

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

MICHAEL DAVIDSON)	
ENTERPRISES, LLC)	
)	
Appellant,)	
)	
v.)	Appeal No. 2012-06
)	
DEPARTMENT OF NATURAL)	
RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee/Agency.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of the time and place of the hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board (the "Board") on November 27, 2012 in the Auditorium of the Richardson and Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were Nancy J. Shevock (Chair), Sebastian LaRocca, Michael Horsey, Gordon Wood, Dean Holden, Andrew Aerenon and Harold Gray. No Board members disqualified themselves or were otherwise disqualified. Deputy Attorney General Robert W. Willard represented the Board.

Appellant Michael Davidson Enterprises, LLC (“MDE”) was represented by Stephen Smith, Esquire. Deputy Attorney General Ralph Durstein represented the Appellee, Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

On June 8, 2012, DNREC Secretary Collin P. O’Mara issued “Secretary’s Order to Cease and Desist No. 2012-WH-0020” (the “Secretary’s Order”). The Secretary’s Order stated that the analytical results of DNREC’s sampling and analysis of various waste and materials generated by MDE’s processing of construction and demolition waste revealed that the mulch being offered by MDE for sale or use, either as alternative daily coverage (“ADC”) or as mulch for residential and commercial use, substantially exceeded the limits for arsenic and chromium allowed under MDE’s Resource Recovery Permit No. SW-09/03 (the Permit”) (authorizing the operation of a construction and demolition facility at 3051 Willow Grove Road in Camden, Delaware).

The Secretary’s Order also stated that MDE had failed to fulfill sampling and analysis requirements imposed by the Permit. The Secretary’s Order required MDE to cease and desist selling the mulch; to cease and desist any grinding and any processing of wood waste into mulch; to identify and permanently remove from MDE’s facility, via proper disposal, the sources of contamination; and to provide documentation to DNREC showing that mulch failing the analytical and performance criteria required by the Permit had been properly disposed of within 30 days.

On June 27, 2012, MDE filed a timely notice of appeal of the Secretary's Order on the following grounds: the Order did not specify a particular instance where MDE failed to fulfill sampling and analysis requirements; that the Permit only allowed DNREC to test ADC product and not residential commercial mulch; that DNREC's testing did not comply with the permit; and that the Secretary's Order was overbroad and therefore must be vacated.

SUMMARY OF EVIDENCE AND ARGUMENTS

In accordance with EAB Regulation 4.0, the Board was provided with the Chronology, consisting of the record below. The following preliminary matters were addressed by the Board:

At the commencement of the hearing, MDE argued that the Chronology contained improper items, specifically notices related to older alleged violations, and that those items should therefore be removed. After hearing argument from both parties, the Board decided not to amend or revise the Chronology. MDE also argued that the Secretary's Order was issued on June 8, 2012 and expired on July 8, 2012 and therefore DNREC should not be permitted to enter evidence from its proposed exhibits concerning any tests conducted after the latter date. DNREC argued that the subsequent tests were relevant because they shed light on the contents of the mulch in May and June 2012. In addition, the Secretary's Order also required MDE to dispose of the sources of contamination and file a written report with DNREC. The only way to determine if this was done, DNREC contended, was to go back and see if it was done. DNREC argued that evidence therefore

is admissible and the parties are free to argue what weight should be given to the evidence. The Board decided to hear this evidence and give it whatever weight was appropriate.

MDE argued that DNREC did not know where the samples used by DNREC in its testing came from and that there were certain materials on site which are not subject to permitting. MDE also argued that DNREC's testing methodology was seriously flawed and could not be relied upon. MDE argued that DNREC's testing samples were not gathered in accord with the Permit.

DNREC's counsel argued that the Secretary's Order essentially set out two alleged violations by MDE. First, that for a period of three years MDE was supposed to be taking samples of material and testing them, and it failed to do so, or it at least never reported test results to DNREC. Therefore, DNREC was forced to do its own testing and its testing showed excessive amounts of arsenic and chromium in the materials on site, which constituted the second violation. Repeat samples were then taken in July, 2012 after the Secretary's Order was entered, and these subsequent tests again showed excessive levels of arsenic and chromium and also PCBs. These results indicated that there had been no remediation of the problem, as the Secretary's Order had required. DNREC noted that on each occasion, Mr. Davidson of MDE was present when DNREC drew its samples and was offered the opportunity to pull companion samples and have them tested. DNREC also noted that MDE did not intend to introduce any evidence that the testing done by DNREC was flawed, nor did it intend to produce evidence that MDE had performed the required testing in the previous three years.

