



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**
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DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

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Secretary's Order No. 2013-WH-0010

Re: Division of Waste and Hazardous Substances, Solid and Hazardous Waste Management Section v Mike Davidson Enterprises, LLC Action to Suspend Resource Recovery Permit SW/09/3 to Operate Resource Recovery Facility located at 3051 Willow Grove Road, near Camden, Kent County

**Date of Issuance: April 29, 2013
Effective Date: April 29, 2013**

The Secretary of the Department of Natural Resources and Environmental Control (Department) issues the following findings, reasons and conclusions as an Order upon consideration of the attached Report by the Department's presiding hearing officer and the hearing record.

Background

On September 24, 2012, the Department's Solid and Hazardous Waste Management Section (SHWMS) within the Division of Waste and Hazardous Substances began an action to suspend Resource Recovery Facility permit SW/09/03 (Permit) issued November 6, 2009 to Mike Davidson Enterprises, LLC (MDE). The Permit authorized MDE to operate a resource recovery facility on 35.67 acres of leased land located at 3051 Willow Grove Road, Camden (Facility), which is within an unincorporated area of Kent County west of the Town of Camden.

SHWMS cited MDE for violations of the Permit and the *Delaware Regulations Governing Solid Waste (DRGSW) 7 DE Admin. Code 1301*. MDE requested a public

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hearing and this request was granted and the Department followed procedures for an on-the-record due process hearing given the potential result of the enforcement action could be the loss of the Permit. The hearing began on January 15, 2013 and concluded after three days of testimony on February 12, 2013. The presiding hearing officer's Report finds that MDE violated numerous provisions of the Permit and the DRGSW. The Report finds that the violations taken together support the suspension of the Permit until such time as MDE is able to demonstrate to SHWMS its ability to operate the Facility lawfully in compliance with the Permit and the DRGSW or in the alternative the revocation of the Permit, particularly given that the Permit is subject to renewal anyway by November 6, 2014.

Findings and Reasons

SHWMS initially presented 26 alleged violations, but SHWMS withdrew one at the hearing. The Report found that the record supports finding that MDE committed the following 22 violations, most of them either ongoing or committed on multiple dates: Violation 1-managing solid waste outside of the allowed areas; Violation 4-failure to operate the Facility in a manner that will preclude degradation of land, air, surface water or groundwater; Violation 5-Failure to operate the Facility consistent with the approved Plan of Operation; Violation 6-Failure to process C&D waste within 72 hours; Violation 7-Storage of recyclable materials in unapproved areas; Violation 9-Failure to dispose of non-recyclable waste materials within 72 hours; Violation 10-failure to timely submit complete annual reports to SHWMS; Violation 11-failure to properly update the closure plan to be submitted annually; Violation 12-failure to operate the Facility only during approved hours of operation; Violation 13-failure of the weigh master to inspect all

incoming loads of C&D waste as per the approved Plan of Operation and the Permit; Violation 14-failure to transfer sorted C&D waste to roll-off containers as per the approved Plan of Operation and the Permit; Violation 15-failure to place incoming C&D waste on concrete pad for sorting and inspection as per the approved Plan of Operation and the Permit; Violation 16-failure to send non-recyclable waste for proper disposal within 72 hours of roll-off containers becoming full as per the approved Plan of Operation and the Permit; Violation 17- failure to use covered roll-off containers for storage of sorted wallboard as per the approved Plan of Operation and the Permit; Violation 18, failure to maintain proper size of wood mulch piles as per the Permit; Violation 19-failure to limit total waste at the Facility at any one time to 2,400 tons as per the Permit and the approved Plan of Operation; Violation- 20-failure to maintain proper fire protection service as per the Permit; Violation 21 failure to timely file complete quarterly reports as per the Permit and DRGSW; Violation 22-failure to follow proper procedures for testing wood mulch product as required by the Permit; Violation 23-failure to prevent acceptance of prohibited waste as required by the Permit; Violation 24-failure to maintain proper records of testing as per the Permit; Violation 25-failure to maintain proper records of personnel training, major equipment maintenance, and fire department inspections as per the Permit and DRGSW; and Violation 26-failure to obtain approval of recycling waste other than C&D waste as per the Permit. Based upon the record and the Report, the Department finds that the suspension of the Permit is supported as the proper remedy for MDE's continuing and flagrant non-compliance with the Permit and DRGSW.

MDE in a pre-hearing motion challenged the Department's authority to suspend any solid waste permit based upon the remedies available in Chapter 60, 7 Del. C. Chap. 60. The presiding hearing officer denied this motion at the pre-hearing conference and provided an explanation in the Report that cited DRGSW for express authority, which he consider was binding on the Department. MDE raised this issue again in its post-hearing memo.

The Department's authority to suspend a permit expressly is provided in the DRGSW Section 4.1.4, which allows for the suspension of any solid waste management permit based upon finding one violation. DRGSW have the force and effect of law and are to be presumed to be lawful. Indeed, the Department is required to follow its own regulations. Consequently, MDE's collateral challenge to DRGSW Section 4.1.4 is rejected, and the Department has the express legal authority in DRGSW to suspend a solid waste management permit. Delaware courts also have recognized the authority to revoke a permit is within the Department's lawful exercise of its enforcement powers over a permit. *Formosa Plastics Corp. v. Wilson*, 504 A. 2d 1083. The suspension of a permit similarly reasonably exists as an enforcement option because it is less onerous than revoking a permit, which is the permanent loss of a permit. SHWMS has requested suspension of the Permit until MDE shows that the Facility can operate in compliance with the Permit, and this suspension is a temporary loss of the right to operate pending correction of the problems.

The selection of an appropriate sanction for any violation is made by the Secretary in the exercise of his discretion in the enforcement of the laws and regulations that the Department administers. While SHWMS in its notice selected suspension as its

sanction, that selection is not binding on the Secretary. The Department finds that the record has the Department's use of various sanctions, including issuance of notice of violations, cease and desist order, and an order of conciliation. The Department's ability to enforce its laws and regulations to protect the environment and public health reasonably includes suspending and revoking any permit,

The record supports suspension of the Permit, but the protection of the environment and public health also supports having the Permit's terms and conditions apply that were imposed to protect the environment and public health. The Department wants MDE to take the necessary corrective actions, working with SHWMS, to bring the Facility back into compliance, but does not want the Facility to accept any more solid waste until the Facility is in compliance. The Department wants MDE to be a successful resource recovery facility and to engage in recycling lawfully, but the record supports that the Facility has been unable or unwilling to comply with the Permit or DRGSW. The Department's consequently selects partial suspension of the Permit. The Permit's authority granted to accept solid waste is suspended, but all other provisions shall remain in effect, including the monitoring, testing and reporting requirements. MDE will be allowed to market or dispose of its accumulated waste in order to bring the Facility's storage of waste to within the allowed limits. SHWMS' request to suspend is granted in part and denied in part because full suspension, while supported by the record, may allow MDE to no longer abide by the other terms and conditions in the Permit that are to protect the environment and public health. The suspension of the Permit's authority to receive incoming waste until the corrective actions have been completed and SHWMS

determines that the suspension should be lifted best serves the Department's goal in this action.

