

**Second Amended Notice of Conciliation Proceedings, Administrative
Penalty Assessment and Secretary's Order**

Issued Pursuant to 7 *Del. C.* § 6005

Order No. 2014-WH-0009

***PERSONALLY SERVED BY AN ENVIRONMENTAL
ENFORCEMENT OFFICER***

Issued To:

Peninsula Compost Company, LLC C/O
Mr. Ken Horn, Facility Operations Manager
Wilmington Organic Recycling Center
612 Christiana Avenue
Wilmington, DE 19801

This Second Amended Assessment and Order serves to notify Peninsula Compost Company, LLC ("Respondent" or "Peninsula") that the Secretary of the Delaware Department of Natural Resources and Environmental Control ("Department") has found Respondent in violation of 7 *Del. C.* Chapter 60, 7 DE Admin Code 1301, Delaware's *Regulations Governing Solid Waste* ("DRGSW") and Beneficial Use Determination ("BUD") #29C/082513. Accordingly, the Department is issuing this Second Amended Notice of Conciliation Proceedings, Administrative Penalty Assessment and Secretary's Order ("Order"), pursuant to 7 *Del. C.* § 6005.

When this Order becomes final (either upon signature of the Waiver portion of this Second Amended Assessment and Order and payment of the penalty assessed herein or upon expiration of the time to request a hearing without one being requested), this Second Amended Assessment and Order will supersede and withdraw Amended Notice of Conciliation Proceedings, Administrative Penalty Assessment and Secretary's Order No. 2013-WH-0056, issued to Respondent on December 6, 2013, which superseded Notice of Conciliation Proceedings, Administrative Penalty Assessment and Secretary's Order No. 2013-WH-0027, issued to Respondent on July 25, 2013 ("original Order").

BACKGROUND

Respondent owns and operates Wilmington Organic Recycling Center (“WORC”), a commercial food and yard waste composting facility located in Wilmington, Delaware. WORC operated under BUD #29C/082513, issued first by the Department on August 25, 2008 and subsequently modified on January 27, 2012, to accept and process hatchery waste, food waste, yard waste, wood waste, and animal bedding, in order to produce compost on Tax Parcel Numbers 2606300018, 2606300019, and 2606600005, located at 612 Christiana Avenue in Wilmington.

“Compost means a product of composting that has been stabilized to a humus-like product, is free of pathogens at an infectious level and of viable plant seeds, that does not attract insects or vectors, can be handled and stored without nuisance, and is beneficial to the growth of plants” (DRGSW, February 21, 2011). The composting process begins with mixing particular wastes together to achieve a specific carbon to nitrogen ratio that is optimal for the composting process.

At Peninsula, once the desired mixture is blended, it is placed in windrows (elongated piles) for the first of three phases of the composting process as described by Peninsula. During the first two phases of the process, the windrows are covered with a GoreTex® fabric designed specifically for composting, which helps to manage air and moisture and helps to reduce odors. Healthy compost piles generate moderate heat. Accordingly, probes are inserted into the piles to monitor temperature and oxygen, both of which are critical to the composting process. The probes send continuous readings to a computer that turns blowers on and off, as necessary, to meet pre-set parameters.

During the third phase of the composting process, the windrows are completely uncovered. Once this phase is complete, the compost is run through a screen and is ready to be distributed to end users.

On February 25, 2013, Department representatives conducted a compliance assessment at Peninsula. During the assessment, eight (8) violations of BUD #29C/082513 were identified. Department representatives observed wood waste piles, Phase 3 windrows, and yard waste storage; all exceeding their size limit parameters. Department representatives also observed storage of feedstocks, unscreened compost, and finished product outside of the BUD-approved boundary limits, without any type of approval from the Department (see area delineated on the attached map, as a portion of 601 Christiana Avenue (hereinafter “601 Christiana Avenue”). Additionally, Department representatives observed prohibited waste including painted wood (at 601 Christiana Avenue) and plastic in the form of plastic bags (at both 601 Christiana Avenue and the BUD-approved site).

Department representatives determined as well that based on the quantity of material on both the BUD-approved site and the unapproved site at 601 Christiana Avenue, along with the closure cost estimate that Respondent reported in its 2012 annual report, Respondent’s current financial assurance was inadequate.