DNREC produced the seven exhibits which it intended to introduce into evidence: (1) the Permit; (2) the notice of violation 12-SW-05 that had been issued based on inspections conducted by DNREC in January and March, 2010; (3) the Secretary's Order; (4) photographs of the site and the sampling procedures in May and July, 2012; (5) the analytical data from both the May and July, 2012 sampling; (6) the Compliance Inspection Report prepared by DNREC with respect to the May sampling and the same report for the July sampling; and (7) an aerial photo of the site. In addition, an eighth exhibit was added, which was a summary of the findings from the May and July testing. MDE again objected to the Board's considering any testing done after the Secretary's Order was issued.

MDE's Position and Evidence

MDE called James Short, an environmental scientist with DNREC, as a witness. Mr. Short testified that the Permit authorized DNREC to gather samples and perform tests. He noted that there were two tables involved in the testing, listed as Table 1 and Table 2. He also noted that the Permit stated at page 10 that DNREC retained the right to collect composite samples of the ADC mulch product and/or residential/commercial mulch product "to be analyzed for the analytical parameters in Table 1", and did not mention Table 2 in that section. But he also noted that the testing is of the analytical parameters and the analytical parameters refer to Column 1 in Table 1 and Table 2 and they are identical, so expressly mentioning Table 2 would be redundant. However, the

testing can show a violation under each table because it is Column 1's parameters that are tested.

Mr. Short further testified that the Permit requires MDE to take samples of a certain size at prescribed time intervals to have analyzed. For example, the Permit states MDE should take three 500 milliliter mulch grab samples and mix them together to make a composite sample. Sampling should take place on the initial day of grinding the mulch and at different time intervals thereafter. DNREC cannot be present when these samples are supposed to be tested. Since MDE never supplied DNREC with evidence of these required samplings, and DNREC had to test samples after the fact, it could not perform the testing in the same way. Mr. Short noted that MDE's counsel had said that MDE did not know where the samples tested by DNREC had come from, but he stated that Mr. Davidson of MDE was present when the samples were drawn in both May and July.

Mr. Short testified that he personally gathered the samples for the testing and that Mr. Davidson of MDE was present at the time and was offered the chance to take his own samples for testing. Mr. Short did not follow the sampling procedures outlined in the Permit when he tested samples in May, 2012. He stated that it would be impossible to follow the same procedure because DNREC had to take samples after the time prescribed for MDE to take samples and the material was already stockpiled. The Permit allows DNREC to collect composite samples to be analyzed for the appropriate parameters regarding Column 1 of Table 1 and Table 2. It does not require a particular size of sample.

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Mr. Short further testified that DNREC sampled a variety of material. Within the sampled material, some was product ready to be sold or product in a curing phase, and some was what is called fines. Fines is an ADC product, which is not mulch, but can be used for covering a landfill setting. The test results showed excessive levels of arsenic and chromium. Mr. Short noted that when samples were taken again in July, 2012, the size of the sample was in accord with the size which MDE was required to sample, and the results were very similar to the results from May.

MDE maintained that it had submitted required reports to DNREC. Mr. Short said DNREC had received some partial data from MDE. But some data submitted only shows whether certain material was hazardous or non-hazardous, and does not provide the data needed for Column 1 of Table 1 and Table 2, although DNREC repeatedly asked MDE for that data. Showing that material is non-hazardous does not mean it fulfills the criteria necessary to allow distribution of the product. The criteria needed to be fulfilled are the criteria specified in Table 1 and Table 2. The permit required tests of samples to show both whether material was hazardous or non-hazardous and also whether the criteria under Column 1 of Table 1 and Table 2 are satisfied.

In questioning Mr. Short, MDE's counsel noted that the May 2012 Notice of Violation referred to a report showing proper levels of arsenic and chromium. MDE argued that this proved that MDE had filed reports with DNREC as required. But Mr. Short said that this report labeled the material as wood chips and did not say whether it was ADC or residential/commercial mulch. Therefore, DNREC could not determine if the sample was appropriate and met the requirements. Also, at most the wood chips

could only be ADC or residential/commercial mulch, and reports were required for both. In addition, this was a single report and twelve quarterly reports over a period of three years were required to be submitted and were not.

Mr. Short maintained that DNREC did not receive the required reports showing compliance with Column 1 in Table 1 and Table 2. MDE argued that those reports were submitted. MDE did not bring proof to the hearing that MDE previously submitted the reports to DNREC, because MDE felt the Secretary's Order did not clearly say what the deficiency was. Rather, the Secretary's Order simply said that there was a failure to comply with requirements of the Permit over a long period of time. Therefore, MDE did not know which of the required reports DNREC was claiming had not been submitted. MDE stated that all reports had been filed. Mr. Short testified that any reports which were received did not contain the required results for the analytical parameters of Column 1 of Table 1 and Table 2. He also noted that MDE never responded to the Notice of Violation sent in May, 2012, which, among other matters, expressly noted that all reports that had been received were incomplete. MDE at that time could have responded and attempted to resolve these issues.

