

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

APPEAL OF: \*  
HARVEY AND HARVEY, INC., \*  
a Delaware corporation. \*

FINAL ORDER

Chronology of Events before the Environmental Appeals Board

On August 1, 1986, Harvey and Harvey, Inc. (hereinafter referred to as "Harvey"), appealed the decision of the Secretary of the Department of of Natural Resources and Environmental Control (hereinafter referred to as the "Secretary" and the "Department") to adopt the "Amendments to Delaware Solid Waste Disposal Regulations of August, 1974 Relating to Transfer Stations", dated July 15, 1986 (hereinafter referred to as the "Regulations") to the State of Delaware Environmental Appeals Board (hereinafter referred to as the "Board"). In addition, Harvey requested that the Board consolidate this appeal with an earlier appeal filed by Harvey relating to the Secretary's decision not to process Harvey's application for a modification to its transfer station permit, which had been issued and never revoked by the Department.

At the conclusion of the hearing on or about October 29, 1986, all interested parties were invited to submit written briefs or arguments in support or against allegations made at the hearing. On or about December 23, 1986, Harvey filed it's opening brief in support of its appeal. On or about November 25, 1986, the City of Newark filed written comments on Harvey's appeal. On or about November 26, 1986, Sussex County filed

written comments relating to Harvey's appeal. On or about January 23, 1987, the Department filed an answering brief in opposition to Harvey's appeal. On or about January 27, 1987, the Town of Newport filed an amicus curiae brief in opposition to Harvey's appeal.

On February 11, 1988, the Board made a written request for further information from the Department, the City of Newark and Sussex County. On or about March 3, 1988, the Department filed a written response to the Board's request. On or about March 4, 1988, the City of Newark filed a written response to the Board's request. On or about March 9, 1988, Harvey filed a written response to the Department's written response of March 3, 1988.

The Board's final order in this case is based on the facts, circumstances and exhibits that make up the record in this matter, which includes the several records of previous proceedings. Furthermore, the Board considered the testimony of witnesses at the hearing on or about October 29, 1986, and comments of counsel at the hearing.

#### Summary of Board's Decision

1. The Board rejects the Department's position that Harvey's appeal is moot because the Department "is in the process of adopting new solid waste regulations" (Department's Letter to the Board dated May 3, 1988).

2. Harvey's request for the Board to reverse the Secretary's decision approving the Regulations is denied. Harvey's request for the Board to modify the Regulations is granted in part.

3. Recognizing its obligation to protect Delaware's environment and its citizens, and also to enter an Order that will best further the purpose of 7 Del. C. Chapter 60, the Board modifies or maintains the Regulations as follows:

a. The Board strikes in their entirety Section 8.05, Paragraphs A and C of the Regulations, which relate to exemptions, and amends the definition of "transfer station";

b. The Board strikes in its entirety Section 8.60, Paragraphs A through F inclusive, which relates to fees;

c. The Board maintains Section 8.42 of the Regulations relating to prohibiting the co-mingling of solid waste generated outside of the State of Delaware with solid waste generated in Delaware;

d. The Board maintains the requirement that a Delaware professional engineer sign or certify plans or drawings in connection with a transfer station;

e. The Board creates an interim permit status for existing transfer stations;

f. Section 8.81 of the Regulations is amended to indicate that the effective date of the Regulations will be May 23, 1988.

Jurisdiction and Authority of the Board and Standing of the Parties

Pursuant to 7 Del. C. Section 6007 and 6008, the Board has jurisdiction over this matter. Harvey's appeal in this case was timely filed, and no party has raised an issue over whether or not Harvey is a person whose interest is substantially affected by the Secretary's decision to issue the regulations.

Pursuant to 7 Del. C. Section 6008(a) and (c), the Board may affirm, modify or reverse a decision of the Department Secretary.

This is a unique hearing for the Board. An entire regulatory program of the Department has been challenged. The administrative process in connection with the Appellant has been protracted and costly for all parties and the State. The Board has thoroughly reviewed the written briefs submitted in this hearing, and was fully advised by counsel about the complicated constitutional law arguments raised and responded to by counsel. Because the Board has modified the regulations, members' reasons for doing so must be stated in the Final Order. Thus, this abnormally long Final Order has been prepared.