In sum, the nature and extent of the violations show that MDE has operated the Facility since the very beginning of its regulated history with a wholesale disregard for the Department's regulations and the Permit. The Department supported the purpose of the Facility to provide a resource recovery facility for the recycling of construction and demolition waste, but MDE's operations failed to achieve the purpose by its numerous violations of the Permit and DRGSW. Consequently, the Permit's authority to receive any solid waste should be suspended until MDE is able to show to the Department's satisfaction that it is able to comply with the Permit and DRGSW. The Department sets forth three months as a reasonable time frame for MDE to make the necessary changes to the Facility in order to have SHWMS lift the suspension upon full compliance. Nothing in this Order shall interfere with SHWMS' regulatory authority over the Facility, including amending the Permit, seeking monetary penalties of up to \$10,000 for each day the Facility does not comply with the Permit or DRGSW, pursuing designation of the Facility as a Chronic Violator, or granting an extension in the three-month compliance schedule for good cause shown.

Conclusions

In sum, as more fully described in the reasons and findings above and in the Report, I adopt and direct the following as a final order of the Department:

1. The Department has jurisdiction under its statutory authority to suspend or revoke the Permit after a hearing that provided MDE with an adequate opportunity to be heard; and that

2. MDE was provided a hearing and an adequate opportunity to be heard on alleged violations of the Permit and DRGSW; and that
3. The record supports the suspension of permit no. SW/08/03's authority insofar as it allows the receipt of any solid waste at the Facility and the suspension shall be lifted when SHWMS determines that MDE is capable of operating the Facility in full compliance with the regulatory duties required by the Permit and the DRGSW; and that
4. The effective date of the Permit suspension shall be ten days after the Department's publication of the legal notice of the suspension; and that
5. MDE shall not accept any C&D waste from any haulers of this decision beginning with the effective date of the suspension, but shall be able to properly manage and dispose of the excess materials currently stored at the Facility in violation of the Permit;
6. MDE shall have three months from the effective date of this Order to have the Facility in full compliance with the Permit and SHWMS, which shall be determined by SHWMS's written approval of the corrective action taken;
7. MDE's failure to achieve full compliance within three months may result in the Department's assessment of monetary penalties and fines as authorized by the law to the maximum extent possible for each day the Facility is not in full compliance and commencement of the process to designate the Facility as a Chronic Violator;
8. Notwithstanding the three months to comply with this Order by undertaking such corrective actions to bring the Facility into compliance and reduce the

amount of waste stored at the Facility, MDE shall continue to be subject to the Permit's and DRGSW's requirements, including conducting tests and submitted reports to SHWMS. MDE's failure to abide by the Permit and RGSW may be subject to additional assessment of fines and penalties as authorized by the law; and that

9. The Department shall publish this Order on its web site and shall provide legal public notice as may be required by the law or regulation.



Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Solid and Hazardous Waste Management Section, Division of Waste and Hazardous Substances v Mike Davidson Enterprises, LLC Notice to Suspend Resource Recovery Permit No. SW/09/03

DATE: April 2, 2013

I. PROCEDURAL HISTORY

This Report reviews an administrative record developed for the Secretary of the Department of Natural Resources and Environmental Control's (Department) decision on the Division of Waste and Hazardous Substances, Solid and Hazardous Waste Management Section's¹ (SHWMS) notice to suspend Resource Recovery Permit No. SW09/03 (Permit) that SHWMS issued to Mike Davidson Enterprises, LLC (MDE). The following is the procedural chronology:

1. On September 24, 2012, Nancy Marker, Environmental Program Administrator of SHWMS issued MDE a 'Notice of Intent to Suspend the Resource Recovery Permit No. SW09/03.' The notice provided MDE with thirty days to request a public hearing.
2. On September 26, 2012, public notice of the notice was published.
3. On October 22, 2012, MDE timely requested a public hearing.
4. On November 9, 2012, I sent the parties a letter indicating the hearing's procedures and requested the parties provide suggested hearing date.
5. The parties submitted suggested hearing dates, and I approved January 15, 2013 in a November 28, 2012 letter.
6. On December 7, 2013, SHWMS submitted proposed findings of fact and list of its proposed witnesses and evidence.
7. On November 30, 2012, MDE's new counsel requested an extension of the procedural schedule until June 2013, which SHWMS opposed.

¹ SHWMS is delegated the Department's authority for regulating resource recovery facilities including issuing permits and prosecuting the enforcement of permits.

8. On December 10, 2012, I denied MDE's motion to postpone the procedural schedule until June 2013, but I provided MDE more time to respond to SHWMS' proposed findings.
9. On December 11, 2012, MDE filed a motion to dismiss the proceeding citing lack of statutory authority to suspend a permit, which SHWMS opposed in an email.
10. On December 14, 2012, I denied MDE's request to take depositions and I provided a schedule for discovery by written interrogatories.
11. On December 21, 2012, MDE requested subpoenas for 7 witnesses.
12. On December 21, 2012, MDE submitted its proposed findings and witness and evidence list.
13. On January 9, 2013, an informal conference call was held to discuss compelling the appearance of 7 MDE witnesses.
14. On January 15, 2013, a pre-hearing conference was scheduled. After hearing oral argument, I denied MDE's motion to dismiss the proceeding. The hearing commenced with the direct examination and cross examination of SHWMS witness Jim Short.
15. On February 11, 2013 the hearing continued with further cross-examination of Mr. Short, the direct and cross-examination of SHWMS witness Mindy Anthony, and SHWMS rested its direct case that included documents admitted as SHWMS exhibits Nos. 1-66. MDE presented Garth Jones, Gregory Scott and the direct examination of Michael Davidson.
16. On February 12, the hearing continued with the further direct examination of Mr. Davidson and his cross-examination, and the direct and cross examination of MDE witnesses Joanna French, Arlene Seaman, and George Barstar. MDE submitting documents as exhibits identified as MDE Ex. Nos. 1-24.
17. SHWMS provided a rebuttal witness Robert Underwood.
18. On March 15, 2013, the parties submitted their post-hearing memorandums based upon an agreed upon schedule that I approved by email.

SHWMS was represented by:

Ralph K. Durstein, III, Esquire, Deputy Attorney General
Delaware Department of Justice
820 N. French Street.
Wilmington, DE 19801

MDE was represented by:

Glenn C. Mandalas, Esquire
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103 S. Bradford Street
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and
appearing pro hac vice

Stuart J. Lieberman, Esquire
Micheal G. Sinkevich, Jr., Esquire
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II. THE RECORD OF DECISION

This Report reviews an evidentiary hearing record from the January 15, and February 11-12, 2013 hearings, which is set forth in a 990 page verbatim transcript. The parties introduced documents as exhibits. SHWMS presented James Short and Mindy Anthony to support its direct case and presented Robert Underwood on rebuttal. MDE presented Garth Jones, Gregory R. Scott, Michael Davidson, Joanna French, Arlene Seaman and George Barstar to support its direct case. All witnesses provided sworn testimony and were subject to a reasonable time for cross-examination.

III. RECOMMENDED FINDINGS

The recommended findings set forth the regulatory history of the Facility and are based upon documents introduced as evidence and the witnesses' testimony.

