

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

In the Matter of

**NOTICE OF ADMINISTRATIVE
PENALTY ASSESSMENT
AND SECRETARY’S ORDER
No. 2026-WH-0013**

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EAB No. 2025-

STATEMENT OF APPEAL BY DONOVAN SALVAGE WORKS, INC.

Donovan Salvage Works, Inc. and Herbert Holdings, LLC (together, “DSW”), by and through its counsel, submits the instant appeal of an action of the Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”). In support of this appeal, DSW avers as follows:

I. BACKGROUND

1. This appeal (“Appeal”) is taken from issuance by the Secretary of DNREC of the Notice of Administrative Penalty Assessment and Secretary’s Order No. 2026-WH-0013 dated June 20, 2026 (the “Order”). The undersigned counsel for DSW received an e-mail copy of the Order on June 24, 2026, however the Order was never served. The Order alleges that DSW acted in noncompliance with certain provisions of Delaware air, water, and waste regulations, and its DNREC issued permits. A copy of the Order is attached hereto as Exhibit A.

2. For background on DSW and its interactions with DNREC, paragraphs 2 through 8 of the appeal of the decision of the Secretary (the “Secretary’s Decision”) dated June 24, 2026, filed contemporaneously herewith, are incorporated herein by reference.

3. The Order identifies violations arising from two “multimedia” (*i.e.*, all relevant DNREC divisions) inspections and a third inspection conducted only by the

Division of Air Quality. These inspections started just weeks after the execution of the DNREC/DSW Conciliation Order by Consent (the “Conciliation Order”) that was intended to resolve DSW’s issues with DNREC.

4. The Order identifies 38 violations; however it also notes that all but seven have been corrected. Moreover, with the exception of visible emissions from the smelter, the violations are administrative or operational in nature and do not involve demonstrated impact to the environment. Of the 38 violations alleged, the Order stacks 18 of these violations over just four discrete sets of operative facts.

5. In addition to the unlawful attempt to accelerate the Conciliation Order’s Compliance Milestones in the Secretary’s Decision appealed contemporaneously herewith, the Order also includes a number of injunctive relief requirements that purport to require that DSW take various corrective measures in just 14 days. This extremely tight time frame cannot possibly be met for at least the following new requirements:

- a. Submission of a written plan for the daily removal of all water in the “surface water impoundments”;
- b. Amending Brightfields’ Surface Impoundment Improvement plan to include: (i) topographic and boundary surveying, (ii) development of a base map with 1-foot contour intervals, and (iii) design and installation of perimeter curbing.

6. In accordance with Section 2.3 of the Board’s Regulations, a \$50 deposit for costs accompanies this Appeal.

II. BASIS FOR APPEAL

A. The Interest Which Has Been Substantially Affected

7. DSW's interests have been substantially affected by the issuance of the Order because DNREC's interpretations of permit-based and regulatory-based standards as applied to DSW, and DNREC's related effort to compel certain actions by DSW, are inconsistent with DSW's permits, contrary to the previously executed Conciliation Order, contrary to law and fact, and otherwise constitute an abuse of discretion for the reasons set forth below. The injunctive relief obligations purported to be imposed on DSW by DNREC through the Order are also more stringent than required under and/or inconsistent with applicable law, unduly burdensome, technically and practically infeasible to implement within the extremely short compliance period prescribed by the Order, and finally, unnecessary to fulfill the purposes of 7 *Del. C.* § 6001 *et seq.* (the "Delaware Environmental Control Statute") and Delaware's regulations governing the control of solid and hazardous waste, air pollution, and water pollution.

B. Allegation That The Decision Is Improper

8. For the reasons set forth herein, DSW asserts that the Order is improper because it is not supported by substantial evidence, is contrary to law and fact, is arbitrary and capricious and constitutes an abuse of discretion.