The Board must enter an Order in this appeal that will further the purpose of 7 Del. C. Chapter 60. One of the stated purposes of 7 Del. C. Chapter 60 is that a program is to be established by the Department providing for improved solid waste storage, collection, transportation, processing and disposal in order that such activities will be conducted only in an environmentally acceptable manner. 7 Del. C. 6001(c).

#### Reasons for Board Decision

##### Constitutional Arguments:

In arriving at its decision in this appeal, the Board exercises restraint and does not find it necessary to consider the arguments presented by the parties relating to constitutional rights. The Board has decided to take a logical and common sense approach toward the issues in the appeal. The Board finds it appropriate

and sufficient to take the facts and circumstances found in the record, and apply them to the Board's statutory mandates that require the Board to render a decision that protects the State of Delaware's environment and citizens, and to further the purpose of 7 Del. C., Chapter 60 by improving the storage, collection, transportation, processing and disposal of solid waste.

Exemptions From Regulations:

The Board is aware of the fact that three major transfer station operations existed in Delaware at the time the Department promulgated the Regulations. These operations include the City of Newark, Sussex County and Harvey's transfer station located near Newport, Delaware.<sup>1</sup> The effect of the Regulations promulgated by the Department was that Harvey's transfer station would be regulated, and the transfer stations operated by the City of Newark and Sussex County would not be regulated. For the reasons stated hereinbelow, the Board finds that the language in the Regulations that resulted in exemptions to the Regulations does not further the purpose of 7 Del. C., Chapter 60 relating to solid waste management. Therefore, the Board has modified the Regulations to do away with the language in the Regulations that results in exemptions for the City of Newark and Sussex County.

Errors and Lack of Evidence Relating to Rationale for Exemption:

The Board finds that to best further the purpose of 7 Del. C.,

---

<sup>1</sup>The record is unclear as to how many transfer stations Sussex County operates, and how many of Sussex County's transfer stations use compaction equipment. Nevertheless, the Board is of the opinion that all transfer stations should be regulated whether they do or do not use compaction.

Chapter 60 as it relates to transfer stations and solid waste in the State of Delaware, the language of the Regulations that results in exemptions to the City of Newark and Sussex County must be modified. Nothing in the record provides a rationale basis for the exemptions to exist.

The testimony of Department representatives about the reasons why the Department decided to exempt certain existing transfer station facilities and municipal facilities is not clear. The Department apparently thought about "grandfathering" clauses. It also took into account prior environmental histories of the municipal transfer stations and also Harvey. Thus, what the Department said and believed about a particular transfer station, and whether or not what was said and believed was supported by facts, is important.

Department employee William Razor stated that the rationale for exempting existing transfer station facilities was because of the standard practice of grandfathering such facilities that are in operation prior to the existence of a regulatory program (Transcript of hearing before the Board dated October 29, 1986, pp. 62-63. Hereinafter reference to transcript pages will appear as "T-\_\_\_"). However, Department employee Phillip Retallic testified that part of the reason for the exemptions relating to municipal transfer stations was based on the environmental record of the existing municipal transfer station (T-86-96). Furthermore, Mr. Retallic indicated that the Department felt that the local electorate and government officials could control any problems with existing municipal transfer stations (T-63-64).

Unfortunately, the Department mistakenly believed that the existing municipal transfer stations were regulated under local environmental regulations. This belief was incorrect because neither the City of Newark or Sussex County has any regulations relating to their transfer station (T-109-110).

The Department also erred when it assumed that Sussex County transfer stations did not use compaction equipment. In fact, Sussex County does have transfer stations that employ such equipment.<sup>2</sup>

The Department was also in error about Sussex County transfer stations being regulated by the Delaware Solid Waste Authority. Sussex County contracts with private contractors (See letter to Board from Sussex County dated November 26, 1986 containing contract bid documents.)