- 1) On February 19, 2008 and March 12, 2008, SHWMS sent MDE letters after a site visit on February 7, 2008. The letters indicated that MDE was operating a construction and demolition facility, which required a resource recovery permit. The letter cited June 5, 2007 and January 8, 2008 meetings with SHWMS representatives. MDE Ex. 17.
- 2) On December 2, 2008, MDE submitted an application to SHWMS for a permit to operate a resource recovery facility in an unincorporated area of Kent County at 3051 Willow Grove Road (Facility). SHWMS Ex. 2.
- 3) The Facility is located on land that MDE leases from 5500 Anderby Hall Road, LLC, which is owned by MDE's owner, Mike Davidson. 5500 Anderby Hall Road LLC also owns most of the land that surrounds the Facility. SHWMS Ex. 2.
- 4) On June 18, 2009, SHWMS received MDE's revised application. SHWMS Ex. 2.
- 5) On June 25, 2009, SHWMS Environmental Program Manager Robert Underwood issued MDE a temporary authorization to operate a construction and demolition recycling facility until October 27, 2009. MDE Ex. 7.
- 6) On October 23, 2009, SHWMS's Mr. Underwood authorized MDE temporary approval to operate. MDE Ex. 7.
- 7) On October 28, 2009, SHWMS' Mr. Underwood authorized MDE temporary approval to operate until November 6, 2009. MDE Ex. 7.
- 8) On November 6, 2009, SHWMS issued MDE resource recovery permit SW/09/03 (Permit) that authorizes MDE to operate the Facility for five years, or until November 6, 2014. SHWMS Ex. 1.
- 9) The Permit applies to the "process of receiving, sorting, and recycling construction and demolition(C&D) waste at the Facility. SHWMS Ex. 1 (I.A.).

- 10) The Permit provides that the Department may revoke the Permit upon a violation of any condition and pursuant to the Department's laws and regulations. SHWMS Ex. 1 (I.H).
- 11) The Permit authorizes the receipt of "loads of C&D waste resulting from new construction (leftover or scrap wastes, etc.), and from the demolition of aged houses and other structures." SHWMS Ex. 1 (II.A.).
- 12) The Permit prohibits the receipt of various wastes, but if any prohibited waste is discovered within accepted C&D waste, then the prohibited waste is to be removed from the Facility within 72 hours of initial receipt. SHWMS Ex. 1 (II.B.).
- 13) The Permit provides for inspection of all incoming truckloads of C&D waste by a weigh master before unloading. SHWMS Ex. 1 (III.A.1).
- 14) The Permit requires that all accepted C&D waste is to be dumped on the designated concrete sorting pad, where it is to be again inspected for prohibited waste. SHWMS Ex. 1 (III. A. 2).
- 15) The Permit requires that all accepted C&D waste be removed from the sorting pad and loaded on a conveyer to be taken to the sorting building and subject to a positive pick line to sort the materials by type of waste and transferred to roll-off containers located outside of the building. SHWMS Ex. 1 (III.A.3).
- 16) The Permit requires use of a concrete storage pad to receiving for all loads of C&D waste. SHWMS Ex. 1 (III.B.).
- 17) The Permit requires that any non-recyclable waste be stored in roll-off containers and be sent to disposal within 72 hours of becoming full. SHWMS Ex. 1 (III.B.2).
- 18) The Permit requires that the total amount of C&D waste stored at the Facility at any one time is the sum of: a) the total amount of unsorted C&D waste, b) the total amount of C&D waste determined needed to be disposed in a landfill, and c) the total amount of C&D mulch produce that does not achieve performance criteria for the analytical parameters listed in Section III. H of the Permit. SHWMS Ex. 1 (III.B.6)
- 19) The Permit requires at least quarterly sampling and analysis of C&D mulch produce grab samples for the Alternative Daily Cover (ADC) market. SHWMS Ex. 1 (H.1).
- 20) The Permit requires three phases of sampling and analysis of C&D mulch produce grab samples for residential/commercial use. SHWMS Ex. 1 (H.2).
- 21) The Permit requires MDE to report immediately to SHWMS any fires. SHWMS Ex. 1 (III.I).
- 22) The Permit requires MDE to report quarterly to SHWMS the results of C&D mulch product analysis conducted for the prior three months and the quantity of C&D waste received, the quantity sold or sent for recycling, the quantity sent for final disposal, and the quantity on C&D waste stored on site. SHWMS Ex.1 (.III.I).
- 23) The Permit requires MDE to report annually to SHWMS on or before February 15 a summary of the prior quarterly reports, the list of recycling facilities used and the list of solid waste transporters. SHWMS Ex. 1 (III.I)
- 24) The Permit requires MDE to submit with its annual report an updated closure cost estimate that takes into account inflation, the current cost to remove solid waste, and the maximum amount of solid waste stored on the site at any one time during the preceding year. If the cost estimate increased, then an updated irrevocable standby letter of credit must be provided within six weeks of the updated cost estimate. SHWMS Ex. I. (III.I).
- 25) The Permit did not authorize any long-term storage of any goods to be recycled and no long-term storage of recyclable goods was set forth in the Plan of Operation,

- which instead indicated dry wastes would be recycled and that metal waste would be sold to a scrap dealer, concrete waste would be transported to Queentown, Maryland for re-use, and wood would be made into mulch. All other waste would be transported to a landfill. Including glass, plastic and brick. SHWMS Ex. 2.
- 26) The application for the Permit indicated that the maximum daily tonnage expected was 800 tons and 4,500 tons a weeks. SHWMS Ex. 2.
 - 27) The application contained a proposed Plan of Operation that included the components that were included in the Permit, including the weigh master inspection, the tipping of truck loads on a 200'x200' concrete sorting pad, the waste inspection on the pad, the removal of waste to the sorting building, the use of a positive pick line to sort waste, and the removal of waste from the building within 72 hours after it has entered the building. SHWMS Ex. 2
 - 28) The Plan of Operation indicated that all unwanted debris will be loaded and trucked to a landfill and held no longer than 7 business days.. SHWMS Ex. 2.
 - 29) The application documents show that the Facility would be on 35.67 acres identified as tax parcel NM-00-116.00-01-0700-000, which Kent County regulates for land use zoning with a split zoning.
 - 30) The Kent County split zoning has 17.95 acres in agricultural residential (AR) zoning the area farthest from Willow Grove Road/State Route 10, and the Parcel's area nearest Willow Grove Road/ Route 10 is zoned general industrial (IG) and which is improved by a 100,201 square foot warehouse and other smaller buildings. SHWMS Ex. 2.
 - 31) On June 5, 2007, Kent County Levy Court approved a conditional use permit for wood recycling storage (Mulch) on 17.95 acres zoned AR and for Waste Management Facility/Transfer Station on the remaining 17.72 acres IG zoned area, which once been used as a pickle factory. SHWMS Ex.2.
 - 32) The record contains maps showing the zoning of the Parcel, but the Parcel does not have any physical boundary between the two areas based upon the survey.
 - 33) On November 19, 2009, SHWMS met with MDE to discuss the permit's conditions. SHWMS Ex. 57.
 - 34) On November 24, 2009, MDE wrote to SHWMS seeking confirmation and clarification on the Permit's conditions. MDE Ex 17.
 - 35) On January 27, 2010, SHWMS wrote to MDE in response to MDE's November 24, 2009 letter that provided some clarifications of the Permit. MDE Ex. 17.
 - 36) On January 14, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated February 2, 2010 that determined violations in the amount of waste managed exceeded the Permit's limit of 2,400 tons, the improper storage of t unprocessed waste on the ground and not on the concrete pad, and the accumulation of non-recyclable material described as "fines." The Report also cited a possible air quality violation for using a burn barrel to keep the workers warm. SHWMS Ex. 7.
 - 37) On February 8, 2010, MDE submitted its quarterly report for October 2009 through December 2009, which was due January 15, 2010. SHWMS Ex. 31.
 - 38) On February 24, 2010, MDE submitted its Annual Report for 2009, which was due on February 15, 2010. SHWMS Ex. 28.
 - 39) On March 9, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated March 11, 2010 that found violations in the amount of waste on the concrete pad that had not been processed in 72 hours, the storage of waste on

