



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. 2005-A-0051**

**Re: Application of Waste Management of Delaware, Inc. For A Permit to Renew Solid Waste Permit SW97/01 and Proposed Modifications To The Permit To Operate The Newport Solid Waste Transfer Station**

**Date of Issuance: December 28, 2005**

**Effective Date: December 28, 2005**

Under the authority vested in 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 application of Waste Management of Delaware, Inc. ("WMDI") for a permit to renew and amend the current permit authorizing the operation of the existing solid waste transfer facility ("Newport Transfer Station") located at 300 Harvey Drive within the Town of Newport, New Castle County.

The application was the subject of a public hearing at the request of five persons, including State Senator Patricia Blevins and State Representative Robert Gilligan in their official capacities representing their numerous constituents. Consequently, the Department held a public hearing and the Hearing Officer developed a record of decision and report of recommendations dated December 20, 2005 ("Report"), a copy of which is appended to this Order and incorporated herein. The Hearing Officer recommended several alternatives as supported by the record. The primary recommendation was to approve the renewal of the current permit with minor modifications that the Department

determines necessary and appropriate. In addition, the Report recommends secondary recommendations that would allow major modifications for the operating hours and amount of solid waste that may be transferred.

I adopt the Hearing Officer's review of the record and primary recommendation, and reject the secondary recommendations. I agree with the Report that the public comments raised important issues for the Department to consider, including whether any permit should be issued to continue the transfer operations at this location. My review of the Report and the record finds and concludes that the Department should issue a permit approving only minor modifications that were reflected in the operating plan and such other conditions that the Department routinely reflects in its current solid waste transfer permits in order to protect the environment and public health. The Department should not approve the major permit modification proposed in the application, as discussed in the Report. The requested major modifications should be denied until such time as the Department may consider an application for major modifications that is supported by an adequate justification in the record of decision. The public comments provide valid environmental concerns with the proposed expansion in the amount of tonnage and the operating hours, and the Department should act to protect the public and the environment from the increased risk of harm, particularly when there is no support for an increase in the record. I note that WMDI in a recent communication indicates its acceptance of a renewal permit as opposed to the major modifications that it originally requested. The Department appreciates WMDI's willingness to avoid more controversy than necessary until such a time when WMDI is able to provide more justification in the record for a major permit modification.

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 a renewal of the existing permit and the minor modifications to its operating plan that are consistent with this decision, and such reasonable conditions necessary to protect the environment and public health;

5. The record supports rejection of the requested major permit modifications that were opposed by the public comments because of the increased risk of harm posed by the major modifications, which lacked adequate justification;

6. The record contains valid public comments opposing any permit approval, but that approval of a permit allowing the existing transfer station to continue to operate at its prior level of operations is consistent with sound public policy and the allowing an existing site to operate at its current level;

7. The Department's Regulations impose a stricter regulatory review standard on major permit modifications, and WMDI has failed to demonstrate to the

Department an adequate justification for any proposed major modifications to justify approval of the requested major modifications;

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

9. The Department shall provide notice of this Order in a manner allowed by law to the persons affected by the 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 Waste Management of Delaware, Inc to Renew and Modify Its  
Permit for the Newport Solid Waste Transfer Station.

DATE: December 20, 2005

### I. BACKGROUND AND PROCEDURAL HISTORY

The Department of Natural Resource and Environmental Control (“Department”) held a public hearing on February 1, 2005, commencing at 6:00 p.m. at the Old Town Hall in Newport, New Castle County.<sup>1</sup> The hearing was held at the request of five persons in order that the public may comment on the November 19, 2004 application of Waste Management of Delaware, Inc. (“WMDI”). The application sought to renew WMDI’s current permit (SW 97/01) to operate the existing solid waste transfer station facility (“Newport Transfer Station”) located at 300 Harvey Drive, within the Town of Newport, New Castle County (“Newport”). The application also sought modifications to the current operating permit. The proposed modifications were to allow the Newport Transfer Station: 1) to increase the hours of operation, 2) to increase the amount of solid waste that may be transferred and 3) other changes to its operations as set forth in the operating manual.