The Department also identified several environmental hazards pertaining to non-hazardous solid waste and solid waste transfer stations. These hazards include vector organisms, solvents, waste oils, pesticides, herbicides, canisters containing explosive materials and vapor releases (T-27-30). However, with the exception of problems at the facilities run by the Delaware Solid Waste Authority, the Department failed to provide any evidence of how frequent these problems occur or may occur in Delaware (T-32).

Additionally, when it was promulgating the Regulations, the Department staff was concerned about environmental hazards caused by releases of solid waste materials after and during

---

<sup>2</sup>Two Board members have taken judicial notice of this fact since both deliver solid waste to Sussex County transfer stations that have compaction equipment.

compaction of solid waste located in the transfer station (T-47, 57-59). However, the Board is of the opinion that to best further the purposes of 7 Del. C., Chapter 60 and protect the environment and citizens of Delaware, all transfer stations should be regulated whether or not compaction of solid waste is involved. Thus, there should be no distinction between transfer stations with or without compactors, and the Regulations are modified accordingly.

Existing Transfer Stations Versus New Transfer Stations and Environmental Histories:

According to the Department, all "new" municipal transfer stations would be regulated under the Regulations. It is for this reason that the Board rejects the Department's justification for exempting existing municipal transfer stations on its stated rationale that the local electorate and government officials will resolve all problems relating to environmental hazards at the existing transfer stations. If the Department believes that the local electorate and governmental officials can take care of environmental problems with existing transfer stations, then why couldn't the same local electorate and government officials regulate or control a newly constructed solid waste transfer station?

The Board also finds that the Department erred when it used the previous environmental records of Harvey as a basis for providing exemptions to existing municipal transfer stations and not for Harvey. During the course of these proceedings, the Department made reference to approximately twenty-six complaints made by citizens against Harvey. However, the Board makes a



distinction between "complaints being made", and complaints that are "valid". Despite the Board's efforts at securing evidence of any valid complaint against Harvey's transfer station, the record before the Board does not contain evidence that any of the complaints about Harvey are valid. The Board reviewed former Deputy Attorney General and Hearing Officer Robert Thompson's reports, this record, and also the Department's letter to the Board dated March 3, 1988. The Department is unable to provide the Board with any incident reports, or statements of whether or not legal action was taken against Harvey in connection with the complaints. The Department comment in its letter dated May 3, 1988, is that its records were purged. This is surprising to the Board because the Department could have reviewed records at the State Archives and also in Court files. The Department could have also presented affidavits from present and former environmental protection officers who investigated the alleged complaints. In summary, the Department staff failed to confirm the validity of any complaints relating to Harvey's operation.

Off-Site Solid Waste:

The Department also improperly considered as part of its rationale for regulating Harvey and exempting existing municipal transfer stations from the Regulations the idea that Harvey would be receiving solid waste from "off-site" (T-94). The Board does not agree with the Department's rationale relating to "off-site" solid waste being delivered to the transfer station as being justification for carving out an exception for existing municipal transfer stations. The record is clear that the transfer

stations for the City of Newark and Sussex County receive solid waste from "off-site".

Harvey indicated that the solid waste that would flow through its transfer station, which would come from New Jersey, would be residential waste. This is the same type of waste that is flowing through the transfer stations operated by the City of Newark and Sussex County (T-14). Furthermore, the City of Newark confirmed in its letter dated March 4, 1988, that the "solid waste disposed of at the City of Newark transfer station is not generated on the site of the transfer station. It is generated throughout the City of Newark".

In summary, the Board sees no distinction between the off-site residential solid waste that would flow through Harvey's transfer station, and the off-site residential solid waste that is flowing through the transfer stations operated by the City of Newark and Sussex County. Thus, there is no need for an exemption in the Regulations for existing municipal transfer stations based on "off-site" waste.

Volume of Solid Waste:

The Board also believes that the volume of solid waste going through a transfer station is relevant to whether or not exemptions from the regulations should be allowed. Unfortunately, the record is not clear as to exactly what volume of solid waste is going through the three principle transfer stations that were discussed at the hearing. Estimates for the City of Newark were given at 8,500 tons per year, 12,000 tons per year for Sussex County, and somewhere between 10,000 and 16,000 tons

per year for Harvey's operations (T-170-172). The Board is of the opinion that because similar significant amounts of solid waste are flowing to and through all of the major existing transfer stations, the Regulations should be modified to further the purposes of 7 Del. C., Chapter 60, and protect the environment and citizens of Delaware by doing away with the exemptions contained in the regulations relating to existing municipal transfer stations (e.g. Transfer stations operated by the City of Newark and Sussex County).

