

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Taraco Environmental Services, Inc. AAD Nos. 91-005/AHE
and 91-002/AHA

DECISION AND ORDER

This matter is before the Hearing Officer pursuant to the Hazardous Waste Management Act of 1978, R.I.G.L. § 23-19.1-1 et seq., as amended ("Act"), R.I.G.L. § 42-17.1-2 and Chapter 42-17.6, statutes governing the Administrative Adjudication Division ("AAD"), R.I.G.L. § 42-17.7-1 et seq., the Administrative Procedures Act, R.I.G.L. § 42-35-1 et seq., the Rules and Regulations for Hazardous Waste Generation, Transportation, Treatment, Storage and Disposal, and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters. The proceedings were conducted in accordance with the above-noted statutes and regulations.

The hearing in these proceedings originally involved the following three matters which were consolidated for hearing by Order dated November 21, 1991:

- (1) The Division of Air and Hazardous Materials ("DAHM" or "Division") of the Department of Environmental Management ("DEM") issued a Notice of Violation and Order and Penalty ("NOVAP") to Taraco Environmental Services, Inc. ¹("Taraco") dated February 5, 1991 (AAD No. 91-005/AHE).

¹ The parties stipulated that the correct name for the Respondent/Applicant is Taraco Environmental Services, Inc.

- (2) Division issued a Notice of Intent to Revoke Taraco's Hazardous Waste Transporter Permit on February 15, 1991 (AAD No. 91-007/AHE).
- (3) Division denied Taraco's application for the renewal of its hazardous waste transporter permit ("renewal permit") on October 16, 1991 (AAD No. 91-002/AHA).

During the course of the hearing on these consolidated matters, Division's Motion to Dismiss the Notice of Intent to Revoke (AAD No. 91-007/AHE) was granted, and the remaining two matters are presently being considered herein.

The NOVAP alleged violations by Taraco of Rhode Island General Law § 23-19.1-9 and Rules 5.02, 5.04 and 5.10 of the Rules and Regulations For Hazardous Waste Generation, Transportation, Treatment, Storage and Disposal in that Taraco at its Cranston facility: (1) failed to clean-up spilled hazardous wastes and materials from the facility's grounds, (2) failed to keep containers of hazardous waste closed while in temporary storage at the facility, (3) failed to properly label containers used for the storage of hazardous waste, and (4) failed to supply containers of hazardous waste with proper secondary containment capabilities.

Said NOVAP contained provisions that Taraco was ordered to:

- A. Immediately label all containers of hazardous waste in accordance with Rule 5.04.
- B. Immediately close all containers of hazardous waste.

- C. All on-site generated hazardous waste must be supplied with secondary containment within 20 days of receipt of this Notice.
- D. All visually-contaminated soils must be collected and properly contained within 10 days of receipt of this Notice.
- E. Submit compliance certifications for all above requirements to this Department subject to the penalties under 23-19.1-18 (H), within 10 days of compliance.
- F. Based on the severity of the above violations, remit to the Department within 10 days of receipt of this Notice of Administrative Penalty in the amount of twenty thousand dollars (\$20,000.00) payable by certified check to the order of the General Treasurer, State of Rhode Island, who shall deposit said monies in the Environmental Response Fund, established pursuant to R.I.G.L. § 23-19.1-23. This administrative penalty was calculated in accordance with the Department's Rules and Regulations for assessment of Administrative Penalties, and the amount sought for each violation is set forth in the attached Penalty Amount Rationale Memo.

Division stated in its notice of denial of Taraco's renewal permit that said denial was based on Taraco's prior performance record; that review of Department's records revealed a consistent pattern and practice of noncompliance, that Taraco had failed to exhibit sufficient reliability, expertise and competency in the area of hazardous waste management; and said notice specified the evidence collected by the Department on which it based its determination.

Taraco duly filed its request for a hearing on the subject matters.

Mark W. Siegars, Esq., represented the Division and Philip W. Noel, Esq., represented Taraco.

Prehearing Conferences were held on May 10, 1991, July 18, 1991 and November 26, 1991, and the requisite Prehearing Conference Record was prepared by the Hearing Officer. No requests to intervene were presented.

The following stipulations of fact were agreed upon by the parties pursuant to the Prehearing Conference Record:

1. The Department issued and Respondent received the Notice of Violation and Order dated February 28, 1989, the Notice of Violation and Order and Penalty dated February 5, 1991 and the Notice of Intent to Revoke Permit and Order dated February 15, 1991.
2. The Consent Agreement of March 20, 1991 was duly executed by both the Department of Environmental Management and Respondent.
3. Taraco timely filed a Hazardous Waste Transportation Permit Renewal Application. The Department denied same by letter dated October 16, 1991 and Respondent timely filed a request for a hearing on the Denial on November 8, 1991.
4. Taraco held a valid Hazardous Waste Transportation Permit bearing Permit # RI-596 at the time of the application for a renewal.