- the ground and not on the concrete pad, and the storage of sorted waste directly on the ground and not in roll-off containers. SHWMS Ex. 8.
- 40) On March 18, 2010, MDE wrote to SHWMS to follow up its November 24, 2009 letter on clarification of the Permit.
 - 41) On April 6, 2010, SHWMS issued MDE Notice of Violation 10-SW-01, which was based upon alleged permit violations in the sampling and analysis that SHWMS' personnel observed during January 14, 2010 and March 9, 2010 visits to the Facility. The Notice provided MDE 30 days to comply before any enforcement action would be taken. SHWMS Ex. 3.
 - 42) On April 30, 2010, MDE submitted its quarterly report for January 2010 through March 2010, which was due April 15, 2010. SHWMS Ex. 32.
 - 43) On May 10, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated May 10, 2010 that describes violations. SHWMS Ex. 9.
 - 44) On May 12, 2010, SHWMS met with MDE to review compliance issues. SHWMS Ex. 58.
 - 45) On May 17, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated May 24, 2010 that indicated some progress but also continued violations. SHWMS Ex. 10.
 - 46) On June 2, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated June 14, 2010 that found progress but also continuing violations. SHWMS Ex. 11.
 - 47) On June 15, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated June 22, 2010 that no progress was made in removing waste since the last visit, but that there was progress in organizing the materials at the back of the site. SHWMS Ex. 12.
 - 48) On June 30, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated July 2, 2010 that noted violations. SHWMS Ex. 13.
 - 49) On August 17, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated August 26, 2010 that described violations. SHWMS Ex. 14.
 - 50) On December 21, 2010, MDE submitted its quarterly report for August 2010 through October 2010, which was due October 15, 2010. SHWMS Ex. 34.
 - 51) On August 31, 2010, MDE submitted its Toxic Characteristic Leaching Procedure (TCLP) report dated June 17, 2010. SHWMS Ex. 33.
 - 52) On November 24, 2010, SHWMS conducted a compliance assessment on the Facility and prepared a report dated November 30, 2010 that described violations. SHWMS Ex. 15.
 - 53) On March 15, 2011, SHWMS conducted a compliance assessment on the Facility and prepared a report dated April 4, 2011 that described violations. SHWMS Ex. 16.
 - 54) On April 7, 2011, MDE submitted its Annual Report for 2010, which was due on February 15, 2011. SHWMS Ex. 29.
 - 55) On June 6, 2011, SHWMS conducted a compliance assessment on the Facility and prepared a report dated June 30, 2011. SHWMS Ex. 17.
 - 56) On October 20, 2011, SHWMS conducted a compliance assessment on the Facility and prepared a report dated November 1, 2011 that described violations. SHWMS Ex. 18.

- 57) On December 12, 2011, SHWMS conducted a compliance assessment on the Facility and prepared a report dated December 15, 2011 that described numerous violations. SHWMS Ex. 19.
- 58) On April 11, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated April 17, 2012 that described numerous violations. SHWMS Ex. 20.
- 59) On May 3, 2011, MDE submitted its Annual Report for 2011, which was due February 15, 2011. SHWMS Ex. 30.
- 60) The record reflects documents showing MDE's quarterly reports for November 2010 through January 2011 but the record lacks any indication of when received or sent. SHWMS Ex. 35.
- 61) On May 3, 2011, MDE submitted monthly reports for all of 2011 and the first quarter of 2012 and an updated closure plan. SHWMS Ex. 37.
- 62) On November 7, 2011, MDE submitted monthly reports for February 2011 through September 2011. SHWMS Ex. 36.
- 63) On January 5, 2012, SHWMS' William Miller, Environmental Program Manager I, contacted Kent County's Planning Supervisor to find out if MDE had land use approvals, and Kent County official responded indicating that MDE was in violation of conditional land use approvals for a waste transfer station/recycling facility and a mulching operation. SHWMS Ex. 56.
- 64) On April 30, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated May 10, 2012 that described violations. SHWMS Ex. 21.
- 65) In a May 4, 2012 email, MDE representative Arlene Seaman complained about the problems with SHWMS claiming non-receipt of documents that MDE claimed had been delivered. SHWMS Ex. 46.
- 66) On May 4, 2012, SHWMS Environmental Scientist Jim Short acknowledged the receipt of the documents that MDE had hand delivered, but also indicated that MDE filed late and that the reports were not complete. SHWMS Ex. 47.
- 67) On May 9, 2012, SHWMS issued MDE Notice of Violation 12-SW-05, which was based upon 11 specific violations or the permit or Department regulations as determined by SHWMS' personnel on April 11, 2012 and April 30, 2012 visits to the Facility. SHWMS Ex. 4.
- 68) On May 17, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated May 29, 2012 that described violations. SHWMS Ex. 22.
- 69) An analytical report by Test America was prepared for Mr. Short dated June 1, 2012 based upon samples collected May 19, 2012. SHWMS Ex. 48.
- 70) The test results from Test America, as summarized by SHWMS, showed excessive levels of arsenic in course mulch and fine mulch samples. SHWMS Ex. 49.
- 71) On June 8, 2012, the Department issued Secretary's Order to Cease and Desist, Order No 2012-WH-0020 that cited MDE for violations of the Permit's sampling and analysis requirements for mulch. SHWMS Ex. 5.
- 72) On June 28, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated June [sic] 21, 2012 that described violations. SHWMS Ex. 23.
- 73) On July 13, 2012, MDE submitted monthly reports for April-June 2012. SHWMS Ex. 38.
- 74) On July 16, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated July 19, 2012 that described violations. SHWMS Ex. 24.

