



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL**

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Office of the  
Secretary

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**Secretary's Order No. 2006-A-0006**

**Re: Application of Eastern Shore Environmental, Inc. for a Permit to Construct and Operate a Solid Waste Transfer Station near Farmington, Delaware.**

**Date of Issuance: March 1, 2006**

**Effective Date: March 1, 2006**

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under *7 Del C. §6003*, the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers the June 30, 2005, application of Eastern Shore Environmental, Inc. ("ESE") for a permit to construct and operate a proposed solid waste transfer facility to be located along southbound Route 13 on a twenty acre site approximately 1,400 feet south of the Farmington, Kent County municipal limits ("Farmington Transfer Station").

The Department held a public hearing on ESE's application based upon two timely and meritorious requests for a public hearing. The Department's Hearing Officer developed a record of decision, and prepared a report of recommendations, dated February 13, 2006 ("Report"), a copy of which is appended to this Order and incorporated herein.

The Report recommends approval of the ESE application and the issuance of a solid waste permit to construct and operate the proposed solid waste transfer station. The Report considered the extensive and well-presented public comments in opposition to

ESE's application, but it concluded that the application is consistent with the law, and the Department's policies and regulations. The Report addressed the public opposition, which largely was based upon the proposed land use as a solid waste transfer station and the perceived adverse traffic concerns. These issues are the primary responsibility of the local zoning authority and the Department of Transportation ("Del DoT"), respectively. ESE's application received approval from Kent County and the Department received Del DoT's comments that did not oppose the application.

The proposed re-location of ESE's present transfer station near the Dover Air Force Base to the proposed location near Farmington also is consistent with important state and local public policy considerations. The Report found that the record of decision, as a whole, does not support denial of ESE application, which the Report found was in compliance with all the Department's regulations and policies, as determined by the Department's experts in their technical review.

The issuance of the permit will include certain reasonable conditions that the Department imposes to protect the environment and public health from the risk of harm from the operations. The permit and its many conditions will allow the Department to enforce the ongoing operations through the exercise of the Department's considerable statutory authority to impose monetary penalties, revoke or suspend a permit, or even undertake criminal prosecution. The permit will also have operational limits imposed on the amount and type of solid waste that may be transferred at the Farmington Transfer Station, and the hours of operation.

I adopt the Hearing Officer's review of the record and recommendation. I agree with the Report that the public comments raised important issues for the Department to

consider, but the application does satisfy the Department's regulations on its proposed location and future operation as a transfer station. The opposition to the location is primarily a land use issue, and the Kent County Levy Court approved the location for the proposed transfer station. The Kent County Levy Court also imposed numerous conditions on the land use. Most of the public comments sought the Department's assurance that the Department would not interfere with the conditions imposed by Kent County Levy Court's zoning approval. The Department has no authority over local zoning actions for the Farmington Transfer Station, but to the extent that the operation of the Farmington Transfer Station violates the zoning approval, then the Department has the authority to enforce its permit to ensure that the operations are consistent with the local zoning approval. My review of the Report and the record finds and concludes that the Department should issue a permit allowing ESE to construct and operate the Farmington Transfer Station. The Department will include the conditions that are necessary and appropriate to protect the environment and public health from the risk of harm.

In sum, as more fully described in the reasons and findings above and in the Report, I adopt and direct the following as a final order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing, and held the public hearing in a manner required by the law and its regulations;

3. The Department considered all timely and relevant public comments in making its determination;

4. The record supports the issuance of a permit based upon the application, and such minor modifications and reasonable conditions that the Department official delegated to prepare the permit determines are necessary to protect the environment and public health;

5. The duly authorized Department official shall timely prepare and issue a permit consistent with this Order; and

6. The Department shall provide notice of this Order to the persons affected by this Order, as determined by the Department, including those who participated in the hearing process.

*s/John A. Hughes*

John A. Hughes  
Secretary

## HEARING OFFICER'S REPORT

TO: The Honorable John A. Hughes  
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire  
Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

RE: Application of Eastern Shore Environmental, Inc. for a Permit to Construct and Operate a Solid Waste Transfer Station near Farmington, Delaware.

