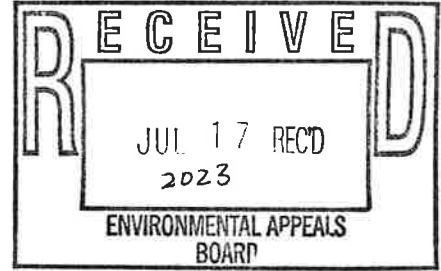




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July 17, 2023

**VIA HAND DELIVERY**

Department of Natural Resources and Environmental Control  
Office of the Secretary  
Environmental Appeals Board  
Attn: Administrative Assistant to the Environmental Appeals Board  
89 Kings Highway  
Dover, DE 19901

**Re: Notice of Administrative Penalty Assessment and Secretary's Order No. 2023-WH-0014**

Dear Sir or Madam:

Enclosed please find Delaware Recyclable Products, Inc.'s Notice of Appeal (with Exhibits) of the Notice of Administrative Penalty Assessment and Secretary's Order No. 2023-WH-0014.

Respectfully submitted,

Sharon Oras Morgan

Enclosures

cc: Valerie Edge, Esq. (via email)  
Travis Groski, Esq. (via email)

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota Nevada  
New Jersey New York North Carolina Pennsylvania South Carolina Texas Virginia Washington

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL  
ENVIRONMENTAL APPEALS BOARD**

*In re Department of Natural Resources and  
Environmental Control Notice of Administrative  
Penalty Assessment and Secretary's Order to  
Delaware Recyclable Products, Inc.*

Order No. 2023-WH-0014

**NOTICE OF APPEAL TO ENVIRONMENTAL APPEALS BOARD**

Pursuant to 7 Del. C. § 6008 and 7 Del. Admin. C. § 105, Delaware Recyclable Products, Inc. (“DRPI”) appeals the issuance of the Department of Natural Resources and Environmental Control’s (“DNREC”) Notice of Administrative Penalty Assessment and Secretary’s Order, No. 2023-WH-0014 (the “Order”, attached as Exhibit 1) dated June 21, 2023.

## **I. INTRODUCTION**

DNREC’s Order is based upon allegations that the landfill operated by DRPI lacked sufficient operational cover, that DRPI failed to properly repair a landfill cover and failed to prevent leachate, failed to prevent discharge of pollutants to surface water and failed to notify DNREC of damage to the liner overlay system and neglected to repair the damage.

The record does not support a finding that pollutants were discharged to surface water, and does not support the finding that the liner system was damaged. The Order also does not consider that each alleged violation was corrected prior to the date of the Order.

As the Order is legally and factually deficient and does not support the penalty assessment or order for cost recovery, DRPI now brings this appeal.

## **II. BACKGROUND**

### **a. DRPI facility operations**

For approximately 20 years, DRPI has owned and operated a permitted industrial landfill and recycling center located at 246 Marsh Lane, New Castle, Delaware (the “DRPI Landfill” or the “Landfill”). Whereas DRPI’s predecessors owned and operated the Landfill since approximately 1985, DRPI assumed that role in 1999.

Located in a Heavy Industry (“HI”) zone in an existing community area (as defined by the County’s Comprehensive Development Plan), the Landfill is currently permitted to accept construction/demolition debris; dry waste including plastic, rubber, lumber, trees, and vegetative matter; and non-hazardous industrial waste solids if approved by DNREC. The Landfill is one of only two active landfills in New Castle County.<sup>1</sup>

Relevant to this appeal, DRPI’s Solid Waste Permit SW-15/02 (the “Permit”) allows for disposal of certain solid waste while maintaining protection of Delaware’s environment and public health.

### **b. Delays and uncertainty surrounding DNREC’s approval process for offsite cover**

The Order does not address the delay experienced by DRPI in association with the review of and approval for offsite soil sources for the Landfill cover.

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<sup>1</sup> The Cherry Island Landfill, operated by the Delaware Solid Waste Authority and located in Wilmington, Delaware, (“Cherry Island”) is the other active landfill located in the County.