The Newport Transfer Station’s current permit was to expire on September 17, 2002, but the Department has extended its expiration date numerous times pending review of WMDI’s two renewal and permit modification applications. WMDI’s first application was submitted to DNREC on August 17, 2002. WMDI decided to withdraw the application in order to submit 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.

revised application, which was submitted on November 21, 2004 and is the subject of this Report. This application also seeks a renewal and permit modifications, but the proposed modifications were reduced from the levels included in the first application.

The Department's Solid and Hazardous Waste Management Branch ("SHWMB") within the Department's Division of Air and Waste Management ("DAWM") reviewed the November 21, 2004 application and determined that it was sufficiently administratively complete. Consequently, the Department published public legal notice to provide the public with an opportunity to comment and to request a public hearing. The Department received the following comments and requests for a public hearing: 1) a December 21, 2004 joint letter from State Senator Patricia Blevins and State Representative Robert Gilligan, who represent the Newport area in the General Assembly; 2) a December 18, 2004 letter from Eric Jester, who lives near the Newport Transfer Station; 3) a December 17, 2004 letter from Franklin Mullin, Sr., who lives in the Newport Heights neighborhood near the Newport Transfer Station, and 4) a December 17, 2004 letter from Mary Sheldrake, who owns a commercial property and business near the Newport Transfer Station. The Department provided public notice of a public hearing, which was held on February 1, 2005.

Following the public hearing, Newport submitted a March 1, 2005 letter indicating that if WMDI would reduce its proposed operating hours, then Newport's position may be to not oppose the application. In a March 4, 2005 letter, State Senator Blevins and State Representative Gilligan reaffirmed their opposition, and noted their objection to Newport's post-hearing effort to gain something from the hearing process. This letter noted that the most impacted residential areas are not within the municipal limits of Newport. WMDI, in response to Newport's letter, indicated in a March 17, 2005 letter that Newport's proposed hours would not be objectionable. This Hearing Officer attempted to contact the other persons who attended the hearing to see if

WMDI's offer to reduce the hours of operation would satisfy their oppositions. The persons contacted remained opposed to the issuance of a permit, although they were pleased with the reduced hours of operation. I informed WMDI of the continued opposition.

The most recent correspondence is a request on the status of the Department's decision in a November 17, 2005 joint letter from State Senator Blevins and State Representative Gilligan. This letter prompted my inquiry with WMDI as to whether it was able to resolve all the public opposition to the permit. WMDI indicated that it was not able to resolve the opposition, but indicated in a December 7, 2005 e-mail that it would accept a renewal permit in order to reduce the controversy. I did not attempt to determine if this would be satisfactory to the persons who attended the hearing because I determined that the record was adequate for a decision.

## **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 DNREC Exhibits ("Ex."), which were admitted into the record as hearing exhibits, and 3) and information I reviewed or obtained, including the Department files and records and post-hearing communications. This information includes certain information the Department's technical experts prepared, and my independent legal research, file and document review and a field inspection following the hearing of the Newport Height and Forest Brook Glen neighborhoods and the Newport Transfer Station location.

At the hearing, Avery Dalton, an Environmental Scientist in SHWMB and the Department's project manager of the application, made a brief presentation and provided for the record<sup>2</sup> the following Department exhibits: DNREC Ex. 1 (WMDI's November 19, 2004

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<sup>2</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 decision, the legal proof of the public notices, and any written public comments received.

application); DNREC Ex. Nos. 2, 3, 4 and 5 (public notices of the application and the hearing); DNREC Ex. 6 (Mary Sheldrake's December 17, 2004 letter requesting the hearing); DNREC Ex. 7 (Eric Jester's letter December 18, 2004 letter requesting the hearing), DNREC Ex. 8 (Franklin Mullin's December 17, 2004 letter requesting the hearing) and DNREC Ex. 9 ( State Senator Blevins and State Representative Gilligan's December 21, 2004 joint letter).

Steve Masterson, WMDI's District Manager, and Tom Ramsey, WMDI's consulting engineer from GeoSyntec Consultants, attended the hearing and Mr. Masterson made a brief presentation and answered questions.

The persons attending the hearing were the five persons who requested the public hearing and twelve other members of the public, including Newport's Mayor, the Vice-Mayor and the Town Manager. The public speakers all opposed the application. The reasons for the opposition were the proposed increased daily tonnage and extended hours of operation, which were viewed as likely causing unacceptable increase in noise, traffic, trash debris, odor, sewer problems and animal pests. These points also were expressed in the written comments included in the record as exhibits.

