

DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL  
DIVISION OF WASTE AND HAZARDOUS SUBSTANCES  
Remediation Section



Guidance for Conditional No Further Action  
Determination under Regulations Governing  
Hazardous Substance Cleanup

*February 2017*

*Revised December 2021*

## 1.0 Introduction

1.1 The purpose of this document is to provide guidance for Section 9.2.6.6 of the Regulations Governing Hazardous Substance Cleanup with regards to Conditional No Further Action (CNFA) Determination.

1.2 The guidance discusses the procedures that may be followed to determine whether a site is eligible to receive CNFA based on the available data.

1.3 A CNFA status may be given to a Site when current use of the property under current conditions doesn't present a risk, but potential future use may present a risk.

## 2.0 Glossary

**“Acceptable risk”** means a probability of one additional lifetime incidence of cancer in 100,000 ( $1 \times 10^{-5}$ ) or less for carcinogens, and a hazard index of one (1) or less for non-carcinogens, as applicable. For certain contaminants, where cancer or non-cancer risk does not apply, the Department may approve or require other methods that it determines are appropriate for determining risk.

**“Conditional No Further Action”** means that based on the information available following a facility evaluation or equivalent, the Department determines that: (a) there has been no release or there is no imminent threat of release; (b) a release has occurred which does not pose a threat to public health or welfare or the environment above the acceptable site specific risk under current conditions; or (c) action by another authority is appropriate. The Conditional No Further Action Determination lists all the conditions that have to be met in order to maintain the CNFA Determination under current and future land use scenarios and should be placed in the property record.

**“Current Condition”** means the land use as it exists on the date the Notice of Conditional No Further Action is recorded in the Office of the New Castle, Kent or Sussex County Recorder of Deeds at the time of the investigation and CNFA determination.

**“Facility Evaluation”** means an investigation to identify a release of a hazardous substance and generate data to perform an initial screening and make a decision regarding future action at a facility or Certified Brownfield.

**“Initial Screening”** means the process of comparison of the maximum observed concentrations of analytes found in environmental samples to background levels and performance of a preliminary risk assessment based on the representative concentrations found in each environmental medium from the results of a facility evaluation or equivalent investigation to determine whether a release poses a threat to human health, welfare or the environment above the acceptable site specific risk.

**“Land Disturbing Activity”** means activities that physically take place on the facility or Certified Brownfield and include digging, drilling, excavating, grading, clearing, earth moving, filling, or performing any subsurface work, but excludes all environmental investigation, planning, designing, or engineering work related to the facility, as well as any physical activity performed off the facility or Certified Brownfield in preparation for, or related to, construction and development activities that will occur on the facility or Certified Brownfield.

**“Phase II Environmental Site Assessment”** or **“Phase II”** means an investigation performed in accordance with ASTM International’s Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process (E 1903), as amended.

**“Preliminary Risk Assessment”** means the use of representative data to analyze for potential adverse human health effects under the residential and current use scenarios and/or adverse effects on ecological receptors caused by contamination for a particular environmental media.

**“Release”** means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of a hazardous substance, pollutant or contaminant into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes: (a) any release which results in exposure to a person solely within his or her workplace, with respect to a claim which such person may assert against his or her employer, provided, however, that this exclusion does not apply to any such release which also results in exposure to the environment; (b) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel or pipeline pumping station engine; (c) the appropriate application of fertilizers and pesticides; and (d) any discharges in compliance with State permits issued in conformance with Title 7 of the Delaware Code and federally permitted releases under CERCLA.

**“Remedy”** means any action, response or expenditure consistent with the purposes of the Act, or any regulations or guidance developed pursuant thereto to identify, minimize or eliminate any imminent threat posed by any hazardous substances to public health or welfare or the environment including preparation of any plans, conducting of any studies and any investigative, oversight of remedy or monitoring activities with respect to any release or imminent threat of release of a hazardous substance and any health assessments, risk assessments, health effect studies or natural resource damage assessments conducted in order to determine the risk or potential risk to public health or welfare or the environment.