The parties agreed upon the admission of the following documents as full exhibits:

- JT. 1. Notice of Violation and Order and Penalty dated February 28, 1989.
- JT. 2. Notice of Violation and Order and Penalty dated February 5, 1991.

- JT. 3. Application for Renewal of Hazardous Waste Transportation Permit bearing date of May 15, 1991.
- JT. 4. Denial of Application by letter dated October 16, 1991.
- JT. 5. Notice of Intent to Revoke and Order dated February 15, 1991.
- JT. 6. Consent Agreement dated March 20, 1991.

The following documents were admitted as full exhibits of the Division:

- Div. 1. Notice of Violation and Order dated May 21, 1987.
- Div. 2. Connecticut Waste Manifest No. CTCO288824.
- Div. 4. Letter from Terrence D. Gray of Division to Raymond Wilbur of Taraco dated December 1, 1987.
- Div. 5. Resume of James McCaughey.
- Div. 6. Six (6) photos taken of premises on November 30, 1990.
- Div. 7. Summary of job responsibility of Jonathan E. Twining.
- Div. 8. Memo package concerning lost manifest (6 pp.).
- Div. 9. Letter from T. D. Gray to Raymond Wilbur dated November 5, 1989.
- Div. 10. Resume of Cynthia M. Signore.
- Div. 11. Notification of discrepancy dated May 24, 1991.
- Div. 12. Notification of discrepancy dated June 27, 1991.
- Div. 13. Connecticut Hazardous Waste Manifest No. CTCO288823.
- Div. 14. Memo from Sav Mancieri to Sue Kiernan dated January 30, 1991.

- Div. 15. Package entitled "Assessment of Impacted Areas: Contamination Investigation and Remedial Action Report" by R. I. Analytical.
- Div. 16. Soil and Groundwater Contamination Study by R. I. Analytical Laboratories, July 26, 1990.
- Div. 17. Soil and Groundwater Contamination Study by R. I. Analytical, August 6, 1990.
- Div. 18. Package of hand-written documents, March 28, 1991 (3 pp.).
- Div. 19. Letter from Cynthia M. Gianfrancesco to Mr. Dale Thake of Narragansett Coated Paper Corporation dated September 11, 1990.
- Div. 20. Letter from C. M. Gianfrancesco to Mr. Thake dated June 28, 1990.
- Div. 21. Hand-written notes dated August 9 and 10, 1990 by C. M. Gianfrancesco.
- Div. 22. Letter from Taraco to DEM, signed by R. E. Wilbur dated June 7, 1991.
- Div. 23. Memo from DEM-DAHM/C. M. Gianfrancesco dated June 14, 1991 to Mark Siegars with two attached documents.

Division's Exhibit No. 3 for ID was introduced for identification purposes only and was not admitted as a full exhibit.

The following documents were admitted into evidence as full exhibits of Taraco (during Division's presentation of witnesses) and marked numerically as follows:

- Resp. 2. Interoffice memo dated October 17, 1990 from J. C. McCaughey to Taraco file.

- Resp. 4. Package concerning payments made by Respondent Corporation in accordance with Consent Agreement (13 pp.).
- Resp. 5. Permanent closure application (3 pp.).
- Resp. 6. Certificate of closure dated July 13, 1990, Facility ID 15943.
- Resp. 7. Certificate of closure dated July 13, 1990, Facility ID 15942.
- Resp. 8. Certificate of closure and permanent closure application, January 11, 1990, Facility ID 3300.
- Resp. 9. Letter from Division of Air and Hazardous Materials dated April 10, 1991 to Attorney Philip Noel.
- Resp. 11. R. I. Analytical Certificate of Analysis and second page, January 4, 1990 (as date received).
- Resp. 12. Certificate of insurance from Insurance House, Inc. to Taraco, Inc., issue date July 11, 1991.

Respondent's Exhibits Nos. 1, 3 and 10 for ID were introduced for identification purposes only and were not admitted as full exhibits.

Terrence Gray was the first witness called by Division. He has a Bachelor of Science Degree in Chemical Engineering, lacks two courses for a Master's Degree, and is a Principal Sanitary Engineer with DEM. He testified that he is in charge of the Taraco file for its Cranston facility and inspected said facility on at least four occasions between 1987 and 1990. As a result of his inspection of said facility on May 6, 1987, the Division issued a Notice of Violation and Order to Taraco, dated

May 21, 1987, citing that Taraco did not fully investigate the chemical composition and hazards associated with oil residues and sludges from tanks being disposed of; it did not manage containers to prevent leakage and spillage; it did not keep containers closed; it did not label containers properly, nor transfer waste oil from bad to good containers to ensure against leakage or spillage; and did not have a containment system to ensure against the release of hazardous waste to the environment.