Since 2020, DRPI has faced challenges because of the limited cover material available for the Landfill. On June 24, 2020, DRPI began discussions with DNREC regarding overburden cover from the Allan Meyers quarry located in Paradise, Pennsylvania. DNREC revoked approval for Evergreen Woodchips (based in Newark, New Jersey) on July 6, 2020, and ended DRPI's ability to use stone dust from a local quarry for cover. As a result, on July 6, 2020, DRPI submitted a 30-day extension request to allow for a transition period to source other cover materials. DNREC approved the extension request on July 7, 2020.

DRPI sought clarification from DNREC on July 8, 2020, on the approval process for offsite borrow sources, particularly regarding stone dust and other materials needed to comply with DNREC's standards for Alternate Operating Cover (AOC) and Alternate Intermediate Cover (AIC), which are not clearly outlined in the management of fill policy. Subsequently, DRPI submitted a draft procedure for soil approvals to DNREC for consideration. On August 28, 2020, DRPI submitted a 90-day extension request to allow for the use of Evergreen Fuel and stone dust as an AOC at the Landfill while other sources of cover materials were pursued.

On September 9, 2020, DRPI submitted an application to approve Allan Meyers soil. Nearly three months later, DRPI and DNREC established the sampling protocol and complete profile submission. DNREC approved DRPI's initial request of 9,000 tons from Allan Meyers quarry later that month on September 18<sup>th</sup>. On September 19, 2022, DRPI submitted another request for 14,000 cubic yards from Corrado for soil from the University of Delaware to also be used as cover. DNREC approved Corrado material nearly six months after the initial request.

In response to the SO<sub>x</sub> exceedance outlined in the other appeal, DNREC required DRPI to transition from weekly cover requirements to daily cover requirements in September 2019 even though there was no connection between the increased H<sub>2</sub>S in the LFG and the permitted cover cycle (weekly). This was a particularly onerous transition considering the lack of adequate cover material available, and DNREC continued to enforce the daily cover requirement until May 22, 2023 despite DRPI's multiple attempts to return to weekly cover shortly after commencing the operation of the sulfur treatment system.

**c. DRPI rectifies all alleged violations**

DNREC alleges that, in June 2022, DRPI inadvertently damaged the liner overlay system and consequently failed to repair and notify DNREC of the damage. The liner overlay system was never damaged. Rather, an operator inadvertently excavated some of the Cell 1-3 Overlay outside berm and nicked the bottom of the outside anchor trench. The area was inspected by site personnel and survey was brought out to verify that neither the Cell 4 liner below the overlay berm or the overlay liner system was damaged. It was determined that no damage to the liner system occurred, and the liner system and leachate collection system were intact. The area was then covered with soil to ensure all exposed waste is covered.

On September 27, 2022, DNREC observed exposed waste in a hauler clean-out area on Cell 6. DNREC spoke to site representatives and operational cover was placed over exposed waste by October 7, 2022, satisfying the compliance requirement.

In November 2022, DNREC observed that areas of Cells 1 through 3 overlay and Cell 4 and Cell 6 did not have required operational cover. After receiving DNREC's approval for the Allan Myers soil, DRPI was able to address other cover deficiencies on November 7, 2022. Specifically, DRPI stopped filling operations in Cells 1 through 3 overlay and Cell 4 area and DRPI shifted the workface to Cell 6. As a result, DNREC's inspector messaged the site district manager, stating there was sufficient cover in the Cells 1-3 and Cell 4 area. DRPI then began actively filling waste in Cell 6 on December 12, 2022, negating the need to place an additional 6 inches of intermediate cover to meet the 12-inch requirement in that area, thereby resolving the issue.

In December 2022, DNREC observed erosion of operation cover on the eastern exterior side-slope of the Landfill as well as evidence that stormwater ran onto the waste, then off the landfill, and into the perimeter of the swale of the landfill. DPRI collected water samples on January 4, 2023, as well as collected water samples from the inlet and outlet of the receiving stormwater structure. DRPI sent DNREC results on January 27, 2023, indicating no impact to the swale.