**“Sensitive Receptors”** Include, but not limited to, playgrounds, areas of open soil, hospitals, daycare facilities, elderly housing and convalescent facilities. These are areas where the occupants are more susceptible to the potential adverse effects of exposure to toxic chemicals, pesticides, and other potential contaminants. Extra care and consideration must be taken when assessing sites with contaminants in close proximity to areas with recognized sensitive receptors.

### **3.0 Conditional No Further Action Determination Process**

A flowchart illustrating the recommended steps for determining whether a site qualifies for CNFA is included in Appendix A. The steps in the determination process are described below:

3.1 Review of the Facility Evaluation or an equivalent investigation including Phase II Environmental Site Assessment (ESA) or Site Inspection and determine whether the data are of sufficient quantity and/or quality for the CNFA determination.

3.2 Comparison of the maximum observed concentrations (MOCs) of analytes for each environmental media to the HSCA screening levels.

3.3 If the MOCs do not exceed the HSCA screening levels then the site can be administratively closed.

3.4 If the MOCs of any analyte exceed the HSCA screening levels, perform a Preliminary Risk Assessment using the MOCs of analytes found in environmental samples to determine if the risk under the current site condition is acceptable. 95% UCL can be used to perform a Preliminary Risk Assessment for soil or/and sediment with DNREC's preapproval.

3.5 If the Preliminary Risk Assessment is acceptable under the residential risk scenario, the site can be administratively closed at DNREC's discretion.

3.6 If the Preliminary Risk Assessment indicates that risk under the current conditions is acceptable, then a letter will be sent to the property owner stating the site is eligible for CNFA status. See section 4.0 of this guidance for details.

3.7 If the Preliminary Risk Assessment using MOCs reveals an unacceptable risk under the site current conditions, then the owner or other responsible party can enter into a written agreement with DNREC-RS to perform a supplemental investigation for collecting representative samples for the media of concern. The supplemental investigation would involve collection of representative samples, comparison of the MOC to the appropriate HSCA Screening Levels and a preliminary risk assessment using MOCs or 95% UCL (for soil and sediment only).

3.8 If the preliminary risk assessment based on the representative supplemental data is acceptable under the residential risk scenario, the site can be administratively closed.

3.9 If the preliminary risk assessment based on the representative supplemental data indicates an acceptable risk under the current conditions, then a CNFA can be issued if the current site conditions and any other restrictions imposed by the CNFA determination remain in place at the site.

3.10 If the preliminary risk assessment based on the representative supplemental data indicates an unacceptable risk under the current site conditions, a remedial investigation under HSCA must be performed.

3.11 In some cases, where there is no direct exposure to soil contaminants due to physical barriers, such as existing pavement or shallow (0-2ft) soil that has acceptable risks under the appropriate use scenarios, DNREC may review and consider the physical site conditions including the nature of contamination to determine if a CNFA can be issued for the Site with unacceptable risk for soil under current conditions. In this case, any future site land disturbing activities will be prohibited without written DNREC approval until a HSCA Remedial Investigation is completed. If CNFA status is given to a site under this scenario, the site owner is responsible for maintaining the physical barrier at the site and keeping the shallow soil intact. The site would be subject to DNREC Long Term Stewardship inspections to confirm compliance with CNFA requirements.

#### **4.0 Implementation and Maintenance of CNFA Status**

This section discusses the steps in the CNFA determination by DNREC-RS.

4.1 DNREC-RS evaluates all the available information including the facility evaluation or an equivalent investigation and initial screening and prepares a memo documenting the CNFA determination that details the required restrictions to maintain the CNFA status for the site.

4.2 DNREC-RS sends a letter to the property owner or other responsible party enclosing a determination memo and a draft Notice of Conditional No Further Action for a Release of a Hazardous Substance. These documents stipulate the conditions that need to be recorded in the chain of title in the (New Castle, Kent or Sussex) Office of the Recorder of Deeds in order for the site to maintain CNFA status. See Appendix B-1 for the letter and B-2 for the template of CNFA notice.

4.3 Once the Notice is finalized, the property owner will record the Notice in the (New Castle, Kent or Sussex) County Office of the Recorder of Deeds and will provide DNREC-RS with written confirmation of the recorded Notice.

