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

RE: TRUK-AWAY OF RHODE ISLAND, INC.
DECISION AND ORDER

INTRODUCTION

This matter came before Hearing Officer Patricia Byrnes pursuant to a request by the Respondent Truk-away of Rhode Island, Inc. ("Truk-away") for counsel fees in accordance with The Equal Access to Justice Act, R.I.G.L. 42-92 et seq and Rule 19.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters, ("AAD Rules").

The Department of Environmental Management ("DEM") or the ("Department") through counsel for the Division of Air and Hazardous Materials ("DAHM") or the ("Division"), has filed a timely objection to Respondent's request.

On June 25, 1985 the General Assembly enacted PL 1985 CH 215 Section 1 entitled "The Equal Access to Justice for Small Business & Individuals Act" known as the Equal Access to Justice Act or EAJA. Modeled after the Federal EAJA (28 USCA Section 2412, West 1988), this act was propounded to mitigate the burden on small businesses by arbitrary and capricious decisions of administrative agencies during adjudicatory proceedings. Taft v. Pare, 536 A2d, 888, 892 (RI 1988).

AUTHORITY

The authority for the Administrative Adjudication Division ("AAD") Hearing Officer to respond to Respondent's motion is derived from the following statutes and regulations: statutes governing the Administrative Adjudication Division 42-17.7-1 et seq, statutes governing the Department of Environmental Management 42-17.1 et seq., the Equal Access to Justice Act R.I.G.L. 42-92.1 et seq, and the duly promulgated Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.

BURDEN OF PROOF

The Equal Access to Justice Act does not enunciate the appropriate burden of proof and persuasion to be applied in these proceedings. However, the Rhode Island Supreme Court has said on several occasions that when a statute is modeled after a federal statute as it is in this case, the court should follow the constrictions put on it by the federal courts unless there is strong reason to do otherwise. Lalliberte v. Providence Redevelopment Agency, 109 RI 565, 575 288 A2d 502, 508 (RI 1972), Iorio v. Chin, 446 A2d 1021, 1022, (RI 1982).

The First Circuit Court of Appeals following the holding in the majority of other federal districts, established appropriate standards of review to be used in these cases. The Court found there is no reason to impose a burden of proof any higher than is normally required in any civil case and

specifically held that the burden of proof to be used is by preponderance of the evidence. United States v. Yoffe 775 F2d 448, 450 (D RI 1985)

In accordance with federal case law, Truk-away as the moving party bears the burden of showing that the company is a party within the meaning of the EAJA. If Truk-away demonstrates that it meets the requirements of the statute, the burden of proof and persuasion shifts to the Department of Environmental Management to show it was substantially justified in its actions., Yoffe at 450.

BACKGROUND

A brief rendition of the travel of this case is in order:

In February 1987, an official at the Stanley-Bostitch ("Bostitch") manufacturing plant in East Greenwich notified DEM authorities that material formed from a leak in a cyanide heat-treating vat was accidentally placed in a commercial dumpster sometime between January 24 and 29, 1987 and hauled by Truk-away of Rhode Island to the Central Landfill.

As a result of that telephone call, officials from the Department of Environmental Management examined the Stanley-Bostitch facility and confirmed the information given to the Department by the Bostitch employee. The officials also found various other environmental violations at the plant.

On March 9, 1987, DEM issued separate notices of violation and penalty (NOVAP) against Truk-away of Rhode

Island and Stanley-Bostitch. The NOVAP issued to Respondent Truk-away alleged the company transported hazardous waste cyanide without a manifest in a non-permitted vehicle to an unpermitted facility in violation of the Hazardous Waste Management Act ("the Act") or ("HWMA") 23-19-1 et seq., specifically R.I.G.L. 23-19.1-7 and 23-19.1-20 and the duly promulgated Rules and Regulations for Hazardous Waste Generation, Transportation, Storage & Disposal, ("Hazardous Waste Rules") Rule 6.01 and 6.04. For these violations the waste hauler was assessed a $10,000 administrative penalty.

Stanley-Bostitch NOVAP alleged that the company violated R.I.G.L. 23-19.1-9 and Hazardous Waste Rule 5.03 for generating and improperly shipping hazardous waste. The violation also alleged eight other violations for various unrelated infractions for improper storage and labeling.

The Stanley-Bostitch Company did not pursue an administrative hearing but entered into a consent agreement with DEM in June 1988. Truk-away filed a timely notice of appeal on March 18, 1987. Subsequently, a status conference was held on August 19, 1990 and a prehearing conference took place December 13, 1990. A full evidentiary hearing was conducted by this tribunal on January 7 and 31, 1991. Prior to the hearing, DEM withdrew its claim for a monetary penalty and in the alternative requested judgment on the merits and a one-day training session.

After the administrative hearing, the Hearing Officer found that DEM failed to prove by a preponderance of the evidence that Truk-away transported hazardous waste cyanide and issued a recommended decision and order dismissing the violation.

On April 28, 1992 the Director of the Department of Environmental Management issued a final agency decision upholding the Hearing Officer's findings 1-30 and 33 and conclusions of law 1-6, 8, 9, 14, 15, 16 and ordered the violation dismissed.

As a result of that ruling the Respondent now moves for $7,031.25 in litigation expenses incurred during its defense of the enforcement action.