Certification by Professional Engineer:

The Board agrees with the Department's position that a professional engineer licensed in the State of Delaware should certify the plans and documents submitted in connection with a transfer station. 24 Del. C. Chapter 28 sets forth the licensing requirements for professional engineers in the State of Delaware, and prohibits the "practice of engineering" by individuals who are not registered pursuant to the provisions of that Chapter. The Board recognizes that there will be an increased cost in connection with the planning and development of a transfer station in Delaware because of the requirements relating to certification by professional engineers, but the environment and the citizens of the State will be better protected.

Issues Relating to Fees

Processing Fees:

7 Del. C. Section 6006(5) and Article VIII, Section 11(a) of the Delaware Constitution were reviewed by the Board to determine if the fee schedule set forth in the Department's regulations

is unlawful. The Board also considered the facts and circumstances in the record that were set forth by the parties in this case.

The Department provided the Board with an exhibit attached to its letter to the Board dated March 3, 1988. The exhibit was a fee schedule that had been adopted and signed by Secretary Wilson (Exhibit "B" of the Department's letter dated March 3, 1988). The Board has determined that the Secretary's fee scheduled for transfer stations should be included in the fee schedule that was attached to the Department's letter and identified as Exhibit "B", and not in the Regulations themselves. This would be consistent with other Department programs and fees. Furthermore, amendments to fees could be done without amending regulations. Therefore, the Board modifies the Regulations by striking in its entirety Section 8.60 of the Regulations.

The Board is aware of the provisions of 7 Del. C. Section 6006(5), which authorizes the Secretary to collect a "reasonable fee for processing an application", and in the event that there is a hearing in connection with a permit application, the Secretary can also collect "the necessary expenses of the Department for conducting the hearing".

Beyond requiring a fee schedule to be promulgated by the Secretary, the Board did not find sufficient evidence in the record that proved that a "reasonable fee for processing an application" amounts to \$2 per ton of solid waste that will be handled during a given year (T-162). There apparently is no engineer on board at the Department that will be working exclusively on processing transfer station permit applications.

Therefore, the Board refuses to consider the comments made by the Department staff at the hearing in connection with personnel costs. The Board inquired about man hours and personnel costs relating to regulating a transfer station by requesting information from the Department in a letter dated February 11, 1988. The Department provided the Board with a copy of a memorandum dated February 24, 1988, prepared by Richard A. Folmsbee, Supervisor of the Department's Solid Waste Branch. That memorandum makes it clear that the Department "does not have an engineer on staff that works exclusively on the transfer station regulatory program", and that the engineer's "hiring package" is being prepared by the Department. Thus, the Board is not convinced that the fees for processing either an operating or construction permit application are "reasonable" for purposes of 7 Del. C Section 6006(5).

Again, the Board's decision is based on the record that it has before it in this hearing, and the Board recognizes that the Department Secretary has the statutory authority to collect from a permit applicant a reasonable fee for processing a permit application, and also the necessary expenses of the Department for conducting any hearing in connection with the permit application. In this record, however, there are no facts relating to hearing costs, nor has any non-speculative evidence been presented on what would be a reasonable fee for processing an application.

Annual Fee for Processing an Annual Operating Permit Application:

The Board incorporates the reasons that were stated hereinabove in connection with processing costs. It would appear from the

comments in the record that the Department contemplates a \$20,000 fee as being the average annual fee for processing an annual operating permit application for a transfer station.