C. Reasons Why The Decision Is Improper

9. As described below, the Order is improper, not supported by substantial evidence, is contrary to law and fact, is arbitrary and capricious and constitutes an abuse of discretion for several reasons. The absence of a specific refutation of individual allegations should not be construed as an admission by DSW as to any fact or legal conclusion included within the Order. Instead, except as specifically stated herein, DSW does not admit the allegations and/or legal conclusions contained within the Order, and

DSW expressly reserves all rights and defenses relative to such allegations and/or legal conclusions.

i. **The Order Does Not Contain Adequate Factual or Legal Bases for At Least Eight Asserted Violations**

10. A number of violations are largely unsupported by substantial evidence:

a. Violation 4: DNREC uses the presence of a single fluorescent lamp on the bailing pad to make the absurd finding that DSW is an unpermitted hazardous waste disposal “Destination Facility.” A “Destination Facility” pursuant to 7 Del. Admin. C. § 273.9 is a “facility that treats, disposes of, or recycles a particular category of universal waste...” One lamp that evaded the screening process does not constitute a “category,” nor convert DSW into an unpermitted hazardous waste facility as DNREC alleges.

b. Violation 10: DNREC asserts that DSW’s scrap tire facility exceeded ten feet in height without any evidence of measurement to substantiate the allegation.

c. Violation 11: DNREC alleges that DSW was “storing” scrap tires outside the scrap tire facility along the fence. This is incorrect. The only tires to be found along the fence were oversized truck tires requiring further processing before they could be fed into the shredder and stored in the scrap tire facility.

d. Violation 31: During the May 27, 2025 “Compliance Inspection,” DNREC representatives observed that the door to the smelter was not fully closed during operations. No further information is provided in the Order regarding the condition of the door or operations at the time; only that the smelter door was not fully closed for some undocumented amount of time. Based on this observation, DNREC cites a violation of condition 3.7 of DSW’s Air Permit, which requires that the operator inspect the smelter

each day to ensure the unit is in proper condition, which inspection shall include the door seal. DNREC asserts that the observation of the door not being properly closed is “a clear indication that the system is not operating in proper condition.” But even conceding that the smelter door was left ajar for some indeterminant amount of time as DNREC alleges, this is not evidence that the system was not operating in proper condition or that DSW violated condition 3.7. There is no evidence cited in the Order that DSW did not inspect the smelter, that the smelter, door, or door seal were damaged, nor is there any other information provided in the Order regarding the condition of the smelter.

e. Violation 32: DNREC alleges that DSW failed to operate the smelter with two operators as required under the relevant permit, and yet DNREC fully admits that the yard manager was acting as one of two operators at the time this “violation” was determined. While DNREC claims that the “availability of the Yard Manager to assist the operator when not fulfilling other duties does not comply with the permit requirement to have two operators at all times;” DNREC never states what assistance the yard manager was unable to provide to the other operator of the smelter. Furthermore, DNREC does not dispute that there was another operator observing the smelter to ensure proper operation, as required.

f. Violation 33: DNREC representatives reviewed a manufacturer’s service report that included the note: “Operator running slighter[sic] larger loads of combustibles.” From this unverified note, DNREC leaps to the conclusion that the smelter is not being operated in accordance with the manufacturer’s recommendations and cites DSW for a violation of condition 3.13, and yet nowhere in the cited note or elsewhere does the unnamed technician indicate this. DNREC further alleges without any factual basis

that it “is **unable to determine** whether [DSW] has taken sufficient actions to reasonably prevent this from recurring **on a daily basis[,]**” effectively conceding that DNREC’s assessment is entirely premised on assumptions. A violation based solely on an unidentified technician’s note (which is unreliable hearsay evidence), and further claiming that the violation is uncorrected based on assumptions falls far short of satisfying the substantial evidence standard.

