

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

DAVID SMALL, SECRETARY,  
DEPARTMENT OF NATURAL )  
RESOURCES AND )  
ENVIRONMENTAL CONTROL, )  
 )  
Petitioner, )  
 )  
 )  
 )  
v. )  
 )  
MICHAEL DAVIDSON, D/B/A )  
MIKE DAVIDSON ENTERPRISES, LLC )  
 )  
Respondent. )

Case No. 2014-03

**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 September 23, 2014 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, Dean Holden and Andrew Aerenon, Esquire. No Board members disqualified themselves or were otherwise disqualified. Deputy Attorney General Robert W. Willard represented the Board.

This hearing was to consider an administrative complaint filed by the (then) Secretary of the Department of Natural Resources and Environmental Control (DNREC),

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Collin P. O'Mara, dated March 21, 2014 which named both Michael Davidson individually and Michael Davidson Enterprises, LLC (MDE), a Delaware LLC, (collectively as the "Respondents"), alleging that each Respondent was a "chronic violator" under 7 Del. C. §7904, because each had demonstrated an unwillingness to comply with a resource recovery permit and had engaged in a pattern of willful neglect and reckless disregard of DNREC regulatory programs (the "Complaint"). While MDE was issued a Resource Recovery Facility Permit to conduct business, Mr. Davidson was the owner of the business and operated the business. Thus, the Complaint was filed against both Mr. Davidson and MDE.

Deputy Attorney General Ralph K. Durstein, III appeared, representing the Secretary of DNREC.

Respondent Michael Davidson did not appear, nor did anyone appear on behalf of MDE. Service of the Complaint was made on MDE through its registered agent. The Complaint and the notice of this hearing was sent to Mr. Davidson's last two known addresses. The Complaint was also attempted to be served on Mr. Davidson by leaving a copy with an employee (Arlene Seaman) of MDE at MDE's permitted facility.

**STATEMENT OF THE CASE AND PROCEEDINGS**

The Complaint set forth several allegations, including the following:

1. DNREC had issued a Resource Recovery Facility Permit (the "Permit") to MDE on November 6, 2009, and Respondents had submitted a detailed plan of operations that was incorporated into the Permit.

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2. DNREC conducted a compliance assessment on January 14, 2010 and found the Respondents in violation of the permit and applicable regulations.
3. Another compliance assessment was performed on March 9, 2010 and found ongoing violations.
4. DNREC issued a Notice of Violation to Respondents on April 6, 2010 notifying Respondents of the violations and requiring full compliance with requirements within 30 days.
5. On May 18, 2010, Respondents submitted a response addressing only a commitment to comply with requirements relating to plastic solid waste and failing to address other issues raised by the Notice of Violation.
6. DNREC conducted additional compliance assessments on June 2, June 15, June 30, August 17, and November 24, 2010, as well as March 15, June 6, October 25 and December 12, 2011, and also April 11, April 30 and May 17, 2012, all of which confirmed continuing violations at the facility covered by the Permit. Analytical testing of samples on May 17, 2012 revealed that mulch samples failed to achieve the criteria specified in the Permit, by exceeding allowable concentrations of arsenic and chromium, in violation of the Permit and regulations.
7. Additional testing in July 2012 also showed excessive levels of polychlorinated biphenyl (PCB).
8. A Cease and Desist Order was issued by the Secretary and served on the Respondents on June 8, 2012, requiring the Respondents to take immediate

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action with respect to contamination by arsenic and chromium of the site covered by the Permit.

9. Respondents requested a hearing before the Board, which was held on November 27, 2012. In a decision dated February 13, 2013, the Board found in favor of DNREC and against the Respondents.
10. A Secretary's Order and Notice of Conciliation was issued and served on Respondents on August 7, 2012. The Order directed the Respondents to cease distributing contaminated mulch product, to remove the contaminated mulch from the premises, and to provide assurance that the site was not contaminated by excessive levels of arsenic, chromium or PCB's. The Respondents declined reconciliation.
11. A Notice of Intent to Suspend the Resource Recovery Permit was issued on September 24, 2012, and Respondents again requested a hearing, which took place on January 15, February 11 and February 12, 2013.
12. In an Order dated April 29, 2013, the Secretary adopted the findings of the Hearing Officer and upheld the suspension of the Permit, giving the Respondents three months to come into compliance with the Permit and applicable law. Respondents were warned that a failure to comply could result in substantial daily penalties and commencement of the process to designate each of the Respondents as a chronic violator.