Consequently, the Department issued NOV No. 13-SW-03¹, dated March 11, 2013, to Respondent, requiring compliance within twenty (20) days of receipt of the NOV and documented proof of compliance within thirty (30) days of receipt of the NOV. Respondent responded to the violations in a letter dated March 19, 2013, in addition to requesting a meeting with the Department.

The Department met with Respondent on April 4, 2013, wherein Respondent provided written documentation indicating that the windrow piles that had exceeded their size limits on the BUD-approved site were now in compliance. Respondent indicated that Peninsula had submitted for review and approval a modified operations plan to the Department to address the material stored on the currently unapproved site at 601 Christiana Avenue and, at the Department's insistence, further agreed to submit to proof of the existence of current markets for their compost material. Respondent agreed to send letters to its customers to inform them that delivered waste cannot contain plastic bags as they constitute a prohibited waste. Respondent agreed as well to submit an updated financial assurance estimate for review by the Department prior to modifying their current letter of credit.

On April 24, 2013, Department representatives conducted an unannounced follow-up compliance assessment at Peninsula to monitor Respondent's progress. During that assessment, the Department determined that Respondent had corrected three (3) violations that were identified during the February compliance assessment, however, a majority of the violations were continuing and one new violation was discovered. The new violation and an odor violation that was documented in previously in NOV 12-SW-43, brings the total number of BUD violations included within this Order to ten (10). Included as well are two (2) statutory violations, for a total of twelve documented (12) violations addressed in this Order.

On April 24, 2013, feedstocks, unscreened compost, and finished product were all still being stored outside of the property boundary specified in the BUD; some Phase 3 windrows still exceeded the maximum width specified in the BUD; prohibited waste, consisting of plastics, in the form of plastic bags, was observed being unloaded; financial assurance continues to be inadequate; facility operations were not being conducted according to Peninsula's June 2008 Operations Plan; and daily records of incoming and outgoing material were not immediately available for inspection by the Department.

Respondent repeatedly operated composting windrows above approved size limits. Compost piles that exceed their regulated size parameters are at much higher risk for spontaneous combustion; an elevated concern since there have been fires on three (3) separate occasions (April 8, 2012, April 9, 2012, and May 13, 2013) involving Peninsula at the WORC or at Peninsula's facility.

¹ NOV's for similar violations were previously issued to Respondent on August 19, 2011 (NOV 11-SW-27) and on June 7, 2012 (NOV 12-SW-43).

**FINDINGS OF FACT AND VIOLATION INCLUDING STATUTORY,
REGULATORY, AND BUD REQUIREMENTS**

1. **Seven Del. C. § 6003(a)(4) states in part:**

“(a) No person shall, without first having obtained a permit from the Secretary, undertake any activity...”

(4) In a way which may cause or contribute to the collection, transportation, storage, processing or disposal of solid wastes, regardless of the geographic origin or source of such solid wastes; or...”

Section 4.1.1.1 of DRGSW states:

“No person shall engage in the construction, operation, material alteration, or closure of a solid waste facility, unless exempted from these regulations under Section 2.3, without first having obtained a permit from the Department.”

On February 25, 2013, Department representatives determined that the height of the ground wood waste pile outside the receiving building exceeded the limit specified in the BUD. On February 25, 2013 and April 24, 2013, Department representatives determined the width of the Phase 3 windrows on the western side of the BUD-approved site exceeded the limit specified in the BUD. Also on February 25, 2013 and April 24, 2013, Department representatives determined that approximately 28,597 cubic yards and more than 18,903 cubic yards, respectively, of feedstocks, unscreened compost, and finished product, were being stored outside of the approved boundary limits specified in both the BUD and the site plan submitted with Respondent's BUD application; violations of 7Del. C. § 6003(a)(4) and Section 4.1.1.1 of DRGSW.

2. **Seven Del. C. § 6025(b) states:**

“(b) No person shall cause or contribute to the disposal or discharge of solid waste anywhere in the State including any surface or ground water, except:

(1) Through municipal or private solid waste collection systems which have received a permit from the Department; or

(2) In solid waste disposal facilities which have received a permit from the Department; or

(3) In containers specially provided for solid waste collection by any state or municipal agency or private or public group, organization, agency, or company which has received a permit from the Department.”

