

**COMMENTS OF HONEYWELL INTERNATIONAL INC.**  
**REGARDING THE PROPOSED HSRA RULE CHANGES**

Honeywell International Inc. has long supported and continues to support the efforts of the Georgia Environmental Protection Division ("EPD") to work with the regulated community in an effort to improve the HSRA program. However, one of the proposed HSRA rule changes currently being considered by EPD contains a proposed revision to the HSRA Rules that is inappropriate, ill-advised, and, in fact, illegal. This proposed change, found in the final two sentences of proposed Rule 391-3-19-.06(3)(b)(2), attempts to circumscribe the manner in which courts may use the health-based remediation standards established by the DNR Board in resolving civil suits between private parties. This proposed rule is well beyond the authority of the DNR Board and would inappropriately entangle the Board in matters that are the exclusive province of the judiciary.

These deficiencies would render the adoption of this particular rule change inappropriate under any circumstances. However, consideration of this proposal is particularly inappropriate at this time and under the present circumstances given that the Georgia Court of Appeals is literally in the process of resolving this specific question at this very moment. As a party in these pending cases, Honeywell expresses its strong disapproval of this proposed rule change. For the DNR Board to needlessly and inappropriately interject itself into judicial process through the adoption of the rule proposed here would cross the line of deference owed to co-equal branches of state government. The DNR Board should allow the judiciary to perform its functions without such needless entanglements. In light of the fatal deficiencies with the last two sentences of proposed Rule 391-3-19-.06(3)(b)(2), Honeywell strongly urges EPD to remove this proposed rule change from any proposal submitted to the DNR Board.

**I. Legal Developments Concerning the Applicability of Regulatory Cleanup Levels to State Tort Claims**

**A. The Advancement of Science Has Spawned a New Form of Litigation**

Recent advances in the scientific field of analytical chemistry have made it possible to detect infinitesimally small quantities of chemical substances throughout the environment — amounts far less than can be perceived by the senses or could possibly cause any harm. As a result, scientists can now find traces of virtually any substance just about anywhere. These developments have spawned a new type of litigation across the country. Using common law concepts of nuisance and trespass, owners of property allegedly "contaminated" with trace levels of substances, detectable only by sophisticated scientific instruments, are bringing suits for millions of dollars in alleged property damages and "loss of peace of mind," based solely on the presence of those trace substances. Courts have been asked to adapt these long-used common law concepts — which traditionally require proof of actual damages, tangible physical invasion, and/or insult to the senses — to the detection of substances that cannot be seen, smelled, or sensed in any way by human beings.

## **B. This New Form of Litigation Has Required Courts from Across the Country to Establish New Tort Rules**

In response to this new wave of litigation, courts from across the country have adopted two common sense rules:

- **Rule One**

First, when an alleged tort claim is based only on the presence of minute levels of a substance on real property, and not on anything that can be detected by the senses (such as dust, smoke, or odor), the substance must be present at levels sufficient to pose an actual health threat before a legally cognizable injury exists.<sup>1</sup> In support of this rule, courts have explained that absent such proof, there simply has not been a substantial injury to or interference with the use and enjoyment of property as required by law to support a tort action. Indeed, without such a rule, a wide range of commonplace activities that may cause harmless, but scientifically detectable, amounts of chemicals to be deposited on neighboring property would become tortious. Courts have recognized that it simply cannot be the case that the presence of any minute quantity of a chemical substance gives rise to a cause of action in tort. Otherwise, driving a car, lighting a charcoal grill, pumping gas, mowing one's lawn, farming, and many other everyday activities, each of which necessarily involves the release and deposit of trace amounts of substances, would become wrongful. In fact, all industrial activity would essentially be tortious, because it is not possible to conduct manufacturing or other productive operations without the incidental release and deposit of small quantities of chemical substances.

- **Rule Two**

As a corollary to this first rule, which requires evidence of an actual health threat, courts have adopted a second: When a regulatory agency, charged by law with determining levels at which substances in the environment present a health threat, has set regulatory safe levels, then the presence of a substance below such levels cannot constitute a legally cognizable injury and thus is not actionable as a matter of law.<sup>2</sup> Indeed, to hold otherwise would subject parties to *ad*

