

DELAWARE SOLID WASTE AUTHORITY

IN THE MATTER OF:)
)
Proposed Amendments to the Regulations)
of the Delaware Solid Waste Authority,)
)
1 DE Admin. Code 501.)

**HEARING OFFICER’S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND PROPOSED ORDER**

1. The Delaware Solid Waste Authority (“DSWA” or the “Authority”) has proposed to amend its governing regulation and the Statewide Solid Waste Management Plan. These regulations are codified in Title 1 of the Delaware Administrative Code as Regulation 501 (“Regulation 501”) and Regulation 502 (“SSWMP”) respectively. Notices of the Authority’s proposed regulatory amendments were published in the October, 2015, issue of the Delaware *Register of Regulations*.¹

I. Summary of Proposed Amendments

2. DSWA’s proposed amendments to Regulation 501 and the SSWMP will implement flow control requirements that have the effect of requiring most solid waste generated in Delaware to be disposed of at DSWA facilities. The solid wastes prohibited from being delivered to DSWA facilities are not proposed to be amended.² Also unchanged is the categories of solid waste that may but are not required to be delivered to DSWA facilities.³

¹ The proposed amendments to Regulation 501 and the SSWMP were also published in the online version of the October, 2015, issue of the *Register of Regulations* at:
<http://regulations.delaware.gov/register/october2015/proposed/19%20DE%20Reg%20226%2010-01-15.htm>
(Regulation 501) and
<http://regulations.delaware.gov/register/october2015/proposed/19%20DE%20Reg%20231%2010-01-15.htm>
(SSWMP).

² The solid waste prohibited from being delivered to DSWA facilities is listed in §4.2 of Regulation 501.

³ The solid waste that may but is not required to be delivered to DSWA facilities is listed in §4.3 of Regulation 501.

Therefore, unless otherwise noted, use of the term “solid waste” in this report refers only to solid waste that the under proposed amendments must be delivered to DSWA facilities.

3. The solid waste exempted from DSWA’s proposed flow control requirements includes all recyclable materials. The proposed amendments, however, would now require that, in order for Licensees to treat waste as recyclable materials, these materials must be source separated and stored apart from solid waste at the place of generation. Additional amendments to Regulation 501 include:

i. Clarification of the requirement that individuals contractually obligated to deliver solid waste or recyclable materials to DSWA facilities in fact do so;

ii. An advance notification requirement before solid waste collected at certain industrial facilities may be transported to a waste to energy plant;

iii. A requirement that any newly licensed Licensees⁴ use only enclosed compactor type vehicles or “roll offs” to collect, transport or deliver solid waste;

iv. A reduction (from 60% to 50% by weight) in the required rate of recovery from construction and demolition waste (“C&D waste”) that must be achieved by non-DSWA recycling facilities; and

v. An annual reporting requirement for Licensees as to the tonnage of recyclables delivered to each non-DSWA facility, including a certification that to the best of the Licensee’s knowledge, the materials recovered from the recyclables delivered were sold or distributed into the market for recovered materials and not landfilled. An acceptable form

⁴ Licensees are defined by Regulation 501 as those persons issued a license by DSWA to collect, transport and/or deliver solid waste, or dry waste (except recyclables) in the State of Delaware, subject to the specific exemptions listed in §3.1.1 through 3.1.3 of the regulation.

document for waste haulers to use in filing this report is proposed as a new Attachment F to Regulation 501.

4. The amendments to the SSWMP are conforming in nature and intended to reflect DSWA's proposed flow control requirements within the statewide plan. An introductory preface also highlights significant circumstances, such as enactment of the universal recycling law, that have occurred since the SSWMP plan was last updated in 2010, but otherwise notes that the majority of the information in the SSWMP remains relevant. The SSWMP indicates that, through contractual arrangements such as discounted pricing and incentive provisions, DSWA has for many years to been able to ensure that all solid waste generated in Delaware was disposed of at DSWA facilities. The amendments to the SSWMP recognize that requiring all Delaware-generated solid waste be delivered to DSWA facilities will allow DSWA to accomplish by mandate what had previously been accomplished by contract. The SSWMP states, however, that DSWA intends to continue to use contractual incentives, including a redesigned Discount Disposal Fee ("DDF") agreement, to provide waste haulers with greater economic incentive to: i) assist DSWA with providing services beneficial to the public but which do not generate revenue; and 2) dispose of their recyclables at DSWA designated facilities.

II. Summary of the Public Hearing Testimony and Evidence

5. The Authority is statutorily required to hold a public hearing whenever it seeks to amend its regulations or the SSWMP.⁵ In compliance with §10115 of the Administrative Procedures Act ("APA"),⁶ the notices published in the October 2015, *Register of Regulations* included a summary of the proposed amendments, the legal authority under which the Authority

⁵ See 7 Del. C. §6403(i) through (m).

⁶ 29 Del. C. c. 10101, *et. seq.* Although not one of the enumerated agencies specifically subject to the APA, DSWA in exercising its regulation-making authority is required to comply with Subchapter II of the APA governing agency regulations. 29 Del. C. §10161(b).

proposed to act, and advised that public hearings on the proposed amendments would be held consecutively on November 2, 2015, beginning at 3:00 p.m. Publication of DSWA's proposed amendments and notice of the public hearings to be held thereon was made in the *News Journal* and *Delaware State News*, Delaware newspapers of general circulation, on October 1st and 4th, 2015, more than twenty days prior to the scheduled hearings. DSWA also posted notice of the scheduled public hearings on its website.⁷

6. On October 5, 2015, I was designated by DSWA to serve as the Hearing Officer for the public hearings and to prepare a report and recommendations for the Authority's board of directors. The public hearings were conducted as scheduled on November 2, 2015, in the Education and Technology Meeting Room of Delaware Technical and Community College's Terry Campus in Dover, Delaware. The public hearing on the proposed amendments to the SSWMP was held first, and the public hearing on the proposed amendments to Regulation 501 followed immediately thereafter. Appearing for the Authority were Michael W. Teichman, Esquire, and Michael D. Parkowski ("Mr. Parkowski"), the Authority's Chief of Business and Governmental Services. Also present on behalf of the Authority were its Chief Executive Officer, Rick Watson, Chief Operating Officer, Robin Roddy, and Ron McCabe, a member of the Authority's Board of Directors. Approximately 25 members of the public also attended the hearings.