Taraco did not request a hearing concerning the May 21, 1987 Notice of Violation and eventually all of the provisions were complied with.

James C. McCaughey was called as the next witness for Division. He is a Senior Sanitary Engineer with DEM and has a Bachelor of Science Degree in Chemical Engineering from the University of Rhode Island. He was qualified as an expert in the area of rules and regulations governing the licensing standards of Hazardous Waste Transporters, and the regulatory standards for the handling, storage, transportation, generation and disposal of hazardous waste.

Mr. McCaughey testified that he is the author of the NOVAP in the instant matter bearing AAD No. 91-005/AHE, which was issued on February 5, 1991 as a result of his inspection of Taraco's Cranston facility on November 30, 1990. During said

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inspection, he observed that numerous 55-gallon drums were present some containing waste oil (considered Hazardous Waste in Rhode Island) which were not covered; said containers were not properly marked as containing hazardous material; some of said material had spilled to and contaminated the ground around said drums; and there was no secondary containment. It was this witness's opinion that the foregoing constituted violations of the Rules and Regulations governing Generators of Hazardous Waste.

This witness stated that he authored the Connecticut Hazardous Waste Manifest, dated October 17, 1990 which was utilized because of the loss of a previous manifest. This manifest pertained to waste that was generated by the Convention Center Authority in Providence and transported by Taraco.

It was Mr. McCaughey's testimony that he was the author of the Consent Agreement entered into by DEM and Taraco dated March 20, 1991 to settle the February 28, 1989 NOVAP. This agreement provided that Taraco pay an administrative penalty amount of Five Thousand Dollars (\$5,000.00) in ten monthly payments of Five Hundred Dollars (\$500.00); and that Taraco submit a Hazardous Waste Remediation Plan within 20 days. He explained that although the Notices of Violation issued to Taraco pertained to some of the same requirements, they were for separate and distinct violations.



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with Rhode Island Analytical, testified for the Division. He

stated that he sent a letter dated October 17, 1990 to the Convention Center Authority (with copies to DEM, Taraco and others) explaining that Taraco had discovered on October 17, 1990 that the manifest was missing for the waste material Taraco had removed on October 11, 1990; and that said waste material was remanifested (per instructions from DEM).

It was elicited in cross examination of Mr. Twining that he mistakenly concluded that the waste material was taken to a garage at 14 Hayward Street, Cranston, Rhode Island, on October 11, 1990 (since Taraco has no garage at that address) based on a statement to him by a Taraco employee that it was taken to a garage.

Cynthia M. (Gianfrancesco) Signore, presently Acting Senior Environmental Scientist with DEM, testified on behalf of the Division. She was qualified as an expert in the area of the rules and regulations governing the licensing standards of hazardous waste transporters, and the regulatory standards for the handling, storage, transportation, generation and disposal of hazardous waste.

This witness stated that she authored the Division's October 16, 1991 Denial of Taraco's Application to renew their Hazardous Waste Transporters Permit. The Division had reviewed

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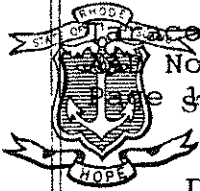
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May Providence RI 02908 June 27, 1991 and received all the necessary
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information to complete Taraco's application in October, 1991. Mrs. Signore testified that she reviewed all of Taraco's hazardous waste files, which revealed that Taraco had failed to comply with the Hazardous Waste Transportation Rules and Regulations.

It was Mrs. Signore's opinion that the denial was based on Taraco's prior performance record which reveals a consistent pattern and practice of noncompliance. Also, that Taraco had failed to exhibit sufficient reliability, expertise and competency in the area of hazardous waste management. This determination was based on evidence collected by the department that:

- (1) Taraco transported and stored hazardous waste, generated and manifested from the Convention Center Authority (manifest # CTC0288824), at its Glen Road facility without first obtaining the proper permits or authorization from the Department (Rule 6.14 and 7.01A).
- (2) Taraco has a record of repeated violations for which it was cited in a Notice of Violation and Order and Penalty (NOVAP) dated 5 February 1991. Violations cited in that NOVAP included failure to clean-up spilled hazardous wastes and materials from the facility's grounds (Rule 5.10; 28 February 1989 NOVAP); failure to keep containers of hazardous waste closed while in temporary storage at the facility (Rule 5.02, 40 CFR 262.34, 40 CFR 265.173; 15 May 1987 NOVAP and 28 February 1989 NOVAP); failure to properly label containers used for the storage of hazardous waste (Rule 5.04; 15 May 1987 NOVAP and



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Department of Environmental Management and failure to supply
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NOVAP).

- (3) Taraco's current financial instability does not ensure their status as a viable transportation company.

It was brought out in cross examination of this witness that Mr. Twining had stated the waste material was picked up on Thursday, October 11, 1990, whereas Mr. McCaughey had stated the date given to him by Mr. Twining for said waste pickup was Friday, October 12, 1990. Also, both of these parties acknowledged that they were informed by an employee of Taraco that the waste was taken to 14 Hayward Street, but that Glen Road was listed by the Division in the notice of violation.