DATE: February 13, 2006

### I. BACKGROUND AND PROCEDURAL HISTORY

The Department of Natural Resources and Environmental Control ("Department") held a public hearing on November 14, 2005, at the Farmington Fire Hall in Farmington, Kent County.<sup>1</sup> The Department was requested to hold the public hearing in order to hear public comments on the June 30, 2005, application of Eastern Shore Environmental, Inc. ("ESE") for a solid waste permit to construct and operate a proposed solid waste transfer station facility south of Farmington ("Farmington Transfer Station").

ESE currently owns and operates a solid waste transfer station at 748 Postles Corner Road, Little Creek, Delaware, which the Department has authorized to process construction and demolition solid waste and municipal solid waste. ESE's permit application proposes to re-locate its current operations to a new site, identified as Kent County tax parcel 6-00019300-01-4800-00001. This parcel is located along the southbound lanes of Route 13, approximately 1,400 feet south of the town of Farmington's municipal limits. ESE proposes to construct<sup>2</sup> at the Farmington location the following: 1) an approximate 2,520 square foot office building, 2) a

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<sup>1</sup> This Hearing Officer was assigned to preside over the hearing, to develop a record of decision and to prepare a report of recommendations for the Secretary of the Department.

<sup>2</sup> The Department's solid waste permit regulates only the solid waste management handling operations, and it does not regulate other planned construction at the proposed solid waste facility location, such as the parking and office building.

truck queuing area, 3) a truck scale facility with a 500 square foot scale house building, 4) a 4,200 square foot maintenance building, 5) a 20,000 square foot transfer building, 6) a water tank for fire suppression, 7) a fuel loading island with fuel pumps, and 8) employee and truck parking areas. ESE proposes to purchase a twenty acre parcel, which will be subdivided from a larger forty-seven acre parcel pursuant to an agreement of sale dated September 14, 2004.<sup>3</sup>

ESE seeks a solid waste permit to transfer up to 660 tons per day of total municipal solid waste, which is the current level that ESE is authorized to transfer at its Little Creek location. The permit application requests approval for the facility to be open for the receipt of solid waste from 6:00 a.m. to 6:00 p.m. Monday through Friday, and 6:00 a.m. through 2:00 p.m. on Saturday. The proposed facility would be open for the management, transfer and removal of solid waste from the facility twenty-four hours from Monday through Saturday, and the facility would be closed on Sunday.

ESE sought and obtained approval for the use of the proposed location from Kent County Levy Court (“Kent County”), which controls zoning and land use issues in Kent County. The Department’s solid waste application requires that an applicant provide evidence that the proposed location complies with local zoning. On January 11, 2004, Kent County approved ESE’s request to use the location for a solid waste transfer station, but the approval imposed certain conditions in response to numerous public comments received as part of the zoning approval process. ESE provided the Department with Kent County’s zoning approval as part of the permit application.

Technical experts within the Solid and Hazardous Waste Management Branch (“SHWMB”) of the Department’s Division of Air and Waste Management (“DAWM”), reviewed ESE’s June 30, 2005, application and determined that it was administratively complete.

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<sup>3</sup> The agreement is satisfactory proof of ownership or control over the property when the facility is built.

Consequently, the SHWMB published legal notices in order to provide the public with notice of and an opportunity to comment on ESE's application. The opportunity to comment included the right to request a public hearing. The Department received two comments and requests for a public hearing, one from the Delaware Solid Waste Authority ("DSWA") in a September 12, 2005, letter, and one from Janice and William Bowman in a September 19, 2005, letter. The Department determined that the requests were meritorious within the meaning of *7 Del. C. §6004* and provided public and personal notice of the November 14, 2005 public hearing. I presided over the public hearing.

## **II. SUMMARY OF THE RECORD**

This report of recommendations is based upon the record of decision, which contains: 1) an eighty-one page verbatim transcript of the public hearing, 2) documents, marked as Exhibits ("Ex."), which were admitted into the record as hearing exhibits, and 3) information I reviewed or obtained, including the Department files and records and post-hearing communications. This information includes from the Department's technical experts, as provided in my discussions with them, my legal research, my file and document review, and my field inspection of the proposed transfer station location and its surrounding area.

