.A.C.*, 128 N.J. 442, 451 (1992); *see also City of Newark*, 82 N.J. at 539-40.

Moreover, that "presumption of reasonableness is even stronger" where, as here, "the agency has been delegated discretion to determine the specialized and

technical procedures for its tasks." *City of Newark*, 82 N.J. at 540; *see also In re Adoption of N.J.A.C. 7:26E-1.13*, 377 N.J. Super. 78, 98-99 (App. Div. 2005), *aff'd*, 186 N.J. 81 (2006). That "strong" presumption can be overcome only by a showing that the agency's actions were "arbitrary or illegal." *City of Newark*, 82 N.J. at 539 (quoting *Flanagan v. Civil Serv. Dep't*, 29 N.J. 1, 12 (1959)). NJDEP's actions were neither arbitrary nor illegal.

CONCLUSION

For all the reasons stated herein, the Court should grant the preliminary injunctive relief sought requiring the RFS Defendants to establish an RFS as required by ISRA and the Brownfield Act in the amount of $943,360,026, which NJDEP has determined, based on currently available data, is the minimum amount required to remediate the contamination at the Chambers Works Site.

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Respectfully Submitted,

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