***Note: A CNFA determination becomes effective as of the date the CNFA Notice is recorded in the applicable County Office of the Recorder of Deeds.***

4.4 If the owner decides to sell, redevelop, or change the use of the property, further investigation may be required. The owner or prospective purchaser is strongly advised to contact DNREC for further guidance. Prior to conducting any investigatory activities on the site, the property owner should enter into a Voluntary Cleanup Program. Prior to taking title, a prospective purchaser should investigate eligibility to enter into the Brownfield Program with DNREC-RS

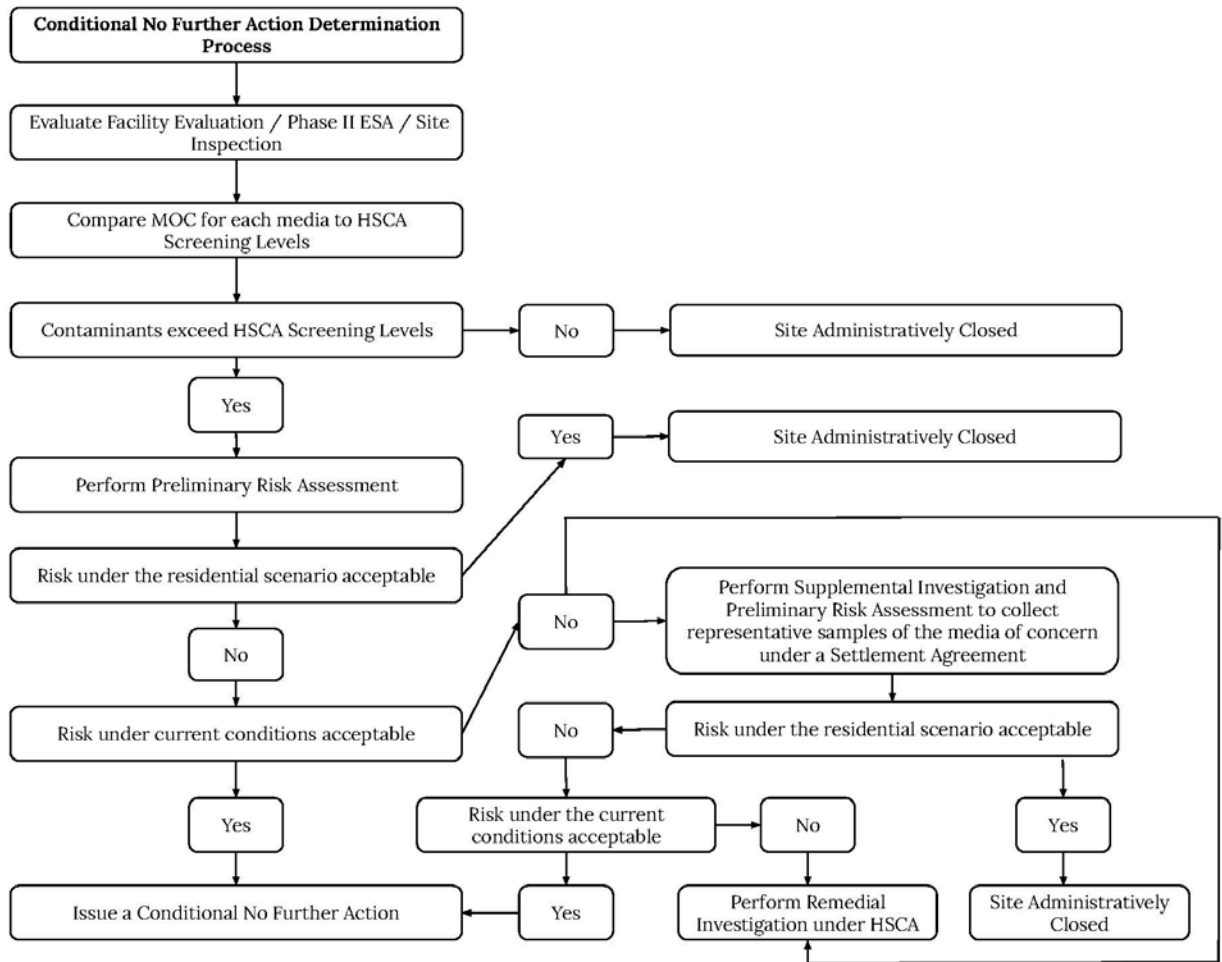
#### **5.0 Long Term Stewardship Requirements**

5.1 The Site is subject to the Long-Term Stewardship requirements; DNREC-RS will inspect the site to determine if the site conditions are being maintained.