First, the Board finds it ironic that the annual fee for a transfer station would exceed the current annual fee for a hazardous waste treatment, storage or disposal facility, which is \$5,000 and also in the area of solid waste, the annual fee for an industrial and sanitary landfill, which is \$5,000 (Department's response to the Board dated March 3, 1988). Secondly, the Board recognizes the Department Secretary's authority to charge a "reasonable fee" for processing an annual operating permit. 7 Del. C. Section 6006(5). However, in the record in this proceeding, insufficient information has been presented to justify the Board finding that the annual fee contemplated by the regulations for processing an annual operating permit application is "reasonable".

Fee for Processing a Construction Permit Application:

The Board incorporates its previous comments relating to fees. As modified, the Regulations do not exclude the existing transfer stations owned and operated by the City of Newark, Sussex County and Harvey. These transfer stations are already constructed, and are or have been operating, and it will already be a significant burden on these owners and operators to pay for the documents and records that must be filed with the Department pursuant to the provisions of Section 8.30 and 8.40 of the Regulations. Thus, the Board believes it would be unreasonable to charge any of these, or other existing transfer stations, a fee for processing a Delaware transfer station construction

permit application.

Although the Board believes that it is unreasonable to charge the existing facilities a fee for processing a construction permit application, the Board recognizes that the Department has the authority to do so under the provisions of 7 Del. C. Section 6006(5). However, the Board finds that on the record before it, the fee contemplated for processing a construction permit is not "reasonable". There is no evidence relating to hearing costs, and the evidence relating to staff time and costs was merely speculation as evidenced by Mr. Folmsbee's memorandum.

Cap on Fees:

Section 8.60, Paragraph E of the Regulations provides for a \$20,000 cap on fees. The Board finds that there is no rationale basis for the cap and it discriminates against transfer station permit applicants who intend to handle 10,000 tons or less of solid waste per year. The Board believes that the larger the transfer station operation, the more potential for harm to the environment and Delaware citizens. Therefore, a larger operation should be treated the same as a smaller operation when it comes to permit application processing fees.

By way of example, under the regulations a permit applicant that intends to handle 20,000 tons of solid waste per year at a transfer station would only have to pay the same \$20,000 fee that a 10,000 ton per year operation would pay.

Fees for Amendments to Permits:

For the same reasons stated hereinabove in connection with the other permit application fees, the Board has decided to

modify 8.60, Paragraphs B and D by striking said paragraphs in their entirety. No evidence of reasonableness has been shown.

#### Summary on Fee Issues

The net result of the Board's decisions relating to the issue of fees is that Section 8.60 of the Regulations is struck in its entirety. The Board recognizes that the Department's Secretary has the authority under 7 Del. C. Section 6006(5) to establish a fee schedule for applications and also collect from a permit applicant the necessary expenses of the Department for conducting a hearing. The Board interprets the phrases "necessary expenses of the Department for conducting the hearing" and "a reasonable fee for processing an application" as meaning the "actual expenses" of the Department. The Board feels very uncomfortable having to render decisions on fees relating to the Department's regulatory programs and believes that this area is better left to the legislative and budget process. However, when an interested party, such as Harvey, raises the issue of the cost of permit processing fees, the Board has a statutory obligation to examine the reasonableness of such fees.

#### Interim Permit Status

The Board recognizes that by modifying the Department Regulations, the existing transfer stations that were originally excluded from the Department's regulatory authority are now covered by it. Thus, the owners and operators of existing transfer stations such as the City of Newark, Sussex County and Harvey will need time to comply with all of the provisions of the Department Regulations, especially the information reporting Regulations



Sections 8.30 and 8.40. Furthermore, these facilities need to operate between the time the Regulations are modified and whenever there construction and/or operating permits are issued.

The Department responded in the record to this very problem (T-194-195). The Department staff indicated that the existing transfer stations could operate in the interim (T-194-195). Therefore, the Board modifies the Regulations by adding a new section at the end of the Regulations to be numbered Section 8.83 and entitled, "Interim Status of Existing Transfer Stations".

Summary of Regulation Modifications by the Board

The Board modifies the Delaware Solid Waste Disposal Regulations of August, 1974 relating to transfer stations, dated July 15, 1986, as follows:

1. Section 8.05, Paragraphs A and C are deleted in their entirety. The new Section 8.05, Exemptions, shall read as follows:

A. Compaction equipment used exclusively for solid waste generated on-site (e.g. offices, apartment buildings, factories, plants, stores, shopping centers or similar facilities) shall be exempt from this regulation.