7. Mr. Parkowski testified at the public hearings on behalf of the Authority, offering both prepared written testimony and sworn live testimony that affirmed and summarized his written submission. Mr. Parkowski's testimony described the uncoordinated nature of waste

⁷ 29 *Del. C.* §10115(b). The notices posted online may be found at: <http://dswa.com/event/public-hearing-for-statewide-solid-waste-management-plan/> (SSWMP); and <http://dswa.com/event/public-hearing-for-regulations-of-the-dswa/> (Regulation 501).

disposal and resulting environmental degradation that had occurred in Delaware prior to creation of the DSWA, highlighted the activities DSWA has historically undertaken to manage solid waste disposal for the benefit of the public, and explained why the proposed flow control requirements are necessary for the Authority to continue to discharge its statutory responsibilities going forward. In addition to Mr. Parkowski's live testimony, the following exhibits were offered by DSWA:

- Ex. 1 Proposed Regulation 501 published in Oct. 2015 *Register of Regulations*;
- Ex. 2 Affidavit of Publication in the *News Journal*;
- Ex. 3. Affidavit of Publication in *Delaware State News*;
- Ex. 4 Affidavit of Pamela Williamson regarding online posting of public hearing notice;
- Ex. 5 Written Testimony of Mr. Parkowski;
- Ex. 6 PowerPoint presentation prepared by Mr. Parkowski;
- Ex. 7 Email correspondence from S. Changaris, Delaware Chapter of National Wastes & Recycling Association ("NW&RA"), to M. Parkowski dated Sept. 16, 2015; and
- Ex. 8 Letter from A. Foster, Esquire, on behalf of "Republic Services",⁸ to R. Watson dated Sept. 17, 2015.

The affidavits admitted were offered to demonstrate compliance with statutory notice requirements applicable to the promulgation of agency regulations. The correspondence from NW&RA and Republic Services will be considered as public comments and addressed in Section III, *infra*.

⁸ As indicated in Mr. Foster's letter, "Republic Services" is a collective reference for BFI Waste Services, LLC, d/b/a Allied Waste Services of Delaware, Republic Services of Delaware, Allied Waste Services of Delmar and/or Republic Services of Delaware.

8. Mr. Parkowski's written and oral testimony, which also adopts and incorporates the "Background and Purpose" Section of proposed Regulation 501 published in the October, 2015, *Register of Regulations*, is summarized in Paragraphs A – I as follows:

A. The Delaware General Assembly created the Authority in 1975 to manage all aspects of solid waste disposal and resource recovery on a statewide basis. The General Assembly's purpose in creating the Authority was to address legislative findings set forth in the Authority's enabling act,⁹ which include:

1. That the people of Delaware have a right to a clean and wholesome environment;

2. That prevailing solid waste disposal practices that pre-dated the DSWA were resulting in unnecessary environmental damage, substantially degrading surface and groundwater, and constituted a hazard to the health and welfare of Delaware citizens;

3. That local governments were hard pressed to provide adequate solid waste disposal services at reasonable cost;

4. That coordinated large-scale processing of solid waste was necessary in order to achieve maximum environmental and economic benefits for the people of Delaware; and

5. That the provision of statutory authorization for the necessary state structure, able to take initiative and appropriate action to provide the necessary systems, facilities, technology, and services for solid waste management and resources recovery is a matter of important public interest.

B. As a statewide public instrumentality, DSWA is charged with providing the necessary systems, facilities, technology, and services to manage all aspects of solid waste

⁹ 7 Del. C. §6401, *et. seq.*

management, recycling, reclamation, and disposal on a statewide basis. Pursuant to this plenary authority DSWA could, if it chose, assume the responsibility of collecting and transporting all solid waste generated in the state, completely shutting out any opportunities for private waste haulers in Delaware. DSWA has not exercised this authority because it has historically been able to guarantee through contractual agreements with licensed waste haulers that virtually all Delaware-generated solid waste was delivered to DSWA facilities.

C. The volume of solid waste annually delivered to DSWA facilities, however, has declined from pre-recession levels of more than 1 million tons. In fiscal year 2015 (“FY2015”) DSWA facilities received approximately 773,772 tons of solid waste, which is consistent with the 2009-2014 six year average of 770,000 tons. DSWA, which is prohibited by statute from accepting solid waste generated outside of Delaware, projects no increase in annual tonnage for the foreseeable future. While DSWA intends to continue to provide waste haulers with economic incentives, such as DDF agreements, to deliver the solid waste they collect to DSWA facilities, there is no guarantee that all haulers will enter into such contracts.

D. The decline in the volume of solid waste delivered to its facilities has created a significant revenue strain for DSWA. DSWA receives no State or Federal money for its operating expenses, although it is authorized to issue bonds to finance major capital projects. DSWA’s primary source of operating revenue is “tipping fees”, the per-ton fee DSWA charges waste haulers to deliver solid waste. In FY15, DSWA had aggregate operating expenses of more than \$38 million (excluding closure/post closure care and depreciation expenses). DSWA’s FY15 expenses are not reflective of its current and future revenue needs. Over the past five years, DSWA has substantially reduced its workforce through reductions in force and has largely deferred capital expenditures. Such cost control measures cannot continue indefinitely.