DECISION AND ORDER

To qualify for a fee award under the Equal Access to Justice Act, the movant must meet the very specific circumstances outlined in R.I.G.L. 42-93-3 and codified in AAD Rule 19.00, the EAJA states:

> Whenever an agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceeding and in the proceeding itself. The adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust. The award shall be made at the conclusion of any adjudicatory proceeding including, but not limited to, conclusions by a decision and in formal disposition or termination of the proceeding by the agency. The decision of the adjudicatory officer under this chapter

shall be made a party of the record and shall include written findings and conclusions. No other agency official may review the award.

The definitions for the terms used in this statute are not assigned their common every day meaning but are terms of art which are defined in R.I.G.L. 42-92-2. The petitioners have stipulated that the Department of Environmental Management is an "agency" as defined in 42-92-2(b), that the underlying hearing leading to Respondent's EAJA claim was an "adjudicatory proceeding" as defined in R.I.G.L. 42-92-2(d) and that the hearing officer meets the requirement as an "adjudicatory officer" set forth in R.I.G.L. 42-92-2(e). The litigants further agree that Truk-away was the "prevailing party" in the underlying adjudicatory proceeding.

The meaning of the terms "party" outlined in R.I.G.L. 42-92-2(a), "substantial justification" pursuant to 42-92-2(f) and (d) and "reasonable litigation expenses" explained by 42-92-2 (c) have not been stipulated to by the litigants and will be analyzed in the course of this decision and order.

I. IS TRUK-AWAY OF RHODE ISLAND A PARTY?

Section 42-92-2(a) of the Equal Access to Justice Act defines a party as:

> Any individual whose net worth is less than two hundred fifty thousand dollars ($250,000) at the time the adversary adjudication was initiated; and, any individual, partnership, corporation, association, or private organization doing business and located in the state, which is independently owned and operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated.

In order to be designated a "party" under the EAJA Truk-away must demonstrate the following four (4) criteria:

1. That Truk-away is a corporation doing business and located in RI.
2. That the business is independently owned and operated.
3. That Truk-away is not dominant in the field.
4. That the waste hauler employed no more than 100 people at the time of the adversary adjudication.

To bolster its claim that Truk-away is an independently owned company doing business in Rhode Island, the Respondent has provided the hearing officer with two affidavits from Charles Wilson, President of Truk-away, signed on May 27, 1992 and April 29, 1993, the original articles of incorporation for Truk-away of Rhode Island, Inc., a certificate of good standing for Truk-away from the Secretary of State's office and the articles of merger between Sanitas Waste Disposal of Rhode Island and Truk-away.

The Department of Environmental Management has argued that the original affidavit submitted by Charles Wilson did not attest to the fact that Truk-away was independently owned and operated and therefore Respondent has not met the requirements of the statute. However, Mr. Wilson's April 29, 1993 affidavit affirmed that Truk-away of Rhode Island, Inc. is a "single company and operated pursuant to the laws of Rhode Island". A review of the other corporate documents

submitted verify that Truk-away is not a publicly held company, a franchise or a subsidiary.

The affidavits along with the undisputed corporate information provided by the Respondent satisfies the Hearing Officer by a preponderance of the evidence that Truk-away is an independently owned and operated corporation doing business and located in the state of Rhode Island.

The Hearing Officer also accepts Charles Wilson's unchallenged statement in his May 27, 1992 affidavit that "Truk-away of RI, Inc. has less than 100 employees and had less than 100 employees on or about March 9, 1987". As such, the Hearing Officer finds that Respondent has shown by preponderance of the evidence that Truk-away employed fewer than 100 people at the time the adversary adjudication was initiated.

The Equal Access to Justice Act also requires the movant to demonstrate that the corporation is not "dominant in the field". This term is not defined in the statute or applicable regulations and has not been interpreted by the courts. In an attempt to clarify the litigants position on this issue and offer them an opportunity to present additional testimony or documentary evidence, the Hearing Officer conducted a hearing on the matter on April 29, 1993.

During that hearing the litigants presented their respective interpretation of the term "dominant in the field"

and offered supporting documentary evidence. The Respondent argued that the term "dominant in the field" should be interpreted to mean "market share" and asserts that in order to "dominate" an organization must control 50% of that market. In support of this theory, Truk-away provided an affidavit from Charles Wilson in which he attests to the fact that Truk-away of Rhode Island is not dominant in the field (Resp. 4/23/92 affidavit). On the other hand, DEM urged the Hearing Officer to accept a definition of dominance it refers to as "economic dominance". To establish dominance under this theory requires viewing the relevant market and establishing the relative economic position of the entity, in this case Truk-away, within the market. In support of this theory, DEM has supplied the Hearing Officer with an affidavit from Dante Ionata, Assistant Director of Planning at Solid Waste Management Corporation (SWMC) in which he provides computer print-outs from SWMC entitled "Commercial Tonnage disposed at the Central Landfill by Highest Customer" for the dates January 1, 1988 through May 31, 1992. The State asserts that Truk-away has for the past five years ranked in the top 10 of all businesses depositing solid waste at the Central Landfill and is therefore economically dominant in the trash-hauler market.

However, the State made no correlation between the weight of garbage disposed and dominance in the field. From the

evidence presented, the Hearing Officer cannot discover if Truk-away was depositing large amounts of trash or just small loads of very heavy garbage. Moreover, a careful review of the figures submitted shows that the tonnage calculations include all companies that deposited at the landfill not just wastehaulers. The agency made no attempt to reconcile this issue. More importantly, no explanation was offered as to why data from the years 1988-1992 was chosen as the basis for the Division's analysis even though the NOVAP which began the process was issued in 1987. Also, DEM presented no evidence to show its theory of "economic dominance" was based upon sound economic principles and not just supposition.