As noted in the procedural history, there was post-hearing communications from Newport and WMDI in an effort to resolve their differences, and my efforts to determine if these offers resolved the public opposition. In addition, the record contains SHWMB's response to the public comments, including its recommendation that the application should be approved, albeit with the reduced operating hours that WMDI had offered as a settlement offer. In addition, SHWMB also responded to my requests for information on the history of the Newport Transfer Station and other additional information that I considered necessary to be in the record of decision.

I also have reviewed much of the Department's voluminous file on the Newport Transfer Station, and researched various prior orders and appeals. I consider the record to be well-

developed and will provide ample support for the Secretary's decision based upon my recommendations, including alternatives.

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

The Department's statute and regulations set forth the underlying regulatory authority. In 7 *Del. C. §6003(b) (5)*, the Department is granted plenary authority to regulate the disposal of solid waste by requiring a permit. The Department promulgated regulations pursuant to this statutory, *Delaware Regulations Governing Solid Waste, adopted December 1988, as amended* ("DRGSW" or "Regulations"). Section 3 of the Regulations defines a "transfer station" as "any facility<sup>3</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, and makes a distinction for "existing facility" as one in existence prior to the Regulations. The Newport Transfer Station is an existing facility since it began its operations in 1981, or well before the Regulations went into effect in 1988.<sup>4</sup>

Section 4 of the Regulations governs the process for permit renewals and permit modifications. The difference between a permit renewal and an application that seeks to modify a permit are considerable from a regulatory review perspective, particularly if a proposed modification is considered "major." The Regulations do not define what constitutes a major permit modification, but they define a minor modification as one that would not "result in any increased impact or risk to the environment or to the public health." Consequently, it is

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

<sup>4</sup> The history of the site indicates that it may have started out as an unauthorized dump site without any Department approval in the summer of 1981. Harvey & Harvey made a permit application filing on October 11, 1982 after various Department efforts to require compliance for unauthorized solid waste handling. The permit application process was the subject of five days of public hearings, and resulted in an interim one year permit approved in the Secretary's Order issued January 11, 1984 (SW-84-01). The more specific transfer station regulations were in to effect in the 1990 amendments to the Regulations.

appropriate to construe the definition of a “major” modification as one that would “result in any increased impact or risk to the environment or to the public health.”

If this application was merely a renewal, then there would be no need for the Department to consider the increased impact or risk to the environment or to public health from a major modification. The application, however, proposes to expand the hours of operation and to increase the amount of solid waste that may be transferred. I find that these changes are proposed modifications are major modifications that require the Department to review the application so see if they are justified by the increased impact or risk to the environment or to the public health,” which imposes a more stringent regulatory standards. In effect, the Regulations’ distinction between a minor modification and a major modification presume that a major modification will “result in any increased impact or risk to the environment or to public health,” and a higher level of regulatory burden is imposed for any major modification than a mere permit renewal.

I find that the application’s proposed changes are major modifications because the hours of operations and daily tonnage limit are critical to the Department’s ability to control the environmental impact through limiting the Newport Transfer Station’s usage. It is the usage of the Newport transfer station that poses the risk of harm, and this usage is minimized by controlling its allowed tonnage that may be transferred and the hours of operations. A solid waste facility that is not used poses little risk of environmental harm or harm to public health. Conversely, as the facility’s usage increases, so does the risk of harm. The Department reasonably in its regulation of transfer stations has regulated the hours of operation and amount of daily solid waste that may be transferred by conditioning the permits that are issued to certain tonnage and hours of operation limits. These operating factors present the risk to the environment and public health, and reasonable limits on the hours of operation and the amount of

solid waste transferred are appropriate regulatory methods that are consistent with the Department's regulatory purpose to minimize the potential risk of harm to the environment from the transfer operations.

The Department's application form<sup>5</sup> requires that an applicant set forth the operating limits requested in the permit, which include the proposed hours of operation, the proposed daily tonnage and other factors that the Department has determined necessary and appropriate to regulate in order to protect the environment consistent with the Department's statutory mandate. The application form does not require the applicant to provide any support for the estimated usage, but as a matter of policy there should be a realistic basis to the estimate provided.