On February 25, 2013 and April 24, 2013, Department representatives determined that approximately 28,597 cubic yards and more than 18,903 cubic yards, respectively, of feedstocks, unscreened compost, and finished product were being stored outside of the approved boundary limits specified in both the BUD and the site plan submitted with Respondent's BUD application; violations of 7Del. C. § 6025(b) and Section 4.1.1.1 of DRGSW.

3. Section III.D of BUD #29C/082513 states in part:

"The yard and/or wood waste pile contained in the outside storage area shall have a maximum height of no greater than 12 feet."

On February 25, 2013, Department representatives determined the height of the ground wood waste pile outside of the receiving building to be fifteen (15) feet, a violation of Section III.D of BUD #29C/082513.

4. Section I.A of BUD #29C/082513 states in part:

"...issues Beneficial Use Determination #29C/082513 (Approval) to Peninsula Compost Company, LLC (Peninsula) for accepting and processing hatchery waste, food waste, yard waste, wood waste, and animal bedding to produce compost on Tax Parcel Nos. 2606300018, 2606300019, and 2606600005 located on 612 Christiana Avenue in Wilmington, Delaware..."

Section III.D of BUD #29C/082513 states in part:

"Yard waste and wood waste shall be stored inside the receiving building or in the designated outside storage area."

Section IV of BUD #29C/082513 states in part:

"Product: Finished compost shall be stored outside, in the designated finished product storage and screening area..."

On February 25, 2013 and April 24, 2013, Department representatives determined that approximately 28,597 cubic yards and more than 18,903 cubic yards, respectively of feedstocks, unscreened compost, and finished product were being stored outside the approved boundary limits specified in both the BUD and the site plan submitted with Respondent's BUD application; violations of Sections I.A, III.D, and IV of BUD #29C/082513.

5. Section III.G of BUD #29C/082513 states:

"No composting windrow shall exceed 185 feet in length, 26 feet in width, or 15 feet in height."

On February 25, 2013 and April 24, 2013, Department representatives observed that the Phase 3 windrows on the western side of the compost processing area were not sized according to the limits specified in the BUD. In February Department representatives determined the width of the pile to be approximately 207 feet. In April, Department representatives determined the width of two piles to be 45 feet and 51 feet; violations of Section III.G of BUD #29C/082513.

6. Section III.D of BUD #29C/082513 states in part:

"The outside storage area shall contain no more than 470 cubic yards of any combination of yard waste and wood waste. This waste can be stored as ground or un-ground material."

On February 25, 2013, Department representatives determined that the volume of wood and yard waste in the outside storage area was approximately 1,469 cubic yards, which is three times the specified limit; a violation of Section III.D of BUD #29C/082513.

7. Section IV of BUD #29C/082513 states in part:

"Product: Finished compost ... shall not exceed 25,000 cubic yards in volume nor 18,750 tons in weight."

On February 25, 2013, Department representatives determined that the volume of finished product stored was approximately 30,630 cubic yards, nearly 23% more than the specified limit; a violation of Section IV of BUD #29C/082513.

8. Section II.P of BUD #29C/082513 states in part:

"Prohibited Waste Types: 1. Plastics... 2. Painted, stained or treated wood..."

On February 25, 2013 and April 24, 2013, Department representatives observed prohibited waste consisting of plastic, in the form of plastic bags, in the yard waste pile outside of the receiving building, in the uncovered Phase 3 windrows, and in the unscreened compost. Department representatives further observed prohibited waste on February 25, 2013 consisting of painted wood in a wood waste pile at 601 Christiana Avenue; violations of Section II.P of BUD #29C/082513.

9. Section II.M.2 of BUD #29C/082513 states in part:

"Annually: ...Peninsula shall provide an updated closure cost estimate, taking into account inflation. If the cost estimate has increased over the amount of financial assurance provided, Peninsula shall accordingly provide increased financial assurance..."