For these reasons, the Hearing Officer rejects the State's analysis of the SWMC figures. The Hearing Officer does find, however, that this evidence shows the amount of waste deposited by Truk-away at the Central Landfill decreased steadily from 1988 to 1992.

Attempting to rebut the Department's contention that Truk-away has held a dominant position in the field, the Respondent took the same SWMC figures and divided the total number of depositors of the Central Landfill with the total weight of garbage for the years 1988-1991. (Resp. 5/27/92 affidavit). Arriving at figures which show Respondent has

never disposed more than 15% of the total tonnage at the landfill for those years, Truk-away contends that this proves it is not dominant in the field.

The Hearing Officer also finds Respondent's analysis to be flawed. Truk-away's percentages include all companies and tonnage, not just waste haulers. In addition, the Respondent also provided no reason for using the years 1988-1991 as the basis for its analysis.

The figures compiled by Respondent did show the percentage of the tonnage disposed by Truk-away have steadily decreased from 1988-1991. This decline is consistent with the decline observed in DEM's analysis.

As previously stated, the applicable statutes and regulations and the courts have not offered a definition of the term "dominant in the field". In instances where there is no guidance in the statute or case law, the Supreme Court has repeatedly stated that the statutory terms must be given their plain and ordinary meaning. , Caithness RICA Ltd. (Newbay Corp.) v. Malachowski 619 A2d 883, 886 (RI 1993)Krikorian v. Rhode Island Department of Human Services, 606 A2d 671, 675 (RI 1992) Gilbane Co. v. Poulas 576 A2d 1195, 1196 (RI 1990), McGee v. Stone 522 A2d 211, 216 (RI 1987), Little v. Conflict of Interest Commission 397 A2d 884, 887 (RI 1979).

In order to arrive at the "plain and ordinary meaning" of "dominant in the field", the Hearing Officer reviewed the

definition of "dominant" set forth in Webster's New Universal Unabridged Dictionary (2nd edition 1983) p. 544. The pertinent definitions supplied are:

dominant: (n) ruling, prevailing, governing, predominant, exercising authority or influence.

dominate: (v) to rule, to govern, to preside over

Applying this definition to the documents submitted the Hearing Officer does not find any evidence that Truk-away is ruling, prevailing or predominant.

The SWMC figures supplied by the agency to contradict Respondent's assertions show the amount of garbage deposited by Truk-away at the Central Landfill has steadily decreased from 1988-1992. Clearly this trend shows Respondent has not presided over, exercised authority or influenced other waste-haulers for at least a five year period.

The statutory definition of dominant in the field does not establish a time frame during which Respondent must show that it is not dominant. However, the SWMC documents and the affidavits of Charles Wilson satisfy the Hearing Officer by preponderance of the evidence that during the adjudicatory process Truk-away was not dominant in the field.

After assessing the evidence presented on this issue the Hearing Officer finds that Truk-away of Rhode Island has met the criteria necessary to be designated a party as the term is defined in R.I.G.L. 42-92-2(a).

II. DID THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT DEMONSTRATE SUBSTANTIAL JUSTIFICATION?

A state agency is relieved from any obligation to pay a respondent reasonable litigation expenses if that agency can demonstrate "substantial justification".

An agency may qualify for the substantial justification exception to the EAJA in one of three (3) ways.

The agency may demonstrate under R.I.G.L. 42-92-2(d) and AAD Rule 19.00 (2)(a)(iii) that it is per se substantially justified. This statute and regulation creates a legal presumption that any agency or decision of an agency charged by statute to investigate complaints is automatically substantially justified for investigating the complaint and any subsequent investigation. The statute provides that: "Any agency charged by statute with investigating complaints shall be deemed to have substantial justification for said investigation and for the proceedings subsequent to said investigation". The regulation, mimicking the language of the statute, states the agency was substantially justified if: "The Division was charged by statute with investigating a complaint which led to the adjudicatory proceeding".

The most common way an agency demonstrates it was substantially justified in its actions is to met the test outlined in R.I.G.L. 42-92-2(f). This statute states:

> Substantial justification means that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact.

Lastly, DEM can avoid liability under AAD Rule 19.00(f)(2)(b) and 42-92-3 by proving "special circumstances" exist which make the award unjust. The term "special circumstances" is not defined in the regulation or statute. However, during a hearing on this matter counsel for the Division waived the Department's claim for special circumstances stating "there is nothing in the record that would indicate there are special circumstances". (T.46, 4/29/93).

A. WAS THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT SUBSTANTIALLY JUSTIFIED PURSUANT TO R.I.G.L. 42-92-2(d) AND AAD RULE 19(2)(a)(iii)?

The Division argues that pursuant to R.I.G.L. 42-92-2(d) and the corresponding regulation, AAD Rule 19.00(2)(a)(iii), any actions taken by the agency to investigate and prosecute Truk-away of Rhode Island are presumptively correct. Specifically, DEM contends that it received a complaint from Stanley-Bostitch and as a result of that complaint conducted a routine investigation which subsequently led to the notice of violation and hearing.

In contrast, Truk-away argues that the telephone call DEM received from the Bostitch employee was not done to register a complaint against Truk-away but to inform the agency of the accident at the plant and to accept responsibility for the chemical accident.

In order to determine if the actions of the Department were predicated upon a "complaint", it is necessary to review the meaning of that term.