In January 2023, DNREC observed the placement of operational cover over some of the deficient areas observed during the Fall of 2022 but approximately one acre of Cell 4 still lacked sufficient operational cover. This issue was corrected on January 6, 2023, and confirmed via verbal communication with DNREC's inspector.

DRPI held another meeting with DNREC on January 25, 2023, to clarify DNREC's soil approvals. Through that time, the submission and approval process was unclear. DNREC was requiring that DRPI submit quantity increase requests for the Allan Meyers soil despite sampling results demonstrated the soil was clean. Given pending approvals from the Allan Myer quarry and several other jobs in the State, DRPI had to prioritize cover of the new waste and return to older/intermediate areas when additional soil was available to the property. Ultimately, DNREC agreed to streamline the approval process and accept letters from large soil sources without requiring additional sampling and quantity increases under the profile if the generator could confirm the cover material excavation process remained the same since the last approval. As a result, the parties clarified the process for using the Allan Meyers overburden and there have since been no cover integrity issues at the Landfill.

On January 26, 2023, DNREC observed four leachate seeps on the exterior side slopes of landfill Cells 1 – 6. DRPI corrected the violation on January 29, 2023. In particular, DRPI excavated soil in the area, placed stone for drainage, and placed cover back over the subject area.

On January 30, 2023, DNREC requested that DRPI sample the water in the potentially impacted perimeter swale and receiving stormwater management structure. DRPI collected water samples on that same day to DNREC's satisfaction. DRPI has since provided the results to DNREC on July 14, 2023.

On April 25, 2023, an additional inspection identified at least two (2) acres of cell 6, which received waste, but was left uncovered for a period longer than one (1) week. DRPI has since covered the area; this is no longer an outstanding item.

**d. DNREC issues Secretary's Order No. 2023-WH-0014 against DRPI**

On June 26, 2023, DNREC issued Secretary's Order No. 2023-WH-0014 (the "Order")<sup>2</sup> imposing an administrative penalty of \$34,020.00 on DRPI for six alleged permit violations. (Exh. 1.) In addition, DNREC imposed \$8,061.38 in costs. The alleged violations arise out of DNREC's conclusion that DRPI failed to comply with multiple conditions of its Solid Waste Permit SW-15/02. The violations are summarized as follows:

- Violation 1: Failure to cover cells with sufficient cover;
- Violation 2: Failure to place intermediate cover;
- Violation 3: Failure to properly repair Landfill cover; failure to prevent leachate from entering perimeter swale;
- Violation 4: Failure to take all necessary steps to identify and prevent discharge of pollutants from the waste into surface water;
- Violation 5: Failure to sample surface water; and
- Violation 6: Failure to timely notify Dept of damage to Landfill liner system.

As part of the Order, DNREC submitted a one-page billing sheet. (Exhibit 2.) The sheet lists three entries for one employee, using the same generic activity descriptions for each entry ("Compliance Inspection, Re-inspection documentation, prepare correspondence"). DNREC never issued any written notices of violation as to any of the currently alleged permit violations. Nevertheless, all violations have since been rectified.

**III. STATEMENT OF APPEAL**

**a. Interest Substantially Affected**

Pursuant to 7 Del. Admin. C. § 105(2.1.1), DRPI's interests are substantially affected by the Order because, if the Order is upheld, DRPI will be responsible for payment of a penalty assessment and DNREC's costs. The Order expressly acknowledges that DRPI's legal rights are affected. (Exh. 1, Order at 11.)

**b. The Order is Improper**

Pursuant to 7 Del. Admin. C. § 105(2.1.2), DRPI submits that the Order is improper. Pursuant to 7 Del. Admin. C. § 105(2.1.3), the reasons why the decision is improper are concisely stated as follows:

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<sup>2</sup> DNREC also issued Secretary's Order No. 2023-A-0013 against DRPI on the same day, which is subject to DRPI's separate appeal being filed contemporaneously.