5.2 If circumstances change or any new information becomes available relating to the release of any hazardous substances, a threatened release, or an exacerbation of an existing release at a site, DNREC-RS reserves the right to require additional actions to ensure the continued protection of human health and the environment.

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## Appendix A: Conditional No Further Action Determination Process



## Appendix B-1 CNFA Determination Letter **Template**

Date

Mr./Mrs. XXXX  
Address, DE

RE: Conditional No Further Action Determination  
XXXX, Wilmington, DE #  
Tax Parcel No. ###

Dear Mr. and Mrs. XXXX:

The Delaware Department of Natural Resources and Environmental Control – Remediation Section (DNREC-RS) has determined that your property identified as tax parcel number XXXX and also known as the XXXX Site (DE-XXXX) is eligible for Conditional No Further Action (CNFA) status at this time. This CNFA determination is based upon review of the Facility Evaluation (or equivalent investigation) performed at the Site in XXXX by XXXX and the performance of an Initial Screening in XXXX .

The enclosed CNFA memo showed no exceedances above acceptable risk at the Site under current conditions which includes elimination of the exposure pathway. The conditions that must be maintained for the CNFA to remain effective are:

- Maintenance of the current condition of the property as it exists on the date this Notice of Conditional No Further Action is recorded in the Office of the [NC/K/S/] Recorder of Deeds, excluding residential uses and commercial uses with sensitive receptors such as schools, daycare facilities, elderly housing, hospitals and convalescent facilities. Any change in use of, or redevelopment activities occurring on, the property without obtaining the prior written consent of DNREC-RS is prohibited;
- Compliance with Long Term Stewardship Inspections as deemed necessary by DNREC-RS; and

*Site-specific conditions (as applicable):*

- No groundwater wells shall be installed, and no groundwater shall be withdrawn from any well, on the Site without the prior written approval of DNREC-RS and DNREC Division of Water;
- There shall be no digging, drilling, excavating, grading, constructing, earth moving, or any other land disturbing activity on the Property, including any repair, renovation or demolition of the existing structures on the Property, without the prior written approval of DNREC;
- Compliance with the Soil and Material Re-Use Policy; or/and
- Compliance with the Generic Contaminated Material Management Plan (CMMP).
- [Add any other conditions, if applicable]



As the property owner, you will need to record the Notice in the property's chain of title with the [NC/K/S] County that sets forth the conditions and/or requirements contained in the CNFA. Please sign the enclosed Notice, file it with the XXXX County Recorder of Deeds, and send a copy of the filed and date stamped CNFA to DNREC-RS at 391 Lukens Drive, New Castle, DE 19720 by (DATE or 45 days of the date of this letter). The CNFA will be effective on the date that the Notice is filed with the Office of the Recorder of Deeds. When filing the notice, please include a copy of the legal description, as found in the deed. See Exhibit 1.

Please contact DNREC-RS if the Notice cannot be recorded on time.

***Note: This CNFA determination becomes effective as of the date the CNFA Notice is recorded in the applicable County Office of the Recorder of Deeds.***

This Site is subject to certain Long-Term Stewardship conditions and/or requirements. DNREC-RS will inspect the site regularly to determine if the current site conditions and/or requirements are being maintained. If circumstances change or any new information becomes available relating to the release of hazardous substances, the imminent threat of a release, or an exacerbation of the existing environmental condition at the Site, DNREC-RS reserves the right to require additional actions for continued protection of human health and the environment.