---

<sup>1</sup> See, e.g., *Quinn v. Amphenol Corp.*, 69 F.3d 533 (Table), 1995 WL 627468, at \*1 & n.1 (4th Cir. Oct. 26, 1995); *In re WildeWood Litig.*, 52 F.3d 499, 503 (4th Cir. 1995); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993); *FAG Bearings Corp. v. Gulf States Paper Co.*, No. 95-5081-CV-SW-8, 1998 WL 919115, at \*41 n.20 (W.D. Mo. Sept. 30, 1998); *Van Scoy v. Shell Oil Co.*, No. C 93-4383 FMS, 1995 WL 381891, at \*5 (N.D. Cal. June 16, 1995), *aff'd*, 98 F.3d 1348 (Table) (9th Cir. 1996); *Trail v. Civil Eng'r Corps*, 849 F. Supp. 766, 768 (W.D. Wash. 1994); *Graham v. Canadian Nat'l Ry. Co.*, 749 F. Supp. 1300, 1319 (D. Vt. 1990); *Bradley v. American Smelting & Ref. Co.*, 635 F. Supp. 1154, 1158 (W.D. Wash. 1986); *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So.2d 648, 664 (Miss. 1995).

<sup>2</sup> See, e.g., *In re WildeWood Litig.*, 52 F.3d 499, 503 (4th Cir. 1995); *Adams-Arapahoe School Dist. No. 28-J v. United State Gypsum Co.*, 958 F.2d 381 (Table), 1992 WL 58963, at \*1-2 (10th Cir. Mar. 23, 1992); *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc.*, 45 F. Supp. 2d 934, 943 (S.D. Ala. 1999), *aff'd*, 204 F.3d 1122 (11th Cir. 1999);

*hoc*, inconsistent, and unpredictable obligations, because different trial courts and juries could establish a patchwork of case-specific safe levels and cleanup requirements, all at variance with scientifically determined regulatory safe levels. When regulatory standards exist that are designed and intended to guide action, private parties should be able to rely on such standards.

### C. Georgia Law in this Relatively New Area Is Still Developing

As is true in many states, the law regarding potential tort liability stemming from trace levels of chemical substances is still developing. The Georgia Supreme Court has made clear, however, that the mere presence of trace substances, standing alone, is not actionable. As explained by the Court: “Theoretically, every person has the natural right to have the air diffused over his premises in its natural state, free from all impurities. If this rule were literally applied, its application would seriously disturb business, commerce, and society itself. . . . The pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society, *is not actionable*; but the right (and such it must be conceded) must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily.” *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 557, 37 S.E.2d 785 790 (1946) (citations omitted; emphasis added). This reasoning puts Georgia in line with the numerous other courts that have ruled that when a substance is present at such low levels that it cannot be detected by the senses, a plaintiff must prove, at a minimum, that the substance is present at a level that poses a health threat.

While the Georgia Supreme Court has spoken clearly on this broader question, Georgia courts have not yet specifically addressed the question of whether the presence of substances below the strict, health-based regulatory levels established pursuant to state law may be actionable. As discussed immediately below, there are two cases currently pending before the Georgia Court of Appeals that squarely raise that precise question.

### D. Pending Litigation Before the Georgia Court of Appeals

In the mid-1990s, two separate lawsuits were brought against AlliedSignal, Inc. (the corporate predecessor of Honeywell International Inc.), charging that activities at the LCP Site in Brunswick, Georgia had “contaminated” numerous properties along the Turtle River. AlliedSignal owned the LCP Site from 1955 to 1979. In 1979, AlliedSignal sold the site to LCP Chemicals. LCP Chemicals failed to maintain the high standards that had historically been in

---

*Rose v. Union Oil Co. of California*, No. C 97-3808 FMS, 1999 WL 51819, at \*6-7 (N.D. Cal. Feb. 1, 1999); *Brooks v. E.I. DuPont de Nemours & Co.*, 944 F. Supp. 448, 449-50 (E.D.N.C. 1996); *Lamb v. Martin Marietta Energy Systems, Inc.*, 835 F. Supp. 959, 970 (W.D. Ky. 1993); *Heider v. W.R. Grace & Co.*, No. 89 C 9607, 1992 WL 189254, at \*5-6 (N.D. Ill. July 15, 1992); *Gleason v. Town of Bolton*, 14 Mass. L. Rptr. 678 (Super. Ct. Mass. 2002); *D & J Co. v. Stuart*, 765 N.E.2d 368, 375-76 (Ohio Ct. App. 2001); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531, 543-44 (Tex. Ct. App. 2001); *Taco Cabana, Inc. v. Exxon Corp.*, 5 S.W.3d 773, 780 (Tex. Ct. App. 1999); *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 277 (Utah 1982). See also Anthony Vale & Joanna Cline, *Stigma and Property Contamination — Damnum Absque Injuria*, 33 TORT & INS. L.J. 835, 841 (1998).

place at the facility. In 1994, the plant was shut down because of violations of its NPDES permit, and in 1996, the site was placed on the federal Superfund National Priority List. As part of the federal Superfund remediation process, AlliedSignal and the other potentially responsible parties have spent more than \$50 million cleaning up the site and the adjacent marshes. AlliedSignal recently reacquired the LCP Site in conjunction with the ongoing remediation activities there.