g. Violation 34: DRNREC cites a submersible pump and a hose for the proposition that oily water collecting in a pole building was being pumped outside and into a nearby creek, and that therefore DSW was discharging pollutants into a surface water body without a National Pollutant Discharge Elimination System (NPDES) permit. However, the only evidence offered are (i) photos of a pump and hose that in fact shows no evidence that oily water had been discharged from this hose, and (ii) a claim that an unidentified “representative” of DSW advised them that oily water was pumped outside of the pole building. Importantly, there are no photographs of an oily discharge or residue on the ground by this pole building nor any evidence whatsoever of oily discharge in the creek.

h. Violation 35: DSW utilizes two bermed areas to (i) crush and bale scrapped automobiles, and (ii) hold aluminum transmissions awaiting smelting. These areas collect rainwater and utilize oil skimmers to skim the oil off the surface of the accumulated water and, without them, residual oils from these areas would be caught up with stormwater runoff and be swept offsite. These areas, deemed by DNREC to be “surface water impoundments,” are at best messy and troublesome, and have been a source of friction between DSW and DNREC over the years. Both are on the list of facility improvements required under the Conciliation Order. At the recommendation of its

environmental consultant, DSW has proposed (at substantial cost) to cover these areas with a roof and otherwise protect them from sheet water flows, thus eliminating the need for the messy and troublesome “surface water impoundments.” From this proposal and a March 24, 2026 site visit to discuss the submitted Surface Impoundment Improvement plan, DNREC has taken the inexplicable stance that the impoundments (which have not changed) are no longer “surface water impoundments” because they do not “collect surface water.” Instead DNREC asserts these areas are “used oil tanks” that must be sealed when not in use (but of course cannot be sealed). Nothing has changed about these impoundments since DNREC first observed them. They never collected surface water (i.e., from a surface water body such as a stream) but instead have always collected and contained rainwater to prevent runoff of oily water from the site.

ii. **The Order Improperly “Stacks” Multiple Violations onto Singular Acts of Operative Conduct**

11. In order to inflate the apparent gravity of the Order and presumably the penalty, in at least four instances the Order stacks multiple violations onto a single set of discrete operative facts:

a. A single fluorescent light fixture on the bailing pad that made it past the DSW screening process: Violations 3 and 4.

b. Smelter was observed with visible flame and smoke during April 9, 2025 inspection. DNREC cites six (6) separate violations based on this observation, Violations 15, 17, and 22 through 26. Notably, Violations 15 and 22 state the same exact regulatory standard. Violation 15 cites 40 C.F.R. § 63.1506(a)(5), whereas Violation 22 cites condition 3.2 of DSW’s permit. Both 40 C.F.R § 63.1506(a)(5) and condition 3.2

state the same exact requirements regarding smelter operations, yet DNREC cites two separate violations based on the same exact standard.

c. DSW self-reported that there was a malfunction with the data logger for its smelter from March 18 to 28, 2025: DNREC again cites six (6) separate violations, Violations 16, 18, 19 through 21, and 27, based on this single malfunction that was promptly corrected upon discovery during DSW's routine collection of the data to transmit to DNREC. Moreover, DNREC is again citing multiple violations of the same exact regulatory standard based on the single data logger malfunction incident. Specifically, Violation 16 cites a violation of 40 C.F.R. §§ 63.1510(g)(1) and (2), whereas Violation 21 cites a violation of permit condition 3.1.12. 40 C.F.R. §§ 63.1510(g)(1) and (2) and condition 3.1.12 state nearly verbatim requirements with respect to the data logger requirements.

d. Stormwater visual monitoring reports submitted March 6, 2026 and April 6, 2026: Violations 36 through 38.