Eventually capital expenditures will be necessary to purchase, replace and maintain equipment and facilities. DSWA anticipates that future annual operating expenses will be between \$45- \$50 million, and annual capital expenditures will need to return to the \$7- \$11 million range. The required debt service payments on DSWA's bond issuances are also substantial and projected to exceed \$11 million in FY16.

E. In order to assure a steady revenue stream, and to mitigate against a risk of further decreases in the tonnage of solid waste disposed of at DSWA facilities should private haulers decline to enter into new 5 year DDF agreements commencing July, 2016, the proposed amendments will require waste haulers to deliver all solid waste collected in Delaware to a DSWA facility. Exceptions to this new proposed requirement include waste types that are not appropriate for disposal in a landfill and recyclables. The proposed amendments also impose reporting requirements with respect to the delivery of Delaware recyclable materials to out-of-state facilities, and a requirement - requested by Delaware waste haulers - that newly licensed waste haulers be required to use vehicles specifically designed for collecting and transporting solid waste.

F. A consistent and reliable source of revenue from tipping fees is vital to DSWA's continued discharge of its statutorily mandated responsibilities. Because tipping fees are generally passed on to generators of solid waste in proportion to the amount of waste they generate, funding the DSWA through tipping fees fairly and equitably allocates the costs of DSWA responsibilities among all Delaware uses. Additional reductions in the tonnage of solid waste delivered to DSWA facilities will result in further operating losses for DSWA that will have to be offset by increases in the tipping fees ultimately borne by Delaware consumers.

G. The public derives substantial benefits from DSWA's comprehensive statewide management of solid waste. These benefits include:

1. DSWA's operation of three state of the art sanitary landfills – Cherry Island in New Castle County, Sandtown in Kent County, and Jones Crossroads in Sussex County. These landfills are solely owned by DSWA and exclusively managed by DSWA personnel. As a result of the waste diversion measures DSWA currently employs, Cherry Island is expected to have landfill capacity until 2046, Sandtown is expected to have landfill capacity until 2059, and Jones Crossroads is expected to have landfill capacity until 2032.

Each DSWA landfill is characterized by solid earthen berms and confining materials and/or specialized composite liners engineered to contain the material within the landfill and to control the escape of liquids and gases into the environment. Each DSWA landfill also features specialized dewatering drains and leachate collection systems. In FY15, DSWA's landfill leachate collection systems successfully recovered over 150 million gallons of leachate, all of which was transported and treated off-site. DSWA ground and surface water monitoring of more than 186 sampling points has consistently indicated no contamination, demonstrating the efficacy of the landfills' natural and composite liners and leachate collection systems.

Each DSWA landfill also has a landfill gas collection system designed to capture the substantial quantities of gases (primarily methane and some hydrogen sulfide) generated by landfilled solid waste, thereby preventing these gases from escaping into the atmosphere and adding to greenhouse gases or causing noxious odors. At each DSWA landfill, the methane collected is converted into energy, resulting in the beneficial use of more than 2,100 million cubic feet of methane gas each year, the equivalent of more than 1 million barrels of oil.

2. DSWA's operation of modern transfer stations in each county to allow for the drop-off of solid waste at locations convenient to population centers that are not particularly close to the landfills. As with its landfills, DSWA's transfer stations are solely owned by DSWA and exclusively managed by DSWA personnel. In FY2015, DSWA transfer stations took in approximately 191,000 tons of solid waste. The use of DSWA transfer stations reduces, by approximately 2 million miles annually, the road miles waste haulers and Delaware citizens who haul their own waste would otherwise have to travel to landfills. This reduction in road miles travelled saves an estimated 245,000 gallons motor vehicle fuel annually and eliminates vehicle emissions of carbon dioxide by 2600 tons, carbon monoxide by 25 tons and oxides of nitrogen by 2 tons.

3. DSWA's expansive recycling and resource recovery programs include the placement of more than 60 drop-off recycling centers throughout the state and, through a partnership, the construction and operation of state of the art materials recovery facilities for single stream recyclables and construction and demolition debris. In FY2015, DSWA's recycling programs resulted in the processing of more than 229,000 tons of recyclable materials. DSWA provides these recycling programs at a significant net loss due to the poor commodities markets for recycled materials.

4. DSWA's operation of yard waste composting and special recycling programs, including the separation of tires, white goods, drywall, textiles, used oil and oil filters, and electronic goods. In FY2015, DSWA's recycling of electronic goods, "e-waste", resulted in the refurbishment or recycling of more than 42,000 electronic devices representing two million pounds of e-waste.

5. DSWA's collection and proper disposal of household hazardous wastes such as unwanted paints, solvents, and stale gasoline that individuals often dispose of simply by pouring down the drain or dumping in their backyard. In FY2015, DSWA organized approximately 170 events statewide for the collection of household hazardous waste, collecting more than 416,000 pounds of these wastes and properly disposing of it at energy recovery and hazardous waste disposal facilities.

6. DSWA's public outreach and education programs to promote recycling and the proper disposal of solid waste. In FY2015, DSWA made more than 90 school and community presentations and exhibited at more than 22 major events. In total, in FY2015 these outreach programs allowed DSWA to potentially connect with more than 250,000 Delaware residents.

H. In addition to assuring DSWA has sufficient revenue to discharge its statutory responsibilities, the proposed regulatory amendments provide other public benefits to Delaware and its citizens. Specifically, requiring all solid waste to be disposed of at DSWA facilities will allow DSWA to better monitor the volume and composition of Delaware-generated solid waste, thereby allowing DSWA to better promote waste reduction and recycling programs. Having a complete understanding of the types and amounts of solid waste generated in Delaware will also give DSWA a better ability to update, amend to and keep current the SSWMP. Further, requiring all Delaware-generated solid waste be delivered to DSWA facilities eliminates the risk this solid waste will be disposed of improperly, and allows DSWA to better monitor the mix of wastes intended for landfilling and to sanction licensed waste haulers for improperly disposing of solid waste. This is particularly relevant with respect to recyclable materials, where historic low

commodity prices create little financial incentive for waste haulers to carefully manage recyclables apart from the rest of the solid waste stream.