There is no definition of "complaint" supplied in any statute governing the Department of Environmental Management, the Hazardous Waste Management Act, Equal Access to Justice Act, or any applicable regulation.

It is axiomatic that if the language of the statute is clear on its face the plain meaning of the statute must be applied. The Rhode Island Supreme Court has recently reinitiated this premise stating "in the absent of equivocal or ambiguous language, the wording of the statute must be applied literally and cannot be interpreted or extended". Caithness RICA Limited Partnership v. Malachowski, 619 A2d 833, 836 (1993).

Applying this tenet of statutory construction to R.I.G.L. 42-92-2(d) and AAD Rule 19.00 (a)(2)(iii), the Hearing Officer looked to the customary usage of "complaint"

available in Webster's New Universal Unabridged Dictionary 2nd edition (1983) p.371 and found the following applicable definitions:

complaint: (n) expression of grief, regret, discomfort, dissatisfaction, pain, censure, resentment, a finding of fault, (2) a grievance, in law a formal charge or accusation.

A review of the statutes and regulations governing the DEM Director's duties and powers shows that the Director is empowered through R.I.G.L. 42-17-1.2(s) to issue and enforce statutory provisions, rules, regulations and orders of the Department and to conduct investigations and hearings. In addition, R.I.G.L. 42-17-1.2(u) grants DEM the authority to issue a notice of violation if there are reasonable grounds to believe a violation exists. The HWMA also allows the Director pursuant to R.I.G.L. 23-19.1-6 to enforce any regulation or rule necessary to insure proper enforcement of the act.

Clearly the unambiguous language of these statutes coupled with the ordinary meaning of complaint provides DEM with the general authority to investigate complaints.

To determine if a complaint precipitated the actions taken by the Department in the instant case, the Hearing Officer reviewed the evidence and testimony received during the administrative hearing. Of particular interest was an internal memo from DAHM inspectors detailing their

investigation of Stanley-Bostitch (DEM 8), the NOVAP issued to Truk-away and the testimony of Allen Gates the Stanley-Bostitch employee who contacted the Department (final agency decision 4/28/92).

The term "complaint" requires some actual or implied action to indicate a grievance, accusation, or charge. There is no evidence in the events underlying the violation to show that the agency's actions were the result of a complaint made against Truk-away. Each report or statement discussing the investigation by DEM at Stanley-Bostitch found in the hearing record always referred to the telephone call to DAHM as a "notification". In addition, the testimony of Allan Gates during the administrative hearing made it clear that his telephone call to DEM was initiated not to grieve the actions of Truk-away but solely to inform the agency about the incident at the plant.

In light of the testimonial and documentary evidence provided in the administrative hearing record, the Hearing Officer finds by preponderance of the evidence that the NOVAP issued to the Respondent was not initiated upon a complaint against Truk-away. As such, the Department does not qualify for the substantial justification exception available in R.I.G.L. 42-92-2(d) and AAD Rule 19(2)(a)(iii).

B. WAS THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT JUSTIFIED PURSUANT TO 42-92-2(f)?

The Department of Environmental Management may demonstrate that its actions were substantially justified as provided in 42-92-2(f) which states "the initial position of the agency, as well as the agency's position in the proceedings has a reasonable basis in law and fact" by meeting the standard articulated by the Rhode Island Supreme Court in Taft v. Pare at 893. The Court, quoting the position taken by the 8th Circuit Court of Appeals in United States v. 1370.65 Acres of Land 794 F2d 1313, 1318 (8th Cir. 1986), found "the Government now must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well-founded in law and fact, solid though not necessarily correct".

Reasonableness in the context of the EAJA has been defined by the United States Supreme Court to mean "justified to a degree that could satisfy a reasonable person", Pierce v. Underwood 487 US 552, 564 108 S CT 2541, 2549 101 L Ed 490 (1988).

Applying the standard for substantial justification set forth in R.I.G.L. 42-92-2(f) and Taft v. Pare, the Hearing Officer will analyze each aspect of the Department's actions.

1. DID THE INITIAL POSITION OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT HAVE A REASONABLE BASIS IN FACT?

Prior to issuing a notice of violation and penalty to Truk-away, the following events had occurred.

1. A telephone call was made to DEM by Allan Gates, Stanley-Bostitch environmental engineer and ex-DEM employee informing the Division that a leak had occurred in a heat-treating vat and the debris from that clean-up was inadvertently transported in a Truk-away commercial waste hauler to the Central Landfill. He also informed the agency he believed the material taken to the landfill was sodium cyanide, a hazardous waste. (final agency decision 4/28/92 p. 7-9)

2. An emergency investigation of the plant was conducted three days later which confirmed the information related by Mr. Gates. DEM officials also found nine other violations at the plant unrelated to the spill (DEM 8, final agency decision 4/28/92 p. 8-9).

3. As a result of this investigation, DEM hired Goldberg Zoino Associates (GZA) to conduct a study on the incident (DEM 12, Resp. 14) at the same time Stanley-Bostitch contracted with Environ to do the same type of investigation (Resp. 13).