Gary E. Powers, Deputy Chief Legal Counsel for DEM, appeared next and produced certain records of the Division in response to a subpoena issued on behalf of Taraco.

Beverly M. Migliori, a Principal Engineer with DEM, was the next witness called by Division. She testified that she had recommended denial of Respondent's license renewal based on Taraco's past history. She relied on the following facts in recommending denial: (1) several incidents when Notices of Violation were issued for noncompliance; (2) several complaints were lodged with Division; (3) repeat violations; and (4) general practice of mismanagement. This witness further



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of Respondent's application for renewal, viz.: that Taraco's
shipments were made without a manifest.

It was brought out in cross examination of this witness that she relied on findings and photos of the Division, discussions with Mr. Wilbur (of Taraco), and conversations with Cynthia Signore, in making her recommendation of denial.

Raymond Wilbur was called as an adverse witness by the Division. He testified that he is the owner (of all of the stock) and president of Taraco (a Rhode Island corporation); he has owned Taraco for approximately six years; Taraco presently employs approximately 15 people and owns 17 self-propelled vehicles and approximately 10 non self-propelled apparatus. Mr. Wilbur acknowledged that he and the corporation are represented by the same attorney and on the advice of counsel refused to answer certain questions on the grounds of invoking his constitutional right not to testify in this matter.

After the Division had completed its presentation of evidence and rested its case, the Respondent made oral motions as follows: (1) Motion to Dismiss the Notice of Intent to Revoke Taraco's Permit; and (2) Motion for a Directed Decision for Judgment in favor of Taraco as to Division's Denial of

Taraco's Permit Renewal; and (3) Motion to Dismiss the NOVAP. The Hearing Officer declined to rule on any of said Motions until the close of all the evidence.

The Division then made a Motion to Dismiss its Notice of Intent to Revoke Taraco's Permit dated February 15, 1991, which the Hearing Officer granted with prejudice, and an Order to that effect was entered January 30, 1992.

The Respondent thereupon rested its case without presenting any evidence. Necessarily, this Decision and Order acts as a decision on Respondent's motions pertaining to the remaining two matters.

Taraco has raised six issues in its Post-Hearing Brief. Taraco first argues that the burden of proof should not be on Taraco to establish that it is entitled to have its Transporter's Permit renewed. Second, Taraco argues that the rules and Regulations set no financial standards whatsoever for transporters. The third argument raised by Taraco is that it is entitled to a hearing before its application to renew its Transporter's Permit can be denied. The fourth claim by Taraco is that DAHM failed to meet its burden of proof regarding the NOVAP. Taraco's fifth contention is that the Consent Agreement of March 20, 1991 represents an accord and satisfaction or

resolution of the NOVAP. Last, Taraco argues that the Division did not have just cause to deny renewal of its Transporter's Permit.

Taraco argues in its Post-Hearing Brief that since DAHM had the burden of proof when it issued the Notice of Intent to Revoke, that burden remains with DAHM to justify its actions in denying Taraco's application for renewal. Taraco maintains that the Division did not have just cause to deny renewal of Taraco's Hazardous Waste Transporter's Permit; therefore, said Permit should be issued. Taraco also argues that DAHM failed to prove the necessary allegations concerning the NOVAP dated February 5, 1991.

DAHM argues that it introduced ample uncontroverted expert testimony to support both its denial of the permit renewal application and the NOVAP; however, even in the absence of that evidence, Taraco is not entitled to judgment on the permit denial because it failed to carry its burden of proof as to said matter. Division maintains that Taraco's appeal of the permit denial should be denied as a matter of law since Taraco called no witnesses to testify on its behalf and therefore failed to meet its requisite burden of proof. Division also argues that the uncontroverted and unrebutted expert testimony of violations of the Act by Taraco and in support of DAHM's grounds for denial of Taraco's application for a permit, coupled with Taraco's 070392

failure to present a case, establishes that judgment should be entered against Taraco for those allegations set forth in the NOVAP and that Taraco's application for renewal of its Hazardous Waste Transporter's Permit should be denied.

Consolidation of the different matters for hearing does not alter the burden of proof required as to each of the matters under consideration. The parties acknowledge that DAHM must prove by a preponderance of the evidence each act or omission alleged in the NOVAP, but differ as to the burden of proof in the renewal permit matter.

Taraco's argument that DAHM should have the burden of proof concerning the denial of Taraco's Hazardous Waste Transporter's Permit Renewal is flawed. The dismissal of the Notice of Intent to Revoke terminated this matter, and Taraco mistakenly assumes that such action (dismissal) might be the basis for an argument that the burden of proof should thereupon "shift" to Taraco. The burden in the revocation matter² (nor upon its dismissal) does not affect in any way the burden as to permit renewal.