I. As to any burdens imposed by the proposed regulations, as a result of contractual agreements the solid waste that is subject of the proposed flow control amendments is already being delivered almost exclusively to DSWA facilities. The proposed amendments are applicable to all waste haulers without regard to whether such waste haulers operate solely within Delaware or in other states as well. Any costs increases associated with the proposed amendments will, therefore, fall exclusively on instate interests, as such cost increases will be passed to Delaware businesses and citizens in the form of higher fees. Consequently, to the extent the new regulations create a burden, Mr. Parkowski testified that such burden was “quite modest” relative to important public benefits the State receives from a properly funded DSWA with a stable and predictable revenue stream.

III. Summary of Public Comments

9. Public comments on the proposed amendments to Regulation 501 and the SSWMP were received from NW&RA, Republic Services, Walter Dennen, Esquire, on behalf of Gold Medal Environmental of DE, LLC (“Gold Medal”), Donald Opdenaker on behalf of RT Opdenaker & Sons, Inc. (“RT Opdenaker”), and the City of Wilmington (the “City”). The comments received are summarized as follows:

A. NW&RA objects to the proposed flow control requirements generally as a draconian and monopolistic measure that leads to higher prices and diminished service quality while showing no positive correlation to enhanced environmental protections or public health and safety benefits. NW&RA also questions the legality of DSWA’s proposed flow control regulations. To the extent the Authority chooses to adopt the flow control requirements, NW&RA

proposes that the requirements sunset after 5 years (in 2021) when the 2016 DDF expires. NW&RA also suggests that instead of mandating flow control, the Authority should make periodic, as needed adjustments to its tipping fees. NW&RA also recommends that DSWA “restore” minimum requirements for Licensees to maintain backup capability. NW&RA expresses its belief that only enclosed compactor or roll offs (with sufficient cover to prevent spillage, loss and littering of solid waste) should be used by Licensees to collect, transport and deliver solid waste. Finally, NW&RA requests the inclusion of clarifying language clearly stating that construction and demolition waste generated in Kent and Sussex counties is exempt from DSWA’s flow control requirements so long as it is delivered to a recycling facility that achieves 50% rate of recovery by weight.

B. Republic Services’ September 17, 2015, letter requests an opportunity to meet with DSWA to discuss its concerns regarding the proposed amendments to Regulation 501 and the SSWMP. The letter expresses, in conclusory fashion, Republic Services’ concerns about the constitutionality of the proposed flow control requirements and further contends that application of flow control to commercially generated recyclables raises additional “legal questions.” Republic Services also takes issue with the limited exemption from flow control for C&D waste generated in New Castle County. Finally, Republic Services contends that the interplay between the DSWA’s new regulatory scheme and existing contractual obligations is “far from clear.” I note that Republic Services did not submit additional comments developing or expanding on these claims prior to expiration of the written comment period.

C. Gold Medal owns and operates a resource recovery facility in Wilmington, Delaware, licensed by DNREC to accept, process and market certain recyclable materials, including those found in C&D waste. Gold Medal claims that there is an inadequate record upon

which to enact or justify regulatory flow control because DSWA has failed to consider the impact the proposed flow control amendments will have on Gold Medal's Delaware recycling facility and privately owned facilities "in Delaware or elsewhere", as well as the role such private facilities already play in helping achieve the State's recycling goals. Gold Medal also questions the constitutionality of the proposed flow control regulations. Gold Medal contends that because it is regulated pursuant to a DNREC-issued resource recovery facility permit, DSWA is wrong as a matter of law in its claim that, absent the proposed amendments, DSWA "will have no control over the methods and manner in which such solid waste is disposed of [.]". According to Gold Medal, DSWA's justification for adopting the proposed amendments is a desire to increase tipping fees and benefit its preferred privately operated facilities, which Gold Medal claims amounts to constitutionally impermissible economic protectionism. Finally, Gold Medal expresses its concern that DSWA will use the DDF arrangement to render the existing exemption for recyclables illusory. According to Gold Medal, DSWA will use the proposed flow control requirements in combination with the DDF as a coercive means to "incentivize" haulers to deliver recyclable materials to DSWA sponsored facilities that compete with private facilities like Gold Medal.

D. RT Opdenaker is a solid waste hauler that does business in Delaware and Pennsylvania. RT Opdenaker serves Delaware customers generally residing north of Naamans Road very close to the Pennsylvania state line. RT Opdenaker claims that the proposed regulatory amendments will unconstitutionally burden its ability to create optimal service routes and take advantage of operational efficiencies independent of state boundaries. According to RT Opdenaker, the proposed amendments leave it with two options: 1) only serve Delaware customers and transport their waste to DSWA; or 2) "estimate" how much waste was generated

by its Delaware customers and “replace” the waste removed from Delaware with a proportionate amount of waste generated outside of Delaware. RT Opdenaker contends either option would increase its cost and diminish its opportunities to participate in interstate commerce. RT Opdenaker further claims that the only purpose of the proposed amendments is to raise revenue, and that the proposed amendments do not improve upon environmental concerns related to solid waste. RT Opdenaker states that the flow control amendments are unnecessary to protect the health, safety and environment of the people of Delaware and that programs, such as mandatory recycling could better achieve the goal of improving environmentally sound solid waste management practices. RT Opdenaker also complains that proposed amendments to section 4.1 of Regulation 501, which require that persons contractually obligated to deliver solid waste and recyclables to DSWA facilities in fact do so, would convert a civil breach of contract into a regulatory violation, thereby giving DSWA not only contractual remedies but also regulatory enforcement authority to impose civil penalties or revoke a Licensee’s license. Finally, RT Opdenaker argues the DDF agreement process undermines transparency requirements in DSWA’s charter and that the DDF agreement is anti-competitive because it “would compel material to be redirected to the DSWA for profit partners”

