

Pursuant to Local Civil Rule 56.1(a), Plaintiffs Delaware Riverkeeper Network and Delaware Riverkeeper (“Plaintiffs” or “DRN”) submit this Responsive Statement of Material Facts in Opposition to Defendant Soil Safe, Inc.’s (“Defendant’s” or “Soil Safe’s”) Motion for Summary Judgment.

RESPONSIVE STATEMENT OF MATERIAL FACTS

1-5. Admitted.

6. It is specifically denied that the Logan Recycling Center operations are or have been “inspected” by numerous agencies. It is admitted only that the operations are subject to monitoring and potential inspections by the referenced agencies. ECF No. 104-39 (Free Aff.), ¶ 10.

7. Denied. The operations described in paragraphs 9-15 of the Free Affidavit are not “recycling.” To the contrary, Soil Safe’s operations simply add cement kiln dust (“CKD”) to petroleum-contaminated soil. Certification of Gerald J. Williams, Esq. (“Williams Cert.”), Ex. A (Free Dep.), at 141:4-5, 8-12. This process does not reduce the levels of contaminants in the soil. *Id.* at 140-142.

8. Admitted.

9. Denied that the “Product” meets “end use specifications.” *See infra*, ¶¶ 14, 87-90.

10. Admitted.

11. Denied. *See supra*, ¶ 7.

12. Denied that the referenced characteristics satisfy the requirements for remedial capping or other uses at the park sites. *Id.*

13. Admitted.

14. Denied. To the contrary, Soil Safe's operations at the park are in violation of the only NJDEP written approval of the RAWP, which, among other things, specifies the permissible height of the cap to be two feet. *See* ECF No. 104-31 (Def. Ex. W-DEP Approval Letter, 11/19/08).

15. Admitted.

16. Admitted only that the park site was used historically as a depository for dredge spoils. It is denied that the contaminants in these spoils, where they were located, required the ongoing operations of Soil Safe over the last eight years. *See* Williams Cert., Ex. A (Free Dep.), at 189-190.

17. Admitted.

18. Admitted as stated.

19. Admitted. By way of further answer, the "baseline" and other assessments referenced by Soil Safe show negligible ecological effects for the "uncapped" surface at the park, and showed that Soil Safe's "Product" has potentially negative effects. ECF No. 104-8 (Def. Ex. B-2008 RAWP), at 51-52.

20. Admitted.

21. Denied. The DEP approval of the applicable RAWP specifically limits the "cap" to the placement of two feet of material meeting remediation standards. All material above the two-foot cap is not additional "capping material." It was to be "construction or redevelopment"-based rather than a

remediation requirement. *See* ECF No. 104-31 (Def. Ex. W-DEP approval letter, 11/19/08); Williams Cert., Ex. A (Free Dep.), at 116-118.; ECF No. 104-6 (Def. Ex. B-2008 RAWP), at 9.

22. Plaintiffs neither admit nor deny that the design is “aesthetically pleasing.” It is admitted that the approved RAWP requires placement of a one-foot layer of topsoil.

23. Denied. *See supra*, ¶ 21.

24. Denied as stated. “Capping” was completed at two feet of depth. It is admitted that Soil Safe contends that its project is 80-85% complete.

25. Admitted. By way of further answer, the project also is incomplete in many areas of the park, nearly eight years after it began. *See* Williams Cert., Ex. C (Benson Dep.), at 38:11-12.

26. Denied as a legal conclusion. Materials placed at the park beginning in 2009 must meet the requirements established under the nomenclature “Residential Direct Contact Soil Remediation Standards” (RDCSRS”), N.J.A.C. § 7:26D, as discussed in Plaintiffs’ accompanying Brief.

27. Admitted.

28. Admitted only that the soil is tested as indicated in this paragraph. Denied that the referenced tests establish that the soil is “non-hazardous.” *See* ECF No. 104-39 (Free Aff.), ¶ 21; 40 C.F.R. § 261.24.

29. Admitted.

30. Admitted.

31. Admitted only that Soil Safe tests samples of its “product” before shipment to the park.

32-36. Admitted.

37-40. Admitted.

41. Admitted.

42. Denied as stated, as the “RDSCC” is not applicable. By way of further answer, many samples “analyzed for Product placed at the County Park” have exceeded the applicable RDCSRS, 0.2 mg/kg for benzo(a)pyrene. *See Williams Cert., Ex. G.*

43-48. Admitted.

49. Admitted only that Clean Earth hired Voros as a consultant. Soil Safe’s characterization of Voros’s testimony regarding his tasks is not supported by its references to his deposition.

50-51. Admitted.

52-54. Admitted.

55. Denied. Mr. Stine did not state that DRN “had nothing but” the referenced materials. To the contrary, DRN undertook an extensive and independent investigation of Soil Safe’s facility and operations before filing suit.