The lawsuits filed against AlliedSignal in the mid-1990s were brought by a large class of property owners in the surrounding area as well as by Glynn County, Georgia. During the course of this litigation, literally hundreds of samples from plaintiffs' properties were collected and analyzed by plaintiffs' experts. These sampling results demonstrate that the levels of substances present, when found at all, are all well below the strict cleanup levels established by the DNR Board for residential properties. In addition, no less than three separate governmental agencies have expressly determined that similar levels of substances found on nearby residential properties are too low to pose a health risk.

Undaunted, the plaintiffs in these cases — led by one of the lawyers involved in the HSRA dialogue — continue to pursue their common law claims against Honeywell under Georgia tort law. These plaintiffs seek “remediation” of their properties as well as millions of dollars in monetary damages.

In March 2002, Honeywell moved to dismiss these claims as a matter of law on grounds that the plaintiffs had suffered no actionable harm and were not entitled to mandatory injunctive relief. In particular, Honeywell asserted that because the levels of substances allegedly found were below the regulatory safe levels established by the DNR Board, the plaintiffs could not demonstrate actionable harm, let alone harm sufficient to support a mandatory injunction. The trial court denied Honeywell's motions. Honeywell immediately sought review in the Georgia appellate courts. Several entities filed amicus briefs in support of Honeywell's request, including the Georgia Industry Environmental Coalition (“GIEC”), the Georgia Chamber of Commerce, the Georgia Power Company and Georgia Pacific Corporation.

In May 2002, the Georgia Court of Appeals took the unusual step of agreeing to hear these cases on an interlocutory basis, that is, prior to the conclusion of the case in the trial court, in order to specifically address the question of whether the presence of substances below regulatory levels can be actionable. See *AlliedSignal v. Owens*, Civ. App. No. A03A1352, and *AlliedSignal v. Glynn County*, Civ. App. No. A03A1354. These two cases now pending before the Court of Appeals squarely present two questions:

1. Whether the mere presence of trace substances on real property is sufficient to support a tort claim. Honeywell contends that the trial court's ruling on this issue is directly at odds with several Georgia Supreme Court decisions. The courts that have considered the question have recognized that when a tort claim is based on the presence of imperceptible levels of chemical substances on real property, and not on anything that can be detected by the senses (such as dust, smoke, or odor), the substance must be present on the property at levels sufficient to pose a recognized health threat.

2. Whether the presence of chemical substances below health-based, regulatory levels may be actionable and, beyond that, subject to a mandatory injunction requiring remediation. Honeywell contends that the better reasoned rule, and the ruled adopted by the courts which have addressed the issue, is that when an agency, charged by law with the duty of determining what levels of substances present a health risk, has set health-based regulatory levels, then the presence of these substances below such levels cannot be actionable as a matter of law and, further, may not support a request for mandatory injunctive relief.

Honeywell recently filed briefs in these cases addressing these two issues. The plaintiffs are expected to file their response in the next few weeks.

## **II. The 2002 HSRA Dialogue and Proposed Rule 391-3-19-.06(3)(b)(2)**

Against the backdrop of this pending litigation, the HSRA dialogue involving numerous stakeholder representatives was taking place. One of the lawyers for the plaintiffs in the cases discussed above was involved in this process. In addition, several attorneys who specialize in environmental regulatory issues were participants in the dialogue. Near the end of the process, language was added to the proposed rule changes that threatens to interject the DNR Board into the litigation now pending before the Georgia Court of Appeals. In particular, Proposed Rule 391-3-19-.06(3)(b)(2) provides:

*Nothing in this language is intended to convey any additional rights to current or former owners or tenants of property that may be a source of contamination on or under adjacent or proximate properties or to abrogate any rights or causes of action of former or current owners or tenants of such impacted adjacent or proximate properties to recover damages associated with contamination.*  
***Nothing in this language is intended to establish any minimum level of contamination that would constitute a basis for determinations of whether contamination constitutes a nuisance under Georgia law.***

Proposed Rule 391-3-19-.06(3)(b)(2) (emphasis added).