E. Public comments were offered by the City of Wilmington both at the public hearing on the amendments to Regulation 501 and in writing before the close of the written comment period. At the public hearing, an employee of the City of Wilmington’s Public Works Department commented that, without the redesigned DDF actually in place, the City could not calculate the fiscal impact of the proposed amendments. In its written comments, the City contends that the proposed amendments lack clarity as to whether “sludge” from a wastewater treatment plant constitutes a special solid waste exempt from flow control. The City

also expresses concern with the continued accuracy of information presented in the SSWMP and argues that the SSWMP should be updated to reflect current information. Echoing RT Opdenaker, the City also claims that converting breaches of contract into regulatory violations is beyond the scope of DSWA's authority. The City also expresses concern with the use of private DDF agreements to set disposal rates, which it claims may create differing regulatory requirements for waste haulers and potentially lead to discrimination among haulers. Finally, the City argues that the SSWMP should be amended to discuss implementing mandatory statewide recycling and a commercial food waste disposal ban.

IV. DSWA's Response to Written Comments

10. On November 19, 2015, I requested the Authority provide a written response to the factual assertions made in the written comments submitted by Gold Medal, RT Opdenaker and the City of Wilmington. DSWA provided this response by letter dated November 20, 2015. The Authority's response to the written comments is summarized as follows:

A. In response to the written comments submitted by Gold Medal, DSWA states that recyclable materials are exempt from the proposed flow control requirements and, as such, DSWA does not believe the regulatory amendments will have any impact on in-state recycling facilities. The Authority also reiterates that its landfills and transfer stations are DSWA owned and managed and that there are "no private facilities sponsored by DSWA" handling the type of solid waste the regulations will require to be delivered to DSWA. DSWA further responds that Gold Medal's regulation by DNREC does not assist DSWA in carrying out its regulatory authority over the collection and transportation of solid waste. Finally, responding to Gold Medal's claim that the DDF will be used in a coercive manner that will render the

exception for recyclables “illusory”, DSWA responds that the DDF is a purely voluntary arrangement in which waste haulers are in no way compelled to participate.

B. DSWA states that RT Opdenaker’s claim that it will be required to “replace” Delaware-generated solid waste with waste generated out-of-state is incorrect and that no such requirement exists in the regulations, either currently or as the regulations are proposed to be amended. Equally incorrect according to DSWA is RT Opdenaker’s claim that the sole purpose of the proposed amendments is to raise revenue. Similar to Mr. Parkowski’s written testimony, DSWA’s response identifies ancillary public benefits the proposed amendments will achieve. As to RT Opdenaker’s assertion that the proposed amendments improperly expand contractual remedies, DSWA responds that the regulations have long included this provision making a breach of the DDF a regulatory violation. Finally, as it stated in response to Gold Medal’s similar contention, DSWA reiterates that the proposed amendments do not direct any material to any “for profit partner” of DSWA.

C. In response to the City’s written comments, DSWA points out that the City’s municipal solid waste has always been subject to flow control. Additionally, sludge from the City’s wastewater treatment plant has always been, and will continue to be, considered a special solid waste exempt from flow control requirements. DSWA answers the City’s complaint that the proposed amendments convert contract breaches into regulatory violations the same way it answered RT Opdenaker’s similar complaint, by noting that the added language is an extension of a long existing regulatory provision. Finally, as to the City’s argument that the SSWMP should be updated and expanded to address discuss implementation of mandatory statewide recycling and a commercial food waste ban, DSWA responds that the SSWMP

remains relevant and that the implementation of mandatory recycling or a commercial food waste ban are policy matters for the General Assembly.

V. Findings of Fact

11. Based upon the evidence admitted into the record, the comments received from the public and DSWA's response thereto, the following findings of fact are made:

A. Regulation 501 presently requires solid waste generated, collected or transported by municipalities to be disposed of at DSWA facilities. The proposed amendments to Regulation 501 will expand this requirement to all private waste haulers and compel all solid waste generated in Delaware to be delivered to DSWA facilities. The proposed amendments also include: (i) a requirement that new Licensees use only vehicles appropriate for waste hauling; (ii) a requirement that persons contractually obligated to deliver solid waste and recyclables to DSWA facilities in fact comply with such requirement; (iii) a requirement that waste haulers provide advance notice to DSWA before transporting solid waste generated at qualifying industrial facilities to a waste to energy plant; (iv) a requirement that recyclable materials be source separated and stored apart from other solid waste at the place of generation; (v) a reduction (from 60% to 50% by weight) in the required rate of recovery of C&D waste that must be achieved by non-DSWA recycling facilities; and (vi) a requirement that Licensees transporting recyclables annually report the tonnage of recyclables delivered to each non-DSWA facility and the average rate of recovery at each such facility for the reporting year, together with a certification that, to the best of the Licensee's knowledge, the materials recovered from the recyclables delivered were sold or distributed into the market for recovered materials and not landfilled.

B. The proposed flow control amendments will not significantly increase the volume of solid waste delivered to DSWA in future. Through contracts with virtually all Delaware licensed waste haulers, DSWA has for many years ensured that all Delaware-generated solid waste was disposed of at DSWA facilities. The annual tonnage of solid waste delivered to DSWA facilities, however, has significantly declined as a result successful waste diversion practices and recession-related decreases in generation. The annual volume of solid waste delivered to DSWA facilities between 2009-2015 was static, and substantially below pre-recession levels.

C. The proposed flow control amendments provide an important protection against further declines in tonnage should any waste haulers decline to enter into DSWA's new 5-year DDF agreements commencing July, 2016.

D. DSWA has a critical need to protect against further declines in the annual volume of solid waste it receives. DSWA receives no State or Federal funding; its statewide operations are funded almost entirely through tipping fees. DSWA is prohibited from accepting solid waste generated out-of-state and, therefore, its revenues come from and are entirely dependent upon the quantity of Delaware-generated solid waste delivered to its facilities.