Following the February 25, 2013 compliance assessment, Department representatives determined that, based on the 2012 annual report submitted by Respondent and received by the

Department on January 15, 2013, the closure cost estimate does not factor in any of the waste material at 601 Christiana Avenue, nor does it account for the unscreened compost at either 601 Christiana Avenue or the BUD-approved site; a violation of Section II.M.2 of BUD #29C/082513.

10. Section I.B of BUD #29C/082513 states in part:

“This Approval shall be conducted in accordance with the conditions herein and with the following documents, as submitted to the Department: (1) Application for Beneficial Use Determination, dated April 3, 2008; (2) “Checklists for Persons Applying for a BUD” and its attachments dated June, 2008...”

On February 25, 2013 and April 24, 2013, Department representatives determined that some facility operations were not being conducted in accordance with Respondent’s June 2008 Operations Plan. Feedstocks and product were being stored outside of the approved property limits; prohibited wastes were being accepted by Respondent, including plastic, which was being re-integrated into the beginning of the composting process; violations of Section I.B of BUD #29C/082513.

11. Section II.E of BUD #29C/082513 states in part:

“Odors resulting from the Peninsula facility shall not be perceived beyond the boundaries of the Peninsula property.”

Odors detected beyond Respondent’s facility have been documented by the Department since June 2012. Peninsula’s call center records show that they received ten (10) odor complaints from August 5, 2012 through February 26, 2013. As a result, NOV No. 12-SW-43 was issued to Respondent in June 2012; a violation of Section II.E of BUD #29C/082513.

12. Section II.L.2 of BUD #29C/082513 states in part:

“Recordkeeping: ... All data required by this Approval shall be recorded and maintained by Peninsula for a minimum of three (3) years and immediately made available to the Department as requested, including: (a) Daily, weekly, and yearly tonnages for all incoming waste and materials (b) Daily, weekly, and yearly tonnages for all outgoing waste and materials...”

On April 24, 2013, Department representatives asked to see Respondent’s records for daily incoming and outgoing material; however, Respondent was unable to provide them during the compliance assessment; a violation of Section II.L.2 of BUD #29C/082513.

CONCLUSIONS

Based on the foregoing, the Department has concluded that Respondent has violated, the above cited statutory, regulatory, and BUD provisions.

NOTICE OF CONCILIATION AND SECRETARY'S ORDER

Following the Department's satisfaction with Respondent's progress toward the Notice of Conciliation portion of the original Order (Notice of Conciliation Proceedings, Administrative Penalty Assessment and Secretary's Order No. 2013-WH-0027, issued to Respondent on July 25, 2013), the Department issued BUD #29/092614D to Respondent on September 26, 2013. Therefore, the Notice of Conciliation portion of the original Order is no longer applicable as Respondent is now bound by the terms of the BUD renewal on September 26, 2013.

ASSESSMENT OF PENALTY AND COSTS

Pursuant to the provisions of 7 *Del. C.* § 6005(b)(3), this is written notice to Respondent that on the basis of its findings, the Department is assessing Respondent an administrative penalty of \$25,000.00 for the violations identified in this Second Amended Assessment and Order.

In addition to the penalty assessment, Respondent is hereby assessed estimated costs in the amount of \$3,750.00, pursuant to 7 *Del. C.* § 6005(c), which were incurred by the Department in the investigation of the noted violations.

The checks shall be made payable to the "State of Delaware" and shall be directed to: Robert F. Phillips, Deputy Attorney General, Department of Justice, Environmental Unit, 820 North French Street, 6th Floor, Wilmington, Delaware 19801.

PUBLIC HEARING

This Second Amended Assessment and Order and all proposals included in this Order, shall become effective and final, and are hereby ordered, unless the Department receives from Respondent, no later than thirty (30) days from receipt of this Second Amended Assessment and Order, a written request for a public hearing on these matters as provided in 7 *Del. C.* § 6005(b)(2). In the event Respondent requests a hearing, the Department reserves the right to withdraw this Second Amended Assessment and Order and take additional enforcement actions against Respondent regarding these and other violations, including but not limited to, the imposition of civil penalties and recovery of the Department's costs and attorney's fees. The Department does not otherwise intend to convene a public hearing on these matters, but reserves the right to do so at its discretion.