MDE's counsel noted that DNREC used Test America to test the samples it drew. He noted that Test America is not certified in Delaware and that another company, Burlington, is certified in Delaware. Mr. Short testified that DNREC had confidence in Test America and that his section of DNREC does not certify labs. He also noted that Burlington is certified under a different program.

DNREC argued that the Secretary's Order was quite clear, calling attention to where the Permit required sampling and actually referencing Table 1 and Table 2. The earlier Notice of Violation 12-SW-05 issued on May 9, 2012, specifically identified the deficiencies in reporting.

DNREC's Position and Evidence

DNREC also called Mr. Short to testify. In regard to his background and experience, Mr. Short stated that he has a bachelor's degree in environmental science and has been employed at DNREC since 1985. He has had numerous courses in safety and sampling training and many years of experience in inspecting sites.

Mr. Short stated that MDE failed to respond to the Notice of Violation. Due to that fact, and the fact that DNREC found analytical results of concern because of MDE's failure to follow the permitting requirements, the Cease and Desist Order was issued. Mr. Short stated that the issuance of a Cease and Desist Order is not done routinely and it is not a step that is taken lightly.

Mr. Short testified that the Permit requires MDE to process any waste. MDE used to have a pick line where the material moved down the line and material was largely removed by hand and went into different containers for recycling or disposal. Mr. Short does not know why, even though he has asked, but MDE has ceased using the pick line.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation and careful review of the parties' arguments and evidence, the Board unanimously finds in favor of DNREC and against MDE.

The Secretary's Order clearly stated that MDE "has failed to fulfill the sampling and analysis requirements of the [P]ermit." This certainly put MDE on notice that DNREC was maintaining that MDE had not conducted the required sampling and analysis. For MDE to argue that DNREC must provide the exact dates of every time MDE failed to fulfill the sampling and analysis requirements appears to the Board to be disingenuous. The May, 2012 Notice of Violation states "[a]ll reports are incomplete because the quarterly reports omit the analytical results of samples required" by the Permit. MDE was therefore told that all of its reports were deficient. When MDE failed to respond to the Notice of Violation, the Cease and Desist Order followed.

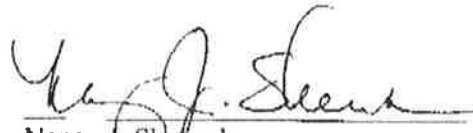
Further, the Secretary's Order clearly stated that DNREC's testing revealed that the mulch being offered for sale or use by MDE, either as ADC or as mulch for residential or commercial use, substantially exceeded the Permit limits for arsenic and chromium. The Secretary's Order also stated that failing to conduct the required sampling, and selling or providing mulch that failed to meet the required criteria specified in the permit are violations of the Permit. The Secretary's Order required MDE to provide documentation showing that the mulch failing to meet the criteria had been properly disposed of within 30 days. The Board finds that MDE was certainly aware of the charges against it and it never adhered to the requirements concerning disposal of the material.

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IT IS SO ORDERED, this th 20 day of February, 2013.


The following Board members concur in this decision.

Date: February 20, 2013


Nancy J. Shevock
Chairperson

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Date: 2/24/13



Andrew Aerenson
Board Member

Environmental Appeals Board
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Date: 2/24/13



Andrew Acrenson
Board Member

Environmental Appeals Board
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Date: 2/25/13



Michael Horsey
Board Member

Environmental Appeals Board
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Date:

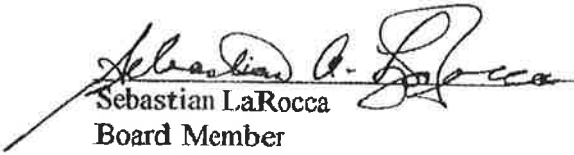
02/19/13

A handwritten signature in blue ink, appearing to read "Dean E. Holden", written over a horizontal line.

Dean Holden
Board Member

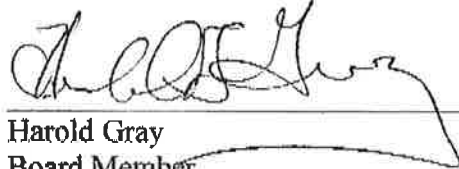
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Date: 2/19/13


Sebastian LaRocca
Board Member

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Date: 2/19/2013


Harold Gray
Board Member