The record discloses that WMDI requests the ability to transfer daily up to 700 tons, but this requested level is not supported by the record as realistic based upon the historical levels. Harvey & Harvey began using the Newport Transfer Station site as a transfer station in the summer of 1981 and the amount of solid waste transferred in the first permit approved by Secretary's Order No SW-84-01, issued January 11, 1984, was for the transfer of up to 260 cubic yards of waste per day, or approximately 130 tons. Department issued an interim permit, SW-88-02, on November 10, 1988, and issued a permanent permit, SW 89/02, on May 22, 1989, that allowed the transfer up to 200 tons per day and a 50 ton per day average. On March 10, 1992, the Department issued permit SW 92/03 authorizing up to 300 tons daily limit. This permit was renewed on September 18, 1997 as permit SW-97/01, and this permit remains in effect today based upon a series of temporary extensions the Department granted pending the final decision of the permit renewal and modification application that is the subject of this report.

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<sup>5</sup> The fact that Department's preliminary determined that the application was administratively complete for the purposes of allowing public comment on the application does not mean that an otherwise complete application must be approved. If that were true, then the purpose of public hearing would be frustrated as it would be ineffective to cause any change from the preliminary determination of an administratively complete application and the final decision by the Secretary.

The above discussion of the permit history and tonnages levels in the permits does not reflect the changes to the Newport Transfer Station's ownership and operating changes. First, the corporate changes began on May 30, 1997, when USA Waste of Delaware, Inc. acquired Harvey & Harvey, Inc. from the original owners, and continued when on December 31, 1998, n USA Waste of Delaware, Inc. was acquired by WMDI. WMDI is part of a national waste management company, Waste Management Holdings, Inc., based in Houston, Texas. Second, the operating changes occurred in 2001 when the Department approved WMDI's proposed improvements to the Newport Transfer Station, which allowed changes to the enclosed structure and other physical improvements at the location. WMDI completed the improvements in 2002, and the present application does not propose any changes to the five thousand square foot building or the transfer operations other than expand its usage with longer operating hours and more transfer of waste permitted.

I find that the current application does not propose any major change in the facilities or operations other than increase the potential usage in tonnage to be transferred and extending the hours of operation. The proposed substantial increase in usage; however, will rely on an operator, who will be responsible for monitoring the unloading as the sole method to inspect the solid waste for its suitability and does not include hazardous waste or other unsuitable materials. The transfer operations will continue with: 1) weighing the full collection trucks upon their arrival at a separate weigh station, 2) unloading the collection trucks inside the transfer station building, 3) using a front end loader to further compact the waste and to load the waste on to transfer trailers, and 4) weighing a full transfer trailer at a weigh station within the transfer building prior to a trailer's departure, and 5) the temporary storage of loaded transfer trailers for up to 72 hours pending their departure from the facility. The Department at this time has no factual basis to know whether the Newport Transfer Station can actually handle more solid waste

without problems until the Newport Transfer station's usage at least approaches the current maximum operating conditions allowed by the current permit.

WMDI has continued to operate the Newport Transfer Station for its collection trucks. This activity currently is not subject to Department regulation, although the statute may allow the exercise of such regulatory authority. The collection activity entails WMDI sending approximately eighty collection trucks out for solid waste collection, Monday through Saturday. The collection trucks depart in two shifts, with approximately forty trucks leaving at approximately 2:00 am and another forty leaving at approximately 4:00 am. These trucks travel to Cecil County, Maryland to collect solid waste, which is either taken directly to a final disposal site or to a transfer station. Currently, the collection trucks return to the Newport Transfer Station empty, but would return with waste if WMDI resumed the transfer operations at the Newport Transfer Station. WMDI voluntarily suspended transfer operations in July, 2004. Prior to the suspension WMDI only transferred about 100 to 140 tons per day, or well below the 300 tons per day in the current permit.

The persons who made public comment at the public hearing opposed the application, particularly the increased hours of operation, the amount of daily tonnage allowed to be transferred and the outside storage of waste in trailers. WMDI's representatives indicated that the operations have improved and that WMDI wants to be a good neighbor. WMDI indicated that it intends to keep working with the community in the future in order to improve the site and address any problems that may arise. WMDI's representatives made an effective presentation at the public hearing on the benefits of WMDI in general and its use of the Newport Transfer Station in specific. Nevertheless, opposition remains to the continued use of the Newport Transfer Station, and particularly to any proposed expansion of its usage.