At the hearing, David Perrego, an Environmental Scientist in SHWMB and the Department's project manager for the application, made a brief presentation and provided for the record<sup>4</sup> the Department exhibits, which included the application, the public comments, and the public notices. ESE had several representatives present at the public hearing, including Marc Shaener, a consultant to ESE's Board, and David Braun, the site engineer for the project with

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<sup>4</sup> The Department takes no position on a pending application until after a public hearing, but it does develop the hearing record with certain information relevant to the record of decision, including the legal proof of the public notices, and any timely and relevant written public comments.

Braun Engineering and Surveying. Mr. Shaener made a brief presentation and provided an Exhibit for the record.

The public comments were made by numerous persons in attendance, as indicated by the hearing sign-in sheet and transcript. The public comments all opposed the proposed location of the site. The reasons for the opposition were based upon the site's use as a transfer station, and included concerns with public health, traffic congestion, attracting birds, noise and light from the transfer station, and other environmental issues based on the presence of a solid waste transfer station operating near their homes, properties and businesses. The overall concerns were the increased risks of potential harm to their property values and quality of life.

I also have reviewed much of the Department's file, and researched various prior orders and appeals on solid waste transfer stations. I consider the record of decision to be well-developed, and will provide ample support for the Secretary's final decision.

### **III. DISCUSSION AND REASONS**

The Department's statute and regulations set forth the underlying regulatory authority for the Department's exercise of its power to issue or deny a permit to construct and operate a solid waste transfer station. The power to issue a permit includes the power to impose such reasonable conditions on the permittee that are consistent with the regulatory purposes. In *7 Del. C. §6003(a) (4)*, the General Assembly granted the Department plenary authority to regulate solid waste by requiring a permit from the Secretary for any activity "[i]n a way which may cause or contribute to the collection, transportation, storage, processing or disposal of solid wastes..." Pursuant to this statutory authority, the Department promulgated regulations, *Delaware Regulations Governing Solid Waste*, adopted December 1988, as amended ("DRGSW" or "Regulations"). The Regulations specifically address a "transfer station," which is defined as

“any facility<sup>5</sup> where quantities of solid waste delivered by vehicle are consolidated or aggregated for subsequent transfer by vehicle for processing, recycling or disposal.”

Section 10 of the Regulations sets forth the regulatory requirements for a transfer station, including the requirements for approval for the construction of a new transfer station. Section 10. B. of the Regulations specifies the following three criteria for siting a new transfer station:

1. Transfer stations shall be located only in areas where the potential for degradation of the quality of air, land, and water is minimal.
2. Transfer stations shall be located adjacent to access roads capable of withstanding anticipated load limits.
3. No new transfer station shall be located in an area such that solid waste would at any time be handled:
  - a. Within the 100-year flood plain.
  - b. Within any state or federal wetland.
  - c. So as to be in conflict with any locally adopted land use plan or zoning requirement.

The issue that was raised by most of the public comments was the use of the Farmington site for a solid waste transfer station. The Department’s role and authority over the use of property is limited. The determination of the use of property is within the sole jurisdiction of the local zoning authority, which for the proposed location is the Kent County Levy Court. The Department’s limited role is to ensure that the local zoning authority has approved the proposed property for use as a solid waste transfer station. The General Assembly imposed this requirement on the Department’s authority to issue any permit in *7 Del C. § 6003 (c)*, which provides as follows:

The Secretary shall grant or deny a permit required by subsection (a) or (b) of this section in accordance with duly promulgated regulations and: (1) No permit may be granted unless the county or municipality having jurisdiction has first approved the activity by zoning procedures provided by law...”