This included review of DEP files obtained through public records requests, direct correspondence with DEP, site visits to view the Soil Safe facility, and extensive internal discussion about whether Soil Safe's operations complied with applicable legal standards. *See Williams Cert., Ex. X* (Plaintiffs' Responses to First Set of Interrogatories), at 7-9 (Response No. 4); *Ex. W* (Tr. of Fed. R. Civ. P. 30(b)(6) Dep. of Maya van Rossum), at 59:4-70:23.

56-58. Admitted.

59-61. Admitted that Soil Safe's expert has offered this opinion.

62. Admitted.

63. Admitted.

64. Denied as a legal conclusion. By way of further answer, the Soil Safe "Product" is not "recycled," and is not a "beneficial use" material. *See Williams Cert., Ex. A* (Free Dep.), at 141:4-5, 8-12; *Ex. B* (Tucker Dep.), at 198:17-18; ECF No. 104-40 (Benson Aff.), ¶¶ 16, 19.

65. Denied as a legal conclusion.

66. Denied. TCLP testing is not performed for certain contaminants, including benzo(a)pyrene. *See* 40 C.F.R. § 261.24.

67. Admitted only that Soil Safe's expert has rendered this opinion, which, among other things, is not dispositive of the issue of whether "Product"

placed at the park contains levels of contaminants in excess of applicable regulatory limits.

68-70. Admitted.

71-72. Admitted.

73. Denied as stated. To the contrary, as the RAWP itself emphasizes, the sampling data in Appendix C allow “a high degree of confidence in characterizing the contaminants of concern in Soil Safe product.” Williams Cert., Ex. R (Appendix C) at C-1.

74. Denied as stated. *See supra*, ¶ 73.

75. Admitted.

76. Denied as stated. The “discrepancy” and “mistake” discussed by Dr. Fox refer only to nomenclature. Dr. Fox accurately assumed that the Appendix C data, taken from the RAWP, “characterized the contaminants in the Soil Safe product.” ECF No. 104-16 (Def. Ex. 16-Fox Dep.) at 125.

77. Admitted.

78. Admitted.

79. Admitted. By way of further answer, the data in Appendix C – based on comprehensive testing – were acknowledged by Soil Safe to reflect a reliable representation of the product to be placed at the Park. *See supra*, ¶ 73.

80. Admitted. *See supra*, ¶ 79.

81-86. Admitted.

87. Admitted only that Dr. Kester refers to these calculations, for the first time, in her affidavit. Notwithstanding her conclusions regarding health risks, Dr. Kester has acknowledged that the average concentration of benzo(a)pyrene in product shipped to the park by Soil Safe exceeds the RDCSRS (0.2 mg/kg) for the compound. ECF No. 104-41 (Kester Aff.), ¶ 30. Dr. Kester also has acknowledged that data taken from hundreds of samples over a five-year period established that the median value of BaP in product shipped to the Park was 0.2 mg/kg. Williams Cert., Ex. F (Kester Dep.) at 57-70. This means that fully half of the samples showed exceedances of the RDCSRS for BaP.

88-90. Admitted.

91. Admitted.

92. Admitted.

93. Admitted as stated. By way of further answer, “BaP equivalents” are routinely used in the toxicological evaluation of polycyclic aromatic hydrocarbons because BaP is considered to have the highest “toxicity equivalence” of the PAHs. Williams Cert., Ex. F (Kester Dep.) at 70. Moreover, the results reviewed by Dr. Kester for BaP itself established multiple exceedances of the RDCSRS. *See supra*, ¶ 87.

94. Admitted. *See supra*, ¶ 93.

95. Admitted. By way of further answer, the same document reveals that the “50th” percentile for BaP concentrations was .374 mg/kg. Williams Cert., Ex. R (Appendix C) at C-16.

96. Admitted only that Dr. Fox analyzed “BaP equivalents,” reflected in total PAHs. Denied that it was “error” to do so. *See supra*, ¶¶ 87, 93.

97. Admitted.

98-99. Admitted only that Dr. Kester proffers these opinions in her affidavit.

100-103. Admitted.

104. Denied as stated. There is no basis to determine whether the County Park portion of the Dream Park will be subject to “much less human activity.”

105. Admitted. By way of further answer, the topsoil placed by Soil Safe exhibits multiple exceedances of the relevant standard for BaP. Williams Cert., Ex. G (compilation of exceedances and topsoil testing results).

106. Admitted.

107. Admitted.

108. Admitted only that Dr. Benson proffers this opinion in his affidavit.

109. Admitted.

110. Admitted.

111. Denied. Plaintiffs’ experts testified at length regarding their knowledge of the contaminants at issue, and their review of relevant data, including three sediment samples taken immediately adjacent to the park. *See* Williams Cert., Ex. B (Tucker Dep.); Ex. W (Cristini Dep.).