Three weeks after the DEM investigation of the Stanley-Bostitch plant, the notice of violation was issued to Truk-away. This petition alleged that:

1. The company transported hazardous waste cyanide from Stanley-Bostitch in East Greenwich without a manifest. (R.I.G.L. 23-19.1-7 Hazardous Waste Rule 6.04)
2. The company transported hazardous waste cyanide from Stanley-Bostitch in a non-permitted vehicle. (Hazardous Waste Rule 6.01)
3. The company delivered hazardous waste cyanide to a non-permitted facility, i.e., Central Landfill, Johnston. (R.I.G.L. 23-19.1.10)

In order to justify the issuing of the NOVAP, the agency must demonstrate its action was clearly reasonable and well founded in fact. Taft v. Pare at 893.

The State argues that its interpretation of the regulations and statutes were justified and advanced the purpose of the Hazardous Waste Management Act. Further, DEM asserts that the reasonableness of its position has already been established by the finding the Director in the final agency decision (final agency decision 4/28/92) that "the Division had reasonable grounds upon which to issue a Notice of Violation". The Respondent belies the agency's contentions and suggests the State's interpretation of the regulations and statutes has no factual foundation or legal basis.

The NOVAP alleging that Truk-away transported a particular substance called "hazardous waste cyanide" was issued in March 1987, yet the final reports from GZA and Environ detailing the composition of the material trucked to the Central Landfill was not available until May 1987, two months after the violation was issued. At the time the NOVAP was sent to Truk-away, the Division did not know what material had been taken

to the landfill and had no proof that any of the debris was hazardous least of all "hazardous waste cyanide". At best, DEM had information from Allan Gates that the material might be hazardous. The Department made no effort to justify why the agency did not wait for results of environmental tests before issuing the violation.

The Hearing Officer finds that DEM had no reasonable basis in fact to issue the NOVAP to Truk-away in March 1987 and concludes by preponderance of the evidence that the initial position of the agency was not substantially justified in fact.

The Hearing Officer also rejects the State's argument that the Director's finding set forth in the final agency decision that the Division had reasonable grounds to issue the violation is controlling. The EAJA gives the adjudicatory hearing officer absolute discretion in this matter. R.I.G.L. 42-92-3 specifically states that "the adjudication officer under this chapter shall be made a part of the record and shall include written findings and conclusions. No other agency official may review the reward".

2. DID THE INITIAL POSITION OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT HAVE A REASONABLE BASIS IN LAW?

At the time the NOVAP was issued DEM knew that Truk-away had taken material from the Stanley-Bostitch plant in a roll-top container but that neither the Respondent nor the truckdriver was aware of the contents of the trash. The Department was also cognizant that Truk-away had not been informed of the environmental accident at Stanley-Bostitch until the Division contacted the company during the DEM investigation. Armed with this information DEM adopted the position that Truk-away was strictly liable for illegally transporting hazardous waste imposed a $10,000 administrative penalty and ordered the Respondent to train personnel to prevent the possibility of knowingly or unknowingly transporting hazardous waste.

As noted earlier, when the NOVAP was issued the regulatory agency had asserted the position that the material trucked to the Central Landfill was hazardous waste despite the fact the debris had not yet been identified. The State's legal theory for imposing culpability upon Truk-away is also based upon the assumption that the material taken to the dump was hazardous. Until the Department became aware of the contents in the roll-off container the State's position that Truk-away was legally liable for transporting hazardous waste is not substantially justified in law.

As a remedy for the alleged violations, the State ordered the movant to pay an administrative penalty of $10,000 and required that "within forty-five (45) days of receipt of the notice of violation, institute procedures and practices to train personnel to prevent the possibility of knowingly or unknowingly transporting hazardous waste".

The Hearing Officer finds the request for the $10,000 administrative penalty was not reasonable in law. This penalty was predicated on the unsubstantiated fact that hazardous waste had been taken to the landfill. In addition, DEM had no administrative or statutory authority to issue the penalty and training order. The authority for the Department of Environmental Management to request an administrative penalty is codified in R.I.G.L. 42-17.6-2 and 42-17.1-2(v). However, Section 42-17.6-8 states "no administrative penalty shall be assessed...until the Director has promulgated rules and regulations for assessing administrative penalties". The Rules and Regulations Governing the Assessment of Administrative Penalties ("Penalty Rules") were not promulgated until August 1987. The pecuniary sanction assessed on Truk-away was made in March 1987.

The Respondent alleges that the training requested in the NOVAP is akin to a request for injunctive relief to which neither this tribunal nor the Director has the jurisdiction to impose. The agency has taken the position that the issuance

of injunctions is solely with the purview of the judiciary and as such the requirement to institute practices and procedures to train Truk-away personnel in knowingly or unknowingly transporting hazardous waste is merely an extension of the Director's authority under the HWMA to protect the environment. (R.I.G.L. 23-19.1-6) (DEM memo 3/11/91)

A review of the applicable statutes show that R.I.G.L. 42-17.1-2(v) and 42-17.6-2 grant the Director of the Department of Environmental Management the authority to impose administrative penalties. An administrative penalty is defined in R.I.G.L. 42-17.6-1(c) as: "a monetary penalty not to exceed the civil penalty specified by statute or, where not specified by statute, an amount not to exceed one thousand dollars ($1000)".

Section 23-19.1-16 of the HWMA allows the Director without prior notice or hearing to take such action that the Director deems necessary to protect the public health and safety including issuing orders the Director deems necessary to prevent or eliminate the condition which constitutes a hazard. The Division has pointed out this statute as support for its position. While it may initially appear that this statute has bearing on the present case, a reading of the entire statute shows that the section is not applicable. R.I.G.L. 23-19.1-16 refers to the Director's emergency powers to eliminate an immediate environmental hazard by instituting

actions such as temporarily closing down a facility or removing hazardous waste from a site. Clearly, this statute does not apply to an administrative violation issued over five years ago. Additionally, the emergency powers of the Director are not enforceable by the Director but must be imposed by a justice of the Superior Court (R.I.G.L. 23-19.1-15).