Several of the public comments questioned the location that ESE selected. This is a valid concern raised by the fear of the possible harm from a neighbor handled solid waste. These

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<sup>5</sup> Section 3 also defines “Facility” as “all contiguous land, and structures...”

comments apparently ask the Department to reject the application based upon their opposition to the proposed use as a transfer station. Any Department decision to reject a proposed site for use as a transfer station must be based upon the law and the Department's regulations. The Department's role is to apply the Department's regulations, exercise its expert judgment, and act in a manner consistent with the Department's statutory and regulatory policies. The Department does not have the power to force an applicant to select another location, or to dictate a different location. The Department must either approve or disapprove a location that an applicant has selected, and the approval or disapproval must be based upon the law, regulation, or statutory policies considerations.

The Department's Regulations provide the specific criteria that an applicant and the Department must follow for a proposed solid waste transfer facility. Based upon my discussions with the Department's technical experts, their review has concluded that the Farmington location for the transfer stations is consistent with the Regulations in that it is an area where the potential for degradation of the quality of the air, land and water will be minimized. The minimization also will be protected by the Department's ongoing regulation of the permit conditions, which impose reasonable measures to ensure the transfer station, when built and operating, will comply with all environmental and public health regulations and minimize the risk of any adverse consequences to the environment or public health.

The proposed location satisfies the transportation criterion because it is adjacent to Route 13, one of the state's major highways. The Department requested that Delaware Department of Transportation ("Del DoT") review the application and provide comments. Del DoT indicated that the proposed transfer station would not adversely impact traffic and otherwise offer any basis for the Department to deny the permit on the grounds of Del Dot's authority over traffic. Many of the public comments were based on the concern with increased traffic. Del Dot's

comments are received as part of the Department's review of an application, and Del Dot, and not the Department, has the primary responsibility to regulate traffic issues in Delaware. I agree with the Department's experts' assessment, as supplemented by Del Dot, that the proposed transfer stations operations will not unduly cause any traffic problems in the area. The proposed operations would entail a maximum of twenty-four collection trucks arriving an hour during the hours when the transfer station is open for receiving solid waste. The number of the larger tractor trailers that would leave the site would be approximately eight an hour leaving the site, based upon fully loaded and forty foot long transfer trailers, as opposed to the smaller collection trucks. In addition, the transfer trailers' departure could be spread out over twenty-four hours Mondays through Saturdays, which should alleviate any traffic congestion concerns. The proposed transfer station would be closed on Sundays and consequently there would be no truck traffic then.

Several of the public comments addressed the need for Del DoT's participation at the DNREC hearing. Del DoT's participation at the public hearing was not required, and I find that the record is adequate on the traffic and road usage issues that are within the Department's limited authority over these concerns. ESE also indicated that it will enforce the truck traffic by adequate training of its drivers, and that it will enforce the rules with the threat of immediate discharge of any employee/contractor who fails to obey the designated truck traffic routes. I find and conclude that ESE's proposed measures are adequate and appropriate means for ESE to voluntarily control this potential problem of trucks not using the designated truck routes. The Department does regulate the transportation of solid waste and has the authority to enforce any failure to obey the Department's Regulations.

The proposed location satisfies the Department regulations because the Department's experts have concluded that the proposed location also would not be within a 100-year flood plain, a state or federal wetland, or in conflict with any local land use plan or zoning

requirement. I agree with these conclusions, which are also evident from the supporting information in the application.

The applicant has complied with the Regulations, and I find no public policy ground to justify denying the issuance of a permit. The Department's experts have provided me their advice and it is that they support the issuance of the permit, subject to certain reasonable conditions to ensure that the facility, when built and operating, will minimize the risk of harm to the environment or public health.

Section 10 of the Regulations also requires the submission of the proposed design of the solid waste management facilities, which is the transfer station building. ESE submitted a proposed design for the solid waste facilities. Based upon the experts' technical review, I am satisfied that the proposed design complies with the Regulations. The Regulations impose design strict requirements in order to protect the environmental and public health from the risk of harm. The Department's technical experts indicate that the design meets all the Department's regulatory standards, and that it will have adequate safeguards to protect the environment and public health from the risk of harm. The design includes a leachate collection system, which will gather and transport any fluids from the solid waste. The leachate will be stored in a sealed container and transported by truck to an approved disposal facility. This system is required to protect the groundwater from contamination, which was a concern raised by the public comments.