- 75) An analytical report by Test America was prepared for Mr. Short dated July 26, 2012 based upon samples collected July 18, 2012. SHWMS Ex. 50.
- 76) The test results from July 18, 2012, as summarized by SHWMS, showed excessive levels of arsenic in all mulch samples. SHWMS Ex. 51.
- 77) On August 3, 2012, the Department issued a Notice of Conciliation and Secretary's Order, Order No.2012-WH-0030 that cited MDE for violations of the permit's sampling and analysis and the reporting and recordkeeping as SHWMS personnel determined from May 17, 2012 and July 16, 2012 visits to the Facility. SHWMS Ex. 6.
- 78) On August 16, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated August 17, 2012. SHWMS Ex. 25.
- 79) On September 19, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated September 26, 2012. SHWMS Ex. 26.
- 80) On November 5, 2012, SHWMS conducted a compliance assessment on the Facility and prepared a report dated November 13, 2012. SHWMS Ex. 27.
- 81) On November 15, 2012, MDE submitted monthly reports for July-October 2012, which should have been the quarter ending September and due October 15, 2012. SHWMS Ex. 39.
- 82) The SHWMS sent MDE reminders for filing the reports and noted missing information in the annual report. SHWMS Ex. 40, 41, 42, 43, 44, and 45.
- 83) On September 4, 2012, SHWMS sent MDE a reminder to pay the annual permit fee and billed MDE for the testing of samples taken on May 17, 2012 and July 16, 2012. SHWMS Ex. 52, 53.
- 84) SHWMS prepared a table for the hearing on MDE's reported tonnage of waste received and the tonnage of waste either disposed, sold or stored. SHWMS Ex. 59.
- 85) MDE did not apply to amend the Permit or the associated plan of operations to reflect changes that MDE unilaterally made to the operations of the Facility that were not allowed by the Permit or the plan of operations.
- 86) MDE did not provide timely reports to SHWMS and failed to provide complete required information in the reports that were provided.
- 87) MDE accepted waste that was not authorized waste as shown by the photographic evidence of tires and other waste to be recycled that was not from C&D.
- 88) MDE maintained waste at the Facility longer than allowed by the permit or DRGSW.
- 89) MDE expanded its C&D waste operations outside of its permitted boundaries. SHWMS Ex. 61, Ex 62 and testimony of Jim Short.
- 90) MDE abandoned the approved Plan of Operations when it removed the pick line and its use of roll-off containers, which causes all waste to no longer be processed properly according to the Permit.
- 91) MDE routinely stores at least 30,000 tons of waste at the Facility for periods longer than 72 hours, which is an amount above the allowed 2,400 tons allowed by the Permit at any one time and for a limited duration of 72 hours.
- 92) MDE stores waste on the ground in violation of the Permit that require all waste to be placed on the concrete pad and then sorted in the building by placement into roll-off containers.
- 93) MDE stores waste on the concrete pad overnight without use of a tarp to cover the waste.
- 94) MDE fails to properly submit complete reports on time.

- 95) MDE fails to properly maintain records of equipment repair, fire department inspections and personnel training.
- 96) MDE's application showed that the 100 year flood plain was within the Facilities boundaries in the area zoned AR that was to be only used for wood mulch operations, but the record does not support any finding that the operation in the floodplain was in violation of the Permit.
- 97) While SHWMS may not have provided MDE with the compliance assessment reports that were prepared, the reports indicate that SHWMS informed MDE of the violations at the time of the inspection and I find that MDE knew or should have known of SHWMS' position that the Facility was in continuing violation of numerous Permit conditions and MDE did nothing to correct the violations with the exception of the fire protection service.

The above findings are a foundation for the following discussion, which will address each of SHWMS' twenty-six alleged violations. SHWMS' post-hearing memo combined the violations for purpose of its argument and as noted below several violations overlap. MDE's post-hearing memo addressed each alleged violation separately.

IV. DISCUSSION

Violation 1- Operating outside of authorized areas

SHWMS claims that MDE is managing C&D waste outside of the area authorized by the Permit. SHWMS memo at 3. MDE claims no violation of the Permit occurred because the Permit does not regulate wood mulching or the area zoned AR, which MDE claims is used for wood mulching operations, land clearing material, or stockpiled recyclable good waiting to be sold. MDE memo at 6.

The record supports finding that MDE was managing solid waste outside of authorized areas. First, I find that the Permit regulates any solid waste management within the entire 35.67 acres that MDE leases from 5500 Anderby Hall Road, LLC. This finding is based upon MDE included the entire parcel in its permit application for a resource recovery facility permit. In addition, this interpretation is consistent with DRGSW, which defines a "Facility" as including "all contiguous land, and structures, other appurtenances, and improvements on the land, used in

resource recovery and/or the treatment, handling, composting, storage, or disposal of solid waste.” 7 *Del. Admin. Code* 1300.

The facts support a finding that MDE has expanded its solid waste management operation beyond the borders of the 35.67 acres based upon the testimony of Jim Short and the aerial photographic evidence of MDE using the land beyond the borders. Looking at SHWMS Ex. 52 compared to SHWMS Ex. 51 shows the expansion. This expansion also was observed by Mr. Short during his many site visits, and the photographs that other SHWMS personnel took during the frequent compliance assessment inspections.

The fact that the adjoining land surrounding the Facility is owned by the same owner as land that MDE leases for the Facility does not make the expansion of MDE’s lawful under the Department’s regulation. Instead, it avoids complaints from the landowner. MDE could have sought approval of such an expansion from both Kent County and the Department, but MDE did not. Instead, MDE unilaterally and unlawfully expanded the resource recovery facility beyond the area authorized by the Permit and Kent County.

The second part of this violation is the land use within the 35.67 acres. MDE apparently considers that the Department has no authority to regulate MDE’s wood mulching operations in the AR zone. This is incorrect. The Department has authority to regulate the use of wood from C&D waste when recycled into wood mulch product and the Permit clearly shows this exercise of waste management authority. Wood mulch from C&D waste is not to be commingled with other wood mulch and is subject to extensive testing and reporting requirements in order to protect the environment and public health from pollutants in the C&D waste being transferred to the wood mulch that is sold to the public. Thus, the Permit regulates the wood mulching of C&D waste, which Kent County’s zoning approval has limited to the Facility’s back area that is zoned AR. The Department’s regulation of MDE’s wood mulching operations as part of the Facility’s

management of C&D waste is consistent with Kent County's land use regulation even if not specifically included in the Permit as a restriction. I find that MDE violated the AR zoning and the approval of the wood mulching operation by storing waste on the area zoned AR based upon Mr. Short's testimony and the photographic evidence from the frequent compliance assessment inspections. Indeed, even MDE acknowledged that the area zoned AR was used to store products other than wood mulch that are waiting to be sold, which was not allowed by the Permit or consistent with the approved Plan of Operation.

Violation 2- Failure to pay the annual permit fee

SHWMS claimed that MDE failed to pay the annual permit fee, but at the hearing SHWMS withdrew this alleged violation. MDE also provided evidence to support its payment of the annual fee.

Violation 3-Operating the Facility within the 100 year floodplain

SHWMS claims MDE violated the Permit by operating the Facility within the 100 year floodplain by the stockpiling of solid waste within the floodplain area. SHWMS memo at 5. MDE disputes this allegation and provided expert witness testimony to support its position. MDE memo at 6-7. I find that SHWMS did not meet its burden of proof to establish by the preponderance of evidence that a violation occurred.

I find the record is uncontested that a small part of the Facility's land area is within the 100 year floodplain. MDE's maps submitted with the application showed the 100 year flood plain with the part of the property farthest from Willow Grove Road, and the plans submitted did not have any solid waste management operations on this area, which is within the AT zoned area and consequently was supposed to be used exclusively for wood mulch operations. I find nothing in the Permit to preclude the Facility from operating in a 100 year floodplain, which may be because DRGSW regulate the floodplain by not allowing the siting of a resource recovery

facility within a 100 year floodplain. The Facility received the Permit anyway, possibly due to its existing, albeit, unlawful operation as a wood mulching operation using C&D waste. MDE's expert contravened the floodplain determination originally submitted in the application, but this evidence does not dispute that part of the Facility is located in the 100 year floodplain. I agree that floodplain location is subject to change. I find that SHWMS failed to meet its burden of proof on this violation that is not regulated by the Permit and SHWMS's approval of the siting precludes it from now saying the siting is unlawful. The record is unclear whether MDE has actually used the area within the 100 year floodplain for solid waste management. I find that the initial siting decision may be re-visited whenever a permit renewal may occur consistent with the DRGSW.