If the owner decides to transfer title to the property or to redevelop the property, further investigation may be required prior to the transfer or redevelopment. In such a case, the property owner must contact DNREC-RS to determine if the extent of the contamination requires further investigation or action under the Voluntary Cleanup Program if redevelopment activities are planned. A prospective purchaser may be eligible to enter into a Brownfields Development Agreement with DNREC-RS prior to taking title to the property.

Details related to the investigation and other pertinent information are included in the CNFA memo. All the documents related to the site are archived by DNREC-RS.

Please contact me at 302-395-2600 if you have any questions regarding this letter.

Sincerely,

XXXX

Environmental Scientist/Project Officer

Enclosures: - DNREC CNFA Determination Memo with Attachments (Report(s), Fact Sheet, site map, analytical data, risk assessment calculations or any other relevant letters or documents);  
- Notice of CNFA for a Release of a Hazardous Substance with the Exhibit 1

cc: XXXXXXXX, Program Manager II, DNREC-RS

:xxx  
XXX 21xxx.doc  
DE XXX II A 3

## Appendix B-2: CNFA Recorded Notice **Template**

Tax Parcel No.: a portion of parcel  
XXXXXX

Prepared By: Department of Natural Resources  
and Environmental Control  
391 Lukens Drive  
New Castle, DE 19720

Return To: Qazi Salahuddin  
Environmental Program  
Administrator  
DNREC-RS  
391 Lukens Drive  
New Castle, DE 19720

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### NOTICE OF CONDITIONAL NO FURTHER ACTION FOR A RELEASE OF A HAZARDOUS SUBSTANCE

Pursuant to 7 Del. C. § 9115, when the Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”) has determined that a release of a hazardous substance has occurred at a facility or property on which the facility is located, and that the release poses a threat to public health and/or the environment, the owner of the property shall place a notice in the records of real property kept by the Recorder of Deeds of the County in which the property is located.

Consistent with the above cited statutory notice requirement, DNREC has determined that a release of a hazardous substance(s) has occurred at or from the XXXX Site (the “Site”) (DE-XXXX), located at XXXXX, Delaware. The Site is further identified as a portion of XXXX County tax parcel number XXXXXX, and is more specifically described in Exhibit 1 attached hereto. XXXXXX are the current owners of the Site (“Owners”).

Pursuant to the Hazardous Substance Cleanup Act (HSCA), DNREC performed an Initial Screening at the Site on [DATE]. The Initial Screening was based on the Facility Evaluation conducted at the Site in [DATE]. From the Initial Screening DNREC determined that the Site is eligible for a Conditional No Further Action (CNFA) as provided for in Section 9.2.6.6 of the HSCA Regulations. DNREC issued a Conditional No Further Action letter for this Site after contacting the Owners who agreed to record this Notice in the Office of the Recorder of Deeds for [New Castle/Kent/Sussex] County and to abide by the conditions and/or requirements set forth herein. Specifically, the conditions and/or requirements provide as follows:

- Maintenance of the current condition of the property as it exists on the date this Notice of Conditional No Further Action is recorded in the Office of the [NC/K/S/] Recorder of Deeds, excluding residential uses and commercial uses with sensitive receptors such as schools, daycare facilities, elderly housing, hospitals and convalescent facilities. Any change in use of, or redevelopment activities occurring on, the property without obtaining the prior written consent of DNREC-RS is prohibited;
- Compliance with Long Term Stewardship Inspections as deemed necessary by DNREC-RS; and

*Site-specific conditions (as applicable):*

- No groundwater wells shall be installed, and no groundwater shall be withdrawn from any well, on the Site without the prior written approval of DNREC-RS and DNREC Division of Water;
- There shall be no digging, drilling, excavating, grading, constructing, earth moving, or any other land disturbing activity on the Property, including any repair, renovation or demolition of the existing structures on the Property, without the prior written approval of DNREC;
- Compliance with the Soil and Material Re-Use Policy; or
- Compliance with the Generic Contaminated Material Management Plan (CMMP).
- [Add any other conditions, if applicable]

***Note: This CNFA determination becomes effective as of the date the CNFA Notice is recorded in the applicable County Office of the Recorder of Deeds.***

This CNFA Notice will remain in the property records unless DNREC-RS determines that an additional remedy is necessary to ensure the protection of public health or the environment. In furtherance thereof, DNREC reserves the right to require that additional remedial measures be taken as warranted by the existing environmental condition of the Site.