The Hazardous Waste Management Act of 1987, Chapter 19.1 of Title 23 of the R.I.G.L., governs the storage, transportation, treatment and disposal of hazardous wastes within the State of Rhode Island, and authorizes and empowers the Director of the

² R.I.G.L. § 23-19.1-10(e) specifies the procedures and burdens in revocation matter.

Rhode Island, and authorizes and empowers the Director of the Department of Environmental Management to adopt plans, rules, etc., and to exercise all powers to carry out the purposes of this Chapter.

R.I.G.L. § 23-19.1-10(a) provides that no person shall transport hazardous waste without first obtaining a permit.

R.I.G.L. § 23-19.1-10(b) provides that "Permits issued under this section shall be issued pursuant to rules and regulations promulgated by the director under the authority of § 23-19.1-6," and that "The permits shall be issued only under conditions of proof of financial responsibility, posting of surety bonds, evidence of adequate liability insurance, and/or such other conditions as the director by regulation may require."

R.I.G.L. § 23-19.1-10(b)(1) provides that:

No permit shall be approved by the director, unless the director finds that the applicant, in any prior performance record in the collection, transportation, treatment, storage or disposal of hazardous or solid waste, has exhibited sufficient reliability, expertise, and competency to operate the hazardous waste management facility, given the potential for harm to human health and the environment which could result from the irresponsible operation thereof, or if no prior record exists, that the applicant is likely to exhibit that reliability, expertise and competence.

R.I.G.L. § 23-19.1-10(c) provides that permits for hazardous waste transporters shall be issued for a period not to exceed one year.

R.I.G.L. § 23-19.1-10(d) provides that:

In any proceeding for issuance or renewal of a permit required under this section, the burden of proving that the operation of the facility for which a permit is sought complies with the rules and regulations under § 23-19.1-6(a) shall be on the applicant for the permit.

Taraco's argument that the burden of proof in the renewal matter remains with DAHM is unsound. § 23-19.1-10(d) clearly mandates that the burden of proving compliance with the rules and regulations shall be on the applicant for the permit in any proceeding for the issuance or renewal of a permit required under this section. Any question concerning the applicability of said section as to transporters is resolved by a clear reading of the entire section. Certainly, the legislature would have specified a different burden of proof as to "transporters," if a different burden was intended. The statute makes it abundantly clear that the same burden applies to all hazardous waste permits, since § 23-19.1-10(b)(1) provides that no permit shall be approved unless the applicant, in any prior performance record in the collection, transportation, treatment, storage or disposal of hazardous or solid waste, has exhibited sufficient reliability expertise, and competency to operate the hazardous waste management facility.

The definitions of "hazardous waste management facility" in the statute does not conflict with the definition of "hazardous waste transporter" and "facility" under the rules; and the rules contain no provisions contrary to the burden of proof placed on permittees by the statute. In construing statutes, if any possible inconsistencies exist within the statute, every attempt should be made to avoid the inconsistency and the statute should not be applied literally if to do so would produce patently absurd or unreasonable results. Brennan v. Kirby 529 A.2d 633 (R.I. 1987).

The intent of the legislature as expressed in the legislative findings and the declaration of purpose of the Hazardous Waste Management Act appears clear and unambiguous. The legislature sought to assure the safe and adequate management of hazardous wastes to protect the environment and the public health and safety from the effects of improper, inadequate or unsound management of hazardous wastes. In order to achieve those goals, the legislature required that permits be issued by the director of DEM to those hazardous waste transporters and hazardous waste management facilities which exhibited sufficient reliability, expertise and competency. The statute imposed the burden of proving compliance upon the applicant for such a permit, and the applicant has the burden of satisfying the Director that the permittee has sufficient

reliability, expertise and competency to conduct such permitted activity in such a manner as to avoid the unnecessary risk of harm to human health and the environment. If the burden of proof placed on applicants by the statute does not apply to "transporters," certainly, the purpose of the Act to protect human life and the environment from imminent hazard could be interpreted to place the ultimate burden of persuasion on transporters in accordance with the established tradition that one who has knowledge of or access to the needed facts has that burden. 2A Sutherland, Statutory Construction § 16.9 (4th Ed. Sands).

Although DAHM has the burden of proving the allegations of the NOVAP, Taraco has the burden of proving that it has sufficient reliability, expertise and competency to obtain a renewal of its transporters permit. Since these matters were consolidated for hearing, the evidence introduced at the hearing is clearly pertinent to both the NOVAP and the renewal permit.