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13. Respondents sought a Temporary Restraining Order in the Court of Chancery in an effort to stay the Order, but the Court denied the motion and granted no relief to the Respondents.
14. On August 9, 2013, the Secretary revoked the Permit due to the complete failure to comply with the enforcement actions. The Secretary cited MDE's improper storage and failure to dispose of over 100,000 tons of waste, exceeding analytical parameters for arsenic, chromium and PCB's, a failure to submit required reports, storage of large quantities of solid waste outside the permitted area, improper acceptance and storage of prohibited waste and grossly inadequate financial assurance. The Secretary noted that about 70,000 tons of waste had been illegally added since the May, 2012 Notice of Violation.
15. Respondents did not contest the Order or file an appeal, nor did they comply with its terms.

The Secretary alleges in the Complaint that the Respondents failed to operate the facility covered by the Permit in a manner that would preclude the degradation of the land, air, surface, water and ground water in violation of regulations. The Secretary also alleges in the Complaint that the Respondents failed to meet the sampling and analysis requirements of the Permit.

The Complaint further alleges that the facility covered by the Permit has been stockpiling solid wastes in a way that poses a potential leaching threat to surface and ground water, in addition to a potential threat of fire and potential objectionable odor

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generation, in violation of regulations. The Complaint also alleges that making contaminated mulch available to the public posed a health risk.

During site visits by DNREC, Mr. Davidson failed to take his own samplings and failed to produce any evidence to question the results obtained by DNREC.

The Complaint alleges that Respondent operated outside of the boundaries of the Permit, failed to transfer construction and demolition waste, accepted prohibited waste in violation of the permit and maintained solid waste stockpiles of tires, plastic and waste in violation of the law and regulations.

The Complaint notes various other charges against the Respondents and states that Respondents have enjoyed the economic benefit of accepting waste for a fee, without properly disposing of it and Respondent has illegally stored waste material on the site.

The Complaint alleges that the Permit required maintenance and provision of records relating to safety and training of personnel, and fire inspections from the Felton Fire Department, but that MDE failed to comply and also failed to maintain a mandated sprinkler system, fire alarm, fire extinguishers and fire hydrants accessible to employees and firefighters. The Complaint also alleges that Respondents failed to file numerous required reports.

The Complaint states that massive piles of waste were involved in a fire in February 2014 that smoldered for weeks. The Complaint also states that neighbors have expressed concerns about odors and drinking water and that Respondents appear to have abandoned the site, having operated an illegal landfill for years that threatens public health and safety.

The Complaint states that the violations can be grouped into:

1. Threat of contamination from arsenic, chromium and PCB's due to acceptance of prohibited waste;
2. Failure to operate within the limitations of the Permit;
3. Chronic violations of Respondents' plan of operation;
4. The steady accumulation of excessive amounts of waste;
5. Persistent failure to adhere to fire safety requirements;
6. Willful failure to follow mandated procedures; and
7. A lack of proper reporting.

The Complaint states that a total of 143 violations were observed through the end of 2012. Respondents took no action to remedy this, despite repeated enforcement actions taken by DNREC.

#### **SUMMARY OF EVIDENCE AND ARGUMENTS**

The Board was provided with and reviewed the chronology of the case. In his opening statement, Mr. Durstein said that service was made on MDE through its registered agent. Service on Mr. Davidson was attempted by mail at two possible addresses, but the mail was returned. Service on Mr. Davidson was also attempted by leaving a copy of the Complaint with Ms. Arlene Seaman, an employee of MDE who worked closely with Mr. Davidson. Mr. Durstein said that Mr. Davidson had an obligation to keep DNREC informed of his proper address. Mr. Durstein also noted that DNREC is involved with Superior Court proceedings with Mr. Davidson, in which he was served with a complaint and participated through counsel, and he has also now failed

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to appear in that case. When his attorneys were allowed to withdraw in that case, he was instructed to keep the court aware of his address and to attend proceedings but he has not done so.

Mr. Durstein moved the Board to accept into evidence a number of documents collectively as Exhibit 1 of the case presented by DNREC and the Board agreed to do so.