The public comments raised the issue of the proposed waste water system. The proposed buildings with plumbing facilities will be connected to a private wastewater collection system and disposed into an on-site septic system, which will be subject to Department septic system permit regulations administered by the Department's Division of Water Resources. To the extent that the waste water does not originate from the solid waste management buildings, but from the

office building, then this concern will not be subject of the solid waste permit. Similarly, the Department will regulate the storm water from the proposed transfer station, and this storm water management will apply to the entire proposed location.

The solid waste permit will include a permit condition requiring full compliance with all of the Department's regulations. The other conditions in the permit will also allow the Department to regulate any future problems that may arise. For example, the public comment's included a possible concern with the attracting birds, which could interfere with air plane traffic at local private airports. ESE received comments from the Federal Aviation Administration and I find that these comments adequate for the Department's approval of the permit. If a problem with birds occurs when the facility is operating, then the Department may take appropriate action to remedy. Thus, the permit conditions that will regulate ESE's conduct in operating the transfer station will address any environmental or public health problems that may arise when the transfer station is built and operating.

The application also includes the proposed operating plan for the transfer station, which is required by Section 10 of the Regulations. The Department's experts have reviewed this proposed plan of operation and have found that it is acceptable. The operating plan should preclude the degradation of land, air, surface water, or ground water. I agree with the experts' assessment of the operating plan, and recommend its approval as part of the permit's conditions. The proposed plan addresses some of the public comments because it will provide for operating standards for the storage of solid waste, the disposition of solid waste leaving the facility, and the control of nuisances and hazards. The permit application also includes a proposed plan for closure as required by the Regulations.

Finally, DSWA in its letter commenting on the application raised various broad issues. I find that these issues have been considered, and that the Department's permit conditions will

adequately protect the environmental and public health. DSWA also raises the question of DSWA's authority to "determine the location and character of any project to be developed under this chapter..." I find and conclude that DSWA's reference to statutory authority over transfer stations in "this chapter" is to Chapter 64 of Title 7. The Department's action on ESE's application is undertaken under the Department's jurisdictional authority in Chapter 60 of Title 7. I find that the ESE application is properly within the Department's authority to regulate under Chapter 60. Based upon my review of Chapter 64, I find that the Department's exercise of its permit authority in Chapter 60 does not conflict with DSWA's authority in Chapter 64.

#### **IV. RECOMMENDED FINDINGS AND CONCLUSIONS**

Based upon the discussion and reasons, I find and conclude that the record supports approval of the issuance of a permit to allow ESE to construct and operate the Farmington Transfer Station. This approval will further important local, state and national public policy concerns with the continued operation of the existing facility at Little Creek, which has been the subject of controversy and litigation. The applicant has satisfied the Department's strict regulatory requirements, and the site is a suitable location and properly zoned for the proposed use, as determined by Kent County. The public opposition was based upon the proposed use as a transfer station, but the Department's authority is limited to applying its Regulations and public policies. The proposed site is an appropriate site location under the Department's Regulations, and is needed consistent with the public policy considerations that support the move of ESE's existing transfer station operations to the Farmington Transfer Station. I recommend the Secretary adopt following findings and conclusions:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;

2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and its regulations;

3. The Department held a public hearing in a manner required by the law and its regulations;

4. The Department considered all timely and relevant public comments in making its determination;

5. The Department should approve a permit, subject to those permit conditions necessary, appropriate and reasonable to protect the environment and public health from the risk of harm from the transfer station operations.

6. The record provides an adequate justification for the approval of the application as consistent with important state and local policy considerations that support the re-location of the current ESE transfer station operations near Dover Air Force Base;

7. The public hearing record contains public opposition to the proposed location to operate a transfer station, and this opposition was considered and determined did not justify denial of the application. Instead, the public interest and concerns with the possible harm to the environment will be addressed in the permit conditions and possible enforcement action should the applicant/permittee violate the permit conditions;

8. The Director of DAWM shall authorize the timely preparation and issuance of a permit consistent with the Secretary's decision.

*s/Robert P. Haynes*  
Robert P. Haynes, Esquire  
Hearing Officer