Owner acknowledges and agrees that this Notice shall not be removed from the property records of the Recorder of Deeds of XXXX County without the prior, written approval of DNREC.

If the owner decides to transfer title to the property or to redevelop the property, further investigation may be required prior to the transfer or redevelopment. In such a case, the property owner must contact DNREC-RS to determine if the extent of the contamination requires further investigation or action under the Voluntary Cleanup Program if redevelopment activities are planned. A prospective purchaser may be eligible to enter into a Brownfields Development Agreement with DNREC-RS prior to taking title to the property.

By executing this Notice, I acknowledge and affirm that I am authorized to bind the Owners, XXXX, to the terms and conditions of this Notice.

**XXXXXX {owner's name}**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name and Title

\_\_\_\_\_  
Date

State of Delaware

ss:

County of XXXXX

Before me, a notary public, in and for said county and state, personally appeared \_\_\_\_\_, a duly authorized representative of \_\_\_\_\_, who

acknowledged to me that *he/she* did execute the foregoing instrument on behalf of \_\_\_\_\_.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this \_\_\_\_\_ day of \_\_\_\_\_, 202\_\_\_\_.

\_\_\_\_\_  
Notary Public

XXX16xxx

EXHIBIT 1

## Summary of 2021 Revisions to Conditional No Further Action (CNFA) Guidance under HSCA:

1. Revised DNREC-SIRS to DNREC-RS to reflect the new section name.
2. Added clarification on when a CNFA status may be given.
3. Added clarification on “Current Condition” definition.
4. Added definition of “Preliminary Risk Assessment” in place of “Limited Risk Assessment”.
5. Added a definition of “Remedy”.
6. Added a definition of “Sensitive Receptors”.
7. Section 3.0 - Initial Screening and Limited Risk Assessment were replaced by Preliminary Risk Assessment.
8. Section 3.4 - Added text that “95% UCL can be used to perform a Preliminary Risk Assessment for soil or/and sediment with DNREC’s preapproval.”
9. Section 3.5 – Added text that “If the Preliminary Risk Assessment is acceptable under the residential risk scenario, the site can be administratively closed.”
10. Section 3.7 – Added clarification that Maximum Observed Concentrations (MOC) of collected representative samples should be compared to HSCA Screening Levels and Preliminary Risk Assessment should be conducted using MOC or 95% UCL.
11. Section 3.8 – Added text that “If the preliminary risk assessment based on the representative supplemental data is acceptable under the residential risk scenario, the site can be administratively closed.”
12. Section 3.10 – Added text that “If the preliminary risk assessment based on the representative supplemental data is unacceptable under the current site conditions, a remedial investigation under HSCA must be performed.”
13. Section 3.11 – Added text that DNREC will consider issuing a CNFA with unacceptable risk for soil under current conditions for sites with existing pavement or shallow (0-2ft) soil that has acceptable risks under the appropriate use scenarios.
14. Section 4.0 – Added note that “A CNFA determination becomes effective as of the date the CNFA Notice is recorded in the applicable County Office of the Recorder of Deeds.”
15. Section 4.4 – Clarification added on further actions under CNFA if the owner decides to sell, redevelop, or change the use of the property.
16. Flow chart edited to reflect changes that were made in the CNFA Guidance.
17. CNFA Determination Memo example is not included in the guidance since it’s a site-specific document prepared by DNREC.
18. CNFA Determination Letter Template edited to reflect changes that were made in the CNFA Guidance.
19. A note is added to the CNFA Determination Letter Template that a “CNFA determination becomes effective as of the date the CNFA Notice is recorded in the applicable County Office of the Recorder of Deeds.”
20. CNFA Recorded Notice Template edited to reflect changes that were made in the CNFA Guidance.
21. A note added to the CNFA Recorded Notice Template that a “CNFA determination becomes effective as of the date the CNFA Notice is recorded in the applicable County Office of the Recorder of Deeds.”