E. The decreases that have occurred have created a significant revenue strain for DSWA. DSWA has managed this revenue strain by decreasing administrative expenses and largely suspending capital expenditures. DSWA's cost containment measures are not permanent solutions, and evidence in the record suggests that DSWA does not have the financial capacity to absorb further reductions in revenue.

F. DSWA's programs and operations, including the operation of a state-of-the-art landfill and transfer station in each county, confer substantial benefits to the State of

Delaware and its citizenry. Many of the beneficial programs and activities DSWA performs do not generate revenue or, like its household hazardous waste and comprehensive recycling and resource recovery programs, are operated at a loss and, therefore, unlikely to be replicated by the private sector.

F. Requiring all Delaware-generated solid waste to be disposed of at DSWA facilities will assure that DSWA has the necessary revenue stream to continue providing these comprehensive and beneficial statewide programs, all of which are essential to the Authority's discharge of its statutory mandate.

G. Requiring all Delaware-generated solid waste be delivered to DSWA facilities will also allow the DSWA to discharge its statutory mandates to develop and implement the SSWMP and a comprehensive waste reduction and recycling program. The new reporting and advance notice requirements will help achieve these objectives by giving DSWA a complete understanding of the amount and composition of Delaware-generated solid waste.

I. Requiring all Delaware-generated solid waste be delivered to DSWA facilities will also ensure that solid waste, hazardous waste and recyclables are not improperly disposed of or landfilled. The new reporting obligation also helps in this regard by requiring that waste haulers certify as to the average rate of recovery of each non-DSWA facility where they have delivered recyclables. With respect to the language of the reporting requirement used in the proposed amendment, there is arguably an inconsistency between the regulation and the new proposed form report (Attachment F). The language proposed to be adopted states:

8.3.4 All Licensees that have transported Recyclable Materials during the course of any calendar year shall report on a form substantially similar to Attachment F, no later than March 1 of the following year, the tonnage of recyclables delivered to each non-DSWA facility during such year and the average rate of recovery from Recyclables at each such facility for such

year, certified by an authorized person on behalf of such facility. The annual report shall contain a certification from the Licensee that to the best of the Licensee's knowledge, the materials recovered from Recyclables delivered to such facility were sold or delivered into the market for recovered materials and were not landfilled.

Although as read the proposed language would require that each non-DSWA recycling facility's rate of recovery be "certified by an authorized person on behalf of such facility", I find based on a review of proposed Attachment F and Mr. Parkowski's testimony that DSWA intends that this report be made by Licensees based on the best of their knowledge and belief after reasonable inquiry. I therefore recommend that the language quoted above be deleted from Regulation 501, as an authorized non-substantive change,¹⁰ such that Section 8.3.4 read:

8.3.4 All Licensees that have transported Recyclable Materials during the course of any calendar year shall report on a form substantially similar to Attachment F, no later than March 1 of the following year, the tonnage of recyclables delivered to each non-DSWA facility during such year and the average rate of recovery from Recyclables at each such facility for such year. The annual report shall contain a certification from the Licensee that to the best of the Licensee's knowledge, the materials recovered from Recyclables delivered to such facility were sold or delivered into the market for recovered materials and were not landfilled.

J. The requirement that all recyclable materials be source separated and stored apart from solid waste at the place of generation in order to be treated as "recyclable materials" by Licensees will ensure that solid waste is not improperly characterized as "recyclable material" in order to avoid the flow control requirements of Regulation 501. This requirement is consistent with Delaware's universal recycling law, which requires waste haulers provide their customers with a separate container for the storage of recyclables and single-stream

¹⁰ Under the APA agency are permitted to make nonsubstantive changes to proposed regulations. 29 Del. C. §10118(c).

curbside collection.¹¹ The City of Wilmington’s recommendations that recycling be made mandatory and a ban on commercial food disposal implemented are matters of legislative policy reserved to General Assembly.

K. The new requirement mandating compliance by Licensees with any contractual obligation to deliver solid waste or recyclable materials to DSWA is a logical extension of the current regulatory provision found in Section 5.2 of Regulation 501, requiring persons to deliver solid waste to DSWA facilities to the extent so required by any agreement between such person and the DSWA. DSWA is mandated by statute with, *inter alia*, preserving Delaware’s environmental resources and assuring the maximum recovery, recycling and reuse of resources. While the Authority’s DDF agreements facilitate proper handling and disposal of solid waste, contract remedies alone may be insufficient to compel compliance by waste haulers. Consequently, as to solid waste required to be delivered to DSWA, Regulation 501 has long treated a breach of the DDF as a regulatory violation. Clarifying the applicability of this regulatory requirement to all private waste haulers that enter into DDF Agreements is a reasonable and necessary component of the Authority’s overall flow control regime.

L. The requirement that new Licensees utilize only enclosed compactor type vehicles or “roll offs” – a requirement added at the suggestion of Delaware waste haulers – will address concerns about litter and spillage associated with the use of pickup and stake body type vehicles by requiring new Licensees to use vehicles specifically designed for collecting and transporting solid waste and recyclables.

M. Reducing in the rate of recovery from C&D recyclable materials that must be achieved by non-DSWA recycling facilities benefits private recycling facilities by assuring

¹¹ 7 Del. C. §6053(1) a. and b.

that they are not disqualified from receiving recyclables based on a failure to meet a potentially unrealistic recovery rate.