The Division introduced ample and convincing proof that Taraco violated the statutes and regulations as alleged in the NOVAP and also that Taraco lacked sufficient reliability, expertise and competency. DAHM presented credible evidence that proved each act or omission alleged in the NOVAP by a preponderance of the evidence, viz.: that at its Cranston facility on November 30, 1990, Taraco (1) failed to clean up

spilled hazardous waste and materials, (2) failed to keep containers of hazardous waste closed while in temporary storage, (3) failed to properly label containers used for storage of hazardous waste, and (4) failed to supply containers of hazardous waste with proper secondary containment capabilities.

Assuming arguendo that the burden of proof is on the Division in the renewal permit matter, the Division introduced credible evidence (in addition to the violations of the NOVAP), that Taraco's prior performance record revealed a consistent pattern and practice of non-compliance, and that Taraco lacked reliability, expertise and competence in the area of hazardous waste management.

DAHM notified Taraco that its Hazardous Waste Transporters Permit would not be renewed by the Department and Taraco duly requested a hearing on said denial. Taraco failed to call any witnesses on its behalf at the adjudicatory hearing. Division called Mr. Raymond Wilbur, the President and owner of Taraco, as an adverse witness but he refused to answer certain questions on Fifth Amendment grounds.

The evidence introduced by DAHM clearly supported Division's contention that Taraco's permit should not be renewed. Taraco was afforded the opportunity to be heard, but instead, the principal of Taraco refused to testify, and Taraco chose not to present any witnesses.

The Division certainly sustained its burden of proof of the violations contained in the NOVAP and presented ample evidence to sustain its denial of Taraco's renewal permit. Taraco failed to produce any evidence to challenge Division actions and did not meet its burden of persuading the Director that its prior performance record exhibited sufficient reliability, expertise and competence to warrant renewal of its permit. The Division's evidence that Taraco had violated the rules and regulations as alleged in the NOVAP and that Taraco had failed to exhibit sufficient reliability, expertise and competency in the area of hazardous waste management was uncontroverted. This evidence was not refuted by Taraco and I find the testimony of Division's witnesses to be reliable and credible.

Taraco's argument that it should prevail because the Director has promulgated no rule or regulation that establishes financial standards as a basis for eligibility to hold a Rhode Island Hazardous Waste Transporter's Permit is without merit. Division stated in its letter of denial that its determination that Taraco has failed to exhibit sufficient reliability, expertise and competency in the area of hazardous waste management was based on certain evidence collected by the Department. In essence, DAHM specified that (1) Taraco had transported and stored hazardous waste without the proper permits or authorization, (2) Taraco has a record of repeated

violations, and (3) Taraco's current financial instability does not ensure their status as a viable transportation company. DAHM's letter of denial provided Taraco with written notice of the reasons for the denial, only one of which concerned Taraco's current financial instability. Division introduced evidence that showed Taraco was experiencing problems paying bills and that its insurance policy had been cancelled for non-payment of premiums. This could certainly affect Taraco's reliability, expertise and/or competency to operate as a viable hazardous waste transporter. Also, this could negate Taraco's ability to comply with other conditions requested for issuance of permits, viz.: proof of financial responsibility, posting of surety bonds and adequate liability insurance in addition to adequately maintaining the necessary procedures and functions to avoid the potential for harm to human health and the environment. However, Taraco's financial instability was only one of the reasons for denial supplied by the Division, and the failure of DAHM to request further financial information from Taraco does not relieve Taraco of its burden, nor support Taraco's position that it was entitled to a hearing prior to DAHM's notice of denial of the permit.

Taraco was afforded the opportunity to present witnesses at the hearing to establish its reliability, expertise and competence, or to refute Division's assertions (that Taraco was

unfit to be a permitted hazardous waste transporter) which Taraco declined to do. Taraco requested and was granted a hearing concerning the denial of its renewal permit (as well as on the NOVAP), and it was afforded ample opportunity to present evidence on its behalf.

Division introduced ample and convincing evidence to sustain its burden of proving by a preponderance of evidence that Taraco violated the Act and the Regulations as alleged in the NOVAP. Expert, uncontroverted evidence was presented by Division that on November 30, 1990 at its Cranston facility, Taraco violated the Act and Regulations by failing to keep some of its 55-gallon drums containing waste oil (considered hazardous waste in Rhode Island) closed, failed to properly label containers as containing hazardous material, failed to provide the necessary secondary containment around those areas where hazardous waste was stored and failed to immediately clean up spills, which contaminated the ground around said drums. Also that these violations were the same type as previously enforced against Taraco and that said violations were recurring and being repeated by Taraco. Said conduct clearly established the reasonableness of the penalty imposed by Division, and also supports the denial of Taraco's renewal permit. This evidence was not refuted by Taraco and, indeed, was most credible and persuasive.

The Consent Agreement entered into by the parties did not resolve the NOVAP which is presently under consideration and should not be considered a bar to this hearing on same. It resolved the NOVAP dated February 28, 1989, and should not prohibit or prevent any action for violations that occurred after the date of the violation addressed in the Consent Agreement. Clearly, these subsequent incidents represent separate and distinct violations which warranted the issuance of the instant NOVAP. The obvious, continued disregard of the Act and Regulation by Taraco, the severity of the violations and the potential for harm threatened by said violations as set forth in the NOVAP under consideration herein mandates the imposition of a substantial penalty.