Violation 4-Failure to operate the Facility in a manner that will preclude degradation of land, air, surface water, or groundwater

SHWMS claims a violation of DRGSW Section 9.4.1.1, which requires the Facility to operate in a manner that will preclude degradation of land, air, surface water or groundwater, but did not argue this alleged violation in its post-hearing memo. MDE argued that there was no evidence of any degradation of the land, air, surface water or groundwater. MDE memo at 7-8. I agree with MDE that no regulatory standards established by regulation were shown to have been violated. Nevertheless, I find that this Section of Regulation 1300 was violated based upon the potential risk to pollute from the other specific violations shown in the record.

MDE's operation of the Facility should be subject to Section 9.4.1.1 because the nature and scope of the other violations shows that MDE's operation of the Facility is so mismanaged and fails to comply with important environmental protections imposed by the Permit and DRGSW that when taken together it poses a threat to the environment and public health. As discussed below, MDE has disregarded substantial compliance with the Permit and DRGSW. MDE's operations show a lack of concern for following the law and regulations, and that it is

this lack of regulatory compliance that pose a significant risk of polluting the land, water and air in the future. The Facility is extensively regulated by the Department in order to protect the environment and public health from the risk of land, water and air pollution by the Facility, and the record shows that MDE has failed to comply with many of the Department's regulatory requirements, which I consider to be the regulatory intent of this Section that does not require any proof of violations of specific regulations on the amount of pollutants entering the water, air or land, but instead protect the environment and public health from future releases. MDE's mismanagement of the C&D waste poses a significant threat to the environment and public health from possible future releases of unlawful amounts of pollutants to the air, the water and on the land.

Violation 5-Failure to operate the Facility consistent with the approved Plan of Operation

SHWMS claims that MDE violated the Permit's Plan of Operation. The Plan of Operation was approved by SHWMS based upon what MDE submitted in its permit application. It sets forth a comprehensive plan for managing the C&D waste from its initial receipt to either final disposal in an approved manner off-site or its re-use by sale as recyclable goods. MDE proposed the following: weighing and inspecting all incoming waste at the weigh master location, dumping all incoming waste on a 200'x200' concrete sorting pad, covering any waste left overnight on the concrete pad with a tarp, transporting all accepted waste from the concrete pad to the warehouse building for processing by sorting using a magnet for metal and using a "positive pick line" for other materials. The sorting was to be into roll-off containers and the entire processing process required removal of waste within 72 hours of receipt. MDE does not dispute that the Facility is not operating consistent with the Plan of Operation, and admits that it unilaterally abandoned covering waste left overnight with a tarp, the pick line and sorting waste and recyclables into roll-off containers.

MDE made no attempt to amend the Plan of Operation or the Permit. Instead MDE unilaterally substantially changed the Facility's operations by abandoning the pick line and not using rolled-off containers. MDE's only defense to this violation is to argue that its Plan of Operation should have been amended to reflect MDE's unilateral changes. I agree that MDE should have applied to SHWMS for approval of the change before making them. The consequences of such a failure to receive approval of the changes means that MDE did not properly process any waste at the Facility, which results in a finding that all the waste MDE received did not get processed according to the approved Plan of Operation.

This violation highlights MDE's problems. MDE for some reason entered a highly regulated industry of solid waste management, but decided that it could ignore the laws and regulations that apply to every resource recovery facility. MDE's defense to this violation is to seek approval of modifications to the Plan of Operation and the Permit that MDE already implemented unilaterally and without SHWMS' approval. Even if there may be valid reasons for MDE's changes to its operations, there is no valid reason to ignore the law and regulations that require all changes to be approved by SHWMS.

In this enforcement action, MDE appears to seek approval of a modification to the Permit and the Plan of Operation or both. I do not believe that this proceeding can properly change any Permit or Plan of Operation. While the record shows informal efforts by MDE to understand the Permit, it does not have any evidence of any MDE attempt to amend the Plan of Operation or the Permit. Consequently, MDE's defense that the Plan of Operation and the Permit should have been amended fails. MDE can only blame itself for that result because it took the unilateral action and elected foolishly not to obtain regulatory approval of the many changes to its operations. These acts placed MDE on the road to SHWMS' action to force the closure of its C&D waste operations.

The importance of operating based upon an approved Plan of Operation cannot be underestimated. SHWMS may not have granted MDE any permit authority based upon its current operations. MDE in its post-hearing memo cites the deterioration of MDE relations with SHWMS. I agree that the record supports deterioration, but then SHWMS provided MDE with notice orally that MDE was in continuous violations of the Permit during each inspection. I agree that SHWMS may avoid any dispute over notice by providing MDE with the reports; it had no obligation to provide the reports. The record shows that SHWMS was patient and optimistic in the beginning, and even authorized temporary permits. SHWMS could have required MDE to close its C&D waste management operation pending a decision on the permit application. The record show that SHWMS' site inspections found multiple violations and little improvement between inspections. The record shows SHWMS began the first enforcement action against MDE on April 6, 2010 and in 2012 commenced several more culminating in this one and that the Environmental Appeals Board upheld the Department's cease and desist enforcement action. I find that the record, when taken as a whole, sets forth a regulatory history of noncompliance that justifies revoking the Permit. This would require MDE to start over with a new application and a new Plan of Operation.

In sum, I conclude that MDE failed to operate consistent with its Permit and the approved Plan of Operation, and took no action to seek regulatory approval of the many changes that MDE unilaterally implemented. MDE has only itself to blame for such a cavalier disregard of its regulatory duty to seek SHWMS' approval before changing its operations in such a significant manner by removing the pick line, the waste inspection by the weighmaster at the weigh area, the dumping of waste only on the concrete pad, the sorting into roll-off containers from the pick line.

Violation 6-Not Processing C&D waste within 72 hours of receipt

SHWMS claims a violation of DRGSW Section 9.4.2.2.4.2 by MDE's not processing incoming C&D waste within 72 hours of receipt. MDE claims that C&D waste is processed within 72 hours. This also is required by the Permit and the approved Plan of Operation. MDE disputes the credibility of SHWMS' evidence based upon the photographs and its cross examination of Jim Short.

MDE basically relies on the burden of proof to question whether SHWMS witness Short knew for sure if waste remained longer than 72 hours at the Facility without being processed. MDE memo at 10-11. I find in favor of SHWMS because I find the record establishes in MDE's own admission that MDE failed to follow its Plan of Operation. Without following the Plan of Operation, the consequence is that all of the incoming waste is not properly processed and remains solid waste and not subject to sale or reuse as recyclable goods. The record supports finding that solid waste has been kept at the Facility longer than 72 hours. I find that Mr. Short's testimony and photographic evidence convincing in the depiction of large amounts of waste at the Facility for durations longer than 72 hours. This violation is connected to the violation based upon storing more than 2,400 tons of waste at any one time because the record supports finding that more than 2,400 tons of waste was stored longer than 72 hours.

Section 9.4 of Regulation 1300 states that the time for processing the waste is to be specified by the Department. The Permit specifies under "III. Facility Operation, B. Storage" that "C&D waste will be removed from the sorting pad within 72 hours of acceptance at the facility." I agree with MDE's technical defense that the record is unclear whether specific pieces of C&D waste were processed within 72 hours. Nevertheless, the record is uncontested that the waste was never properly processed according to the approved Plan of Operation. Consequently, while SHWMS did not identify and track a piece of incoming waste from the

time it is received at the Facility to when the waste is processed, MDE's failure to properly process any waste according to the approved Plan of Operation means that no individual tracking of waste is needed because it all waste is not processed properly.