Applying the regulatory review standards for a renewal versus a permit modification, I find that the record supports the Department's issuance of a permit to renew the current permit and the proposed permit modifications, other than the proposed hours of operation or total daily tonnage. I agree with the public comments, based upon my observation of the site, that it is not a good location for a transfer station due to its location in a congested urban area close to residential neighborhoods. The Newport Transfer Station, however, enjoys grandfathered status and this permit decision does not apply the Regulations on site location. I agree with the public comments that the permit renewal will continue the risk of environmental problems from the usage up to 300 tons and the associated solid waste truck traffic and the on-site temporary storage of solid waste. This current level of operations can be regulated through reasonable permit conditions and enforcement of the permit, including the 1992 permit condition that first imposed the 300 tons per day limit. Despite the public's opposition to the continued opposition to any transfer operations at the Newport Transfer Station location, the existing operations have operated lawfully and are entitled to continue to operate lawfully with a new permit if there is no risk of harm to the environment or public health. I do not find that the record provides sufficient support to deny WMDI a permit to continue the current transfer operations based upon the current permit's level, which would avoid the stricter regulatory scrutiny imposed by a major permit modification.

I find that the Newport Transfer Station has been in operation for over twenty years, and, as such, enjoys certain grandfathered status at its current location and level of operation, even though it may not be the best location when it was built. The passage of time and more urban congestion has made the site even less suitable now. The grant of a permit is a privilege that can be revoked or denied or granted with or without conditions. Nevertheless, sound regulatory policy and reasons support the continuation of the transfer operations at the Newport Transfer

Station through the issuance of a new permit to renew the current permit. These reasons include the significant investment WMDI made in the site and that the site has been used for transfer operations for more than twenty years. WMDI has operated the site without any significant complaints or violations since taking the operations over several years ago and this record is an important factor to the recommendation for a permit renewal. The public comments did indicate that WMDI has been a better operator than the site's former owners. On the whole, I recommend and the record supports the Department issuing a renewal permit to WMDI and allowing the minor modifications, other than the two proposed major modifications.

The second issue is the level of operations that should be approved and the two proposed major permit modifications. The level of operations raises a different issue from a permit renewal because the Department must assume that the major modifications will pose a greater risk of environmental harm. In this case, the Department's technical personnel recommend that the permit be issued with conditions that are necessary to protect the environment, including reflecting Newport's settlement offer of operating hours and WMDI's requested 700 tons per day transfer limit. The technical analysis provides no explanation for the reasoning behind the recommendations, which would result in two major modifications to the existing permit despite the public opposition. The technical advice is not binding on the Department, which acts only through the final order of the Secretary. Nevertheless, the technical advice provides an option for the Secretary to consider in making the final decision. Thus, the Department, acting through the Secretary, must decide if a permit should include the proposed major modification to reflect changes that would increase the hours of operations and daily tonnage.

The issues with the proposed major modifications to the permit include the increased risk of harm to the environment or public health impacts, which the public comments identified as from: 1) the truck traffic, 2) the hours of operations, 3) the amount of waste to be transferred, 4)

odor, 5) trash debris and pests, 6) the use of the public sewer system and 7) the aesthetic concerns of transfer operations next to the Department's recreational boat ramp. The following discussion reviews these comments, as does the Division's response document that is incorporated herein and attached as Appendix A.

The public comments on the truck traffic object apply to the current and proposed level of operations, but I previously addressed the current level. The truck traffic impact of transferring up to 700 tons per day would be to increase up to approximately thirty-one fully loaded, twenty-two ton, transfer trailers to arrive and depart each day. This increase would be from the current permit level allowing 300 tons per day, which equals up to approximately thirteen fully loaded trailers a day. Thus, the potential increase over the current authorized level could be more than double the transfer truck trips each day, and represents an increased risk to the environment and public health, although not quantified in this record. I find that it is a considerable risk. The Delaware Department of Transportation considered the traffic impact and found that it would not create any undue traffic problems, particularly as the transfer truck traffic would be spread out over the proposed operating hours and that the increased traffic would not overburden the local roads. The application does not specifically require truck traffic to be spread out over all the operating hours, but such a schedule would be consistent with the facility's normal operation. This Department considered truck traffic in its review of a Milford transfer station application, and the Department determined that it has no direct jurisdiction or authority to regulate truck traffic outside of the facility. I agree with the analysis in the Milford Transfer Station decision that the regulation of truck traffic is not something that this Department should consider in its permit review so long as the truck traffic is otherwise lawful and the impact does not cause harm over which the Department does regulate, namely, the environment. Thus, while the truck traffic is not subject to direct regulation, any harmful impact to the

environment from truck traffic appropriately should be considered by this Department as part of its statutory duty to protect the environment.