12. 7 Del. C. § 6005(b)(3) provides, in relevant part: “[s]imultaneous violations of more than 1 pollutant or air contaminant parameter or of any other limitation or standard imposed under this chapter shall be treated as a single violation for each day.” The authority for DNREC to promulgate regulations and to write permits is of course derived from the statutory authority provided to DNREC under Chapter 60. It follows that each regulation and permit condition cited in the Order are “parameters” and “limitations or standards” imposed under Chapter 60. DNREC may not stack these violations and therefore inflate the administrative penalty by taking into consideration the total number of violations in the Order, yet this appears to be precisely what DNREC did by expressly

stating “[t]his Order identifies and describes thirty-eight (38) regulatory violations” in its attempt to justify the amount of the administrative penalty imposed (Order at p. 58). This action, and the administrative penalty apparently derived therefrom, are contrary to law and an abuse of discretion.

13. In addition to inflating the administrative penalty, DNREC is further relying on the overall number of alleged violations as justification for effectively trying to rescind the Conciliation Order – its binding commitment. Stacking violations in an attempt to undermine the Conciliation Order is an abuse of discretion. Having agreed to the Conciliation Order, DNREC cannot unilaterally terminate it.

iii. The Penalty is Excessive Given the Lack of Any Finding of Demonstrable Harm to the Environment

14. The overwhelming majority of violations are administrative or procedural in nature and do not involve a finding of demonstrable harm to the environment. Indeed throughout the Order, the only observed and recorded impact to the environment are a few minutes of excessive opacity in the permitted emissions from the smelter on April 9, 2025 and May 27, 2025 (Violations 15, 17, 22 through 26, and 29). The Board is empowered to, and has, completely eliminated administrative penalties where “the violations were not culpable and did not harm the environment.” *Delaware Solid Waste Auth. v. Delaware Dep’t of Nat. Res. & Env’tl. Control*, 250 A.3d 94, 119 (Del. 2021). The nature of the violations asserted does not support the imposition of an administrative penalty of anything close to \$135,040.00, especially when combined with the secretary’s parallel (and unlawful) decision to vacate and accelerate the \$750,000.00 deferred and suspended administrative penalty in the Conciliation Order. The combined nearly \$1 million in penalties that would be immediately due and payable is clearly designed not to encourage

more careful compliance, but to drive this small, yet vitally necessary operation out of business. Another clear abuse of discretion.

iv. **The Order Fails to Properly Apply Required Statutory Factors in Assessing the Penalty**

15. Pursuant to 7 Del. C. § 6005(b)(3), “[a]ssessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation, or violations, ability of violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require.” DNREC attempts to satisfy this requirement with a cursory few sentences on pages 58 and 59 of the Order that in no way lead the reader to a better understanding of how the penalty of \$135,040.00 was calculated. This whitewash is legally insufficient to satisfy the above statutory mandate.

16. As discussed in *Delaware Solid Waste Auth. v. Delaware Dep't of Nat. Res. & Envtl. Control*, 250 A.3d 94 (Del. 2021), the Secretary’s authority to impose an administrative penalty is constrained and must include an explanation for the penalty that is based on the factors stated in § 6005(b)(3). Here, DNREC’s cursory discussion of the factors offers no insight into how the Secretary determined that \$137,040.00 was an appropriate administrative penalty. There is no apportionment of the penalty to specific violations, there is no discussion of the factors with respect to specific violations (for example, culpability is stated as being significant, yet several of the violations cited involved no culpability on the part of DSW, such as the malfunctioning data logger), and perhaps most notably, the Order claims DSW’s “prior history of violations was not a factor in assessing the administrative penalty.” Throughout the Order, DNREC repeatedly cites

instances of alleged past violations (notably Violation 34), yet it claims DSW's prior history was not a factor in determining the penalty – this strains credulity.