The record also is uncontested that the Plan of Operation has 72 hours storage of processed material in the building. The sorted materials will go to roll-off containers outside of the building to await market for recycling or disposition for non-recyclable material. The 72 hour time period begins when C&D is initially received by the Facility and ends when the product has been processed at the building. Processed according to the Plan of Operation means use of the positive pick line to sort the C&D waste to be either recyclable product for sale or non-recyclable waste that will be sent to final disposal. Given that MDE abandoned the pick line, the whole processing approved in the Plan of Operation now violates the Permit. Consequently, the end time period is now impossible to meet absent use of a pick line. I find that the pick line abandonment means that none of the waste is processed according to the Plan of Operation within 72 hours.

This violation also applies to the storage of recyclable products. DRGSW applies a time period limit of 30 days for holding nonputrescible recyclable material, which could be extended by the Department for a longer time period. I find that MDE has violated the 72 hour limit based upon the testimony of Mr. Short and from MDE's own witnesses who stated the need for more time to build its inventory in order to sell nonputrescible recyclable materials. Again SHWMS may have allowed MDE a longer storage time for non-perishable recyclable goods if MDE had requested more time, but the record does not show that MDE ever made such a request.

Violation 7-Storage of recyclable materials in unapproved areas

SHWMS claims that MDE violated the Permit by storing recyclable materials in unapproved areas. SHWMS memo at 3-4. MDE disputes this allegation based upon the lack if

any approved storage area in the Permit other than for wood mulch products. MDE memo at 11. I agree with MDE that the Permit does not impose any restriction on where the recyclable products are to be stored. The permit application, however, included maps of the proposed Facility. These maps do not show any storage areas for recyclable material except for wood mulch in the area zoned AR. If MDE planned to store recyclable materials anywhere on the Parcel, then such sites needed to be identified and approved by SHWMS. Consequently, any storage of recyclable material other than wood mulch anywhere except in roll-off containers is a violation of the Permit and I find that MDE has stored materials in vast amounts throughout the Parcel without any regulatory approval.

Violation 8-Failure to keep the Facility clean and maintain fire protection equipment

SHWMS claims that the overall routine maintenance and general cleanliness of the Facility constitutes a violation. MDE disputes this claim and cites its expert Mr. Barstar. MDE memo at 13. These claimed violations include the fire protection system and equipment. I find the record supports a finding that problems existed with the fire protection system and equipment, but that MDE has corrected them. I find that the determination of the routine maintenance and general cleanliness is too subjective to enforce given that a resource recovery facility manages solid waste and that business is inherently not that clean by normal standards. Nevertheless, the photographic evidence supports that MDE does not manage the waste properly with the dumping of waste at locations other than on the sorting pad and by the bulldozing of waste shingles. Indeed, these acts may be described as solid waste mismanagement, but should properly be subject of one of the many other violations, such as violation no.6.

Violation 9-Failure to dispose of nonrecyclable waste within 72 hours.

SHWMS claims that MDE fails to process the nonrecyclables after sorting within 72 hours, or 3 days. SHWMS memo at 3-4. MDE responds to this allegation by claiming no

credible proof was presented and that all incoming waste is subject to recycling. MDE memo at 13-14. I find that MDE violated this Permit requirement based upon the testimony of Jim Short and the photographic evidence of considerable amount of solid waste that either had not been timely sorted or was nonrecyclable. This issue probably has resulted in the enforcement action because of the apparent accumulation of large amounts of waste at the Facility that was estimated to be 30,000 tons. I find the same difficulty in proof as with violation No. 6 discussed above, but here vast quantity of the waste supports a finding that MDE violated this requirement in its ongoing operations and that there is no way that there is a recyclable market for all incoming waste accepted, contrary to Mr. Davidson's testimony. Again, absent any proper processing, all materials stored at the Facility should be considered to be waste and either sent to proper processing or disposal. No long term storage is allowed even for materials that may sometime in the future be sold as recyclable goods.

Violation 10-Failure to timely file complete annual reports

SHWMS claims that MDE failed to timely file the annual reports. SHWMS memo at 9-10. MDE disputes this alleged violation and claims that the requested sampling information was not based on any law or regulation. MDE memo at 14-15. I find that MDE did not file on time any of the reports that are in the record. I also find that the required sampling test information was not submitted. The record is not clear the frequency of the required sampling and testing but the Permit required it to be performed at least quarterly. I consider that Mr. Short's testimony and the documents in the record as exhibits support the finding that MDE violated this Permit requirement. I consider the failure to comply with sampling and testing to be a major violation that could endanger the environment and public safety. The documents in evidence portray a wholesale lack of compliance with the Permit administrative requirement, and the reports to be submitted are essential to effective regulation. I agree with SHWMS assessment that MDE

operates with “contempt for the law and those who enforce it,” and that the inability to comply with straight forward reporting requirement shows a “renegade operation.” The argument that there is no law or regulation on the permit’s standards is not correct. The law and regulation that authorize the Permit provide the Department with legal authority to impose limits as conditions to the Permit in order protect the environment and public safety. Moreover, if MDE sought to challenge the Permit’s limits, then it should have appealed the Permit and not raise its complaint now years later when caught not complying with the Permit’s reporting requirement.

Violation 11-Failure to update closure plan

SHWMS claims that MDE failed to update its closure plan required to be submitted with the application and updated in the annual report filings. SHWMS memo at 7. MDE denies this allegation and claims that the closure plan was updated in its annual reports. MDE memo at 14-15. Technically I find that MDE did include a closure plan, but I also find the updated that MDE submitted was based upon the flawed amount of waste at the Facility at one time as being only 2,400 tons at any one time. This update was disproven by the record that shows that the waste at the Facility was at least 30,000 tons at certain times. .

The real issue is whether the submission accurately reflects the amount of solid waste at the Facility and the estimated cost to remove the solid waste under the voluntary and involuntary closure scenarios. I find that the record supports finding that MDE’s closure plans were not genuine updates, but merely the same information provided despite the increased accumulation of waste at the Facility. This finding is based upon DRGSW that require such an updated calculation and also imposes a financial burden to provide additional financial assurance in Section 4.1.11.3.3 of Regulation 1300. Absent any indication from SHWMS that the updated closure plans were not accepted, I recommend that this allegation be dismissed. SHWMS could

have sent notice that MDE's closure plan updates were not acceptable, or provide its own estimate that MDE would have to satisfy.

Violation 12-Operation of Facility outside of authorized hours

SHWMS claims that MDE operates its resource recovery facility outside of the hours of operation in the Permit. MDE disputes this claim, which relies on MDE's web site that MDE admits was wrong. I find that SHWMS met its burden of proof on this violation by the testimony of SHWMS witness Anthony. I find that this violation is not a significant violation compared to the others if the Facility was otherwise operating lawfully, although it also may violate the zoning approvals.

Violation 13-Failure of weighmaster to inspect all incoming loads of C&D waste

SHWMS claims MDE does not inspect all of the incoming loads of C&D waste as required by the Permit. MDE does not dispute this allegation, but seeks to explain the violation as reasonable. MDE's response is that the Permit should be modified to conform to MDE's operation. I disagree with MDE explanation and find no excuse for this admitted violation or the failure to seek a permit modification before making any unilateral change in its operations.