N. As to matters raised in public comments, I find that the proposed amendments do not direct or require that any solid waste be delivered to DSWA “sponsored” or “for profit” partners. DSWA exclusively owns and manages the landfills and transfer stations where the solid waste that will be subject to flow control must be delivered. The proposed amendments also do not change the treatment of “sludge” produced by wastewater treatment plants, which remains exempt flow control requirements as a “special solid waste.”¹² Nor do the proposed amendments change the requirement that Licensees maintain minimum backup capability.¹³ The proposed amendments also do not require, and in fact would not permit, Delaware-generated solid waste to be “replaced” by solid waste generated out-of-state, as DSWA is statutorily prohibited from accepting solid waste generated outside of Delaware. Finally, recyclable material consisting of C&D waste generated in Kent and Sussex counties is exempt from flow control requirements, provided the recyclables are delivered to a private facility that achieves the required 50% rate of recovery.

O. Any burdens caused by the proposed amendments will ultimately and solely be borne by Delaware businesses and residents in the form of higher fees charged by waste haulers.

VI. Conclusions of Law

12. Based on a review of the relevant statutes, regulatory provisions and case law, I make the following conclusions of law:

¹² Pursuant to §4.3.3 special solid wastes may be delivered to DSWA facilities to the extent DSWA permits the delivery.

¹³ This requirement is found in §3.10 of Regulation 501.

A. The authority to implement the proposed flow control requirements rests in the State of Delaware’s general police power to regulate all aspects of solid waste collection and disposal for the benefit of the public. The Delaware General Assembly created DSWA to provide and achieve the many public benefits set forth in DSWA’s enabling legislation. As a public instrumentality, DSWA is vested with plenary authority over all aspects of solid waste. The statutory authority granted to DSWA specifically includes the power to direct the flow of solid waste to DSWA facilities. This power is enumerated in §6406 of Title 7 as follows:

(a) The Authority shall have the power to:

Control, through regulation or otherwise, the collection, transportation, storage and disposal of solid waste, including *the diversion of solid waste within specified geographic areas to facilities owned, operated or controlled by the Authority*; provided, however, that such power shall not extend to the collection, transportation, transfer and storage of hazardous wastes as defined in §6302(8) of this title, except to the extent that the [DSWA] engages in activities authorized under § 6452(8) of this title.¹⁴

B. The proposed amendments to Regulation 501 and the SSWMP are entirely consistent with DSWA’s statutory authority and appropriate based on the evidence received into the record.

C. DSWA has complied with all statutory notice and online posting requirements applicable to the promulgation of agency regulations.

D. The proposed amendments are constitutional pursuant to the United States Supreme Court’s decision in *United Haulers*.¹⁵ The Commerce Clause of the United States Constitution grants Congress the authority to “regulate commerce among . . . the several states.”¹⁶ The Commerce Clause “presumes a national market free from local legislation that

¹⁴ 7 Del. C. §6406(a)(31)(emphasis supplied).

¹⁵ *United Haulers Ass’n v. Oneida Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007).

¹⁶ U.S. Const. art. I, § 8, cl. 3.

discriminates in favor of local interests.”¹⁷ For this reason, the Supreme Court has long interpreted the Commerce Clause as also having a negative implication, often referred to as the “Dormant Commerce Clause”, prohibiting the states from interfering with interstate commerce through the enactment of discriminatory measures that favor in-state interests over out-of-state interests.¹⁸

Whether a state law violates the Dormant Commerce Clause is determined by asking if the law discriminates on its face against interstate commerce.¹⁹ In this context, discrimination simply means that the law treats in-state and out-of-state economic interests differently, benefitting the former and burdening the latter.²⁰ Laws discriminatory on their face are subject to a “virtually *per se* rule of invalidity” which can only be overcome by a showing that the State has no other means to advance its legitimate state interests.²¹ Laws not discriminatory on their face may also violate the Dormant Commerce Clause if they impose burdens on interstate commerce that are clearly excessive in relation to the putative local benefits.²²

The General Assembly created DSWA as a state instrumentality for benefit of the public.²³ In the context of the Dormant Commerce Clause, DSWA’s status as a public body has constitutional significance. The United States Supreme Court has twice before addressed solid waste flow control ordinances under a Dormant Commerce Clause analysis. The boundaries of what is constitutionally permissible are now well established and largely dependent on whether public or private interests are benefitted by the legislative enactment under review.

¹⁷ *C.A. Carbone, Inc., v. Town of Clarkstown*, 511 U.S. 383, 393 (1994)(“*Carbone I*”).

¹⁸ *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality of Or.*, 511 U.S. 93, 98 (1994); *United Haulers* at 338.

¹⁹ *United Haulers* at 338.

²⁰ *Id.*

²¹ *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Maine v. Taylor*, 477 U.S. 131 (1986).

²² *United Haulers* at 346, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

²³ See 7 *Del. C.* §6401(a) – (c).

In 1994, the United States Supreme Court in *Carbone I* considered a county ordinance requiring that all county-generated waste be disposed of at a single private facility serving the county. The Court in *Carbone I* held that this requirement discriminated on its face against interstate commerce because it favored a single local operator, thereby denying all out-of-state businesses access to the local market.²⁴ The Supreme Court, therefore, regarded the ordinance as “just one more instance of local processing requirements we long have held invalid” and struck down the ordinance based on the “virtually *per se* rule of invalidity.”²⁵

The Supreme Court’s decision in *Carbone I* was generally interpreted as banning all “flow control” ordinances.²⁶ In 2007, however, the Supreme Court in *United Haulers* reviewed the constitutionality of county adopted flow control ordinances that directed all solid waste to a state created public benefit corporation.²⁷ The Court in *United Haulers* found this difference from the ordinance struck down in *Carbone I* “constitutionally significant”, noting that trash disposal was a traditional government function and that laws favoring the government in such areas – but treating “every private business, whether in-state or out-of-state, exactly the same – do not discriminate against interstate commerce for purposes of the Commerce Clause.”²⁸ Because the ordinances under review were found not to discriminate against interstate commerce, a plurality of the Court in *United Haulers* ruled that the ordinances were properly analyzed under the *Pike* balancing test applied to “laws directed to legitimate local concerns, with effects on interstate commerce that are only incidental.”²⁹

²⁴ *Id.* at 389-391.