A review of the applicable statutes and regulations show that there is no statutory authority which allows the Director of DEM to impose any another sanction but a monetary penalty for a violation of the Hazardous Waste Management Act or the Hazardous Waste Rules.

Having found the sanction imposed by the Department was not a prescribed statutory remedy or supported by the Division's rules and regulations, the Hearing Officer finds by preponderance of the evidence that DEM's request for a training program to prevent the possibility of knowingly or unknowingly transporting hazardous waste had no reasonable basis in law.

Impugning legal culpability to Truk-away without a determination if the contents of the debris was hazardous waste and requiring a sanction which the agency must have been aware it was not entitled to by regulation or statute was clearly unreasonable.

Therefore, the Hearing Officer finds by preponderance of the evidence that the agency's initial position was not substantially justified in fact or law.

3. DID THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT'S POSITION DURING THE PROCEEDINGS HAVE A REASONABLE BASIS IN FACT?

Through the discovery process and the Department's own investigation as of the time of the hearing DEM was aware of the following additional facts:

1. That a contract existed between Truk-away and Stanley-Bostitch to haul commercial trash which explicitly excluded the hauling of hazardous material (Resp. 1).

2. That the final reports from Environ and GZA that in the worst case scenario a small amount of cyanide was deposited at the Central Landfill and that the waste resulted in no environmental or public health risk. (Resp. 13., 14 & 4 DEM 7 & 8, final agency decision, 4/28/92 p. 13).

3. That Stanley-Bostitch and DEM had entered into a consent agreement defining Stanley-Bostitch as the generator of the waste. That the waste sent to the landfill was spent material a listed hazardous waste and the material presented no threat to the public or the environment. (Resp. 10).

As the State proceeded to hearing, the agency was aware that the material transported by Truk-away did not meet the statutory definition of hazardous waste set forth in R.I.G.L. 23-19.1-4(4). At no time did the State move to amend the

violation. During the hearing, the Department attempted to demonstrate that the hazardous waste transported met the definition of hazardous waste supplied in DAHM Rule 3.25 which states "hazardous waste shall also mean any hazardous waste as defined in 40 CFR 261.1(c) and 261.3". These federal statutes defines the cyanide as spent material, a listed hazardous waste. The hearing officer concluded that the Department had not proven that Truk-away hauled hazardous waste cyanide as alleged in the violation and the Director, finding the Division had not met its burden, dismissed the violation (final agency decision 4/28/92).

The State has pointed out that not meeting its evidentiary burden does not automatically make the agency's position unreasonable. Paris v. Department of Housing and Urban Development 795 F Supp 513, 518 (D RI 1992), United States v Yoffe 775 F.2d 448, 450 (1985).

The agency is correct, to determine "reasonableness" the Hearing Officer must look at the actions of the State using the "reasonable man" standard. Pierce v. Underwood at 564

Reviewing the actions of DEM, it is clear that the Department was aware that the material trucked to the landfill was not hazardous waste as defined by Rhode Island law, yet it made no attempt to amend the NOVAP to reflect a change in the State's theory. Also, during the proceedings the agency persisted in its assertion that Truk-away was engaged in a

hazardous waste business and was a transporter of hazardous waste. This position completely disregards the fact that Truk-away is a commercial waste hauler under a contract with Stanley-Bostitch that specifically excludes the hauling of hazardous waste materials.

Based upon the facts that were available to the agency during the litigation process, the Hearing Officer finds by preponderance of the evidence that DEM's position during the proceedings was not substantially justified in fact.

4. DID THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT'S POSITION DURING THE PROCEEDING HAVE A REASONABLE BASIS IN LAW?

At the time of the administrative hearing, the State continued to assert its theory that Truk-away was strictly liable for the contents in the roll-off container.

In defense of the position, the agency claims that the HWMA fixes absolute liability for the illegal transportation of hazardous waste pursuant to R.I.G.L. 23-19.1-22(a) and the corresponding federal statutes set forth in the Resource Conservation and Recovery Act (RCRA) 42 USCA 6901 et seq. The Department also asserts that the various federal case law and the legislative history discussing RCRA support its position. (DEM memo 3/11/91).

The agency's reliance on R.I.G.L. 23-19.1-22(a) as grounds for affixing the legal theory of strict liability to this case is misplaced. Unlike the situation in Truk-away

where the State is trying to impugn liability in an administrative violation for unknowingly transporting hazardous waste, this statute empowers the Court to assess absolute liability for the clean-up of hazardous waste on a transporter convicted of willfully and knowingly transporting hazardous waste.

The Department admits that there is no precedent in Rhode Island case law for interpreting the HWMA or RCRA to impose strict liability but asserts that federal case law and RCRA impose strict liability on individuals engaged in hazardous waste business activities (DEM memo 3/11/91).

A review of the federal case law provided in the State's various memos refers to RCRA cases that discuss civil sanctions for discovery violations or instances where individuals were criminally liable for knowingly transporting hazardous waste. The agency was unable to point to any case or specific section of the RCRA statutes which imposes strict liability for unknowingly transporting hazardous waste.