The increased usage of the Newport Transfer Station by transfer trucks will increase the risk of environmental and public health harm within the local community. I find that the environmental assessment's presumption of no harm based upon a regional air quality analysis does not address the local impact on public health from the potential increased truck activity. The people who live in the adjoining neighborhoods may be adversely impacted by air emissions from the increased truck traffic, and this potential harm, although not quantified, should be considered in weighing the overall environmental and public health risks of a major permit modification.

The second issue raised concerns the proposed hours of operation. The application sought an increase in the current hours of operation, which are 6:00 a.m. to 5:00 p.m. Monday through Friday and 6:00 a.m. to 12:00 p.m. Saturday. WMDI proposes from 4:00 a.m. to 8:00 p.m. Monday through Saturday. After the public hearing, Newport indicated in a March 1, 2005 letter that it could accept 6:00 a.m. to 8:00 p.m. Monday through Saturday. WMDI indicated in a March 17, 2005 letter to the Department that Newport's suggested hours of operation would not be objectionable.

WMDI's offer was an attempt to settle the operating hours issue at least with Newport. The application was not formally amended to reflect this change of position, which occurred after the public hearing. I find that this offer does not require any amendment or additional notice. I attempted to contact the persons who attended the hearing in order to determine whether the shorter operating hours would change their position. Those contacted all viewed the change as an improvement, but none stated that the change would alter their overall opposition. It is important public policy for the Secretary to know if a settlement offer resolves a controversy,

and a post-hearing settlement offer should be the subject of an inquiry, if reasonably possible, of the known interested persons to determine if those persons who attended the hearing would be satisfied with the settlement offer. In this case, the public participants supported the settlement offer as an improvement, but the offer still did not eliminate the opposition. Even Newport's letter indicates some reservations.

A permit condition that restricts the hours of operations is an important way for the Department to control a transfer station's operations consistent with its duty to protect the environment and public health from increased risk of harm. The more hours a transfer station operates also increases the risk of environmental harm from the transfer operations. In a recent communication, WMDI indicated its acceptance of a less controversial permit renewal. I agree that this option avoids the major permit modifications issues. I appreciate WMDI's willingness to offer this to resolve the controversy. I find that WMDI has been a good operator of the Newport Transfer Station and has attempted to resolve many of the community's concerns. The agreement to accept the current permit level is consistent with this good neighbor policy, and implicitly recognizes that the public comments raised valid environmental concerns for the Department to consider.

I find that the proposed hours of operations sought in the application are not supported in the record with an adequate justification to overcome the burden imposed by a major permit modification. In the alternative, the record provide some support for the operating hours in the settlement offer, but even this reduced increase in the proposed operating hours was opposed by the public who appeared at the hearing. This smaller increase still would be a major permit modification. I do not find any other increase in the operating hours reasonable or supported by the record at this time and that is my primary recommendation. As an alternative for the

Secretary to consider, I also recommend the small increase based upon the settlement offer as the sole support for any increase and in the interest of encouraging settlements.

The third issue was the amount of solid waste that should be allowed to be transferred. The public opposed the increase from 300 tons per day to the proposed 700 tons per day and the comments may also be against any approval of a permit to continue operations. Together, tonnage limits along with operating hours are essential for the Department to effectively regulate the facility's usage and the risk of harm to the environment or public health. Obviously operating hours without any actual transfer of solid waste poses no real harm, but instead the actual amount of solid waste that may be transferred is the more important factor to control the risk to the environment or public health.