1. Contrary to DNREC's conclusions, DRPI did not violate certain permit conditions. For example, as to Violation 7, the liner overlay system was never damaged to have necessitated DRPI notifying DNREC.
2. The Order ignores that DRPI corrected all alleged violations by the date of the Order. It also ignores that most of the observed concerns with cover, rills, and washouts were event driven, coming on the heels of heavy or significant rain events.
3. DNREC's consideration of the discretionary factors under 7 Del. Code section 6005(b)(3) is inappropriate as omitting meaningful detail, ignoring pertinent facts, and relying on a record that does not justify the penalty and cost recovery sought. In particular, the following record ultimately does not justify a \$34,020.00 penalty:

- a DNREC's bare analysis inadequately weighs the discretionary factors. *See Delaware Solid Waste Auth.*, 250 A.3d at 119 (acknowledging that "[t]he Secretary's Orders, however, did not provide any analysis of why the penalties assessed against the [appellant] were appropriate in light of the discretionary factors listed in § 6005(b)(3). Rather, the orders appear to rely on the assertion that the penalties assessed were appropriate because the [appellant] committed violations.").

***Nature, circumstances, extent, and gravity of the violations***

- i DNREC lacks an evidentiary basis to conclude that DRPI caused pollutants to discharge into the environment.
- ii DNREC lacks an evidentiary basis to conclude that the Landfill liner was damaged and not properly repaired.

***The degree of culpability***

- iii The Order disregards DRPI's early and frequent coordination with DNREC as well as delays and uncertainty associated with obtaining offsite cover approval.
  - iv The Order fails to consider DRPI's efforts to address violations between the date of the violations and Order.
4. DNREC is required to "submit a detailed billing of expenses to the liable person." 7 Del. C. § 6005(c)(1)d; *see Garvin v. Booth*, S18M-10-040 JJC, at \*12-13 (Del. Super. Ct. July 10, 2019) (noting that the Secretary is not permitted "to bypass his obligation to provide a detailed billing of expenses as a prerequisite to collecting those expenses."). While the Detailed Billing

provided by DNREC identifies 311.25 hours of Mike Melito, for the periods in question, such amount of hours appears exorbitant and may include routine non-enforcement activities. Without a detailed billing, DRPI cannot reconstruct or determine DNREC's basis for its incurred costs.

In addition to these reasons why the Order is improper, DRPI reserves the right to "[i]dentify issues" through the pre-hearing process (7 Del. Admin. C. § 105(3.1.6)) and raise additional reasons once it obtains the "entire record before the Secretary[.]" 7 Del. Admin. C. § 105(5.3).

The Board is empowered to "affirm, reverse or remand with instructions any appeal of a case decision of the Secretary." 7 Del. C. § 6008(b). For the foregoing reasons, DRPI respectfully requests that the Board utilize this authority and discretion to grant the following relief:

1. Reverse the Order's determinations and corresponding assessment of administrative penalties to the extent that DRPI did not in-fact violate certain permit conditions;
2. Reverse the Order's determinations and corresponding assessment of administrative penalties to the extent that DRPI corrected certain violations by the date of the Order;
3. Reverse the Order's determinations and corresponding assessment of administrative penalties to the extent they are based on DNREC's inappropriate and unreasonable consideration of discretionary factors under 7 Del. C. § 6005(b)(3);
4. Reverse the Order's penalty to the extent it is not substantiated by detailed billing or a breakdown of penalties; and
5. Remand the Order back to the Secretary consistent with the foregoing issues and concerns.

**c. Estimate of Number of Witnesses and Time Involved**

Pursuant to 7 Del. Admin. C. § 105(2.2), DRPI currently estimates that presentation of its appeal will involve 3-4 witnesses and will take between 4-6 hours.

Depending on the volume of the entire record before the Secretary, and the parties' ability to narrow issues in advance of a hearing, DRPI may be able to reduce these estimates. 7 Del. Admin. C. § 105(3.1.1.)

Enclosed is the \$50.00 deposit for costs required under 7 Del. Admin. C. § 105(2.3).

**IV. CONCLUSION**

For the foregoing reasons, DNREC's issuance of the Order was improper. DRPI looks forward to presenting its appeal to the Environmental Appeals Board if no resolution with DNREC can be achieved beforehand.

Dated: July 17, 2023

Respectfully submitted,



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