The evidence clearly establishes that Taraco's application to renew its Hazardous Waste Transporter's Permit should be denied. However, common sense dictates that the applicant for renewal of a transporter's permit should have the burden of proving that its application complies with the rules and regulations. Certainly, an applicant rather than the Division would be expected to possess the information and documentation to establish that the applicant has the requisite reliability, expertise and competency to comply with the rules and regulations, given the potential for harm to the human health and the environment. The legislature could not have intended

otherwise. Even were this not so, once the Division has introduced evidence to substantiate that Taraco lacks such qualifications and capabilities then the burden of persuasion to the contrary would most assuredly be on the applicant. DAHM introduced competent evidence to support its decision to deny Taraco's renewal of its Hazardous Waste Transporter's Permit, and the burden is on the party challenging this action to produce evidence sufficient to rebut this presentation. Larue v. Registrar of Motor Vehicles 568 A.2d 755 (R.I. 1990).

The direct and competent evidence introduced at the hearing adequately substantiates that DAHM has sustained its burden of proof and that Taraco has not met its burden of proof as to the renewal permit. It is, therefore, unnecessary to consider the arguments raised by Division that certain adverse inferences are to be drawn from Taraco's failure to produce an available material witness or that Taraco's silence or Wilbur's refusal to testify constitutes certain admissions. The Division's evidence was uncontroverted and abundantly supports DAHM's position that it is entitled to an entry of an order with regard to the NOVAP and that Taraco's application for a Hazardous Waste Transporter's Permit be denied.

FINDINGS OF FACT:

After reviewing the documentary and testimonial evidence of record, I find as a fact the following:

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1. Taraco was a permitted Hazardous Waste Transporter at all times pertinent hereto.
2. The Division issued and Taraco received the Notice of Violation and Order dated February 28, 1989, the Notice of Violation and Order dated February 5, 1991, and the Notice of Intent to Revoke Permit and Order dated February 15, 1991.
3. AAD No. 91-007/AHE (The Notice of Intent to Revoke Taraco's Hazardous Waste Transporter's Permit, dated February 15, 1991) was withdrawn.
4. The Division inspected Taraco's Cranston facility on November 30, 1990, and discovered that certain 55-gallon drums present at the site contained hazardous waste (consisting of waste oil which is considered hazardous waste in Rhode Island) which required containerization and labeling pursuant to the Rules and Regulations duly adopted by DEM.
5. AAD No. 91-005/AHE (NOVAP dated February 5, 1991) and AAD No. 91-002/AHA (renewal permit) were consolidated for hearing and each was the subject of these proceedings.
6. Taraco was in violation of the Hazardous Waste Management Act of 1978 and the DEM Rules and Regulations at its Cranston facility on November 30, 1990 in that a) it failed to keep containers of hazardous waste closed while in temporary storage at said facility; b) it failed to properly label containers used for the storage of hazardous waste; c) it failed to supply containers of hazardous waste with proper secondary containment capabilities; d) that some of the hazardous waste from said drums spilled to and contaminated the surrounding ground; and e) that Taraco failed to immediately clean up spilled hazardous wastes and materials from the facility's grounds.
7. Division issued the NOVAP, dated February 5, 1991, for those violations which it observed at the November 5, 1990 inspection.

8. The violations cited in the February 5, 1991 NOVAP were the same type of violations as previously enforced against Taraco.
9. These violations in the February 5, 1991 NOVAP were separate and distinct from the previous violations by Taraco.
10. The Consent Agreement of March 20, 1991 was duly executed by both the Department of Environmental Management and Taraco.
11. Taraco timely filed a Hazardous Waste Transportation Permit Renewal Application. The Department denied same by letter dated October 16, 1991 and Respondent timely filed a request for a hearing on the Denial on November 8, 1991.
12. Taraco held a valid Hazardous Waste Transportation Permit bearing Permit # RI-596 at the time of the application for a renewal.
13. The Consent Agreement dated March 20, 1991 was executed by the parties to resolve the violations for which Taraco was cited in the NOVAP dated February 28, 1989.
14. Said March 20, 1991 Consent Agreement specifically provided that compliance with the terms of said Agreement would satisfy the requirements of the February 28, 1989 NOVAP; and that said Agreement shall have the full force and effect of a final administrative adjudication.
15. The DEM has jurisdiction in this matter and Taraco is subject to the pertinent provisions of the Statutes governing hazardous waste and the applicable regulations of DEM promulgated thereunder.
16. Taraco violated the statutes governing hazardous waste and the applicable regulations of DEM on November 30, 1990 at its Cranston facility.
17. Taraco has been repeatedly responsible for recurring and separate violations similar to those cited in the February 5, 1991 NOVAP.