Mr. Durstein explained that the Complaint was lengthy as there is a long history to this case. He said paragraphs 3 through 15 of the Complaint contain a rough chronology of events at the site through August of 2013. Paragraphs 16 through 57 set forth all of the individual violations. He indicated his belief that of the fifteen factors listed in *7 Del. C. § 7904(b)* as factors to be considered in determining whether a regulated party has engaged in a pattern of willful neglect or reckless disregard of the regulatory programs of DNREC, the Respondents had violated at least ten. He also noted that § 7904(c) lists types of violations the Board may consider in determining whether someone is a chronic violator. Mr. Durstein believed that Respondents had committed several of those types of violations.

Mr. Jim Short testified that he is an environmental scientist employed by DNREC. He is familiar with Mr. Davidson and MDE. Mr. Short believed that the employee who accepted the Complaint, Arlene Seaman, was an office manager for MDE. It was Ms. Seaman that Mr. Short would contact when he needed to communicate with MDE. Mr. Short testified that Ms. Seaman was involved with the preparation and submission of company reports required to be filed with DNREC.



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Exhibit 2 was admitted into evidence, consisting of demonstrative evidence prepared for this hearing. The first page of the exhibit was a broad estimate of the tonnage of waste on the site of the facility covered by the Permit issued to MDE. Mr. Short testified that they are only estimates because they are simply measurements of the size of piles of waste converted into a volume by using a density applied to the different waste materials commonly used in the waste management industry. These estimates were required because the Respondents failed to file reports required by its Permit.

Mr. Short testified that there was a substantial increase in the quantity of materials found there between April 2012 and July 2013. DNREC therefore believes that Respondents simply moved materials to that area rather than disposing of them properly. Respondents did not have a permit for a landfill so moving the materials in this way was improper.

Mr. Short testified that while DNREC can see that there is a large pile of material there, it cannot say with certainty what is underneath the pile without core sampling or some kind of testing.

Mr. Short testified that the Permit was issued to MDE in 2009 and allowed MDE to accept construction and demolition waste, to process and remove recyclables, market the recyclables and properly dispose of what could not be recycled in a permitted facility.

Mr. Short testified that Respondents reported charging a gate fee of about \$50-60 a ton, which would mean Respondents made at least \$6 million at this facility covered by the Permit.

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Mr. Short testified that Respondents prepared and submitted a plan of operation for the site which indicated that the company would follow the Permit in recycling what could be recycled and properly disposing of what could not be recycled.

Mr. Short testified that the chronology accurately summarizes the site investigation, the violations that were found and the compliance assessments done by DNREC at the facility. That history culminated in the Permit being suspended and then revoked.

Mr. Short testified that Mr. Davidson never cooperated with DNREC. There were verbal discussions with Mr. Davidson, notices of violation and partial Permit suspension orders designed to provide the Respondents with every opportunity to come into compliance with the law and regulations. The Respondents not only failed to come into compliance, but actually continued to make the problems worse.

Mr. Short testified that DNREC was in regular contact with Respondents between 2009 and 2012. Finally, a Permit revocation order was issued by the Secretary of DNREC in August 2013, which also imposed a fine of \$10,000 per day which continues to accumulate and which has not been paid. A copy of that Order is in the record before the Board. The Respondents were provided a path forward to clean up the site and come into compliance, but never did so. DNREC has been researching property owned by Mr. Davidson and is seeking to find ways of enforcing payment of these penalties.

Mr. Short testified that because Respondents were not filing required reports and because DNREC was in the process of taking enforcement action, it was necessary for DNREC to investigate to understand the problem and the quantity of material on site.

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Therefore, a first estimate was done in April, 2012. The problem continued to worsen after that point.

Mr. Short further testified that in February, 2014, an enforcement officer was driving by the site and noticed smoke and DNREC learned that the main waste pile of almost 73,000 tons was on fire. It took two weeks to put the fire out with both DNREC and the Federal EPA working on it. The total cost of fighting the fire exceeded \$100,000. Mr. Davidson and MDE's employees offered no assistance in fighting the fire. In fact, during the fire fighting, Mr. Davidson continued to remove metals and sold them.

Mr. Short showed a series of pictures contained in the record taken between 2011 and 2013 which appeared to show the main waste pile at the site continued to grow over time.