The proposed changes regarding the relationship between the HSRA Rules and Georgia tort law was included in the proposed rule changes near the end of the process and without a great deal of oral or written discussion of the issue. As a result, many of the participants in the dialogue either were not aware of this specific rule change, or did not fully appreciate the potential problems that this language could raise in the cases currently before the Georgia Court of Appeals or in civil actions generally.

It was only during the course of the public comment period that this proposed rule change was brought to the attention of Honeywell and the other parties that had submitted amicus briefs to the Court of Appeals. When Honeywell realized that this proposal was about to be promulgated as a rule, Honeywell became extremely concerned and determined that it must notify EPD and the DNR Board of its vigorous opposition to the inclusion of the language.



### **III. The Fatal Flaws of Proposed Rule 391-3-19-.06(3)(b)(2)**

#### **A. The Proposed Rule Oversteps the Authority of the DNR Board**

Honeywell finds the two sentences included at the end of Proposed Rule 391-3-19-.06(3)(b)(2) highly objectionable for two primary reasons. As an initial matter, the proposed rule change is outside the authority of the DNR Board to adopt. The DNR Board is charged by law with establishing remediation standards that are protective of human health and the environment. In setting these standards, the DNR Board has established levels of chemical substances below which it has determined that no significant risk to human health or the environment is presented. Indeed, the Georgia General Assembly has specifically charged the DNR Board with the responsibility —

to adopt, promulgate, modify, amend, and repeal rules and regulations to implement and enforce the provisions of this part as the board may deem necessary to provide for corrective action for releases of hazardous wastes, hazardous constituents, and hazardous substances into the environment that pose a present or future danger to human health or the environment . . . .

O.C.G.A. § 12-8-93(a).

As a state agency, the Board “possesses only such jurisdiction, powers, and authority as are conferred upon it by the Legislature, or such as arise therefrom by necessary implication to carry out the full and complete exercise of the powers granted.” *See Gravitt v. Georgia Casualty Co.*, 123 S.E. 897, 899 158 Ga. 613 (1924). Once it has determined the levels at which chemical substances may pose a health risk, the DNR Board does not have the further authority to declare whether and how these determinations can be used by the courts in resolving civil suits between private parties. This authority is reserved for the courts or the legislature.

As noted above, courts in many states have held that when a regulatory agency has set a safe level for an environmental contaminant, no private cause of action exists for contamination at or below such levels. Yet here, by seeking to include the two objectionable sentences quoted above, EPD attempts to pretermitt this decision reserved for the courts by suggesting that the HSRA safe levels are not intended to be used in private litigation based on contamination. This is outside the scope of the DNR Board’s authority.

Stated differently, the DNR Board has the authority to determine whether environmental contaminants pose a health risk, but it is up to the courts (or the legislature) to decide what relevance those DNR determinations might have to civil tort law. By injecting the additional language into the proposed rule, the DNR Board would take it upon itself to suggest that its “no significant health risk” determinations have no relevance in private nuisance cases or other civil actions based on contamination of real property. This exceeds the authority of the DNR Board and invades the province of the courts.

## **B. The DNR Board Should Not Interfere in the Pending Judicial Proceedings**

The proposed rule change in question not only exceeds the scope of the authority of the DNR Board but would entangle the DNR Board in private litigation presently pending before the Georgia Court of Appeals, litigation to which the DNR Board is not even a party. Determining the relevance of HSRA's remediation standards to tort claims brought by private litigants under Georgia common law is the sole province of the Georgia courts. On this issue, the DNR Board must defer to the judiciary. Thus, for the DNR Board to take the action proposed here would be inappropriate at any time. This proposed action is especially inappropriate at this particular time given that the courts are quite literally in the process of reviewing this specific matter at this very moment. For the DNR Board to step into that process through the adoption of a proposed rule change would cross the line of deference owed to the co-equal branches of state government. Resolution of this matter is a question for the courts, and the DNR Board should refuse the suggestion of some to interfere in this process.

## **IV. Conclusion**

Based on the foregoing reasons, Honeywell expresses its strong disapproval of the language included in the final two sentences of Proposed Rule 391-3-19-.06(3)(b)(2). This proposed change is entirely inappropriate, ill-advised, and, in fact, illegal as going beyond the DNR Board's authority. In light of these fatal flaws, Honeywell requests that EPD remove this proposed rule change from any proposal submitted to the DNR Board.