112. Denied as stated. The opinion of Drs. Tucker and Cristini were not “personal.” They were based on their evaluation of sampling results, and their knowledge of the effects of chemicals on the environment, and reflected professional opinions consistent with their training and experience. *See* ECF No. 104-18 (Def. Ex. J-Tucker-Cristini Report); *see also supra*, ¶ 111.

113-114. Admitted.

115-116. Admitted.

117. Denied as stated. The Guidance document is required only for certain regulatory activities, and is not required to determine what is an “imminent and substantial endangerment” under federal law. *See, e.g.*, Williams Cert., Ex. W (Cristini Dep.), at 167-169.

118-124. Admitted. By way of further answer, *see supra*, ¶ 117.

125. Admitted only that Drs. Cristini and Tucker evaluated the samples referenced in this paragraph.

126. Admitted.

127. Admitted. *See supra*, ¶ 117.

128-131. Admitted that the Guidance document contains this language.

See supra, ¶ 117.

132. Admitted.

133-135. Admitted.

136. Admitted. By way of further answer, doing so was neither necessary for her opinions nor required for their validity.

137. Admitted.

138-141. Admitted. *See supra*, ¶ 136.

142-144. Admitted. By way of further answer, *see supra*, ¶¶ 115-118.

145-146. Admitted.

147-149. Admitted.

150-154. Admitted.

155. Admitted only that Uhl testified that he was not granted access to do sampling at the park to analyze “background” specific to the park site. *See* ECF No. 104-22 (Def. Ex. N-Uhl Dep.) at 229:7-25.

156-157. Admitted.

158. Denied as stated. Mr. Uhl’s testimony regarding the basis for this opinion speaks for itself, and encompasses more than mere proximity to the “drainage culverts.” *See* Williams Cert., Ex. Q (Uhl Dep.) at 164-171.

159-160. Admitted.

161. Denied. *See supra*, ¶ 158.

162-163. Denied as stated. The evidence cited as the basis for these statements is unrelated to the statements.

164-166. Admitted.

167-168. Admitted only that, at his deposition, Uhl acknowledged that he had not “looked at the dredge results for a while.” By way of further answer, he also explained why they did not affect his conclusions. *See* ECF No. 104-22 (Def. Ex. N-Uhl Dep.), at 218:1, 15-24.

169. Admitted only that Uhl testified that he did not know how old the sediment materials were. *See* ECF No. 104-22 (Def. Ex. N-Uhl Dep.), at 146-147.

170-171. Admitted.

172. Admitted as stated.

173-179. Admitted. By way of further answer, the cap at the Logan Recycling Site remains unfinished many years after issuance of the Class B permit, and no substantial progress has been made for years. *See* Williams Cert., Ex. A (Free Dep.) at 127-128.

180-181. Admitted.

182. Admitted. By way of further answer, the letter speaks for itself, and cited a number of ongoing violations by Soil Safe.

183-184. Admitted as stated. By way of further answer, this evidence relates to the “Logan site,” not the “Park site.”

185. Denied. To the contrary, as expressly stated in the portion of the RAWP cited by Soil Safe, the Plan called for a two-foot remedial “cap,” with all other materials comprising “contouring” and topsoil. *See also* ECF No. 104-31 (Def. Ex. W-DEP letter, 11/19/08).

186. Admitted.

187. Denied. Section 5 of the RAWP provides no such information.

188. Admitted.

189. Denied as a legal conclusion. *See* ECF No. 104-31 (Def. Ex. W-DEP letter, 11/19/08); *see also* N.J.A.C. § 7:26E-1.8 (definition of “unrestricted use remedial action”); N.J.A.C. § 7:26D, Appendix 1-Table 1A (RDCSRS of 0.2 mg/kg for BaP).

190-191. Admitted.

192. Admitted only that Mr. Free, whose compensation for work at the park is paid by Soil Safe, and who is Soil Safe’s LSRP for the Logan site, so testified. *See* Williams Cert., Ex. A (Free Dep.) at 14-15, 26. Denied that Free’s testimony is competent evidence of NJDEP’s intention.

193. Denied. *See supra*, ¶ 192.

194-195. Admitted.

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Respectfully submitted,

WILLIAMS CUKER BEREZOFSKY, LLC

/s/ Gerald J. Williams

GERALD J. WILLIAMS, ESQ.

CHRISTOPHER MARKOS, ESQ.

MICHAEL J. QUIRK, ESQ. (*pro hac vice*)

*Attorneys for Plaintiffs Delaware Riverkeeper
Network and Delaware Riverkeeper*