B. Resource Recovery Plants.

C. Co-Generation Plants.

D. State agencies that are immune due to statutory rights shall not be required to submit copies of local government approvals including, but not limited to zoning, building permits, public works or other permits or approvals.

2. The definition of "Transfer Station", Section 8.20, is amended as follows:

The following words are deleted in the second, third, fourth and fifth lines of the definition "compacted using mechanical, hydraulic, or pneumatic equipment; and", and also the words "to large transportation containers for shipment".

The definition of "Transfer Station" as modified by the Board would then read as follows: "Transfer Station": means any facility where quantities of solid waste are delivered from off-site sources and it is then transferred to other intermediate or final treatment, storage and disposal facilities."

C. Section 8.60 of the Regulations is struck in its entirety.

D. A new Regulation, Section 8.83 entitled, "Interim Status of Existing Transfer Stations" is added to the Regulations to read as follows:

The Department shall grant an interim permit to the owner of an existing transfer station regulated under these regulations for the purpose of allowing said existing transfer station to operate in the interim between the effective date of these Regulations and the date on which the Department issues said transfer station owner a construction and/or operating permit. The effective date of the interim permit shall be the same as the effective date of these Regulations, and said interim permit shall expire on or before one year after the effective date of these Regulations, or the issuance of a construction and/or operating permit, whichever occurs first. Said interim permit shall not be unlawfully denied nor may it be revoked without notice and opportunity to be heard, and just cause shown.

The one year time period set forth in this new regulation does not conflict with the time period already set forth in Regulation 8.50, Paragraph B, nor is it intended to supercede or interfere with the six month time period for submitting documents and records required pursuant to Regulation 8.50, Paragraph B.


#### Effective Date of Final Order

This Final Order shall be effective May 23, 1988.

Appeal from Board's Decision

The Board's decision in this matter may be appealed pursuant to the provisions of 7 Del. C. Section 6009.


Having considered the entire record and comments of counsel and interested citizens in the appeal of Harvey and Harvey, Inc., the provisions of the Final Order set forth hereinabove are hereby ordered into effect.

  
EVELYN GREENWOOD  
5/18/88

Having considered the entire record and comments of counsel and interested citizens in the appeal of Harvey and Harvey, Inc., the provisions of the Final Order set forth hereinabove are hereby ordered into effect.

*Thomas J. Kealy* 17 May 88  
\_\_\_\_\_  
THOMAS J. KEALY

Having considered the entire record and comments of counsel and interested citizens in the appeal of Harvey and Harvey, Inc., the provisions of the Final Order set forth hereinabove are hereby ordered into effect.

  
CLIFTON HUBBARD, JR. 5/15/88

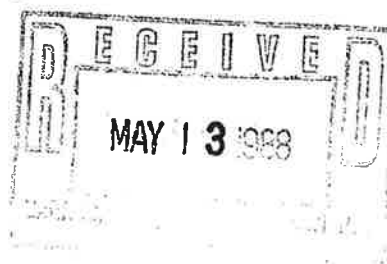
Having considered the entire record and comments of counsel and interested citizens in the appeal of Harvey and Harvey, Inc., the provisions of the Final Order set forth hereinabove are hereby ordered into effect.

Ray K Woodward 5/13/88  
RAY WOODWARD



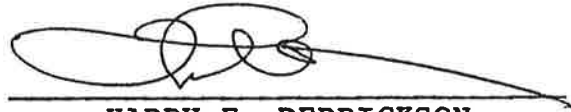
Having considered the entire record and comments of counsel and interested citizens in the appeal of Harvey and Harvey, Inc., the provisions of the Final Order set forth hereinabove are hereby ordered into effect.

  
\_\_\_\_\_  
RICHARD C. SAMES





Having considered the entire record and comments of counsel and interested citizens in the appeal of Harvey and Harvey, Inc., the provisions of the Final Order set forth hereinabove are hereby ordered into effect.



HARRY E. DERRICKSON