The Department asserts that the legislative history quoted in the cases provided and in the footnotes of the RCRA statutes indicate that RCRA was patterned after the Clean Air Act and Clean Water Act which applies a strict liability standard in all civil matters and argues the agency was justified to extrapolate those sanctions to RCRA violations. The Department made no showing that the civil standards set

forth in the Clean Air Act or Clean Water Act had any bearing on RCRA or HWMA violations.

During the administrative hearing the State tried to show that Truk-away was bound by any statements or admissions made by Stanley-Bostitch in its consent agreement. There is no plausible basis in established agency law which would justify that litigation position.

Prior to the hearing, the State waived the administrative penalty of $10,000 originally imposed in the NOVAP (final agency decision 4/28/92). Since the assessment of this fine had no basis in law, the Hearing Officer finds this action by the agency to be wholly reasonable.

The agency also clarified its request for a seminar stating: "the only thing the State would be looking for in the form of a judgment is a one-day training session for haulers on identifying classes of waste that may or may not be in containers that are transported" (T. 1/7/91 p. 13). Further, DEM asserts that this is the same training program agreed to by Stanley-Bostitch in its consent agreement with DAHM. (DEM memo 1/25/90).

As previously stated, the Director of DEM had no authority to issue an administrative penalty to Truk-away which requires any other relief than a monetary sanction.

Assuming for the moment that the State had a good faith belief that DEM had the authority to impose the one-day

seminar, it would be incumbent upon the Department during the administrative hearing to describe the details of the acts on terms sought in the order. On the contrary, the DEM made no attempt to explain the meaning of the requested seminar or provide details on how the relief would be applied. The only testimony on this issue came from David J. Wilson, Vice-President of Truk-away, who testified that DEM had not provided any guidance concerning the content of the training and stated that to train his drivers not to unknowingly haul hazardous waste would be an impossible task. (T. 1/7/91 p. 35)

A review of the consent agreement entered between Stanley-Bostitch and DEM reveals no requirement as alleged by the State that Stanley-Bostitch engage in any type of training program. (Resp. 10)

As another theory for substantial justification, DEM argues that the Hearing Officer's denial of a motion by Respondent to dismiss the violation at the close of the State's case in chief serves as an affirmation that the agency's position was justified. (DEM memo 1/25/90)

During the administrative hearing, Respondent made a motion to dismiss in accordance with Rhode Island Superior Court Rules of Civil Procedure 41(b)(2). The Hearing Officer after reviewing the evidence deferred the decision until the close of the hearing.

This ruling is consistent with case law on the subject and in no way established a premise that DEM's position was reasonable.

Carefully considering the evidence as a whole, the Hearing Officer finds by preponderance of the evidence that the litigation position of the Department during the proceedings was not reasonably based in law.

Having found the initial position of the agency as well as the agency's position in the proceedings were not reasonably based in laws and fact, the Hearing Officer concludes that the Department of Environmental Management was not substantially justified within the requirements outlined in R.I.G.L. 42-92-3(f).

III. IS RESPONDENT ENTITLED TO REASONABLE LITIGATION EXPENSES?

Once the movant has met all the eligibility requirements to receive a fee section 42-92-3 of the Equal Access to Justice Act states that the adjudicatory officer "shall award to the prevailing party reasonable litigation expenses". Reasonable litigation expenses is defined in R.I.G.L. 42-92 2(c) as:

> those expenses which were reasonably incurred by a party in adjudicatory proceedings, including, but not limited to, attorney's fees, witness fees of all necessary witnesses, and other such costs and expenses as were reasonably incurred.

The U.S. Supreme Court in Commissioner, Immigration & Naturalization Service v. Jean, 496 US 154, 160, 110 S.CT. 2316, 2318 (1990) determined that the substantial justification requirement is a "single finding that operates as a clear threshold for determining a prevailing parties fee eligibility."

The EAJA limits the amount of reasonable litigation expenses for attorney fees to $75.00 per hour and asserts that "no expert witness may be compensated at a rate in excess of the highest rate of compensation for experts paid by this state".

As the basis for its fee request, Truk-away's attorneys have submitted a full, complete and unredacted copy of Adler, Pollack and Sheehan's Client Detailed Time and Expense Report which outlines the time spent and hourly rate charge by the firm to defend the violation, (Resp. memo 5/27/92), and an affidavit from Dennis Esposito, Chairman of Adler Pollack and Sheehan's Environmental Practice Group. In his affidavit Mr. Esposito states that he has reviewed the billing and time entries and finds the hours spent to defend the violation are within the scope of services generally provided in environmental cases. Truk-away asserts that by applying the maximum hourly rate allowed by statute, the Respondent is entitled to a fee award of $7031.25.

AAD Rule 19(f)(l)(c) provides that the Hearing Officer may recalculate the expense alleged and make a finding that some or all of the litigation expenses are reasonable. A review of the Adler, Pollack and Sheehan's client time sheet and the affidavit of attorney Dennis Esposito convince the Hearing Officer that the amount of litigation expenses alleged are properly calculated and reasonable. It should be noted that the State never disputed the expenses submitted by Truk-away.

For all the reasons listed above the Hearing Officer finds the Respondent Truk-away of Rhode Island is entitled to reasonable litigation expenses in the amount of $7031.25.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with the provisions of RIGL 42-92-3 and AAD Rule 19.00 the Hearing Officer enters the following findings of fact and conclusions of law.

FINDINGS OF FACT:

1. That this matter came before the Administrative Adjudication Division pursuant to a request by Respondent Truk-away of Rhode Island, Inc. for reasonable litigation expenses under the terms and conditions set forth in the Equal Access to Justice Act and the Administrative Rules of Practice & Procedure for the Administrative Adjudication Division for Environmental Matters.