The Department's current permit allows up to 300 tons per day, which is well below the current maximum operating capacity. The regulatory concern is that the more solid waste to be transferred will also increase the risk of the harm, including the very concerns that were the subject of the public comments. This case presents a strange factual background, namely, WMDI's current permit's capacity of 300 tons per day has been more than ample to handle the historic levels of solid waste actually transferred. In fact, the actual historic levels transferred have been less than 150 tons per day. Indeed, the most recent history since the voluntary suspension indicates that no waste is being transferred.<sup>6</sup>

The Department's Regulations do not require that an applicant demonstrate a public demand for the capacity requested in a permit, but the application requires estimated levels based upon "expected average daily tonnage during the peak season," "maximum daily tonnage," "average weekly tonnage expected during the peak season" and "maximum weekly tonnage." WMDI request for an increase from 300 tons to 700 tons is subject to the more stringent

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<sup>6</sup> The record is silent on the reason behind the voluntary suspension of operations. I speculate that it may have begun for maintenance reasons and continued to avoid or minimize public opposition to the permit application.

regulatory standard as it is a major modification and the increase in tonnage will increase the risk to the environment or public health. The requested 700 tons per day would be a 133% increase in the current permitted capacity. The Department's regulation of tonnage levels is that, like operating hours, the amount of waste that actually may be transferred is a fundamental tool to regulate the usage of the site. The possible usage is determined both by limits on hours of operation and tonnage limits that may be transferred.

The Department needs to know that the Newport Transfer Station's operations are capable of handling the amount of solid waste approved, but the physical capability alone is not sufficient to justify a major modification that increases the tonnage levels. The review of a major modification does not necessarily result in the approval of the maximum possible level of operation, but rather the minimum level possible in keeping with the assumption that the more waste transferred increases the risk of harm to the environment or public health. Thus, the Department's decision on tonnage is not controlled by what the applicant has built.<sup>7</sup> Instead, the decision also considers whether the increased tonnage is justified by the increased risk of harm.

The Department's technical personnel concluded that the current Newport Transfer Station can handle up to 700 tons per day. I find this level to be acceptable from the physical capability perspective, but the 700 tons per day level is not supported by the potential risk of harm. There simply is no need shown in the record for any increase over the current permit's level of 300 tons. Indeed, the record supports the reduction in the tonnage levels to the historic levels of 150 tons based on past operations or zero based upon current conditions since July 2004. Newport's post-hearing letter also suggests that the Department wait until more waste is processed up to the current permit's level before the Department fully authorizes the total requested increase to 700 tons. The Department permit procedures do not allow this type of

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<sup>7</sup> The Department already approved the improvements that WMDI states allow for up to 1,500 tons per day, but this was done not in a permit application to increase the tonnage.

'wait and see' process as part of a permit application decision because the obvious public notice problems that would be present. Thus, the Department requires that an application be submitted and that a review process be followed, including public notice, for a permit modification, particularly a major modification.

I find that the record supports the issuance of a permit based upon historic levels at the Newport Transfer Station between the zero tons transferred since July 2004, the no more than 150 tons prior to the voluntary suspension, or the current permit's 300 tons. The Department is not required to issue a permit based upon the physical capability of the Newport Transfer Station that currently exists or is planned to be built, but I find that the Department should approve tonnage limits that are demonstrated to be necessary, in effect, the minimum amount reasonably required so that the risk of harm is minimized. WMDI made a business decision to build an amount of capacity that it may intend to serve someday, but the Department is not obligated to follow blindly any business' particular decisions, which may be contrary to the Department's purpose to protect the environment and public health from harm.

I recommend that the Department issue a permit based upon the existing permit's level of 300 tons per day until such time as the applicant demonstrates to the Department a need for more transfer capacity. In the alternative, I would recommend reducing the daily tonnage limit to 150 tons per day, but allow peak usage of up to 300 or 700 tons during a defined seasonal time period. This level reflects the past usage levels and may allow the higher usage in order to evaluate the actual ability of the Newport Transfer station to handle the current permit's limits. Simply stated, the request to increase the tonnage level is premature at this time, but I recommend that the Department re-issue the permit at the same tonnage level until such time as WMDI presents an application that has an adequate justification for increased tonnage.

The fourth issue raised by the public comments was the odor, and this is subject to Department regulation. The Department addresses this issue in the permit's conditions, which reflect that odors should be minimized and prohibited from leaving the site. The problem is enforcing the permit conditions, but that problem is present with every permit the Department issues. Thus, if a permit is authorized, it should include conditions that require WMDI to take all necessary steps to prevent the release of odors and prohibit any odors from becoming a nuisance to those people who may smell odors from the site. The reduction in the tonnage should reduce this issue's adverse impact on the environment.