Mr. Short noted again that Mr. Davidson did essentially nothing to help when there was a fire at the site. Since that time, he said Mr. Davidson has done nothing to cooperate with the remediation or clean up of any kind at the site. DNREC then performed sampling analysis of a variety of media including air, surface water and groundwater, and found parameters that exceeded the acceptable DNREC screening levels. DNREC is now conducting a risk assessment to determine what should happen for remediation of the site.

Mr. Short testified that DNREC believed that the ultimate disposition of waste would cause remedial costs to exceed \$10 million.

Mr. Short also testified that there is over 2,700 tons of yard and land clearing wood waste that is west of the area covered by the Permit. There is another 13,000 tons

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of fines materials that is east of the permitted area. This land surrounding the permitted site is also owned by Mr. Davidson.

Mr. Short testified that DNREC has not yet tested property owned by other citizens in the area, but that this may well become necessary. DNREC has found enough evidence to show that further investigation is required, but DNREC cannot say with certainty precisely what is buried on these premises. DNREC must try to determine the extent of the damage to the environment and whether there are significant health risks to the public.

Mr. Short testified that further action will probably be done by the Site Investigation and Remediation Section, State Superfund, because it has other resources to try to deal with these types of issues.

In response to a question from the Board as to whether Mr. Davidson has abandoned this property, Mr. Short said Mr. Davidson has not been seen on the property since the fire in February 2014. Mr. Short testified that in his 30 year career, he has never seen a regulated party act in such a blatantly egregious fashion as did Mr. Davidson.

In closing, Mr. Durstein stated that DNREC had submitted exhibits as well as a chronology and measurements. He noted that this Board had previously held a hearing on an appeal by Respondents of a DNREC action against them and had decided the appeal in favor of DNREC, after hearing evidence which was similar to that which was presented at this hearing.

Mr. Durstein argued that based on the evidence presented, the Respondents clearly disregarded the Permit issued to MDE and failed to comply with DNREC regulatory programs. He noted that 7 *Del. C.* § 7904(b) sets out fifteen (15) factors for the Board to consider in determining whether a regulated party is a chronic violator. Mr. Durstein argued that at least ten (10) of those applied in this case.

Mr. Durstein argued that 7 *Del. C.* § 7904(c) provides that the Secretary may consider one or more of several types of violations including a violation that could threaten harm to the environment or to public health. Mr. Durstein noted that the risk to public health must still be examined by DNREC but that the evidence clearly shows potential harm to the environment. Mr. Durstein argued that another violation involved a failure to maintain proper pollution controls, noting that Respondents filed a plan of operation that provided for properly segregating materials and disposing of them, but failed to do so. Mr. Durstein also argued that Respondents failed to file required reports with DNREC and substantially deviated from what was permitted activity under the Permit that was issued. Mr. Durstein also noted that the suspension and revocation of the Permit were eventually reduced to a court order, which incorporated the requirement that Respondents clean up the site, and that this court order was also ignored. Respondents continued to add waste to the site after the Permit had been suspended and then revoked.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After deliberation and careful review of the evidence, the Board unanimously finds in favor of DNREC and hereby finds that Michael Davidson and Mike Davidson Enterprises, LLC (MDE) are each a chronic violator under 7 *Del. C.* § 7904. In addition,

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the Board holds that the Secretary has the right to impose any penalties permitted by the statute.

The Delaware chronic violator statute, *7 Del. C. § 7904*, provides that: “A chronic violator is a regulated party that has demonstrated an inability or unwillingness to comply with 1 or more of the Department’s regulatory programs” (*7 Del. C. § 7904(a)*). The criteria for determining that shall include whether the regulated party has engaged in a pattern of willful neglect or reckless disregard of the permits or regulatory programs of DNREC (*7 Del. C. § 7904(b)*).

The factors to be considered in making this determination shall include:

- (1) The nature and extent of the harm caused or threatened;
- (2) The impact on the integrity of regulatory programs;
- (3) Duration of the noncompliance;
- (4) Number of similar violations;
- (5) Total number of violations of all types;
- (6) Economic benefit attributable to violations and noncompliance;
- (7) Relationship and relevance of violations to activity for which permit is sought;
- (8) The state of mind of the violator;
- (9) The actions of new owners where ownership has changed
- (10) Actions taken or not taken to mitigate the harm caused or threatened;
- (11) Whether the violations were self-reported;

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- (12) The amount of an illegal release of a pollutant in proportion to the amount legally authorized to be released;
- (13) Whether the regulated party has adequately capitalized its operations so that compliance can be reasonably expected;
- (14) Whether the regulated party has used recognized and accepted good engineering within its field;
- (15) The size, scope and complexity of operations and the number of facilities located within the State (*7 Del. C. § 7904(b)*).