2. That Respondent filed the request for litigation expenses on May 27, 1992.

3. That the Department of Environmental Management filed an objection to the request for litigation expenses on June 16, 1992.

4. That an evidentiary hearing on this matter was held on April 29, 1993.

5. That the parties have stipulated to the following facts:
   a. Truk-away was a prevailing party in the underlying adjudication.
   b. DEM is an agency as defined under the EAJA.

c. The underlying hearing leading to this action was an adjudicatory proceeding.

d. The hearing officer is an adjudicatory officer pursuant to the EAJA.

6. That Truk-away is a corporation doing business and located in Rhode Island.

7. That Truk-away is an independently owned and operated company.

8. That Truk-away had less than 100 employees at the time the adjudicatory proceeding was initiated.

9. That Truk-away is not dominant in the field.

10. That Truk-away has met the criteria necessary to be considered a party as defined in the Equal Access to Justice Act.

11. That a state agency has no obligation to pay a fee award if the agency can demonstrate substantial justification.

12. That an agency may show substantial justification in three different ways:

a. By showing it is per se substantially justified.

b. By showing the agency's position was reasonable in law and fact.

c. By showing special circumstances that would justify non-payment.

13. That the Department of Environmental Management was not pre-se substantially justified in its actions.

14. That no complaint was made by Stanley-Bostitch against Truk-away.

15. That the Department of Environmental Management's initial position had no reasonable basis in fact.

16. That the Department of Environmental Management's initial position had no reasonable basis in law.

17. That the Department of Environmental Management's litigation position had no reasonable basis in fact.

18. That the Department of Environmental Management's litigation position had no reasonable basis in law.

19. That any claim of special circumstances was waived by the Department of Environmental Management.

20. That Respondent has met the criteria set forth in the Equal Access to Justice Act for reasonable litigation expenses.

21. That Respondent is entitled to $7,031.25 in reasonable litigation expenses.

CONCLUSIONS OF LAW

1. That this matter came before the Administrative Adjudication Division pursuant to a request for reasonable litigation expenses pursuant to RIGL 42-92-2 known as the Equal Access to Justice Act or EAJA and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters, Rule 19.00.

2. That Respondent Truk-away of Rhode Island, Inc. filed a timely request for litigation fees pursuant to R.I.G.L. 42-92-2 & AAD Rule 19.00(b).

3. That the claim for litigation expenses conformed to the general filing requirements of AAD Rule 6.00 and R.I.G.L. 42-92-1.

4. That the Department of Environmental Management filed a timely objection to that request pursuant to R.I.G.L. 42-92-2 and AAD Rule 19.00(d).

5. That the filings by the litigants to support their respective positions contained a summary of legal and factual issues, affidavits, and documentary evidence as required in AAD Rule 19.00(b) and (c).

6. That the Rhode Island Equal Access to Justice Act is modeled after the federal EAJA (28 USCA Section 2412).

7. That the Act was propounded to mitigate the burden to small business from arbitrary and capricious decisions of administrative agencies.

8. That this tribunal has the authority to respond to Respondents motion pursuant to RIGL 42-17.7-1 et seq, 42-92.1 et seq and the duly promulgated Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.

9. That Respondent has the burden of proof by preponderance of the evidence to show he is a party as defined in the Equal Access to Justice Act.

10. That if the Respondent is successful in showing he is a party the burden of proof shifts to the agency to show it is substantially justified in its' actions.

11. That the agency must show it is justified by the preponderance of the evidence.

12. That Truk-away was a prevailing party in the underlying adjudication pursuant to (AAD Rule 19(f)(l)(b).

13. That DEM is an agency as defined in R.I.G.L. 42-92-2(b).

14. That the underlying matter was an adjudicatory proceeding pursuant to R.I.G.L. 42-92-2(d).

15. That the Hearing Officer is adjudicatory hearing officer as defined in 42-92-2(e).

16. That by preponderance of the evidence Truk-away has met the requirement to be designated a party pursuant to 42-92-2(a) and AAD Rule 19.00(f)(l)(a).

17. That by preponderance of the evidence the Department of Environmental Management was not substantially justified pursuant to 42-92-2(f) and AAD Rule 19.00(2)(a)(ii).

18. That by preponderance of the evidence Department of Environmental Management was not substantially justified pursuant to 42-92-2(d) and AAD Rule 19(2)(a)(iii).

19. That the Department of Environmental Management has waived any claim for special circumstances available to the agency pursuant to RIGL 42-92-3 and AAD Rule 19.00(f)(2)(b).

20. That Respondent has met the requirement for reasonable litigation expenses pursuant to RIGL 42-92-2(c) and AAD Rule 19(f)(1)(c).

Whereby, the Hearing Officer enters the following orders.

ORDERED

1. That the Department of Environmental Management is to pay Truk-away of Rhode Island, Inc. reasonable litigation expenses in the amount of $7,031.25.
2. That this fee is to be paid to Truk-away of Rhode Island, Inc. within 30 days of the issuance of this order.

Entered as an Administrative Order this 6th day of August 1993.

Patricia Byrnes
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to John Webster, Esq., Adler, Pollock and Sheehan, 2300 Hospital Trust Tower, Providence, RI 02903 and via interoffice mail to Mark Siegars, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 6th day of August 6, 1993.

Dawn L Stewart