PRE-PAYMENT

Respondent may prepay the administrative penalty of \$25,000.00 and the Department's estimated costs in the amount of \$3,750.00 in the manner described in the attached waiver. By

doing so, Respondent waives its right to a hearing and the opportunity to appeal or contest the Second Amended Assessment and Order which shall become a final Order.

NO ADMISSIONS

DNREC and Respondent desire a resolution of the matters addressed in the Second Amended Assessment and Order and all notices, complaints, allegations, inquiries, investigations, or proceedings by DNREC that occurred prior to the date of execution of this Waiver (those matters are collectively referred to as the "Disputed Claims"). DNREC and Respondent agree that this settlement is made in order to resolve The Disputed Claims, without admission of fact, violation, or liability, and in lieu of further enforcement action by DNREC. Respondent specifically denies any and all allegations of liability or wrongdoing. DNREC and Respondent agree that the actions to be performed by Respondent pursuant to this Second Amended Assessment and Order, as well as the execution of this Waiver, shall not be construed to be an admission of any liability or wrongdoing on the part of Respondent with respect to the Disputed Claims.

If you have any questions, please contact Mindy Anthony at (302) 739-9403.

Date: 4/23/14



Collin P. O'Mara, Secretary
Department of Natural Resources
and Environmental Control

PCC 2nd AMENDED NOC APO 041614

xc: Robert F. Phillips, Deputy Attorney General
Marjorie A. Crofts, Director, WHS
Nancy C. Marker, Program Administrator, SHWMS
William D. Miller, Program Manager, SHWMS
Mindy Anthony, Environmental Scientist, SHWMS
Jennifer M. Bothell, Environmental Coordinator
Susan S. Baker, Paralegal, SHWMS
Phil Auld, Peninsula Compost Group, LLC
Eric Meyers, Waste Management
Andrew DiSabatino, EDiS
Mike Evanko, Greenhull Compost, LLC
Waylon Pleasanton, Peninsula Compost Company, LLC
SHWMS File

WAIVER

Peninsula Compost Company, LLC hereby waives its right to a hearing and its opportunity to appeal or contest this Second Amended Assessment and Order and agrees to the following:

1. Respondent shall settle the above alleged violations through this Second Amended Assessment and Order as set forth below.
2. The Department shall accept \$15,000.00 of the administrative penalty to be paid to the Department by submitting a check payable to the "State of Delaware" within 30 days of issuance of this Second Amended Assessment and Order. The check shall be directed to Robert F. Phillips, Deputy Attorney General, Department of Justice, 820 North French Street, 6th Floor, Wilmington, Delaware 19801.
3. The Department shall allow Respondent to offset the remaining \$10,000.00 of the administrative penalty on a minimum 2:1 basis in the form of an Environmental Improvement Project ("EIP"). This EIP is described in Attachment A, which is incorporated herein by reference. Respondent shall complete the EIP as described, and by the dates specified, in Attachment A. If Respondent fails to complete the EIP, Respondent shall pay the balance as an additional administrative penalty, within 30 days of notification in writing by the Department that Respondent has failed to meet the terms associated with the EIP.
4. Respondent shall reimburse the Department in the amount of \$3,750.00, which represents the Department's estimated costs. The reimbursement shall be paid to the Department by submitting a check payable to the "State of Delaware" within 30 days of issuance of this Second Amended Assessment and Order. The check shall be directed to Robert F. Phillips Deputy Attorney General, Department of Justice, 820 North French Street, 6th Floor, Wilmington, Delaware 19801.

Peninsula Compost Company, LLC

Date: _____

By: _____

ATTACHMENT "A"

Environmental Improvement Project ("EIP")

1. Within thirty (30) days of executing this Second Amended Assessment and Order, Respondent shall hire a currently licensed and/or certified third party consultant to conduct quarterly compliance inspections at the WORC facility and to prepare inspection reports for each of the quarterly inspections. The inspections shall be conducted for a period of one (1) year, totaling four (4) inspections. The estimated cost for this effort is \$7,500.

Prior to performing the inspections, Respondent shall submit to the Department the proposal and work plan of the consultant, for the Department's approval, which shall not be unreasonably withheld or delayed. The Department reserves the right to reject the Respondent's use of the consultant and reject or modify the proposal and work plan at Respondent's expense.