17. Without DNREC's analysis demonstrating how it calculated the administrative penalty and apportioning the penalty among the various violations cited, it is impossible to review whether substantial evidence supports the Secretary's decision and whether the penalty was determined based on the factors stated in § 6005(b)(3). This is clear reversible error, as affirmed by the Delaware Supreme Court in *Delaware Solid Waste Auth. v. Delaware Dep't of Nat. Res. & Envtl. Control*.

v. **The Order Impermissibly Contravenes The Contemporaneously Negotiated And Executed Conciliation Order**

18. Under 7 *Del. C.* § 6005, DNREC has a significant amount of discretion in deciding how to enforce Delaware's environmental laws, including the ability to resolve continuing violations through "conciliation" under § 6005(b)(2). DNREC and DSW chose to resolve several violations through a conciliation agreement, executing the Conciliation Order on or about February 5, 2025. Having exercised discretion under § 6005(b)(2), DNREC is bound to honor the agreed-upon terms of the Conciliation Order. However, rather than honor the Conciliation Order and work with DSW in good faith as stated in the Conciliation Order, DNREC conducted a multi-media compliance inspection on April 9, 2025, just 63 days after the Conciliation Order was executed and well before the deadlines for nearly all of the Compliance Milestones. The purpose of this inspection so soon after entering the Conciliation Order is unclear, but the Order demonstrates the inspection was not intended to assist DSW in meeting the objectives of the recently executed Conciliation Order, i.e., to slowly bring the facility into compliance while continuing to operate. Now,

DNREC relies on the April 9, 2025 inspection and DSW's own self-reporting in March 2025 concerning the data logger to cite DSW for 28 of the 38 Violations cited in the Order, ignoring the Conciliation Order's provision regarding stipulated penalties and a 90-day cure period.

19. DSW entered into the Conciliation Order in good faith and with an expectation that DNREC would similarly honor the terms of the Conciliation Order. Nearly all of the violations cited in the Order correspond directly with corrective actions DSW is taking or will be taking under the Conciliation Order. Yet, only 63 days later, DNREC decided it no longer wanted to honor the Conciliation Order and began citing DSW for issues that are being addressed through the Conciliation Order. Most notably, Violation 35 is entirely premised on DSW's efforts to work with DNREC to satisfy the Conciliation Order's provision on providing and implementing a Surface Impoundment Improvement plan (*see* paragraph 8 of the Conciliation Order). DSW has proposed to cover and otherwise protect these areas from contact with rainfall and stormwater runoff rather than simply patch them up. But DNREC, applying a hyper-technical interpretation of the term "tank," now claims that DSW's proposal, submitted in accordance with the Conciliation Order, somehow converts the impoundments into uncovered "used oil tanks."

20. DNREC's decision to issue an Order assessing a new administrative penalty despite having a binding Conciliation Order with DSW that covers all (or nearly all) of the violations cited therein (while simultaneously relying on that Order as a basis to effectively terminate the Conciliation Order) is a clear violation of the Conciliation Order. Having exercised discretion to resolve violations through conciliation, DNREC cannot unilaterally

disregard the Conciliation Order. Thus, DNREC's decision to issue the Order with the intent of nullifying the Conciliation Order is a clear abuse of discretion and reversible error.

D. Request for Relief

21. Under 7 *Del. C.* § 6008(b), "the Board may affirm, reverse or remand with instructions any appeal of a case decision of the Secretary." DSW respectfully requests that the Board reverse the Order, as the Order is unsupported by substantial evidence, a clear abuse of discretion, and replete with errors of law and fact.

E. Reservation of Rights, Counsel, and Estimate of the Number of Witnesses and Time for Hearing

22. DSW reserves the right to assert additional grounds for appeal and reserves the right to amend this Statement of Appeal.

23. DSW has authorized the following attorneys to represent it in this matter before the Environmental Appeals Board:

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24. Relative to the hearing of this matter before the Board, DSW estimates that it will call four witnesses and that the presentation of its testimony and other evidence will require one to two days of hearing, not including any time DNREC needs to have its case heard. Furthermore, DSW anticipates that this Appeal can (and should) be consolidated with its Appeal of the Secretary's Decision regarding the Conciliation Order, which involves the same witnesses and overlapping issues.

Dated: July 13, 2026

Respectfully Submitted,

/s/Michael W Teichman

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