Seven *Del. C. § 7904 (c)* states that one or more of the types of violations to be considered by the Secretary shall include, but not be limited to:

- (1) Violations that cause or threaten harm to the environment or to public health or safety;
- (2) Violations resulting in criminal convictions;
- (3) Tampering with equipment;
- (4) Filing false reports or inaccurate information;
- (5) Failing to maintain or use required pollution control equipment;
- (6) Repeatedly failing to submit required reports;
- (7) Repeatedly conducting a regulated activity without a required permit;
- (8) The extent of deviation from the permit;
- (9) Noncompliance with court orders;
- (10) Alleged violations that were the subject of negotiated settlements; and
- (11) Violations and conduct by related persons.

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Under the terms of 7 *Del. C.* § 7906, the Secretary is authorized to impose an administrative penalty of up to \$10,000 per day for each violation against any regulated party that is determined to be a chronic violator.

From the evidence presented, the Board finds that Mr. Davidson and MDE have caused sufficient harm to the environment which could also potentially result in serious adverse environmental consequences. The Permit issued allowed the company to take in waste, process and market what could be processed, and properly dispose of the remainder. Rather than dispose of the remainder, Mr. Davidson and MDE have allowed waste to continue growing at the site as if he were running a landfill, and he had no permit to run a landfill.

Respondents' repeated violations have an impact on the integrity of the regulatory programs of DNREC. To simply ignore repeated attempts by DNREC to remedy the situation shows a blatant disregard for the regulatory process.

Respondents' noncompliance has been ongoing for more than four years. DNREC cited Respondents again and again, finally suspending the permit and ultimately revoking it, yet Respondents never attempted to cooperate in remedying the problems at this facility.

MDE repeatedly failed to file required reports, so that DNREC was not able to monitor the site on an ongoing basis. Respondents continued to ignore the terms of the plan of operation that Mr. Davidson himself created and that was incorporated into the Permit issued to MDE and continued to accept inappropriate waste and stockpile it at the



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site covered by the Permit. Even after the Permit was suspended, Respondents continued to collect waste thereby conducting business without a valid permit.

In February, 2014, a fire started in the pile of waste. Mr. Davidson was present and essentially did nothing to help. Damages exceeded \$100,000.

Respondents charged a fee each time a person dropped waste at the site and marketed what could be recycled. Respondents therefore continued to profit while ignoring their duty to properly dispose of waste that could not be recycled.

The evidence shows that Mr. Davidson and MDE were confronted by DNREC on many occasions and were urged to remedy the situation and refused to do so. Therefore, these violations show a reckless disregard of the law, and a willful neglect of what the issued Permit allowed, by both Mr. Davidson and MDE.


Accordingly, based on the evidence presented as applied to the applicable law, the Board finds and declares that Michael Davidson and MDE are each a chronic violator as such term is defined under *7 Del. C. § 7904(a)* and, as a result of such designation, the Secretary may reject any permit application filed by either Mr. Davidson or MDE pursuant to *7 Del. C. § 7904(d)(4)*.

**IT IS SO ORDERED**, this 12th day of December, 2014.

The following Board members concur in this decision.

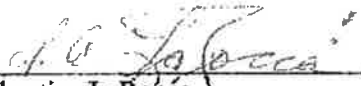
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Date: December 10, 2014

  
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Nancy D. Shevock  
Chairperson

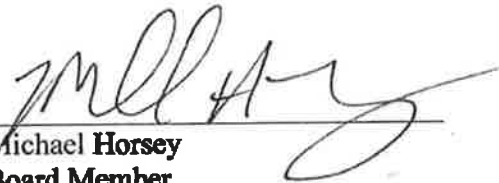
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Date: Dec. 10 2014

  
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Sebastian LaRocca  
Board Member

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Date: 12/12/14

  
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**Michael Horsey**  
**Board Member**

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Date: 12/10/14

  
Dean Holden  
Board Member

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Date: 12/11/14



Andrew Aerenson  
Board Member