The first inspection shall be conducted no later than thirty (30) days following the Department's approval of the proposed work plan. Each inspection thereafter shall be conducted approximately three (3) months after the previous inspection. Respondent shall submit the consultant's inspection report and recommendations to the Department within 4 weeks following each inspection with the final report received by the Department no later than twelve (12) months following the Department's approval of the work plan. Neither Respondent nor its consultant shall use any information relating to this EIP to argue against any regulatory requirements or permit imposed by the Department.

2. Respondent shall receive and process, at no cost to Delaware non-profit food or yard waste generators, up to 500 tons of food waste or yard waste or provide 12 months of free tipping, whichever comes first.

Respondent shall document all loads of food waste and yard waste received from the non-profit food or yard waste generators in Delaware and provide quarterly reports to the Department on tons received and processed, along with documentation of the costs of receiving and processing the food waste/yard waste. Respondent shall offer to return up to a total of 500 cubic yards of finished compost to the non-profit businesses in Delaware that participated in the food/yard waste recycling program at no cost to those non-profit businesses.

Within thirty (30) days of executing this Second Amended Assessment and Order and prior to receiving the waste related to this EIP, Respondent shall submit to the Department for approval, which shall not be unreasonably withheld, a plan for accepting food or yard waste from Delaware non-profit businesses and for distributing finished compost. The Department reserves the right to reject or modify the Respondent's plan at Respondent's expense.

3. Respondent shall provide onsite, compostable waste segregation education to non-profit organizations in Delaware and supply them with compostable bags (certified by the Biodegradable Plastics Institute or equivalent certifying third party) in order to start up the program.

Within thirty (30) days of executing this Second Amended Assessment and Order and prior to providing any education or bags related to this EIP, Respondent shall submit to the Department for approval, which shall not be unreasonably withheld, a plan for providing the education and bags. The Department reserves the right to reject or modify the Respondent's plan at Respondent's expense.

Respondent estimated the cost to implement the plan from this item and item 2 above to be approximately \$35,000.

4. Within fourteen (14) month's of receipt of the Department's approval of the consultant's work plan, Respondent shall provide to the Department;

- a) a summary, from the consultant, of the consultant's work and, findings;
- b) its own summary and findings from working with the consultant;
- c) formal documentation of costs (estimated to be \$7,500) for the consultant's work (to include receipts, paid invoices, or similar);
- d) formal documentation of the dates and tons received from each Delaware non-profit business involved with this EIP;
- e) a letter* (with original signature) from each non-profit business that participated in the food/yard waste recycling program referenced in Paragraph 2 of this EIP that acknowledges their participation and estimates how much organic waste they sent to Respondent;
- f) formal documentation of costs for providing no-cost tipping and finished compost to the non-profits (to include receipts, paid invoices, or similar);
- g) formal documentation of the dates and assistance programs provided to each Delaware non-profit business involved with this EIP;
- h) a letter* (with original signature) from each non-profit business that received services as referenced in Paragraph 3 of this EIP that acknowledges their participation and indicates the type(s) of assistance they received; and
- i) formal documentation of costs for providing bags and providing assistance with compostable waste segregation to the non-profits (to include receipts, paid invoices, or similar).

*If applicable, items 4.e) and 4.h) can be combined into the same letter.

5. Should Respondent, its agents or contractors publicize the EIP in any way, they shall state that the EIP was undertaken as part of the settlement agreement of an enforcement action with the Delaware Department of Natural Resources and Environmental Control.

6. Respondent shall comply with all applicable approvals, rules, regulations, and laws of the State of Delaware during the performance of this EIP.

7. Within thirty (30) days of receipt of the documentation regarding completion of the project and expenditures, the Department shall determine, in its sole discretion, whether or not the EIP has been completed to its satisfaction and shall inform Respondent, in writing, of its determination.

8. Respondent shall submit all documentation and correspondence related to this EIP to:

Mindy Anthony
Department of Natural Resources and Environmental Control
Solid and Hazardous Waste Management Section
89 Kings Highway
Dover, Delaware 19901