This issue also was raised because of the storage of solid waste in trailers, albeit with impervious tarps covering the waste. A review of the regulations finds that the storage of solid waste in trailers may be allowed if the trailers are considered structures. Based upon the normal operations, the trailers as temporary storage will be used as a last resort because of the inability to travel to a final disposal site. I recommend that it be allowed unless odor complaints require the Department to consider other action, including a review of the use of trailers as enclosures.

The fifth issue is the potential for trash, debris and pests. Again, this can be addressed through the appropriate permit conditions to ensure that the operations do not cause these problems. The application includes an operations and maintenance plan that includes in Section 6.1.4 Nuisance Control to cover this aspect of the operations.

The sixth issue was the use of the sewer system. The Newport Transfer Station is an existing, lawful customer of the sewer system. The Department has no authority in this record to interfere with WMDI's continued usage of the sewer system in a lawful manner. Newport Transfer Station is authorized to discharge wastewater into the sewer system, and the Department can impose as a permit condition, if the Department determines that one is necessary and appropriate.

The seventh issue is the aesthetic impact of having a solid waste transfer station adjacent to the Department's recreational boat ramp located along the southern boundary of the Newport Transfer Station. This boat ramp was constructed in 2002 and required significant site remediation. The Department personnel considered that the boat ramp's site may have been an unlawful waste disposal site, but the source of the dumping is unknown. As part of the 2002 improvements, WMDI installed fencing that does partially shield the hauling and transfer operations from the boat ramp. I find that the boat ramp's location in a pre-existing industrial area is a usage that must accept the surrounding area and not dictate that the surrounding area change. There are very limited ways to improve the aesthetics of a transfer station located in an industrial park. The Department could require WMDI as a permit condition to consider landscaping improvements, but I do not recommend any condition be imposed to improve aesthetics based upon a renewal permit, but would recommend measures if the major modifications are approved.

In summary, I recommend as my primary recommendation that a permit be issued based upon a renewal of the existing permit and such minor modifications that the Department's technical experts determines necessary and appropriate. In the alternative, I consider the record supports a decision based upon the following secondary recommendations: 1) a permit be issued that allows a small expansion of the current operating hours, which WMDI's March 17, 2005 letter indicated was not objectionable; 2) a permit be issued that allows in increase in the tonnage of solid waste transferred from the historic level of 150 tons to a high of the requested 700 tons, on a daily or on a seasonal basis, as determined by the Department's technical experts as a way to evaluate the impact of gradual increased usage; and 3) a permit be issued based upon some combination of the above alternatives.

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

I find and conclude that the record supports approval of the issuance of a permit that renews the current permit or the alternatives presented as secondary recommendations. The Secretary is to determine the policy course for the Department, and the selection of the options is consistent with his exercise of the policy making final decisions on behalf of the Department. I recommend the Secretary adopt following findings and conclusions based upon my primary recommendation:

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 renewal permit without any major modifications based upon the review standard for renewals, or major modifications determined by the Secretary to be appropriate under the higher regulatory standard for major modifications.

6. The record does not support an adequate justification for any increase over the existing permit's operating levels, and such increases will increase in the risk of harm to the environment or public health;

7. The public hearing record contains public opposition to any increase in the usage of the Newport Transfer Station, and this opposition was based upon valid environmental concerns with the potential for more local air pollutant emissions, odor, trash, debris, pest problems, and aesthetics from the current and proposed usage of the Newport Transfer Station;

8. The increased usage of the Newport Transfer Station in excess of its 300 tons per day limit is not supported by any justification for an increased usage when there has been no usage since July 2004 and the prior usage was less than approximately 150 tons per day prior to when WMDI voluntarily suspended the transfer operations;

9. The Department's Regulations impose a stricter regulatory review standard on non-minor permit modifications and under this standard the Department has considered the public comments in opposition to the issuance of any permit and concluded that it is reasonable to issue a permit no higher than the existing permit's operating levels, and allow the transfer operations to continue until such time as the applicant may demonstrate that an adequate justification for increasing the operating levels;

10. The Newport Transfer Station was constructed as an operating transfer station before there were Department regulations over the construction and location of transfer stations, and its present location may not be suitable as near residential areas and in an environment that may not be appropriate for a new transfer station if one was to be proposed to be built there today;

11. The duly authorized Department officials shall timely prepare and issue a permit consistent with the Secretary's decision.

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