18. The ease of access to Taraco's Cranston facility and their failure to correct past violations caused a major potential for harm to human health and the environment to exist as to violations No. 1 in the February 5, 1991 NOVAP.
19. The large quantity of drums, the ease of access to Taraco's Cranston facility by the general public, and the overall storage conditions posed a major potential for harm to human health and the environment as to violations Nos. 2, 3 and 4 in the February 5, 1991 NOVAP.
20. The administrative penalty assessed against Taraco in the total amount of Twenty Thousand Dollars (\$20,000.00) is not excessive and certainly warranted under the circumstances.
21. The Order requested by DAHM in the February 5, 1991 NOVAP is necessary to assure compliance with the Statutes and Regulations.
22. Taraco's prior performance record establishes that it had a consistent pattern and practice of non-compliance with the Statutes and Rules and Regulations.
23. Taraco has not exhibited sufficient reliability, expertise and competency in the area of hazardous waste management, and the Division was warranted in denying Taraco's application for the renewal of a hazardous waste transporter's permit.

CONCLUSIONS OF LAW:

Based upon the foregoing facts and testimonial and documentary evidence of record, I conclude as a matter of law that:

- 1) DEM has jurisdiction in this matter.

- 2) The Division has proved by a preponderance of the evidence that Taraco on November 30, 1990 at its Cranston facility a) failed to keep containers of hazardous waste closed while in temporary storage at its Cranston facility; b) failed to properly label containers used for the storage of hazardous waste; c) failed to supply containers of hazardous waste with proper secondary containment capabilities; d) allowed hazardous waste to spill onto and contaminate the ground; and e) failed to immediately clean up spilled hazardous waste and materials from the facility's grounds.
- 3) Taraco violated the Rhode Island Hazardous Waste Management Act of 1978 and the Rhode Island Rules and Regulations for Hazardous Waste Generation, Transportation, Treatment, Storage and Disposal as alleged in the NOVAP dated February 5, 1991.
- 4) The Department is entitled to the relief requested in the Order as set forth in the NOVAP dated February 5, 1991.
- 5) That the NOVAP dated February 5, 1991 should be affirmed in its entirety (except as modified herein as to dates and times).
- 6) That Taraco must pay a total administrative penalty of Twenty Thousand Dollars (\$20,000.00) to the Department no later than ten (10) days after the receipt of the Final Order herein.
- 7) That Taraco failed to prove that the operation of its facility for which a permit is sought complies with the rules and regulations under R.I.G.L. § 23-19.1-6(a).
- 8) That Taraco's prior performance record establishes that it has not exhibited sufficient reliability, expertise and competency in the area of hazardous waste management to support an approval of its application for renewal of its hazardous waste transporter permit.
- 9) The Division's denial of Taraco's application for the renewal of its hazardous waste transporter's permit on October 16, 1991 should be affirmed.

WHEREFORE, it is hereby

ORDERED

1. That the Notice of Violation and Order and Penalty issued to Taraco dated February 5, 1991 be and is hereby sustained.
2. That Taraco IMMEDIATELY label all containers of hazardous waste in accordance with Rule 5.04.
3. That Taraco IMMEDIATELY close all containers of hazardous waste.
4. That Taraco supply all on-site generated hazardous waste with secondary containment within 20 days of receipt of the Final Order herein.
5. That Taraco collect and properly contain all visually contaminated soils within ten (10) days of receipt of the Final Order herein.
6. That Taraco submit compliance certifications for all above requirements to DAHM subject to the penalties under 23-19.1-18 (H) within ten (10) days of compliance.
7. That Taraco pay an administrative penalty for said violations in the amount of Twenty Thousand Dollars (\$20,000.00). Said payment shall be in the form of a certified check (pay to the order of Rhode Island General Treasurer) and mailed directly to:

Rhode Island Department of Environmental Management
ATTENTION: Robert Silvia
Office of Business Affairs
22 Hayes Street
Providence, RI 02908
8. That the Division's denial of Taraco's application for the renewal of its hazardous waste transporter's permit on October 16, 1991 be and is hereby sustained.

I hereby recommend the foregoing Decision and Order to the
Director for issuance as a Final Order.

7-15-92
DATE

Joseph F. Baffoni
Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Order this 24th day of July, 1992.

7-24-92
DATE

Louise Durfee
Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, RI 02908

Taraco Environmental Services, Inc.
AAD Nos. 91-005/AHE and 91-002/AHA
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CERTIFICATION

I hereby certify that I caused a true copy of the within Final Order to be forwarded via regular mail, postage prepaid to Philip W. Noel, Esq., McGovern, Noel & Benik, P.C. 321 South Main Street, Providence, RI 02903 and via interoffice mail to Mark W. Siegars, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 24th day of July, 1992.