²⁵ *Id.* at 391-394.

²⁶ *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241, 245-46 (3rd Cir. 2008).

²⁷ *United Haulers, supra.*

²⁸ *Id.* at 334.

²⁹ *Id.* at 346, quoting *Philadelphia v. New Jersey* at 624.

Under the *Pike* balancing test, nondiscriminatory statutes violate the Commerce Clause only where the burdens imposed on interstate commerce are “clearly excessive in relation to the putative local benefits.”³⁰ Applying this test, the plurality in *United Haulers* ruled that the generation of revenue to fund public facilities was a cognizable benefit that could be considered in the *Pike* analysis.³¹ The plurality in *United Haulers* also recognized the other benefits provided by the flow control ordinances, including increased recycling and enhanced enforcement of recycling laws. *Id.* As the benefits of the ordinances at issue were plainly evident, the *United Haulers* Court upheld the ordinances, finding it unnecessary to even decide whether the ordinances imposed any incidental burdens on interstate commerce because any arguable burdens would not exceed the public benefits of the ordinances.³²

The federal court cases decided after *United Haulers* have almost uniformly upheld flow control ordinances that benefit public entities.³³ For instance, in 2013 the United States Court of Appeals for the 4th Circuit upheld the constitutionality of a flow control ordinance adopted by Horry County, South Carolina, that required all solid waste generated in the county be disposed of at facilities operated by the county’s solid waste authority.³⁴ Similarly, in 2014, the United States District Court for the Southern District of New York in *Carbone II* upheld a flow control ordinance that directed all solid waste generated in Rockland County to facilities owned by the

³⁰ *Pike v. Bruce Church* at 142.

³¹ *United Haulers* at 346-347.

³² *United Haulers* at 347-348.

³³ The only post *United Haulers* case invalidating a flow control ordinance benefitting public facilities is *National Solid Wastes Management Association v. City of Dallas*, 903 F. Supp. 2d 446 (N.D. Tex. Oct. 16, 2012). The District Court’s decision in this case, however, was based on Due Process and contractual franchise rights rather than a Dormant Commerce Clause claim, which the District Court noted was not asserted. *Id.* at fn. 8 (stating “[t]his case, however, is not one asserted under the interstate commerce clause . . .”).

³⁴ *Sandlands C&D, LLC v. County of Horry*, 737 A.2d 45 (4th Cir. 2013).

county's solid waste management authority.³⁵ Among the issues raised in *Carbone II* was which Supreme Court ruling, *United Haulers* or *Carbone I*, should apply in light of the fact that the landfills and transfer stations owned by Rockland County were managed by private contractors.³⁶ Rejecting the haulers' contention that the Supreme Court's decision in *United Haulers* requires both public ownership and public operation of the designated facilities, the District Court ruled, based on binding 2nd Circuit precedent, that public ownership alone is sufficient for the first phase of the Dormant Commerce Clause analysis.³⁷ Because it found public ownership alone to be sufficient, the District Court ruled, based on *United Haulers*, that Rockland County's flow control ordinance did not discriminate against interstate commerce and upheld the ordinance under the *Pike* balancing test analysis.³⁸

E. In my opinion, the proposed amendments to Regulation 501 directing all Delaware-generated solid waste to DSWA facilities are indistinguishable from the issues addressed in *United Haulers*. DSWA owns and manages the landfills and transfer stations to which all Delaware-generated solid waste will be directed and, consequently, the proposed regulatory amendments fall squarely under *United Haulers*. The proposed amendments do not discriminate on their face or in application; all waste haulers are treated the same inasmuch as all waste haulers must comply with the flow control requirements.

F. The proposed amendments, if adopted, would provide substantial benefits to the State by guaranteeing DSWA has a "convenient and effect way to finance [its] integrated package of waste disposal services" for the benefit of the public.³⁹ Further, I am satisfied that

³⁵ *C & A Carbone, Inc., v. County of Rockland*, 2014 WL 1202699 (S.D.N.Y. Mar. 24, 2014).

³⁶ *Id.* at *7.

³⁷ *Id.*

³⁸ *Id.* at *8-11.

³⁹ *United Haulers* at 346.

the proposed amendments provide ancillary benefits beyond revenue generation, including enhancing DSWA's ability to ensure proper disposal of Delaware-generated waste and more effectively administer its SSWMP and comprehensive recycling programs. The evidence does not suggest any burdens on interstate commerce; however, in reliance on *United Haulers*, I find that if there were such a burden, it would not exceed the public benefits achieved through the proposed amendments to Regulation 501 and the SSWMP.

G. It is constitutionally permissible for DSWA to use DDF agreements to incentivize waste haulers to deliver their recyclable materials to DSWA. To implicate the Dormant Commerce Clause, state action must "take the form of regulatory activity."⁴⁰ DDF agreements are purely voluntary contracts which waste haulers are free to accept or refuse. Nothing in the Dormant Commerce Clause restricts DSWA's authority as a market participant to offer incentives to waste haulers.⁴¹ The critical point is that the haulers are free to take their recyclables to non-DSWA recycling facilities and, therefore, DDF incentives do not amount to regulatory activity implicating the Dormant Commerce Clause.

Conclusion

13. Based upon the foregoing findings of fact and conclusions of law, I conclude that the proposed amendments to Regulation 501 are appropriate and warranted under the circumstances and not inconsistent with State or Federal law. Accordingly, I recommend that Regulation 501 be amended as published in the October, 2015, *Delaware Register of Regulations*, subject to the minor non-substantive change set forth in Paragraph 11-I of my findings of fact.

⁴⁰ *Carbone II* at *6.

⁴¹ *Id.* (recognizing that "[w]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause")(citation omitted).

SO RECOMMENDED this 1st day of December, 2015.

/s/ James D. Nutter, Esquire
Hearing Officer