Violation 14-Failure to transfer sorted C&D waste to roll-off containers located outside of the building

SHWMS claims MDE violated the Permit by not sorting C&D waste to roll-off containers located outside of the building. MDE admits to not following the Permit and relies on the excuse that the Permit should be modified. MDE memo at 17. I find that this violation is included in the violation of the Plan of Operation discussed in Violation 5 above.

Violation 15-Failure to properly place C&D waste on concrete sorting pad

SHWMS claims MDE violated the Permit by not properly placing C&D waste on the concrete sorting pad. MDE disputes this claim with the testimony of Mr. Davidson that flatly states all waste is dumped on the concrete pad except for some customers who already source

separate the incoming waste. I find this allegation is within Violation 5 insofar as it is based upon the Plan of Operations. Mr. Short testified to observing the dumping of incoming loads on the ground and supports his testimony by photographic evidence. I consider Mr. Short's testimony to be accurate and find a violation of the Permit. I find no basis to regulate based upon certain customers have source separated incoming loads. The fact that such unlawful dumping was done in front of Mr. Short during a visit may allow justification that such dumping procedure may be normal procedure. The dumping of unsorted waste directly on the ground may result in discharges into the groundwater that could cause pollution.

Violation 16-Failure to send non-recyclable waste for proper disposal within 72 hours of roll-off containers becoming full

SHWMS claims MDE violated the Permit by not disposing of waste within 72 hours of being processed and determined to be non-recyclable waste. MDE acknowledges that the use of roll-off containers and the pick line were abandoned in favor of a better method, and seeks a permit modification. Again this violation is of the Plan of Operation and the Permit and was discussed in violation 5 above.

Violation 17-Failure to use covered roll-off containers for storage of sorted wallboard

SHWMS cites MDE for not using covered roll-off containers as a Permit violation and MDE's response is to seek a permit modification to allow the current operation to continue. MDE describes wallboard as an emerging recyclable material. This was discussed as part of violation 5's conduct that is contrary to the approved Plan of Operation and the Permit as discussed above.

Violation 18-Failure to maintain proper size of mulch piles

SHWMS alleges a violation for the size of the mulch piles and MDE disputes the evidence in support of the claim, which is the testimony of Mr. Short. I find ample support in the

record in the testimony of Mr. Short and the photographic evidence that the mulch piles were not the size required by the Permit.

Violation 19-Failure to limit total waste at Facility to maximum of 2,400 tons at any one time

SHWMS claims that the Permit's limit was violated by the speculative accumulation of waste at the Facility in excess of 2,400 tons at any one time. MDE disputes SHWMS' interpretation of the Permit as imposing any limit on the amount of recyclable goods that may be stored at the Facility.

I find that the Permit imposes a limit on certain types of waste that should not exceed 2,400 tons at any one time. Apparently the dispute is over what constitutes "waste." MDE contends that once C&D waste is processed at the Facility it should no longer should be counted as waste for purposes of the Permit's tonnage limit. SHWMS informed MDE of its interpretation and objection to the speculative accumulation of waste at the Facility. I disagree with MDE's interpretation and find the SHWMS' interpretation is reasonable. In face of SHWMS' repeated warnings, MDE continued to store material in excess of 2,400 tons risking SWHMS' enforcement action. MDE did not seek to amend the Permit to seek greater storage capacity at the Facility than 2,400 tons.

I find that the Plan of Operation does not provide for any long-term storage of recyclable goods pending a possible future sale. MDE's position apparently relies on an overly technical reading of the Permit to defend its accumulation of material well in excess of 2,400 tons. The technical interpretation apparently is based upon the magical transformation of C&D waste into recyclable goods to be sold merely because the waste is dumped at the Facility without proper processing. I disagree that C&D waste becomes recyclable goods and not regulated by the Permit. The reasonable proper interpretation of the Permit requires protecting the environment from massive accumulation of C&D waste at the Facility well above the anticipated temporary

holding of 2,400 tons. Moreover, the magical transformation of C&D waste into something that is not regulated under the Permit assumes proper processing and as discussed above that does not occur at the Facility. The sorting of the C&D waste does not even come close to being properly done according to the approved Plan of Operation. I find the only reasonable interpretation is that the Facility's total storage of non-wood mulch products is limited to the 2,400 tons and that any other materials stored at the Facility has not been approved in the Permit or the Plan of Operation.

Violation 20-Failure to maintain proper fire protection system

This specific violation was discussed in Violation 8. I find that at one time MDE was in violation, but took corrective action to bring this into compliance.

Violation 21-Failure to properly file quarterly reports

This specific violation was established by the record that contained the filings MDE submitted.

Violation 22-Failure to meet mulch product testing requirements

This violation was established by the record that showed that MDE testing failed to meet the Permit's standards and by SHWMS' testing that showed excessive levels of pollutants in the mulch.

Violation 23-Failure to prevent acceptance of prohibited waste

SHWMS claims that the Facility accepted prohibited waste in the form of tires. I find that the record supports this violation in the photographic evidence and the testimony of Jim Short who observed the storage of tires at the Facility.

Violation 24- Failure to maintain proper records of testing

SHWMS claims that the Facility did not maintain proper records of testing and I find that the record supports this allegation and that SHWMS was required to perform its own testing to determine whether the mulch from C&D waste should be sold or disposed in a landfill.

Violation 25-Failure to maintain proper records of personnel training, major equipment maintenance and fire department inspections

SHWMS claims MDE does not maintain proper record of personnel training, major equipment maintenance and fire department inspections. I find that the record supports this allegation.

Violation 26-Failure to obtain approval for recycling waste other than allowed C&D waste.

SHWMS claims MDE manages waste other than allowed C&D waste. MDE witnesses testified to obtaining material from Kraft Foods. I find that this cannot be considered C&D waste. The Department does not want to discourage recycling, but it also does not condone wholesale disregard for its laws and regulations. MDE was not granted any permission to recycle anything other than C&D waste, which is defined in the Permit as from “new construction (leftover scrap wastes etc.), and from demolition of aged houses and other structures. The Permit did not authorize MDE to manage any other waste from other sources.

V. CONCLUSION

I find that the record supports finding that MDE violated its permit and the Department regulations, as discussed above. The violations of the recordkeeping and reporting requirements are administrative tasks, and, as such, may not seem as an appropriate ground to suspend a permit since they do not pose any direct serious harm to the environment or public health. Nevertheless, this record shows that these administrative violations prevent effective regulation and may hide significant pollution from being discovered by the regulators and that as a whole

the permit should be suspended until MDE is able to provide evidence submitted to SHMWS to allow SHWMS to determine that MDE can properly follow the law, regulations and its Permit, including any amendment thereto. I find that despite ample warnings that the violations are continuing even in the face of ongoing enforcement actions. I find particularly disturbing the attitude in changing its Plan of Operation without regulatory approval, the chronic failure to take the required samples of the mulch products, the lack of proper recordkeeping, and the mismanagement of waste that poses a significant risk of polluting the land and water.

MDE also questions the authority to suspend the Permit. I find that DRGSW grant express authority to suspend and given that regulations have the force and effect of a law, I need not look for any other authority. To the extent that MDE seeks to collaterally challenge the authority of DRGSW, I find that the authority to suspend reasonably within the inherent authority since it is less severe than the statutory authority granted to revoke. I find that the record justifies revoking the Permit, and the length of a suspension may result in defacto revocation anyway if the permit is not renewed.

Attached is a draft order consistent with this Report.



Robert P. Haynes, Esquire
Senior Hearing Officer